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Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment

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LITIGATING *BUSH v. GORE* IN THE STATES: DUAL VOTING SYSTEMS AND THE FOURTEENTH AMENDMENT

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"Every voter's vote is entitled to be counted once. It must be correctly counted and reported."[1]

I. INTRODUCTION

THERE is no such thing as a perfect election system. Almost everyone who has studied the systems and technologies used throughout the United States for registering and counting votes acknowledges the accuracy of this assertion. But it took the tumultuous events surrounding the 2000 presidential election for the imperfections in these systems to become common knowledge.[2]

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1. Gray v. Sanders, 372 U.S. 368, 380 (1963).

2. For general discussions of the 2000 presidential elections, and in particular, the battle between George W. Bush and Al Gore for Florida's electoral votes, see ABNER GREENE, UNDERSTANDING THE 2000 ELECTION (2001) and RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). Although these imperfections became apparent in the 2000 election, they were not unknown to experts beforehand. For examples of early examinations of the problems of residual balloting see Herb Asher and Peg Rosenfield, The Effect of Voting Systems on Voter Participation, Paper Delivered at the Annual Meeting of the Midwest Political Science Association, Milwaukee, Wisconsin (Apr. 28-May 1, 1982) (on file with authors). *See* ROY SALTMAN, NAT'L BUREAU OF STANDARDS, SPECIAL PUBLICATION 500-158: ACCURACY, INTEGRITY AND SECURITY IN COMPUTERIZED VOTE-TALLYING (1988), *available at* http://www.itl.nist.gov/lab/specpubs/500-158.htm (discussing technology vis-à-vis equitable voting system); Jeanette Fraser, The Effects of Voting Systems on Voter Participation: Punch Card Voting Systems in Ohio, (1985) (unpublished Ph.D. dissertation, The Ohio State University) (on file with authors). Moreover, many of these imperfections continued into the 2004 presidential election. *See, e.g.*, David Boies, *Rise of Machines*, N.Y. TIMES, Oct. 26, 2004, at A25; John Schwartz, *Glitch Found in Ohio Counting*, N.Y. TIMES, Nov. 6, 2004, at A12; Kate Zernike & William Yardley, *Charges of Fraud and Voter Suppression Already Flying*, N.Y. TIMES, Nov. 1, 2004, at A16.

Perhaps for the first time, many citizens across the country realized that the notion of an election system in which "all votes are counted"[3] was a literal impossibility. Even assuming a thoroughly comprehensive and effective voter registration system and the complete absence of any fraud, the nation learned that the physical machinery of voting was itself so flawed that it could not be guaranteed that every voter who shows up at a polling place and follows directions would actually have his or her vote counted.[4]

From the points of view of democratic theory and elections systems management, the apparent unreliability of election machinery poses problems that are as complex as they are profound.[5] These problems have captured the attention and the imagination of a wide array of individuals, including members of the United States Congress and state legislatures,[6] state and local election officials,[7] technology experts[8] and the

3. *See, e.g.*, David Firestone, *Hearing Is Scheduled for Saturday Despite Demands of Gore Lawyers*, N.Y. TIMES, Nov. 29, 2000, at A1 (quoting Al Gore as asking: "Why not count all the votes?").

4. Increasing numbers of voters are opting to vote early or absentee in general elections. Thirty-five states now allow early voting in some form; in addition, 25 states permit no-excuse absentee voting, while 25 states and the District of Columbia require an excuse. *See* ELECTIONONLINE.ORG, BRIEFING: THE 2004 ELECTION 3 (Dec. 2004), http://www.pewtrusts.com/pdf/ERIP_Brief_9_1204.pdf (noting same). Often such voters use forms of voting technology that differ from those used in the polling places. For example, voters in Franklin County, Ohio (the Columbus metropolitan area) use electronic machines at the polling places, whereas absentee voters use punch cards.

5. On the other hand, to some the lesson learned from the 2000 elections appeared both simple and obvious: "We need better voting machines." Einer Elhauge, *The Lessons of Florida 2000*, 110 POL'Y REV. 15-36 (Dec. 2001-Jan. 2002), *available at* http://www.policyreview.org/DEC01/elhauge.html.

6. *See, e.g.*, Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, 42 U.S.C. §§ 15,301-15,545. For a discussion of HAVA and other legislative developments, see *infra* notes 53-113 and accompanying text.

7. *See, e.g.*, Katharine Q. Seelye, *He Pushed the Hot Button of Touch-Screen Voting*, N.Y. TIMES, June 15, 2004, at A16 (discussing California Secretary of State Kevin Shelley's efforts to achieve election system reform); *see also* J. KENNETH BLACKWELL, CHANGING THE ELECTION LANDSCAPE IN THE STATE OF OHIO (2003), http://www.sos.state.oh.us/sos/hava/statePlan011205.pdf (discussing efforts to achieve election system reform); NAT'L ASS'N OF SEC'YS OF STATES (NASS), HOW STATES ARE SPENDING FEDERAL ELECTION REFORM DOLLARS (Nov. 15, 2004), http://www.nass.org/Survey%20Summary%20HAVA.pdf (summarizing how states are spending federal money appropriated for reforming their elections).

8. *See, e.g.*, Henry E. Brady et al., COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 4 (2001) [hereinafter COUNTING ALL THE VOTES], http://ucdata.berkeley.edu:7101/new_web/countingallthevotes.pdf (evaluating performance of voting technology in United States); Tadayoshi Kohne et al., ANALYSIS OF AN ELECTRONIC VOTING SYSTEM 3 (2003), *available at* http://www.avirubin.com/vote.pdf (analyzing security of one type of commonly used electronic voting machine); *see also* CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS AND WHAT COULD BE 2 (2001) [hereinafter CALTECH/MIT REPORT], http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf (evaluating existing voting technologies "to determine

voting machine industry. But from the perspective of the law, to what extent are the flaws in the machinery of elections problematic? And to the extent they are legally problematic, what role can and should the courts play in providing remedies?

In this Essay, we address one such flaw that originates in two features of the voting systems that have been common throughout the United States. The first feature relates to the fact that establishment and administration of voting systems, for both state and national elections, are matters of state and local, not federal, responsibility. By virtue of the United States Constitution, the responsibility for determining the "times, places, and manner" of holding elections for (federal) senators and representatives resides, in the first instance, in the legislatures of the states.[9] Moreover, with respect to presidential elections, the Constitution empowers the states to "direct the manner" of choosing presidential electors.[10] Thus, traditionally, there has been no uniform national standard governing the equipment used for conducting elections.[11] The second feature arises because most jurisdictions have not required statewide uniformity in election equipment. That is, many states leave the initial choice of election equipment to local officials,[12] perhaps subject to the review or final approval of the state's chief election official.[13] Consequently, voters in different counties or other election districts in a state will be required to vote on different equipment. And unless the error rates[14] of all machines used in a

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whether they meet the country's needs for a secure, reliable, robust system of recording election[s]").

9. U.S. CONST. art. I, § 4, cl. 1. Under this Clause of the Constitution, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.*

10. U.S. CONST. art. II, § 1, cl. 2. Under this Clause of the Constitution, "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." *Id.* The Twelfth Amendment to the Constitution then instructs the manner in which these Electors must perform their duties. U.S. CONST. amend. XII (setting forth duties of Electors).

11. For a brief discussion of the first federal forays into the establishment of national election standards, beginning in 1975, see Brian Kim, *Recent Development: Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 582-83 (2003) (discussing "influence of Congress and federal agencies" on state and local elections).

12. For a further discussion of the variety of election equipment on the market and used throughout the United States, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1717-24 (2005) and CALTECH/MIT REPORT, *supra* note 8, at 18-20.

13. *See, e.g.*, OHIO REV. CODE ANN. § 3506.05 (West 2005) (requiring Secretary of State's certification of election equipment before counties can purchase or use equipment).

14. For present purposes, voting equipment produces an error when the physical machinery does not register a valid vote in a given electoral contest. Normally, this takes the form of "overvotes" or "undervotes." Overvotes occur when voters either intentionally or unintentionally select more than the permissible number of candidates for a given office. Undervotes occur when voters either in-

state are either identical or closely comparable, voters in some parts of a state may feel that their right to be treated equally with respect to the right to vote has been denied.

Research into the performance of voting equipment conducted after the 2000 national election has provided significant evidence that such concerns are fully justified.[15] In particular, there is strong evidence that voting equipment that does not have the capacity for error-notification and in-precinct counting[16] produces a statistically significant increase in the rate of residual votes over equipment with such a capacity.[17] For present purposes, we define *residual votes* as votes in a particular electoral contest that are not counted due to machine error, or to human factors, such as overvotes or undervotes. The simultaneous use of balloting equipment that notifies voters when they have engaged in overvoting or undervoting, and equipment that does not provide such notice, gives rise to a *dual balloting system.* The practical import of dual balloting systems is that some voters will be exposed to a higher risk of disenfranchisement than others. The dual balloting system undermines public confidence in the fairness and integrity of election systems, and it raises serious questions about

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tentionally or unintentionally fail to cast a vote in a given electoral contest. Often, neither the equipment nor election officials can discern the intent of the voter from the ballot itself, and often such ballots are considered errors. They also are referred to in the literature as "residual votes," "nonvotes" or "invalid votes." Studies indicate that there were approximately 2,000,000 uncounted, unmarked or spoiled ballots in each of the presidential elections between 1988 and 2000. *See* CALTECH/MIT REPORT, *supra* note 8, at 20 (estimating that "rate of residual votes [in the past four] presidential elections was slightly over two percent" resulting in 2,000,000 lost votes).

15. The literature on balloting equipment and residual voting now is extensive. For analysis of balloting equipment and electoral administration, see Seelye, *supra* note 7, at A16. For analysis of what types of voters experience problems with residual voting, see Michael C. Herron & Jasjeet S. Sekhon, *Overvoting and Representation: An Examination of Overvoted Presidential Ballots in Broward and Miami-Dade Counties*, 22 ELECTORAL STUD. 21 *passim* (2003), *available at* http://sekhon.polisci.berkelEy.edu/elections/election2000/HerronSekhon.pdf; D.E. "Betsy" Sinclair & R. Michael Alvarez, *Who Overvotes, Who Undervotes, Using Punchcards? Evidence from Los Angeles County*, 57 PUB. RES. Q. 15 *passim* (2004); Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, 47 AM. J. POL. SCI. 46 *passim* (2003).

16. The term "error-notification" refers to equipment that provides feedback to the voter in the form of notice that an overvote or undervote has taken place; it also is referred to in the literature as "second-chance voting." On electronic equipment, this takes the form of lights flashing or a mechanical block that makes it physically impossible to overvote. On optical scan equipment, a vote tabulator will return the ballot to the voter if there is an overvote. Optical scan ballots can be tabulated in two different ways. In-precinct tabulation systems read ballots at the polling place, thereby affording voters an opportunity to receive error-notification and an opportunity to correct their ballots. Central-count systems tabulate ballots at a central location in the county after the polls close. Such systems do not provide error notification.

17. For analysis of statistical evidence of these disparities, see *infra* notes 38-55 and accompanying text.

whether such systems comply with the law. This Essay argues that dual systems discriminate against voters who are required to vote on non-notice equipment in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that these systems also implicate the principle of fundamental fairness that underlies that Amendment's Due Process Clause.[18]

In Section II of this Essay, we discuss the structure of voting systems commonly used throughout the United States. With particular focus on Ohio, we describe systems adopted by many states that do not prescribe statewide uniformity with respect to voting equipment. Among the costs of such policies is the uneven distribution of the risk of residual voting. That is, the extent to which voters realistically can expect their votes to be registered and counted will depend upon the election district in which they reside. Since the 2000 presidential election, a variety of studies and reports have accentuated this problem. Prominent policymakers, including state election officials and legislators,[19] have publicly acknowledged it, and we present data from the presidential and down-ballot elections of 2000 in Ohio that further confirm its dimensions.

In Section III, we consider the problem of residual voting through a legislative lens. We examine Congress's efforts to respond to the 2000 presidential election through the enactment of the Help America Vote Act (HAVA).[20] According to its sponsors, HAVA was intended to provide a comprehensive overhaul of election systems in response to the problems in Florida. While Congress's efforts in the HAVA legislation to address such issues as voter registration and access of handicapped persons to the polls may be both salutary and overdue, its effectiveness in responding to the practical problems of voting technology is considerably more doubtful.

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18. This Essay addresses the equal protection and due process problems that arise from a state's maintenance of a dual balloting system. There also is strong evidence that minority voters who are required to use non-notice equipment are at a disproportionate risk of not having their votes count, when compared to non-minority voters using the same equipment. *See* Toms & Van Houweling, *supra* note 15, *passim*; *see also* Allen J. Lichtman, *Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida, reprinted in* U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES DURING THE 2000 ELECTION (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/appendix/lichtman/ltrpt.htm. Most of the litigation that has been filed nationwide challenging the use of non-notice voting systems also has raised this issue, usually in the context of alleged violation of Section 2 of the federal Voting Rights Act. For examples of such litigation, see *infra* notes 114-250 and accompanying text. The question whether dual balloting systems in fact violate the Voting Rights Act is an important one, but is beyond the scope of this Essay. For a further discussion of this issue, see Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes* (unpublished manuscript, on file with authors).

19. Examples of these officials include Georgia Secretary of State Cathy Cox, former California Secretary of State Kevin Shelley and Ohio Secretary of State J. Kenneth Blackwell.

20. *See* HAVA, Pub. L. No. 107-252, 116 Stat. 1666, 42 U.S.C. §§ 15,301-15,545 (2002).

Already, state officials have relied upon HAVA to defend against litigation challenging the continued operation of dual election systems.[21] To highlight HAVA's many shortcomings, we describe its origins and aspirations, and we suggest reasons for questioning its prospects for achieving meaningful reforms.

Section IV addresses the questions of whether and to what extent dual balloting systems can withstand scrutiny under the Fourteenth Amendment, particularly in light of the Supreme Court's decision in *Bush v. Gore*.[22] The Court's reliance on the Fourteenth Amendment as a basis for stopping the vote recount in Florida has caused both courts and commentators to reconsider the constitutional ramifications of what one leading scholar has called the "nuts-and-bolts" issues of election law.[23] We focus primarily on the Court's conceptualization—or as some would have it, its reconceptualization—of the Fourteenth Amendment's guarantee of equal protection. We also consider whether such systems are consistent with the value of fundamental fairness that underlies due process. We conclude that, taken seriously, *Bush v. Gore* renders such systems quite vulnerable to constitutional challenge.

In Section V, we consider the legal implications of a state's simultaneous use of voting equipment with and without error notification. Prior to the 2000 presidential election, many of the technological "glitches" associated with lost votes were likely to have been considered routine. Of course, in modern times, lost votes that result from fraud, vote rigging and other similarly malevolent conduct have been legally condemned. But the combination of technological imperfection and human error that produces the vast majority of residual voting might well be considered inevitable and, as such, not a central concern of the law.[24]

The Supreme Court's decision changed such attitudes. *Bush v. Gore* focused on constitutional requirements that apply to state procedures established to determine the intent of the voters in connection with a statewide recount of cast ballots.[25] Whether the equal protection principle

21. *See infra* notes 251-303 and accompanying text.

22. 531 U.S. 98 (2000).

23. Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 377-78 (2002) (stating 2000 presidential election challenged predominating views on elections). According to Professor Hasen, prior to the 2000 election, the "conventional wisdom" among legal scholars was that only "big picture" issues, such as "representation, the meaning of political equality, and the role of money in politics" were considered worthy of serious study. *Id.* at 378. Hasen concludes that "[t]he Florida controversy challenged that conventional wisdom." *Id.*

24. In this regard, consider Professor Tribe's suggestion that much of the post-2000 outcry concerning the vote counting process in Florida was all but inevitable when we entrust "political power to fallible human beings who might at any time abuse it—an outcry, in other words, against democracy itself." Laurence H. Tribe, *eroG .v hsuB and its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 214 (2001).

25. *Bush*, 531 U.S. at 105-06.

recognized in *Bush v. Gore* applies beyond that context has been the subject of considerable debate. We consider the arguments on both sides of that debate and conclude that it does. More specifically, we conclude that after *Bush v. Gore*, the Equal Protection Clause precludes the states from establishing or maintaining voting systems that cause the risk of residual balloting to depend upon the voting district in which one resides.[26]

Whether the courts will accept this conclusion remains to be determined, and we consider several recent cases in which this equal protection claim has been asserted. The case that has advanced the furthest in litigation is *Stewart v. Blackwell*,[27] and we focus primarily on it. In *Stewart*, the plaintiffs have challenged Ohio's system for registering and tabulating votes. In many ways, Ohio's system is representative of the systems in other states. Thus, *Stewart* provides a useful paradigm for testing the viability of the equal protection principles we advance. Finally, in Section VI, we offer our conclusions concerning the problems and prospects of using courts as a vehicle for election technology reform.

II. EMPIRICAL ANALYSIS OF RESIDUAL VOTES AND BALLOTING EQUIPMENT

Under the American system of federalism, state and local officials have primary responsibility for the selection of balloting equipment and the administration of the electoral process.[28] Most states have a chief elections officer who certifies electoral equipment and county or township officials who select from a list of approved vendors.[29] Currently, there are five balloting systems that are used in national elections in the United

26. It is important to note that we do not argue that the Equal Protection Clause necessarily requires that each voter must have access to "the best" voting machinery available. Nor do we believe that the Constitution requires a state to adopt a system in which all voters must vote on the same voting equipment. Instead, we argue that the Constitution requires that all voters in a state are entitled to vote on reasonably reliable equipment that subjects every voter to comparable risks that their votes will be counted.

27. 356 F. Supp. 2d 791 (N.D. Ohio 2004) (denying request for injunctive and declaratory relief). The suit challenges Ohio's simultaneous use of error and non-error notification voting equipment under the Fourteenth Amendment to the United States Constitution and Section 2 of the federal Voting Rights Act of 1965. *Id.* at 795. The suit was brought by the American Civil Liberties Union (ACLU) of Ohio and the ACLU Voting Rights Project. The authors serve as co-counsel for the plaintiffs. The views expressed in this Essay about the *Stewart* litigation are those of the authors, and not necessarily of the ACLU or any of the litigants in *Stewart*. An Appeal has been docketed in the United States Court of Appeals for the Sixth Circuit on all claims.

28. U.S. CONST. art. I, § 4, cl. 1.

29. *See, e.g.*, FLA. STAT. § 101.015 (2005) (needing approval by Secretary of State); 10 ILL. COMP. STAT. 5/24A-3 (2005) (providing approval by State Board of Elections); OHIO REV. CODE ANN. § 3506.02 (West 2005) (calling for approval by Board of Voting Machine Examiners and Secretary of State).

States: paper ballots,[30] lever machines, punch cards, optical scan systems (both precinct count and central count) and digital recording electronic (DRE) equipment.[31] Since the 2000 presidential election, the reliability and performance of each of these systems have been the focus of considerable study. In this Section we summarize this literature and examine empirical evidence concerning the strengths and weaknesses of various balloting systems in American elections. We start with a brief historical overview.

A. *The History of Election Technology*

The history of election technology in the United States reflects a tension between the goals of efficiency and the avoidance of fraud. In the mid-to-late nineteenth century, paper ballots were the most common means of voting. Political parties distributed ballots of different sizes, shapes and colors outside the polling places to assist voters who could not read.[32] But the distinctiveness of the ballot interfered with the secrecy of the vote. Political machines and corporations routinely offered jobs or money in exchange for votes or threatened recalcitrant employees with dismissal if they did not support the right candidate. The bright colors of the ballots made it relatively easy to observe how others voted.

To remedy this problem, reformers urged the adoption of the Australian ballot, which was introduced in America in 1888.[33] This system provided a uniform, preprinted paper ballot upon which voters placed a mark beside the name of their preferred candidate. Despite the additional privacy that it afforded, the Australian ballot presented difficulties for immigrants and others with limited command of written English. Counting paper ballots in congested urban jurisdictions also proved time consuming and expensive. In the 1890s, the invention of the mechanical lever voting machine offered a more efficient means of voting as well as useful features

30. In addition to paper ballots used in polling places in some rural states, Oregon and Washington have mail-in ballot options for voters. These systems also are categorized as paper ballot systems.

31. *See* CALTECH/MIT REPORT, *supra* note 8, at 17-26 (discussing current election technology); *see also* Daniel P. Tokaji, *Political Equality After* Bush v. Gore: *A First Amendment Approach to Voting Rights, in* FINAL ARBITER: THE CONSEQUENCES OF *Bush v. Gore* for Law and Politics (Christopher P. Banks et al. eds., 2005); Tokaji, *supra* note 12, at 1717-24. As noted, the term "DRE" stands for digital recording electronic device.

32. For a general discussion of the history of paper ballots and their eventual replacement with the Australian ballot and the lever voting machine, see A. KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 142-43 (2000). *See also* Saltman, *supra* note 2, at 3.2 to 3.2.1 (discussing problems associated with paper ballots).

33. The first election in the United States conducted on the Australian ballot occurred in Louisville, Kentucky in 1888. *See* KEYSSAR, *supra* note 32, at 143 (noting, however, that "[t]he Australian ballot was . . . an obstacle to participation by many illiterate foreign-born voters in the North, as well as uneducated black voters in the South").

such as straight party-line options and mechanical blocks against overvoting. By the middle of the twentieth century, these "mechanical voting machines" ("MVM") became the dominant voting apparatuses used across the country.[34]

The major problem with the MVM was that it was bulky and expensive to store. In the 1960s, political scientists at the University of California at Berkeley designed a cheaper and more portable system based on IBM punch card technology. Voters used a stylus to punch holes in a blank punch card that contained pre-scored perforated chads corresponding to the names of the various candidates. Electronic tabulators used a beam of light to count the open spaces in each card, and election results were available shortly after the polls closed.

In the 1980s, the punch card replaced the voting machine as the most common balloting technology in America, but the digital revolution rapidly led to a host of new alternatives. The first was a variation of the punch card ballot that featured an optical scan system. Voters used a pencil to mark paper ballots in a manner similar to taking a standardized examination like the Scholastic Aptitude Test (SAT). The ballots are either tabulated electronically at the polling place (in-precinct tabulation) or at a central location after the polls close (central tabulation). The most recent innovation, the DRE, uses either buttons or touchscreens to register voter choices, and it then stores the voter preferences in memory for later tabulation.[35] These devices can be equipped with voice-activated prompts to assist blind voters and are generally more suitable for use by disabled voters. To guard against possible fraud or electronic manipulation of votes, a handful of jurisdictions have required that DRE equipment be supplemented by voter-verified paper trails so that voters can see a printed copy of their final ballot before they leave the polling place.[36] Currently, equipment containing this feature is still under development. But, in the 2004 general election, experimental prototypes were used in a small number of precincts throughout the country.[37]

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34. Occasionally, the mechanical voting machines ("MVM") encountered problems with inaccurate tabulation of votes. *See* COUNTING ALL THE VOTES, *supra* note 8, at 10 ("Difficulties can occur if the machine is improperly set up or if the mechanism fails to relay vote choices to the counters.").

35. *See* David C. Kimball, *Assessing Voting Methods in 2002* (July 2004), http://www.umsl.edu/~kimballd/dkmpsa2.pdf. There are two types of DRE equipment. The earliest, which came into use in the 1970s, is known as the "full-face" DRE system, because the entire ballot appears at once on the screen. The second takes the form of an ATM-style touchscreen. *Id.* at 9.

36. *See, e.g.*, OHIO REV. CODE ANN. § 3506.18 (West 2005) (requiring all counties using DRE devices to incorporate equipment that provides voter-verified paper trail); *see also* CAL. ELEC. CODE § 19,250 (West 2005) (requiring same); NEV. REV. STAT. § 293B.084 (2005) (requiring voter-verified paper trail for all electronic voting equipment). For a recent general discussion of security issues surrounding electronic voting equipment, see Tokaji, *supra* note 12, at 1773-94.

37. The State of Nevada used a voter-verified, contemporaneous paper trail system in the primary and general elections of 2004. *See In Nevada, Touchscreen*

Both precinct count optical scan devices and DRE systems offer voters an "interactive voting" environment, which provides notice of undervotes and overvotes, and in some instances physically prevents overvotes. As we develop more fully below, the simultaneous use of notice and non-notice equipment in the same jurisdiction raises constitutional problems, including the question of whether this practice denies voters the fundamental right to have their votes count equally with those of other voters. In order to make this claim, empirical evidence of disparate levels of residual voters by residency must be established.

B. *The Empirical Picture*

In the aftermath of the 2000 presidential election, attorneys, reporters and scholars initially focused on the level of residual ballots associated with the various forms of voting technology in Florida. The 2000 Florida Ballots Project[38] examined all 175,010 residual ballots in the state for each type of balloting system, and their results are presented in Table One.

TABLE ONE: FLORIDA VOTING SYSTEMS BY NUMBER OF COUNTIES AND NUMBER OF RESIDUAL VOTES[39]

Voting System	*Number of Counties*	*Undervotes*	*Overvotes*	*Total Number of Ballots*
Votomatic	15	53,215	84,822	138,037
Datavote	9	771	4,427	5,198
Optical Scan	41	7,204	24,571	31,771
Lever*	1			
Paper*	1			
Total	67	61,190	113,820	175,010

* Vote totals for the lever county are summed into the totals for Datavote counties, and vote totals for the paper county are summed into the totals for optical scan counties.

Voting Leaves a Paper Trail, USA TODAY, Sept. 8, 2004, *available at* http://www.usatoday.com/news/politicselections/2004-09-08-nv-evote-system_x.htm (noting same); Rachel Konrad, *Nevada Election Impresses Nation*, LAS VEGAS REV. J., Sept. 13, 2004, *available at* www.reviewjournal.com/lvrj_home/2004/Sep-13-Mon-2004/news/24755286.html (noting Nevada's use of computer and paper trail voting system).

38. The 2000 Florida Ballots Project was a collaborative effort of three organizations: the National Opinion Research Center (NORC) at the University of Chicago, the National Election Studies (NES) project at the University of Michigan and a consortium of news organizations, including the New York Times and the Washington Post. Their final report is available at http://www.umich.edu/~nes/florida2000/index.htm.

39. 2000 Florida Ballots Project, *supra* note 38, Table One.

Although most of the residual votes and especially the overvotes occurred on punch card equipment,[40] a number of other factors also contributed to the relatively high number of residual votes. These included a higher than expected voter turnout, a relatively high percentage of first time voters and problems with ballot design.[41] In the end, President Bush won the Florida campaign by 337 votes. But further study revealed two other significant facts. First, the overall closeness of the presidential election was not unique to Florida: in three other states (Iowa, New Mexico and Wisconsin) the margin of victory by one of the candidates was less than one half of one percent.[42] Second, in five additional states—Georgia, South Carolina, Illinois, Wyoming and Idaho—the rate of residual ballots exceeded that of Florida.[43] This prompted scholars to conduct more comprehensive analyses of the relationship between voting technology and uncounted ballots.

The first such study, conducted by the Cal-Tech/MIT Voting Technology Project, examined voting technology and election systems in presidential and U.S. Senate elections between 1988 and 2000.[44] The authors identified a comprehensive set of factors that contribute to "lost votes," including outdated voter registration records, inadequate polling accommodations, ballot design and voting technology. They studied the impact of voting technology on residual ballots by assembling a database consisting of all presidential, gubernatorial and U.S. Senate elections between 1988 and 2000 by balloting type. Table Two summarizes their findings regarding the relationship between voting equipment and residual voting.

40. Datavote punch card systems use ballot cards that contain the names of the candidates, thereby enabling voters to check the accuracy of the ballot relatively easily. Votomatic systems, on the other hand, utilize a booklet containing the candidates' names, and the ballot does not list the names of the candidates. This makes it much more difficult for voters to inspect.

41. A study of overvoting in Miami-Dade and Broward Counties, using ballot level and precinct level analysis, found that voters who made voting errors down the ticket also were prone to making this same mistake in the presidential race. The study also found that Democrats were approximately three times more likely to overvote in the presidential race than were Republicans and that precincts with relatively large numbers of blacks, Hispanics and registered Democrats had relatively high presidential overvoting rates. *See* Herron and Sekhon, *supra* note 15, at 19-22 (arguing that "Democrats cast presidential overvotes more frequently than Republicans").

42. *See* CALTECH/MIT REPORT, *supra* note 8, at 17.

43. *Id.*

44. *Id.*

TABLE TWO: RESIDUAL VOTES AS A PERCENTAGE OF ALL BALLOTS CAST, 1988-2000[45]

Machine Type	*President*	*Governor and Senator*
Paper Ballot	1.8%	3.3%
Punch Card	2.5%	4.7%
Optical Scan	1.5%	3.5%
Lever Machine	1.5%	7.6%
Electronic (DRE)	2.3%	5.9%

The authors estimated that between four and six million presidential votes were "lost" in the 2000 presidential election, primarily due to poorly functioning election equipment and inaccuracies in the voter registration process. Over the twelve-year period of the study, counties that used optical scan equipment experienced an average residual vote rate of 1.5% in presidential elections and 3.5% in Senate and gubernatorial elections. The residual ballot rate in punch card counties was at least 50% higher.

Two other findings from the Voting Technology Report are noteworthy. The first concerns the problem of intentional undervoting. Based on survey data from the Voter News Service and National Elections Studies, the authors estimated that only 0.5% of voters who cast residual ballots at the top of the ballot did so intentionally.[46] This means that nationwide, approximately 1.5% or 1.5 million voters in the 2000 presidential election thought they were casting valid ballots when in fact they did not. The second finding concerns the difference in residual ballot rates between "up ballot" electoral contests for president and "down ballot" contests, such as those for governor or U.S. Senator. The authors found that the percentage of residual ballots increased significantly in down ballot elections, from 3% to 7%, and variations also existed in the performance of balloting equipment in these elections. This may be a function of increases in intentional nonvoting among various subgroups of voters rather than a measure of differences in the voting equipment itself.

In 2001, Professor Henry Brady and his colleagues at the University of California at Berkeley issued a second major study of residual balloting in the 2000 election.[47] Brady's analysis revealed that as of 2001, over 500

45. *Id.* at 21.

46. A second study estimated that the level of intentional undervoting at the top of the ballot ranges between .24% and .77%. Martha Kropf & Stephen Knack, *Roll-Off at the Top of the Ballot: Intentional Undervoting in American Presidential Elections*, POLS. & POL'Y, Dec. 2003, at 14.

47. *See* COUNTING ALL THE VOTES, *supra* note 8, *passim*. Professor Brady limited his analysis to the 2000 election because he did not think that reliable data existed for the elections prior to this date. *Id.* at 20. Even in the 2000 data, he found significant problems with statistics from Indiana, Maryland and Nevada. *Id.* at 21.

counties in more than 30 states used punch card systems, and in eleven jurisdictions (Arizona; California; Washington, D.C.; Florida; Illinois; Indiana; Missouri; Nevada; Ohio; Utah; and Washington) at least one-third of the counties used them.[48] Table Three presents his findings regarding access to various forms of voting equipment used in the 2000 presidential election and the performance of each.

TABLE THREE: UTILIZATION OF BALLOTING EQUIPMENT, 2000 GENERAL ELECTION[49]

Machine Type	*No. of Counties*	*% of Counties*	*% of All Voters*
Optical Scan	1,336	43%	28.8%
Punchcards	531	17%	32.1%
Lever Systems	388	12%	16%
Electronic (DRE)	327	10%	12.3%
Paper Ballots	294	9%	0.5%
Mixed Systems	265	8%	10.4%

"Mixed Systems" represent counties using more than one type of equipment. This occurs primarily because townships select the voting equipment that is used.

Brady noted that voting systems are not randomly distributed across counties.[50] Counties with very small populations tend to use paper ballot systems, those with lower levels of educational attainment tend to use DRE and lever equipment and those with relatively high percentages of minorities tend to use lever equipment.[51] As a result, Brady evaluated voting equipment using a rating scale based on the percentage of residual votes: counties with residual vote rates of 0-1% are "good," those with rates between 1% and 2% are "adequate," those between 2% and 3% "worrying" and those above 3% are "unacceptable."[52] These figures are reported in Table Four. Like the authors of the Voting Technology Report, Brady concluded that the punch card is more error-prone and "unacceptable" than the four other balloting systems.[53]

48. *Id.* at 12 (noting popularity of punch card systems); *see also* Kim, *supra* note 11, at 584 (reporting that "[i]n the 2000 elections, almost one-fifth of all counties nationally used punch card voting machines").

49. COUNTING ALL THE VOTES, *supra* note 8, at 10-11.

50. *See id.* at 22 (asserting non-random assignment of voting systems).

51. *See id.* (discussing trends of voting system distribution).

52. *See id.* (using grading system from report of National Commission on Federal Election Reform).

53. *See id.* at 48-49 (detailing negative performance of punch card system). But unlike the Caltech/MIT researchers, who concluded that the optical scan system is associated with the lowest levels of residual balloting, the Brady research team concluded that while more testing of voting equipment is needed, DRE sys-

TABLE FOUR: RATINGS OF AVERAGE RESIDUAL BALLOT RATES, 2000 PRESIDENTIAL ELECTION[54]

Voting Systems	*Good*	*Adequate*	*Worrying*	*Unacceptable*	*No. of Counties*
Punch Card	6.4%	22.3%	35.6%	35.6%	435
DREs	20.7%	22.6%	25.6%	31.2%	266
Optical Scan	32.8%	28.5%	16.4%	22.3%	1018
Lever Machine	31.0%	29.7%	13.6%	25.7%	323
Paper Ballot	17.5%	36.2%	24.3%	22.0%	177
% With Rating	24.7%	27.4%	21.5%	26.5%	2219

Widespread public concern about disenfranchisement in the 2000 presidential election, which was confirmed by these and other studies of residual balloting rates, increased the pressure on lawmakers to initiate reform. In 2001, for example, the Florida Legislature responded by decertifying the punch card ballot and requiring all counties to adopt voting systems that notified voters of errors.[55] But in the 2002 Florida primary, poll workers had trouble setting up and running the new electronic equipment, and critics alleged that poor training of poll workers yet again led to voter disenfranchisement. One month later, the Conference Committee of the United States Congress working on election reform announced that a final agreement had been reached, paving the way for floor consideration of the Help America Vote Act.

III. THE CONGRESSIONAL RESPONSE: THE HELP AMERICA VOTE ACT OF 2002

In its per curiam opinion in *Bush v. Gore*, the Supreme Court predicted that "[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting."[56] The Help America Vote Act of 2002 (HAVA)[57] represents Congress's bipartisan response to the controversies of the 2000 election. In certain respects, HAVA is landmark legislation because it reflects Congress's judgment that elections for federal office are the joint responsibility of both the federal government and the states. Under the Act,

tems pose fewer problems than other systems for most voters, especially poorly educated voters. *See id.* at 49 (comparing DREs with other systems).

54. *Id.* at 30.

55. *See* Florida Election Reform Act of 2001, FLA. STAT. §§ 101.5604 to 101.56042 (2002) (requiring electronic or electromechanical precinct-count tabulation systems and prohibiting punch card systems). For a discussion of the Florida reform effort, see John L. Mills, *Florida on Trial: Federalism in the 2000 Election*, 13 STAN. L. & POL'Y REV. 83 (2002). .

56. Bush v. Gore, 531 U.S. 98, 104 (2000) (predicting election reform).

57. HAVA, Pub. L. No. 107-252, 116 Stat. 1666, 42 U.S.C.§§ 15,301-15,545 (2002).

Congress authorized $3.5 billion for replacement of outmoded election equipment, improvements to the accessibility of polling places and expanded efforts at voter education and poll worker training. The Act also mandates centralized voter registration databases, provisional voting and the installation of one electronic voting device per precinct for use by disabled, blind and deaf voters. In other respects, however, HAVA falls short of comprehensive election reform. It does not require the phase out of non-notice voting systems such as the punch card or central count optical scan systems that caused difficulty in the 2000 presidential election, and it erects new identification requirements for first-time voters that vitiate several of the liberalized registration provisions of the 1993 Motor Voter Bill.[58]

With respect to the specific issue of voting systems standards, HAVA is equivocal. Although the Act requires all voting systems to notify voters of overvotes before the ballot is cast and counted,[59] it exempts paper systems, punch cards, central count systems and mail-in balloting systems from this requirement.[60] Instead, states may use these systems if they establish voter education programs or instructions at the polling place regarding how to obtain a replacement ballot to correct any error.[61] This provision reflects Congress's view that states using a particular voting system in the 2000 election would not be required to abandon that system as long as it could be modified to meet the other federal requirements.[62] These requirements include manual audit capacity, a uniform state definition of what constitutes a vote and a machine error rate (not attributable to an act of the voter) that meets federal standards.[63] Funds for voting system up-

58. While the National Voter Registration Act of 1993 enabled first-time voters to register to vote by mail or at Bureau of Motor Vehicles offices without state verification, HAVA requires first-time registrants to provide proof of identification in the form of a driver's license or the last four digits of the applicant's Social Security number. *See* 42 U.S.C. §§ 15,483(a)(5), (b) (2002) (stating voter registration requirements). In addition, first-time voters who register by mail must present suitable identification at the polling place before being able to vote. *Id.* § 15,483(b). This identification can take the form of a bank statement, utility bill or government check. *Id.* Otherwise, such voters must cast a provisional ballot.

Following the adoption of the Motor Voter Bill, the eligible voter population grew by 4.3% or 8.3 million people, while the number of registrants grew by 19.6% or 25.7 million people. *See* CALTECH/MIT REPORT, *supra* note 8, at 26 (noting increase in voting population between 1994 and 1998). Nevertheless, only 55% of the voting-age population and 60% of eligible citizens turned out to vote in the November 2000 election. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000 (2002), www.census.gov/prod/2002pubs/p20-542.pdf (relating voter eligibility and voter turnout).

59. 42 U.S.C. § 15,481(a)(1)(A)(iii)(I) (2002).

60. *See id.* § 15,481(a)(1)(B) (stating alternative means to meet overvote requirement).

61. *Id.*

62. *Id.* § 15,481(c)(1) (2002).

63. *Id.* §§ 15,481(a)(2), (a)(5)-(a)(6) (2002).

grades under the Act come from two sources: a $650 million fund[64] to provide $4,000 per precinct for the replacement of punch cards and lever machines[65] and a fund of $3.1 billion, payable over fiscal years 2003, 2004 and 2005, for "requirements payments."[66] Although the $4,000 per precinct assistance under Title I would be insufficient to phase out all punch cards in an urban jurisdiction whose precincts used more than one voting device, the Act requires states applying for Title I funding to phase out all punch card and lever voting systems by January 1, 2006 at the latest or risk a partial return of the federal funds.[67] At their option, however, states may utilize Title II funds for this purpose, based on priorities they establish in a State Action Plan that is filed with the Elections Assistance Commission.[68] As of this writing, Congress has appropriated all funding for fiscal years 2003 and 2004, but did not do so for fiscal year 2005.[69]

During the floor debate, one legislative leader characterized HAVA as "the most important voting rights bill since the passing of the Voting Rights Act in 1965,"[70] while another described it as perhaps "the most important bill of the 107th Congress."[71] Yet despite all these accolades, HAVA is flawed legislation that in key respects represents a significant step backwards. Philosophically, HAVA erects a partnership between the federal government and state and local election officials who run federal elections. Under the agreement, Congress provides additional resources and a narrow set of enforceable mandates, leaving the states with broad discretion to make policy decisions concerning the scope of core voting rights.

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64. *Id.* § 15,304(a) (authorizing appropriations).

65. *See id.* § 15,302(c)(1) (noting amount of payment to state).

66. *See id.* § 15,401(a) (providing requirements payment to state each year).

67. *See id.* §§ 15,302(a)(3), (d)(1) (noting monetary requirements surrounding punch card and lever system phaseout). Funding for the phase out of punch cards is available under Title I of HAVA. But because this funding is relatively modest, states at their option may choose to use Title II funds for this purpose as well. States choosing not to accept Title I funds must establish state administrative complaint procedures or submit a compliance plan to the United States Department of Justice that explains how they will meet the requirements of Title III of the Act. *See id.* § 15,512 (discussing state administrative complaint procedure and compliance plan).

68. *See id.* § 15,403(b) (providing conditions for receipt of funds).

69. *See* Nat'l Conference of State Legislatures, *Reminder from the National Association of Secretaries of State, the National Conference of State Legislatures and the Election Center* (2004), www.ncsl.org/standcomm/scbudg/elecreform.htm (detailing HAVA funding). There is no funding for state HAVA initiatives in the Omnibus Appropriations Bill for Fiscal Year ("FY") 2005. *Id.* In addition, undistributed appropriations from FY 2004 HAVA monies may be targeted for budget reductions. *See id.* (addressing status of HAVA funding).

70. 147 CONG. REC. H9290 (daily ed. Dec. 12, 2001) (statement of Rep. Lewis).

71. 148 CONG. REC. S2523 (daily ed. Apr. 11, 2002) (statement of Sen. Feinstein).

Rather than creating new substantive rights that are enforceable through administrative agencies and federal courts,[72] HAVA empowers states to make fundamental decisions about election technology reform, the purging of voter registration lists and identification requirements for first time voters who register by mail. By endorsing a highly deferential model of federalism that encourages state autonomy at the cost of uniform federal rights, HAVA is fundamentally at odds with the framework for voting reform that has evolved over the last four decades since the adoption of the Voting Rights Act.[73]

Viewed in its entirety, HAVA contains two overriding themes: "make it easier to vote and tougher to cheat."[74] The Act facilitates easier voting for disabled and overseas voters, provides for provisional voting for all voters who believe they are registered yet do not appear on official registration lists at the polling place and authorizes funding for the replacement of punch card voting equipment. Yet it also stiffens protections against voter fraud by requiring states to construct centralized voter registration databases and permits the purging of first-time voters who register by mail and fail to provide the requisite identification at the polling place.[75] Of primary importance for present purposes is the reluctance of Congress to phase out the use of punch card equipment and require "actual notice" of overvoting in all federal elections.

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72. HAVA does not explicitly provide for a private cause of action that would allow individuals to sue to enforce any of its provisions. At least one court, however, has held that HAVA is enforceable in a private action filed pursuant to 42 U.S.C. § 1983. *See* Sandusky County Democratic Party v. Blackwell, 386 F.3d 815, 816 (6th Cir. 2004) (affirming enforceable right to cast provisional ballot in federal elections).

73. The dominant theme of voting reform since the civil rights movement of the 1960s has been the creation of federal laws that either prohibit specific voting practices or require states to undertake affirmative steps to expand voter participation, such as the Motor Voter Bill. For example, Congress prohibited a specific voting practice when it outlawed the literacy test in the 1970 amendments to the Voting Rights Act of 1965. *See* 42 U.S.C. § 1973(b) (1970) (ending literacy testing in effort to banish racial discrimination). Congress also mandated affirmative steps to expand voter participation by liberalizing voter registration laws in the National Voter Registration Act of 1993. *See* 42 U.S.C. §§ 1973gg to 1973gg-10 (1993) (changing voting practices to prevent discrimination and unfairness).

74. *See* 148 CONG. REC. S10,488 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (discussing need for change in voting system). For a discussion of the steps Congress took in HAVA to curtail voter fraud, see Gabrielle B. Ruda, *Picture Perfect; A Critical Analysis of the Debate on the 2002 Help America Vote Act*, 31 FORDHAM URB. L.J. 235, 246-55 (2003) (presenting arguments surrounding identification requirements).

75. *See* 42 U.S.C. § 15483 (2002) (implementing requirements to prevent voter fraud). Under the Motor Voter Bill, states must provide three means for voter registration in addition to any means already provided for under state law: simultaneous application for drivers' licenses and voting registration at offices of the Bureau of Motor Vehicles, mail-in registration and registration at approved government agencies. *See* 42 U.S.C. §§ 1973gg-2 to 1973gg-5 (1993) (establishing national voter registration procedures).

In March of 2001, Representative John Conyers (D-Mich.) introduced the Equal Protection of Voting Rights Act of 2001,[76] which required all voting systems used in an election for federal office to notify the voter of overvotes and undervotes, and provide an opportunity to correct the ballot before it was cast and tabulated.[77] Although the Bill had 168 co-sponsors, it was referred to the Judiciary Committee and never reached the floor. In the meantime, during the spring and summer of 2001, the House Government Affairs Committee held four hearings on election reform, and its chair, Representative Bob Ney (R-Ohio), and ranking member, Representative Steny Hoyer (D-Md.), later introduced the Help America Vote Act (H.R. 3295).[78] With the support of the House majority leader, the Bill moved forward rapidly, and on December 11, 2001, it came to the floor. As originally reported in the House, H.R. 3295 required all states to adopt uniform standards defining what constitutes a vote on each type of voting equipment certified for use, as well as implement safeguards to ensure that absent uniformed services and overseas voters have the opportunity to vote and have their votes counted in a timely manner.[79] The Bill created an Elections Assistance Commission, without rule-making authority, which would study policy proposals and balloting equipment and issue recommendations to the states.[80] Finally, it required each state to meet a set of minimum standards that would apply to all federal elections.[81] These standards include: (1) a centralized on-line voter registration system; (2) the removal of all registrants who have not responded to a notice after failing to vote for two or more consecutive federal elections; (3) a provision of an effective means for voters with disabilities to cast secret ballots; and (4) if the balloting technology the state selects has this feature, error notification of both undervotes and overvotes prior to the time voters finally cast their ballots.[82]

Although many lawmakers applauded the bipartisan nature of the Bill, the provision of funds for the buy-out of punch card equipment and the rules curtailing voter fraud, others expressed concern because the Bill failed to allow for provisional voting and sanctioned the "purging" of inactive voters from the registration rolls. Nevertheless, in December 2001, it passed the House by a vote of 362-63.[83]

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76. Equal Protection of Voting Rights Act of 2001, H.R. 1170, 107th Cong. (2001).

77. *See id.* § 531 (proposing voting system requirements).

78. Help America Vote Act, H.R. 3295, 107th Cong. (2001).

79. *See id.* §§ 501-502 (describing minimum standards for state election systems).

80. *See id.* §§ 201-202, 206 (establishing Election Assistance Commission).

81. *See id.* § 501 (discussing requirement of minimum standards for state election systems).

82. *See id.* § 502 (describing minimum standards); *see also* 147 CONG. REC. H9264-308 (daily ed. Dec. 12, 2001) (debating Help America Vote Act of 2001).

83. *See* 147 CONG. REC. H9308 (daily ed. Dec. 12, 2001) (stating result of House vote).

In the meantime, in March of 2001, Senator Christopher Dodd (D-Conn.) introduced the Equal Protection of Voting Rights Bill (S. 565) in the Senate.[84] The Bill, which mirrored the legislation Representative Conyers introduced in the House, provided for mandatory error notification, increased accessibility for disabled voters and provisional balloting.[85] In addition, it created a Commission on Voting Rights and Procedures to study election technology, ballot design, voter registration and poll worker training.[86]

After many months of negotiations in the Senate Rules Committee, Senators Mitch McConnell (R-Ky.) and Christopher Dodd brought the HAVA Bill to the floor in February of 2002 for what they planned to be two days of deliberation. Instead, following the introduction of over forty-six amendments and several high-profile debates, the deliberations took nine full days. Of particular interest for present purposes are the Durbin Amendment (S.A. 2895)[87] and the Clinton Amendment (S.A. 3108).[88]

As originally reported in the Senate on November 28, 2001, Dodd's Bill required each voting system used in an election for federal office to provide voters with actual notice of overvotes and undervotes so that the ballots could be corrected before being cast and tabulated. Additionally, it required voting systems to be accessible to the blind and visually impaired, and it required states to adopt provisional voting. The Bill was referred to the Senate Rules and Administration Committee, where a series of intense negotiations occurred between Senators McConnell, Dodd and Kit Bond (R-Mo.). By the time the Bill emerged from Committee on February 13, 2002, it bore a close resemblance to the Bill that had cleared the House. The change in substance and tone is reflected in Senator Dodd's opening remarks on the floor, when he stated: "[W]e should be cautious not to overstate the Federal role in the administration of Federal elections. This legislation does not replace, nor would I tolerate it replacing, the historic role of State and local election officials, nor does it create a one-size-fits-all approach to balloting in America."[89]

Gone from the Bill was any requirement that all voting systems used in federal elections provide voters with actual notice of error and an opportunity to correct their ballots before casting them. Instead the Rules Committee had added language known as the Bond exception that enabled states using paper ballot, punch card or mail-in voting systems to

84. Equal Protection of Voting Rights Act of 2001, S. 565, 107th Cong. (2001) (proposing new election measures).

85. *See id.* §§ 301(a)-(b) (presenting uniform requirements for election technology).

86. *See id.* § 103(a)(1) (describing duties of Commission).

87. *See* 147 CONG. REC. S813 (daily ed. Feb. 14, 2002) (statement of Sen. Durbin) (presenting amendment).

88. *See* 148 CONG. REC. S2469 (daily ed. Apr. 10, 2002) (statement of Sen. Clinton) (presenting amendment).

89. *See* 148 CONG. REC. S710 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd) (recognizing with caution importance of election reform bill).

meet the new HAVA voting systems requirements by establishing a voter education system that notifies each voter of the effect of casting multiple votes for an office and provides the voter with instructions on how to correct the ballot before it is cast and counted.[90]

Senator Durbin's amendment[91] proposed to eliminate the special treatment of punch card voting systems under the voting systems standards. Senator Durbin took issue with the Bond exception on the grounds that there was no rational basis for excluding punch cards from the actual notice requirement. A lengthy exchange with Senator Dodd ensued, during which Dodd admitted that his Republican colleagues on the Rules Committee, Senators Bond and McConnell, did not want to force the states using punch cards to provide actual notice of overvotes. Senator Durbin then criticized the Bill for discriminating against voters who use punch cards. Their exchange follows:

> Mr. DURBIN: Is it not true in this bill with the Bond exception that we do say to jurisdictions across America that we want them to tell people if they have overvoted and spoiled their ballot, if they have cast other than a paper ballot, a punchcard ballot, or a mail-in central counting system, like Washington or Oregon? So for other methods of voting, the optical scan, the standard lever machines, the direct recording electronic, this bill says: We want to save you from making a mistake. We want you to have your vote count. Isn't that true? We have said for those systems that we really want to have this protection, but not the punchcard system.
>
> Mr. DODD: The Senator from Illinois is exactly correct. That is exactly what the bill does. . . .
>
> . . . .

90. Several leading commentators have overlooked this crucial point. *See, e.g.*, Kim, *supra* note 11, at 581 ("[The act] specifies uniform election technology and administration requirements for federal elections, including voter notification of 'overvotes' and the ability to correct for them. . . ."). Although it is true that HAVA contains this provision, the exceptions it provides for punch cards, paper ballots and mail-in ballots swallow the general rule that actual notice is required.

Nor are commentators the only ones who have made this mistake. In the Conference Report to the House of Representatives on H.R. 3295, Representative Ney stated, "Voters will now also be able to have the opportunity to check for errors and verify the accuracy of their ballot in privacy before it is cast. No more will voters have to wonder if their vote was properly recorded or not." 148 CONG. REC. H7836 (daily ed. Oct. 10, 2002) (statement of Rep. Ney). Representative Conyers stated, "nobody can spoil a ballot anymore in America when this Bill becomes law, no way. If you vote, the machine selected by the State, or another apparatus, has to make sure that the voter has not spoiled his ballot or her ballot before they walk out of that booth." 148 CONG. REC. H7843 (daily ed. Oct. 10, 2002) (statement of Rep. Conyers).

91. *See* 148 CONG. REC. S813 (stating purpose of S. 565, 107th Cong. (2002) (S. Amend. 2895)).

> Mr. DURBIN: . . . Why do you make an exception for a punchcard system where one out of three Americans vote with that system, a system we saw in Florida that was rife with problems, where people voted with the best of intentions, and where we lost 120,000 voters in Cook County, IL? . . .
>
> . . . .
>
> Mr. DURBIN: If you accept the premise of the bill you brought to us that this is an incontrovertible constitutional right, think about what you have just said. Is this really equal justice under the law, that we have a slot machine culture when it comes to voting? If you happen to be in the right jurisdiction with the right machine, we will correct your mistakes; but if you happen to be one of those poor people with a 40-year-old punchcard system, good luck. If your vote doesn't count, try it again in 2 or 4 years from now.
>
> Mr. McCONNELL: One short answer to the Senator's concern is that of these millions of people who voted on punchcards, almost nobody complained except in Florida. Nobody demanded a recount. Nobody went to court. The practical effect of what the Senator is suggesting here is that we mandate a certain kind of punchcard voting system. It seems to me that clearly wrecks the fundamental concept of the bill.
>
> Mr. DURBIN: With all due respect to my colleague, if I have cast a spoiled ballot, they don't give me a call or send me a note in the mail. I never know it. Those 120,000 people, who thought they had done the right thing and performed their civil duty, went home proudly after voting in Cook County, and 300,000 who voted across America went home and said to their kids: This is what you have to do, you have to vote. Their ballots were tossed because they were punchcard voters who got caught in hanging chads and a system that was over 40 years old. Are we really serious about giving people their constitutionally protected, incontrovertible right to vote, or is this going to be a haphazard system? I hope not.[92]

The Durbin Amendment failed by a vote of 44 to 50, largely along party lines.[93] Its opponents argued that Congress should not mandate what type of voting equipment states select. They further contended that adoption of the Durbin Amendment would have ended the bipartisan compromise and threatened passage of the Bill. As it was, however, the final HAVA legislation (without the Durbin Amendment) passed the Sen-

92. 148 CONG. REC. S815-816 (daily ed. Feb. 14, 2002) (statements of Sen. Durbin, Sen. Dodd and Sen. McConnell).

93. *See* 148 CONG. REC. S820 (daily ed. Feb. 14, 2002) (reporting voting result on Durbin Amendment).

ate by a voice vote of 92 to 2,[94] and it passed the House by a vote of 357 to 48.[95] This at least suggests that there was significant support for HAVA, especially in the wake of further problems in the Florida primary of September 2002, and that if the Durbin Amendment had passed the Senate, at least a majority of legislators in both houses would have supported the amended Bill.

Following the defeat of the Durbin Amendment, Senator Clinton proposed an amendment that would have required the Federal Election Commission to establish a residual ballot performance benchmark that jurisdictions could not exceed.[96] Clinton defined "benchmark" as the combination of overvotes, unreadable spoiled ballots and undervotes occurring at the top of the ballot, less an estimate of intentional undervotes.[97] The amendment also authorized the Commission to establish a separate benchmark for communities that have historically high rates of intentional undervoting, relative to the rest of the nation.[98] Senator McConnell voiced strong objection to the amendment, largely on the grounds that the primary business of the federal government was to safeguard against machine error and not human error, and that voters should be given the option to engage in intentional undervoting if they desired.[99] The Senate defeated the Clinton Amendment by a vote of 48 to 52.[100] As noted, the final Bill received overwhelming support in both houses of Congress. President Bush signed the Bill into law on October 29, 2002.[101]

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94. 148 CONG. REC. S10,515 (daily ed. Oct. 16, 2002) (noting Senate vote results on HAVA Bill).

95. 148 CONG. REC. H7853 (daily ed. Oct. 10, 2002) (stating House vote results on HAVA Bill).

96. 148 CONG. REC. S2470 (daily ed. Apr. 10, 2002) (discussing general purpose of amendment).

97. *See id.* (defining residual vote error rate as proposed in amendment).

98. *See* 148 CONG. REC. S874 (daily ed. Feb. 14, 2002) (discussing S. 565, 107th Cong. (2002) (S. Amend. 2906)); *see also* 148 CONG. REC. S2502 (daily ed. Apr. 10, 2002) (discussing S. 565, 107th Cong. (2002) (S. Amend. 3108)).

99. *See* 148 CONG. REC. S2470-2471 (daily ed. Apr. 10, 2002) (statement of Sen. McConnell) (opposing Clinton Amendment).

100. *See* 148 CONG. REC. S2543 (daily ed. Apr. 11, 2002) (reporting Senate vote results on Clinton Amendment).

101. Notwithstanding the broad consensus in favor of HAVA, at least one commentator has questioned its constitutionality. *See* Martin J. Siegel, *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section I*, 28 VT. L. REV. 373, 374-75, 417-22 (2004) (analyzing constitutionality of HAVA). The author suggests that the manner of presidential selection is a "Federative feature" of the American national government and that the Congress, as a matter of separation of power, is not free to define the methods of selecting presidential electors on behalf of the states. *See id.* at 401, 406-07 (leaving presidential selection to states). This position reflects the approach taken by then Justice Rehnquist in his dissent in *Anderson v. Celebreeze*. *See id.* at 414 (citing Anderson v. Celebreeze, 460 U.S. 780, 807 (1983) (Rehnquist, J., dissenting) (opposing majority's ruling that Ohio's March filing deadline for independent candidates to present requisite petitions was unconstitutional)). Rehnquist sought to distinguish congressional power to protect federal elections from fraud—which the Court sus-

Since HAVA was enacted, progress on the adoption of new voting technology has been slow. Four states have entered into consent decrees prohibiting the continued use of punch card equipment (Florida, Georgia, Illinois and California), and eight other states have stopped using punch cards in national elections.[102] These are Arizona, Texas, Nevada, Oregon, Montana, North Dakota, South Dakota and Minnesota.[103] Many of these states, however, only had a small number of counties that used punch cards in the 2000 election. Moreover, several additional states have purchased new voting equipment, including Indiana, North Carolina and Maryland. Although the remainder of the states have submitted HAVA state action plans to the federal government,[104] nationwide, in the 2004 presidential election, 3/4 of all voters used the same equipment they used in 2000.[105] According to data released by the National Conference of State Legislatures,[106] during the three years following the 2000 election,

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tained in *Ex parte Yarbrough*, 110 U.S. 651 (1884), *Burroughs v. United States*, 290 U.S. 534 (1934) and *Oregon v. Mitchell*, 400 U.S. 112 (1970)—from the power to prescribe for the states the manner of presidential selection under Article II, Section 1. *See id.* at 414 (discussing Rehnquist's dissent in *Anderson*).

102. *See* ELECTIONONLINE.ORG, WHAT'S CHANGED, WHAT HASN'T, AND WHY: ELECTION REFORM 2004 (2004), http://electionline.org/Portals/1/Publications/Election%20Reform%202004.pdf (detailing voting system reform).

103. In addition to these states, Indiana, North Carolina and Maryland also have initiated election technology reforms. *See* Nat'l Conf. of State Legislatures, *2001 State Election Reform* (2001), http://www.ncsl.org/programs/legman/elect/taskfc/overview.htm (providing national summaries of election reform). In the 2000 elections nationwide, however, almost one-fifth of all counties used punch card voting machines. *See* William McNulty & Hugh K. Truslow, *How It Looked Inside the Booth*, N.Y. TIMES, Nov. 6, 2002, at B9 (presenting statistics on county voting methods nationwide). By the mid-year elections of 2002, more than fifteen percent of all precincts still used them. *See id.* (noting little change in use of punch card systems). And in the 2004 general election, over 30 million Americans voted with punch cards. *See* ELECTION DATA SERVICES, NEW STUDY SHOWS 50 MILLION VOTERS WILL USE ELECTRONIC VOTING SYSTEMS, 32 MILLION STILL WITH PUNCH CARDS IN 2004 (2004), http://www.electiondataservices.com/EDSInc_VEstudy2004.pdf (noting registered voters using punch cards).

104. HAVA state action plans for all fifty states are available online through the National Association of Secretaries of State (NASS) website. NAT'L ASS'N OF SEC'YS OF STATE, HAVA: STATE PLANS (2005), http://NASS.org/electioninfo/HAVA_stateplans.html.

105. *See* Jim Drinkard, *Remember Chads? They've Hung Around*, USA TODAY, July 13, 2004, at 1A. Among the reasons for the delay in voting technology reform is the failure of Congress to make the bulk of HAVA funds available to the states until December of 2003 and the failure of the Bush administration to submit and the Senate to confirm nominees for the federal Election Assistance Commission until December 9, 2003.

106. *See* Nat'l Conf. of State Legislatures, *The States Tackle Election Reform* (Oct. 5, 2005), www.ncsl.org/programs/legman/elect/tskfc/TackleElectRef.htm (quantifying number of states to pass election reform). Of the 816 bills that have been passed into law, most concern recount procedures, provisional balloting, voter registration, primary elections, felon disenfranchisement or voter identification requirements. *See id.* (stating nature of proposed reforms). According to a survey of state elections laws conducted by the Election Reform Information Project at electionline.org in January of 2004, 28 states (including the District of Columbia) use

nearly 5,400 election reform bills were introduced in state legislatures, but most of these have failed to become law.[107]

Although federal funds are now available for the purchase of new voting equipment, many states are uneasy about moving forward. This is due, in part, to the absence of national standards for voting equipment, which were not to be completed until after the 2004 election.[108] Although this may be due to controversy concerning the security of electronic voting equipment and the need for a voter verified paper trail on electronic auditing equipment,[109] there are no reported security problems with precinct-count optical scan equipment. Yet with the exception of Arizona and Florida, most states have not embraced this technology either. This suggests that bureaucratic inertia, concerns about local autonomy, the insecurity of federal funding or perhaps even veiled perceptions of partisan advantage may be the real reasons legislators have failed to move more expeditiously in outlawing non-notice voting technology.[110]

The broad discretion that Congress has provided to the states concerning the selection and replacement of voting equipment means that HAVA is not likely to remedy many of the flaws that are implicit in the dual balloting system. At their option, local and state jurisdictions can ignore the federal reform effort, at least with respect to the replacement of punch cards and other non-notice forms of balloting equipment. Instead, they may rely upon voter education initiatives or often-ignored

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non-notice voting equipment and have made no plans to require notice voting technology.

107. *Id.*; *see also* Editorial, *As Primary Season Heats Up Voting-System Upgrades Lag*, USA TODAY, Feb. 4, 2004, at A.14 (emphasizing slow voter reform). According to the report from the Election Reform Information Project, twenty-two states still used punch cards in the 2004 primary and general elections, including Arkansas, California, Colorado, Idaho, Illinois, Michigan, Mississippi, Missouri, Montana, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming. *See id.* (noting states still using punch card systems). The states that relied most heavily on punch cards in the 2000 election were Ohio, Illinois, Missouri, Tennessee, Utah and Washington.

108. *See* 42 U.S.C. §§ 15,361-15,362 (2002) (stating that HAVA requires National Institute of Standards and Technology (NIST) to establish voluntary voting equipment standards by January 1, 2006). *But see* Nat'l Inst. of Standards and Tech., Voting Fact Sheet (Oct. 5, 2005), www.nist.gov/public_affairs/factsheet/voting (noting that, after funding this project in FY 2003, Congress failed to specifically appropriate funds in FY 2004).

109. *See* Tokaji, *supra* note 12, at 1782-84 (discussing states that have required DRE equipment to be accompanied by voter-verified paper trail).

110. State and local officials also may view federal elections as an obligation that takes place only every two to four years and, therefore, choose to spend limited funds on other priorities. For those seeking to conduct elections with minimal expense, punchcards are an attractive alternative because they cost between five and ten cents per ballot. *See, e.g.*, Peter Sinton, *Turning Election Chaos into Victory Hayward Ballot-Machine Firm Could Score Big in Overhaul of Election Machinery*, S.F. CHRON., Nov. 17, 2000, at B1 (stating cost of punchcards); *see also* Dennis Chapman, *Wisconsin Votes to Ban Punch Card Ballots*, MILWAUKEE J. SENTINEL, Nov. 29, 2000.

warnings on voting equipment to instruct voters about the consequences of residual balloting.[111] To the extent that a given jurisdiction does express an interest in the replacement of its non-notice balloting system, the permissive rules for waivers of implementation deadlines and the utter absence of Election Assistance Commission enforcement authority mean that the HAVA reforms are not likely to assure access to notice voting equipment, nor will they guarantee that every citizen's vote will count equally. States such as Oregon and Washington that utilize mail-in paper ballots may have been justified in seeking an exemption from the actual notice requirement.[112] But this concern simply should not have extended to punch cards, which repeatedly have been associated with problems. In 2004, the presidential election was relatively close in several states, and in down-ballot elections in Washington and North Carolina, the margin of victory was razor thin.[113]

In close elections, the punch card ballot has a track record of failure. This failure has raised serious questions about the reliability and integrity of the processes upon which our democracy relies for its fundamental legitimacy. Moreover, the partial, albeit substantial, reliance on punch card technology for the administration of state and national elections results in a system in which the efforts of many voters to participate in the process of self-government are thwarted. Thus far, legislative responses to the defects of this system have been inadequate. The extent to which this state of affairs is constitutionally problematic is a question to which we now turn.

IV. DUAL BALLOTING SYSTEMS AND THE FOURTEENTH AMENDMENT

A. *Equal Protection*

As a general rule, the dual balloting systems that many states used in the 2000 presidential election also remained in place for the 2004 general

111. 42 U.S.C. § 15,481 (2002) (listing voting system standards).

112. *See* 148 CONG. REC. S1171 (daily ed. Feb. 26, 2002) (referring to statement by Sen. Murray). Senator Murray (D-Wash.) proposed an amendment permitting signature verification and attestation in lieu of photo identification or a government check as a means of voter verification. *Id.* (explaining that this amendment, which was eventually adopted, was necessary to accommodate states such as Washington and Oregon that use mail-in ballots).

113. In Ohio, for example, President Bush beat John Kerry by 118,599 votes, but over 91,000 residual votes were cast. *See* CNN.com, *U.S. Presidential Election Results*, http://www.cnn.com/ELECTION/2004/pages/results/president/ (last visited Jan. 11, 2006) (quantifying election results and stating that difference between candidates in Iowa, New Mexico and Wisconsin was less than 15,000 votes); *see also* Wash. Sec'y of State, *Washington State 2004 General Elections* (Oct. 6, 2005), http://vote.wa.gov/general/recount.aspx (stating in State of Washington, Democratic candidate for governor beat her Republican opponent by only 129 votes); N.C. State Bd. of Elections, *2004 Official General Election Results* (Oct. 6, 2005), www.sboe.state.nc.us (stating that in North Carolina, Republican candidate for Commissioner of Agriculture beat his opponent by 2,287 votes).

elections.[114] To the extent that these systems subject those who vote on non-notice equipment to a significantly greater risk that their votes will not be counted, they create inequalities that are vulnerable to challenge under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment ("Clause") provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[115] Historically, the Clause has been understood to constrain the power of the states (understood as state and local government institutions and officials) to discriminate against individuals and groups. More specifically, the Clause constrains the power of the state to classify, enact and apply laws and policies that use one or more traits as a basis to treat (or, if you will, "protect") one person (or group of persons) differently than another.[116]

1. *The "Purposeful Discrimination" Requirement*

Equal protection concerns itself with purposeful discrimination. That is, those who seek to challenge discrimination on constitutional grounds must establish that the discrimination of which they complain was brought about as the result of a purposeful or intentional government action.[117] In all but the most extreme cases, demonstrating that a challenged law or

114. *See, e.g.*, Boies, *supra* note 2, at A29 (noting that "many of the same conditions that led to the events of 2000 are present today").

115. U.S. CONST. amend. XIV.

116. Normally, a classification will be readily identifiable from an examination of the text and/or structure of a law. For example, a law that requires that anyone who wishes to vote in an election register within "x" days of the election explicitly classifies on the basis of (1) the fact that one has registered, and (2) the date on which one registers. Those who have registered within the time prescribed by the law are treated differently than those who have not. The Supreme Court has held, however, that an individual, under certain circumstances, can constitute a "class of one" for equal protection purposes, so that a plaintiff may state a valid equal protection claim even where not alleging membership in a class or group. Vill. of Willowbrook v. Oleach, 528 U.S. 562, 564 (2000) (recognizing successful equal protection claims brought by "class of one"). But even here, plaintiffs must allege that they have been intentionally treated differently than others.

117. Washington v. Davis, 426 U.S. 229, 240 (1976); *see also* City of Mobile v. Bolden, 446 U.S. 55, 67 (1980) (citing "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause").

It is important to note what the purposeful discrimination requirement *does not* entail. While it does require that the plaintiff establish that the unequal treatment of which she complains was brought about by the conscious or intentional conduct of the government, this is true only in the sense that she must show that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (noting limitations of purposeful discrimination requirement). The general purposeful discrimination requirement does not require that the discrimination complained of was "invidious"—that is, motivated out of animus or hostility toward the plaintiff or the group to which the plaintiff belongs. While the existence of such hostility or animus may be a sufficient condition to establish a constitutional violation, it is not generally viewed as a necessary condition. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996)

policy has a disproportionately negative impact on the plaintiff (or those who share the triggering classifying trait with the plaintiff) will not suffice to constitute a successful equal protection claim.

In many states, equal protection challenges to statutory frameworks that lead to discriminatory rates of residual voting should easily satisfy any purposeful discrimination requirement.[118] Once again, we use Ohio's statutory framework as an example. In Ohio, the determination of voting equipment used throughout the state is governed by statute.[119] State law leaves it up to local voting officials to determine, in the first instance, the kind of voting equipment to be used in elections, subject to approval by state officials. Once state officials authorize the use of voting equipment, any particular election district's use of the equipment it employs is clearly attributable to the state statutes that permit a choice.[120] Thus, voters in a punch card jurisdiction should easily be able to establish that they are "victims" of a classification that is explicitly embodied (or at the very least contemplated by) state law, and are thus the "victims" of "purposeful discrimination."[121] They are treated differently than voters living in jurisdictions using other types of voting equipment "because of" the state's

(noting Colorado law that effectively disenfranchised gays and lesbians violated Equal Protection Clause because it was motivated by anti-gay animus).

118. *See* Marshall Camp, Bush v. Gore: *Mandate for Election Reform*, 58 N.Y.U. ANN. SURV. AM. L. 409, 423–25 (2002) (arguing that it may not be necessary to establish existence of traditional classification as condition to maintaining equal protection challenge to state voting systems after *Bush*). It is true that the Court in *Bush* does not explicitly focus on the problem of classification, and that *Bush* may provide support for the notion that the "[m]ere uneven treatment of voters will suffice." *Id.* at 425. For reasons discussed in the text, however, we believe that any requirement of establishing a classification scheme in states that maintain dual voting systems is easily satisfied.

119. *See* OHIO REV. CODE ANN. §§ 3506.01 to 3506.20 (West 2005) (determining state voting equipment).

120. *See id.* § 3506.05(B) (stating guidelines for certification of equipment).

121. In *Black v. McGuffage*, the court, while rejecting a defense motion for summary judgment on the plaintiffs' equal protection claim directed against the discriminatory residual vote rates produced by a dual voting system, asserted that "[h]ere, as in *Bush*, the State is not classifying citizens insofar as it is choosing one system of voting for some and a different system of voting for others . . . . Rather, it leaves the choice of voting system up to the local authorities." 209 F. Supp. 2d 889, 898-99 (N.D. Ill. 2002). For reasons advanced in the text, we disagree with the court's notion that the Illinois system, and by analogy Ohio's, doesn't "classify" in the sense relevant to equal protection analysis. Perhaps it might be argued that the Illinois system "classifies," not on the basis of voting itself, but on the basis of the county in which one happens to live and vote. But this distinction is purely formalistic: the Illinois statutory scheme contemplates and permits (as does Ohio's) counties to make the decisions that result in the inequalities of which they complained. In this sense, the discrimination is clearly attributable to, and exists "because of," the fact that state law allows it. Indeed, as Judge Guzman goes on to note: "The State, through the selection and allowance of voting systems with greatly varying accuracy rates 'values one person's vote over that of another.'" *Id.* at 899 (citing Bush v. Gore, 531 U.S. 98, 104-05 (2000)). The very fact that the state is responsible for the "selection" of the disparate voting systems ought to be sufficient to make it vulnerable to an equal protection challenge.

conscious decision, as reflected in statutory law, to permit them to be treated differently than others.[122]

This is true even if plaintiffs cannot allege or prove that the disadvantage they suffer is attributable to some sort of malevolent or sinister government purpose to treat the plaintiffs "worse" than those who vote in optical scanning districts.[123] All that is necessary is that the state established a system that permits the discriminatory treatment of which the plaintiffs complain.[124] In the context of a state where it is inevitable that some districts will choose more and less error-prone equipment, one might argue that the system requires this result.

2. *The Standard of Review*

Modern equal protection jurisprudence requires a court to determine the applicability of one of three "standards of review" to test the validity of a given classification.[125] These standards determine the location and the nature of the parties' burdens in either challenging or justifying various

122. *Feeney*, 442 U.S. at 279 (establishing "because of" causation requirement).

123. While there are some voting rights cases that do talk about the significance of malevolent discrimination, most recent cases do not. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 266 (2001) (Thomas, J. dissenting) (noting that "racial gerrymandering offends the Constitution whether the motivation is malicious or benign"). Voting rights experts seem to agree that the voting rights cases do not stand as an exception to the general equal protection, purposeful discrimination requirement. *See* Samuel Issachoroff, *Political Judgments*, 68 U. CHI. L. REV. 637, 648 (2001) (noting that many of 1960s line of voting cases "succumbed to the emergence of intent-based equal protection review after *Washington v. Davis*").

124. This understanding of the requirements of alleging and proving purposeful discrimination is well established in the Supreme Court's general equal protection jurisprudence, as well as in cases dealing specifically with voting rights. *See, e.g.*, Mobile v. Bolden, 446 U.S. 55, 66 (1980) (holding that evidence fell short of demonstrating that Mobile officials intended to further racial discrimination, and thus there was no violation of equal protection).

In addition, there is nothing in *Bush v. Gore* that suggests otherwise. Indeed, none of the non-dissenting Justices in *Bush v. Gore* even bothered to mention the general purposeful discrimination requirement, and for good reason. As they saw it, the state action in question—the decision and order of the Florida Supreme Court in *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000)—raised an obvious equal protection problem, and to that extent, it contemplated that similar ballots would be treated differently in the recount (e.g., the system established by the Florida Supreme Court classified on the basis of the county, or, in some cases, precincts, where a recount would take place). The Justices made no explicit suggestion that an equal protection violation depended on the possibility that the outcome would be affected by the sort of partisanship that might be analogized to animus or hostility against one of the candidates. For a somewhat different analysis of the purposeful discrimination issue that leads to the same conclusion, see Camp, *supra* note 118, at 425-27.

125. For an overview of modern equal protection methodology and its standards of review, see Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591 (1999-2000).

classifications.[126] Determining the standard that a court will (or should) apply to a given classification is ordinarily very consequential; in fact, the choice of standard is frequently outcome determinative.[127]

The Supreme Court has identified three main standards. So-called "rational basis" review is the most deferential. It entails a presumption that classifications are constitutional and places the burden on the plaintiff to convince a court that differences in treatment are not rationally related to any legitimate government interest.[128] The second standard, "intermediate scrutiny," is considerably more demanding. It entails a presumption that a classification is *un*constitutional, and requires the Government to show that differences in treatment are *substantially* related to *important* government interests.[129] The final standard, "strict scrutiny," is the most difficult standard for the Government to satisfy. Once referred to as "strict in theory but fatal in fact,"[130] strict scrutiny entails a presumption that discrimination is unconstitutional and requires the Government to establish that a classification is *necessary* to further a *compelling* (and of course legitimate) interest.[131] Strict scrutiny is required where the state discriminates in ways that adversely affect either so-called "suspect classifications" or "fundamental interests."[132] The "fundamental interest" strand

126. The courts also have applied "hybrid" equal protection standards that do not fit neatly within the three-tiered framework; some have suggested that *Bush v. Gore* might be explained as such a case. *See, e.g.*, Richard Hasen, *The California Recall Punch Card Litigation: Why* Bush v. Gore *Does Not Suck* (Sept. 2004) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=589001 (referring to *Bush* Court's equal protection standard as "new" and "murky").

127. For an overview of the outcome-determinative nature of standard-of-review selection, see Richard B. Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335 (1981).

128. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985) (describing Equal Protection Clause); *see* Saphire, *supra* note 125, at 597-98 (discussing extraordinarily deferential nature of paradigmatic rational basis review).

129. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210 (1976) (holding that Oklahoma statute prohibiting males under age of twenty-one and females under age of eighteen from consuming two percent alcoholic beverages was gender discrimination that violated Equal Protection Clause).

130. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (agreeing with Court's holding that Congress can use racial and ethnic criteria, in limited way, as condition attached to federal grant). More recently, the Court has explicitly rejected this characterization of strict scrutiny. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (noting that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it").

131. *See* Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (describing strict scrutiny). This standard ordinarily imposes on the Government the burden to show that a classification is "narrowly tailored" to achieve the relevant interest(s) and that there are no less discriminatory means available to it for that purpose.

132. *See* Saphire, *supra* note 125, at 601 (describing when strict scrutiny is required).

of equal protection analysis is most directly implicated by the dual voting systems addressed in this Essay.[133]

The federal Constitution does not explicitly confer a right to vote in state elections.[134] Notwithstanding this fact, the Supreme Court has long held that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[135] Moreover, because the right to vote is central to democratic governance,[136] laws that impair or infringe the right to vote are subject to strict scrutiny.[137] Applying this standard, the Supreme Court has struck-down a wide range of state laws discriminating against the right to vote.[138]

Prior to 2000, most voting rights cases in which state election regulations were struck down on equal protection grounds involved such things as challenges to direct denials of access to the polls,[139] challenges to state reapportionment plans[140] and efforts to draw voting districts to enhance

133. In some cases, voting regulations have implicated both of these concerns. For example, in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court struck down a state poll tax requirement. Its reasoning strongly suggested that its application of strict scrutiny was influenced by the presence of both a fundamental interest in voting in state elections and a wealth-based classification, which, at least at the time, was widely believed to be constitutionally suspect. *Id.* at 670 (stating reasoning). Other cases have arguably implicated both the right to vote and the (paradigmatic) suspect classification of race. In these cases, however, the Fifteenth Amendment's explicit prohibition of racial discrimination in voting arguably makes the equal protection's prohibition against racial discrimination largely superfluous.

134. *Harper*, 383 U.S. at 665 ("While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution, the right to vote in state elections is nowhere expressly mentioned.").

135. *Id.*

136. The Court has offered a number of rationales for treating the right to vote as fundamental in the constitutional sense, all of which have focused on the importance of such a right in a democracy. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) (noting that right to vote "in a free and unimpaired fashion is a bedrock of our political system"); *see* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (noting that "statutes distributing the franchise constitute the foundation of our representative society").

137. *Reynolds*, 377 U.S. at 562 ("[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

138. For a general overview of the development of modern constitutional doctrine pertaining to the right to vote, see RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 14-46 (2003).

139. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 359-60 (1972) (striking down states durational residency requirement that only permitted citizens who had lived in state at least twelve months to vote); Harper v. Va. Bd. of Elections, 383 U.S. 663, 669-70 (1966) (holding that State violated Equal Protection Clause when it made affluence of voter or payment of any fee electoral standard).

140. *See, e.g.*, Vieth v. President of the Pa. Senate, 541 U.S. 267, 288 (2004) (holding Constitution provided equal protection to people and not to political parties); Reynolds v. Sims, 377 U.S. 533, 575 (1964) (holding States proposed plan for apportioning of two seats in State's legislature violated Equal Protection Clause).

the political participation of minority voters.[141] Before the landmark decision in *Bush v. Gore*,[142] however, we doubt that many lawyers, courts or scholars would have maintained that the disparities in residual voting associated with dual voting systems raised serious constitutional problems.[143] But in overturning the Florida Supreme Court's decision requiring state election officials to conduct a state-wide manual recount of all undervotes,[144] the U.S. Supreme Court relied in part on the Equal Protection Clause and did so in a way that provides at least a plausible—indeed, we believe a solid—framework for challenges to the disparities in residual voting.

3. Bush v. Gore

In many respects, *Bush v. Gore* was a signal political and constitutional event. It captured the attention and the imagination of the American public in a way that has been matched by few other jurisprudential events of the last half-century.[145] The case proved to be controversial at a number of points and on a number of levels. Many observers were surprised when the Supreme Court first granted review in the case.[146] This was

141. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 633 (1993) (demonstrating propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups). Of course, the courts have been called upon to entertain constitutional challenges to a variety of other electoral system regulations, including ballot access and campaign financing. While many of the cases have raised equal protection claims, many have also raised First Amendment issues. *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409 (2003).

142. 531 U.S. 98 (2000).

143. Indeed, most election law specialists would probably have agreed with the U.S. Court of Appeals for the Eighth Circuit's observation that "the issue of the validity or invalidity of a ballot or ballot procedures is a question of state law." Roberts v. Wamser, 883 F.2d 617, 622 (8th Cir. 1989); *see also* Partido Nuevo Progresista v. Perez, 639 F.2d 825, 827 (1st Cir. 1980); Hubbard v. Ammerman, 465 F.2d 1169, 1176 (5th Cir. 1972).

144. *See* Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000) (ordering recount of votes).

145. We do not address *Bush* from a political or jurisprudential point of view. For readers interested in more global assessments of the case, the literature is expansive, and is still expanding. *See, e.g.*, *BUSH V. GORE*: THE COURT CASES AND THE COMMENTARY (E.J. Dionne Jr. & William Kristol eds., 2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); H. GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001); THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001); Tribe, *supra* note 24. For an assessment of the scholarly literature, see Richard L. Hasen, *A Critical Guide to* Bush v. Gore *Scholarship*, ANN. REV. POL. SCI. 297 (2004).

146. *See, e.g.*, Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1731 (2001) (noting "nearly universal conclusion of legal academics and political pundits" that Court would not intervene). This also was true when the Court first agreed to review the Florida Supreme Court's initial decision in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (Fla. 2000), allowing the manual recounts and the extension of time for do-

equally true when the Court decided to review the Florida Supreme Court's subsequent disposition of Gore's suit contesting the election, in which the Florida court ordered a state-wide recount of undervotes based on its formulation of an "intent of the voter" standard.[147] The controversy and drama heightened when, in connection with its grant of review, the U.S. Supreme Court granted Bush's request to stay the mandate of the Florida Supreme Court, effectively preventing the recount from proceeding, pending the Court's review. As things turned out, this deprived Florida authorities of the ability to continue the recount within the time frame that the Court found to be required.[148]

The Court's ultimate disposition of the merits of Bush's appeal also was controversial.[149] The main opinion was issued per curiam. The opinion identified the Fourteenth Amendment issue:[150] "whether the use of

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ing so that was sought by the Gore forces. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1050 (2000). For a discussion of the legal community's reaction to these events, see Linda Greenhouse, *Learning to Live with* Bush v. Gore, 4 GREEN BAG 2d 381 (2001).

147. *See Gore*, 772 So. 2d at 1243.

148. *See* Bush v. Gore, 531 U.S. 98, 110-11 (2000) (per curiam) (stating time frame for any controversy or contest to lead to conclusive selection of electors). The Court's stay order provoked a blistering dissent by Justice Stevens. *See id.* at 123 (Stevens, J., dissenting) (arguing Constitution assigns rights to states to determine manner of selecting Presidential electors). The dissent in turn provoked a response by Justice Scalia. *See id.* at 112 (Scalia, J., concurring) (stating additional grounds to reverse Florida Supreme Court's decision). When the Court issued its decision, Justice Breyer began his dissenting opinion by asserting that "[t]he Court was wrong to take this case. It was wrong to grant a stay." *Id.* at 144 (Breyer, J., dissenting); *see also* Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 761-62 (2001) (criticizing Court for taking case).

149. Professor Tribe, who served as counsel to Al Gore, asked how "so flawed and peculiar an equal protection claim could have prevailed." Tribe, *supra* note 24, at 222. Professor Sunstein observed that "nothing" in the Court's previous decisions suggested that constitutional questions would be raised by the sort of inequalities at issue in *Bush*. Sunstein, *supra* note 148, at 764 (stating Court's decision lacked any basis in precedent). Professor Marshall began an essay on *Bush* by asserting that the case is not defensible doctrinally. William B. Marshall, *The Supreme Court,* Bush v. Gore, *and Rough Justice*, 29 FLA. ST. U. L. REV. 787, 788 (2001) (finding opinion unsound on several grounds, including equal protection, standing, political question and remedies).

In response to the Court's decision, more than 500 law professors—including one of the present authors—signed a statement published in the New York Times, claiming that the Court's decision was so unsupportable as to be illegitimate. *See People for the American Way*, N.Y. TIMES, Jan. 13, 2001, at A7; *see also* Hasen, *supra* note 145 (citing sampling of scholarly criticisms of Court's equal protection holding).

150. In addition to the Fourteenth Amendment issue, the Court also considered the issue whether "the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Article II, §1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5 . . . ." *Bush*, 531 U.S. at 103. The per curiam opinion did not reach this issue. It was, however, addressed in a concurring opinion by Chief Justice Rehnquist, which found the Florida Supreme Court's action to be in violation of Article II. *Id.* at 111 (Rehnquist, C.J., concurring) (providing that there are additional grounds to reverse

standardless manual recounts violates the Equal Protection and Due Process Clauses."[151] A majority of the Court, of course, held that the procedures ordered by the Florida Supreme Court violated equal protection.[152]

With respect to the equal protection issue, the per curiam opinion noted the "common, if heretofore widely unnoticed, phenomenon" of uncounted votes, with "an estimated 2% of ballots cast" for President not registering, "for whatever reason."[153] The Court noted that the Constitution does not confer an individual right "to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."[154] Once the state grants individuals the right to vote for presidential electors, however, the "right to vote is protected in more than the initial allocation of the franchise."[155] With respect to the right to vote in state elections,[156] 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."[157] Consistent with its prior cases, the Court noted that the right to vote, once conferred, is "fun-

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Florida Supreme Court's decision). For commentary directed toward this issue, see Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89 (2002); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613 (2001).

151. *See Bush*, 531 U.S. at 103 (identifying Fourteenth Amendment issue).

152. Five Justices joined the per curiam opinion: Chief Justice Rehnquist and Justices Kennedy, O'Connor, Thomas and Scalia. These Justices were joined by Justices Souter and Breyer in finding an equal protection violation. *See id.* at 129 (Souter, J., dissenting) (stating holding). In what was an odd configuration of opinions, Souter and Breyer's separate opinion was styled as a dissent. They concluded that the Florida Supreme Court's disposition of the case violated neither 3 U.S.C. § 5 nor Article II of the Constitution. While they agreed that this disposition violated the Fourteenth Amendment, they disagreed with the majority Justices on the question of remedy, concluding that the Court should have remanded the case to the state court so that it could establish uniform standards for continuing the ballot recount. Justices Stevens and Ginsburg joined all of their opinion except the part that dealt with the equal protection issue.

153. *Id.* at 103. The Court included in this figure ballots "deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot." *Id.* The Court went on to note that "[t]his case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter." *Id.* at 104.

154. *Id.* at 104.

155. *Id.*

156. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding Equal Protection Clause prohibits states from "fixing voter qualifications that invidiously discriminated").

157. *Bush*, 531 U.S. at 104-05.

damental."[158] The problem with the recount mechanism ordered by the state court inhered in an absence of rules designed to ensure that each ballot received uniform treatment, which in turn led to "unequal evaluation of ballots in various respects."[159] Relying on its early "one-person, one-vote jurisprudence," the Court noted the constitutional infirmities that "arose when a State accorded arbitrary and disparate treatment to voters in its different counties."[160] Among the potential disparities that the Court found constitutionally significant was the likelihood of both inter- and intra-county differences in the "standards for accepting or rejecting contested ballots."[161] In addition, the Court was concerned with disparities in the recount that would follow from the fact that the Florida Supreme Court's order "did not specify who would recount the ballots."[162] The state court's order left open the prospect that different counties would use hastily organized "ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots."[163] Taken together, these "difficulties" made it "obvious" to the Court that "the recount cannot be conducted in compliance with the requirements of equal protection . . . ."[164]

Justice Souter's dissenting opinion also focused on the equal protection issue.[165] In Souter's view, only the equal protection claim asserted by Bush was "meritorious."[166] That claim entailed the argument that "unjustifiable disparate standards are applied in different electoral jurisdictions

158. The Court found that the recount mechanisms ordered by the state court "do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." *Id.* at 105.

159. *Id.* at 106.

160. *Id.* at 107 (citing Gray v. Sanders, 372 U.S. 368 (1963)).

161. *Id.* at 106. The Court also noted that the Florida Supreme Court had "ratified" uneven treatment by mandating that the "recount totals from two counties . . . be included in the certified total," and that the court had ordered uncompleted recounts in a third county to be included in the certified vote totals even though Gore had not contested that county's certification. *Id.* at 107. In addition, the recounts from these three counties "were not limited to so-called undervotes but extended to all of the ballots" including overvotes, a fact the Court found troubling in light of the fact that the estimated 110,000 overvotes from the rest of the state were not subject to a recount.

162. *Id.* at 109.

163. *Id.*

164. *Id.* at 110. The Court also held that these "difficulties" amounted to a violation of due process, an issue to which we will turn later. *Id.*

165. Justice Stevens also wrote a dissenting opinion in which Justices Ginsburg and Breyer joined. While Stevens acknowledged the possibility that "the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns," he avoided a direct conclusion concerning whether the "aspects of the remedial scheme" ordered by the Florida Supreme Court "might ultimately be found to violate the Equal Protection Clause." *Id.* at 126 (Stevens, J., dissenting). Even assuming the possibility of an equal protection violation, Stevens objected to the Court's "disposition of the case." *Id.*

166. *Id.* at 133 (Souter, J., dissenting).

to otherwise identical facts."[167] For Souter, the apparent flaw in the recount order under review was that different results could be obtained in the counting of "identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as 'hanging' or 'dimpled' chads)."[168] He saw "no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."[169]

4. *The Precedential Value of* Bush v. Gore*'s Equal Protection Holding*

What are the implications of the equal protection holding in *Bush* for the dual balloting systems we address in this Essay? As indicated above, seven Justices in *Bush v. Gore* held that the Equal Protection Clause applied to the disparities (or the potential disparities) associated with the Florida Supreme Court's order providing for a recount of the undervotes in the 2000 election. While this fact may have surprised many observers, the decision had significant reverberations in the election law community. Writing in a law review symposium devoted to the case, Professor Richard Hasen observed that the decision illustrated in numerous ways the fuzzy line between nuts-and-bolts questions and big-picture questions.[170] Hasen further observed that "[t]he opinion is potentially far-reaching, translating

167. *Id.* at 134.

168. *Id.*

169. *Id.* Although Souter (and Justice Breyer, who joined his opinion) found an equal protection violation, his unqualified dissent from the per curiam opinion, which also found such a violation, was apparently attributable to his disagreement with the Court's disposition of the case. Unlike the Court, Souter would have remanded the case to the state courts with instructions to establish uniform standards for conducting the statewide recount.

Justice Ginsburg also wrote a dissenting opinion. With respect to equal protection, she concluded that the Court had not been presented with "a substantial equal protection claim." *Id.* at 143 (Ginsburg, J., dissenting). Although any recount standard was destined to be imperfect, she noted that "we live in an imperfect world," and she saw no reason to believe that "the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount." *Id.*

Any final tally of the Justices' positions on the equal protection issue would have to account for Justice Breyer's rather enigmatic position. While Breyer joined Souter's opinion, he also joined Justice Stevens's dissent, which makes any confident assessment of his views on the application of equal protection principles in this area problematic. *See* Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 344 (2001) (discussing Breyer joining Justice Souter's opinion, including portion that found Bush's equal protection argument "meritorious," as well as Justice Stevens's dissenting opinion, which rejected claim that "Florida Supreme Court's manual recount order violated equal protection principles").

170. *See* Hasen, *supra* note 23, at 378 (noting that before Florida controversy, election law casebooks drew distinction between "big picture" issues—such as representation, nature of political equality, role of money in politics—and "nuts-and-bolts"). "The conventional wisdom was that the former was more important . . . to study than the latter. The Florida controversy challenged that conventional wisdom." *Id.* at 377.

just about any disparity regarding the means of voting into a justiciable question."[171]

The key word here, however, is "potentially." As others have noted, the per curiam opinion in *Bush* was full of suggestions that the Court itself did not intend to announce a robust equal protection principle that would invalidate every disparity associated with the structure and administration of elections.[172] While the Court did affirm that equal protection extended beyond "the initial allocation of the franchise" to "the manner of its exercise,"[173] and while it more specifically noted that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another,"[174] it also used limiting language. For example, the Court stated that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[175] In addition, it noted that the question before it was "not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead we are presented with a situation where a state court with power to assure uniformity has ordered a statewide recount with minimal procedural safeguards."[176]

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171. *Id.*

172. For other recent analyses of the potentially limiting language in the per curiam opinion, see Issacharoff, *supra* note 123; 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); Edmund S. Sauer, Note, *"Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of* Bush v. Gore *on Election Administration*, 19 J.L. & POL. 299 (2003).

173. *Bush*, 531 U.S. at 104.

174. *Id.* at 104-05.

175. *Id.* at 109. This passage was preceded by a reference to the specific features of the recount process before it, and to the rights of voters "in the special instance of a statewide recount under the authority of a single state judicial officer." *Id.* For a consideration, and rejection, of the notion that *Bush*'s equal protection holding could, as a matter of principle, be confined to only this context, see Mulroy, *supra* note 172, at 366 ("Theoretically, the case could be limited to statewide recounts. But it is difficult to see any principled reason why Bush's vote dilution logic would not apply equally to a county election where different voting precincts used different recount procedures.").

176. *Bush*, 531 U.S. at 109. Another reason to question the extent to which *Bush*'s equal protection analysis and holding would extend to the residual vote disparities associated with dual balloting systems derives from Justice Souter's dissenting opinion. Souter agreed with the majority Justices that the Florida Supreme Court's order was deficient in equal protection terms. He noted, however, that "the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on." *Id.* at 134. Of course, the Court in *Bush* did not have before it a record establishing the severe disparities between notice and non-notice voting technologies that were revealed in post-2000 studies of the use of these technologies. There is no way to know whether Justice Souter, or Justice Breyer, who joined his dissenting opinion, would regard these severe disparities as constitutionally problematic.

Notwithstanding these statements, the notion that the Court may have intended to announce an equal protection holding limited to the facts before it in *Bush* has been subject to serious and even scathing academic criticism.[177] Generations of constitutional theorists have supposed that the Court's legitimacy rests, at least to some degree, on whether it decides cases on the basis of principles of law that are capable of application, and that the Court is prepared to apply, uniformly to like cases.[178] In Alexander Bickel's famous formulation, when courts "cannot find such a principle, they are bound to declare the legislative choice valid. No other course is open to them."[179] If the Court in *Bush* intended that its equal protection holding indeed would have no application beyond the specific facts presented in the case,[180] then it would indeed be fairly accused of invoking the Equal Protection Clause "as a cynical vessel used to engage in result-oriented judging by decree."[181]

Of course, it is difficult for outside observers to determine what the Court actually intended with respect to the general applicability of the Equal Protection Clause to the nuts-and-bolts aspects of election system administration. As others have noted, while its use of limiting language may suggest a certain reluctance to apply equal protection principles vigorously to features of voting administration such as the disparity in residual votes that result from a state's operation of a dual voting system, the Court, as one commentator observed, "does *not* expressly state that its analysis would not apply to such a factual scenario."[182] Unless and until the Court tells us that its equal protection holding and analysis were meant to be confined to the precise and specific facts before it in December of 2000, traditional notions of how our legal system is structured—including the concepts of precedent and stare decisis—are likely to imbue that holding with a strong gravitational force.[183]

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177. *See, e.g.*, Marcia Coyle, *Gauging* "Bush v. Gore" *Fallout: Will Equal Protection Language Open a Can of Worms?*, NAT'L L.J., Dec. 25, 2000, at A4 (quoting Yale Law Professor Jack Balkin as stating that rule applied to only one case "isn't consistent with rule-of-law principles").

178. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 58-59 (1962).

179. *Id.* at 58.

180. Or, to use Professor Issacharoff's pithy formulation, a "good for this train, and this train only" offer. Issacharoff, *supra* note 123, at 650.

181. *See id.* Although most commentators agreed that if the Court's involvement in resolving the 2000 presidential election was based on an ad hoc and even partisan effort to resolve the election in Bush's favor, its action would be unjustifiable, there were a few prominent exceptions.

182. Mulroy, *supra* note 172, at 364 ("Rather, it merely stresses that such a question is not before it.").

183. Of course, one who believed generally that the Court takes an insincere and manipulative approach to precedent might be less sanguine about this. *See generally* Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087 (2002).

This is so for a number of reasons. First, despite the widespread shock and dismay that the Court had applied serious equal protection scrutiny to the Florida recount, the *Bush* Court's understanding and application of equal protection principles actually had reasonable, if not substantial, credentials. These can be found in some of the very cases upon which the per curiam opinion relied. For example, to the extent that a dual voting system works to the disparate disadvantage of voters who are forced to vote in counties with non-notice equipment, they can plausibly claim to invoke the principle, recognized in *Reynolds v. Sims*,[184] and quoted in *Bush*,[185] 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."[186] Similarly, these disfavored voters also can plausibly appeal to the principle articulated in *Moore v. Ogilivie*,[187] likewise quoted in *Bush*,[188] that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."[189] Moreover, the Bush Court relied upon *Gray v. Sanders*,[190] which it described as "[a]n early case in our one-person, one-vote jurisprudence [that] arose when a State accorded arbitrary and disparate treatment to voters in its different counties";[191] arguably, this description fits the discrimination facing voters who reside in counties that use non-notice technology. This line of cases establishes—even absent the holding in *Bush* itself—that inequalities in the realm of voting, particularly those that accord greater weight to voters in some counties compared to others, are constitutionally problematic.

Indeed, the disparate rates in residual voting that flow from dual voting systems raise even stronger claims to serious equal protection scrutiny than did the discriminatory aspects of the Florida system struck down in *Bush*.[192] There were a number of indications in *Bush* that the Justices were aware of this possibility. For example, Justice Stevens noted in dissent that meaningful equal protection restraints on the mechanics of election administration might mean that "Florida's decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection."[193] In a

184. 377 U.S. 533 (1964).

185. *See* Bush v. Gore, 531 U.S. 98, 105 (2000).

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

187. 394 U.S. 814 (1969).

188. *See Bush*, 531 U.S. at 107 (noting principle relied upon in *Moore* from early case in one-person, one-vote jurisprudence).

189. *Moore*, 394 U.S. at 819.

190. 372 U.S. 368 (1963).

191. *Bush*, 531 U.S. at 107.

192. *See* Issachoroff, *supra* note 123, at 650 (arguing that "the disparity in the standards for counting contested ballots, pales before other disparities in access to a meaningful vote, most notably the well-documented failure of voting machines used in one part, but not in another, of many states, Florida included").

193. *Bush*, 531 U.S. at 126 (Stevens, J., dissenting).

footnote contained in this passage, Stevens noted that the "percentage of nonvotes" in punch-card systems was significantly greater than was the case for "the more modern optical-scan systems."[194] A similar point is made in Justice Breyer's dissent. After referring to the language from Justice Stevens's opinion just quoted, Breyer noted that "in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted."[195] Given this, he could "not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair."[196] At least for Breyer, then, the logic of the Court's equal protection analysis would apparently extend to significant disparities in residual votes that flow from the simultaneous use of notice and nonnotice technology.

The constitutional vulnerability of dual balloting systems is highlighted by another fact. The claimed disparities in *Bush* principally involved nonuniform standards for the hand counting of undervotes. In the 2000 presidential election, these were speculative by comparison to the disparities in the number of residual ballots in states like Ohio. If, as the Court noted, the key question is the differential "opportunity to have [one's] vote count,"[197] it is hard to see how such disparities should not be considered constitutionally troublesome.

In his analysis of *Bush*, Professor Jack Balkin made this point quite powerfully.[198] As Balkin noted, "the discrepancies created by technology are always there."[199] If the potential for discrepancies in the Florida recount were constitutionally impermissible for the *Bush* majority, "the puzzle that the Supreme Court's decision creates is why the Equal Protection Clause does not require that states create uniform technologies for counting votes rather than just uniform standards for manual recounts."[200] As Balkin noted: "[t]he per curiam order does not say, [i]ndeed, it specifically does not hold, that technological differences among counties can give rise to an equal protection violation;" but this, Balkin suggested, "is probably the greatest source of unequal treatment."[201] Balkin then made an observation that stands as a fair challenge to the Supreme Court, and we would argue, to the lower courts as well:

> The question, then, is not whether this newly crafted [equal protection] doctrine might make sense. The question is whether the Court is at all serious about applying it and living with its poten-

194. *Id.* at 126 n.4.
195. *Id.* at 147 (Breyer, J., dissenting).
196. *Id.*
197. *Id.* at 108.
198. *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1428 (2001).
199. *Id.*
200. *Id.*
201. *Id.*

> tially revolutionary implications. If the Court were truly committed to the principle that voters should not be subjected to arbitrary procedures that decide whether their votes get counted or not, the Court would be obligated to investigate a number of different aspects of state voting practices, including technology.[202]

Of course, even if the Court is truly committed to this principle, there may be legitimate reasons to expect that it will proceed cautiously. As Professor Sunstein and others have noted, in recent years the Supreme Court generally has not been known for boldness in announcing and enforcing new constitutional doctrines.[203] Some commentators have argued that the Court has engaged, and indeed that it should engage, in "minimalism," rejecting broad-brush pronouncements of doctrine and instead deciding cases on only the most narrow grounds available.[204] Recently, a prominent election law scholar has claimed that the argument for judicial minimalism is especially compelling in cases raising claims of political equality, including cases involving voting rights.[205]

But whatever the merits of minimalism,[206] the right articulated in *Bush* "is not at all easy to cabin, at least as a matter of basic principle."[207] Were the Court now to announce categorically that its newly recognized equal protection principle would in fact not be applied to other voting practices, it would surely "cast grave doubt on how important that principle really was, other than as a means to decide the election in favor of George W. Bush."[208] Such an announcement would once again renew claims of the Court's political partisanship, claims that it took pains in *Bush* itself to deny.[209]

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202. *Id.*

203. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). It should be noted that even at the time of the 2000 presidential election, this view had not gone unchallenged. *See, e.g.*, Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 ("[The Court] cast aside nearly 70 years of precedent in the area of federalism, holding that Congress cannot use its powers under the Commerce Clause or the Fourteenth Amendment to regulate matters that touch on state interests, unless the [C]ourt approves.").

204. Indeed, this is what some believe best explains the Court's initial decision to remand the Florida election controversy to the Florida Supreme Court for clarification of the grounds of its decision in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000). *See* Cass R. Sunstein, *The Broad Virtue in a Modest Ruling*, N.Y. TIMES, Dec. 12, 2000, at A31.

205. HASEN, *supra* note 138, at 159-65.

206. For a general argument against Supreme Court minimalism, see LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW (2001).

207. Sunstein, *supra* note 148, at 769.

208. Balkin, *supra* note 198, at 1429.

209. In *Bush* itself, the Court suggested that its decision to take the case was anything but enthusiastic; it referred to its "unsought responsibility to resolve the federal and constitutional issues the judicial system has been *forced* to confront."

B. *Due Process*

There could have been little question that in the wake of *Bush*, lower courts soon would be called upon to apply the equal protection principle announced there to other voting practices, and indeed they have. But before we examine a number of these cases, we turn briefly to the other Fourteenth Amendment ground raised by the Bush forces in the Supreme Court—the argument that the recount ordered by the Florida Supreme Court violated the Due Process Clause.

1. *Procedural Due Process*

The Fourteenth Amendment's Due Process Clause provides, "nor shall any State deprive any person of life, liberty, or property without due process of law."[210] As construed by the Supreme Court, due process has both procedural and substantive dimensions. The *procedural* aspects of due process are fairly well established (and are less controversial than the substantive ones). The hallmark of procedural due process is the general requirement that, before the government acts to deprive an individual of a "protected interest," the individual must be afforded notice and some sort of opportunity to be heard.[211]

One of the biggest obstacles to asserting a procedural due process claim is the threshold requirement that one point to a protected "liberty" or "property" interest. The Supreme Court has held that most of these protected interests are not created by the Constitution, but owe their existence to state law. Thus, a plaintiff must point to some sort of state law that in some reasonably objective way creates and protects the interest in question. Once that obstacle is overcome, determining what additional procedural safeguards the government is required to provide the individ-

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Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam) (emphasis added). This passage was widely criticized. *See, e.g.*, Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 686 (2001) (describing as insincere Court's suggestion that case was forced upon it). Nevertheless, the passage does reflect some effort to assure the public that the Court's intervention in the 2000 presidential election was both reluctant and not itself political. After the case was decided, some of the Justices who voted with the Court made public statements denying that politics played any role in its deliberations or decisions. *See, e.g.*, Neil A. Lewis, *The 43rd President: The Justice; Justice Thomas Speaks Out on a Timely Topic, Several of Them, in Fact*, N.Y. TIMES, Dec. 14, 2000, at A23 (reporting that, in meeting with group of high school students, Justice Thomas denied that Court's decision in *Bush* had anything to do with partisan politics).

210. U.S. CONST. amend. XIV, § 1.

211. At least this is the case where the deprivation occurs pursuant to regularly established government processes, and not as a result of random action. *See* Parratt v. Taylor, 451 U.S. 527 (1981) (holding where deprivation follows random and unauthorized state action and not as result of established state procedure, individual must first resort to state remedies before pursuing any procedural due process claim), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

ual is a function of applying a three-part balancing test that the Court first articulated in 1976.[212]

Prior to *Bush v. Gore*, procedural due process doctrines did not seem to play a very important role in voting rights cases. Some of the most respected academic commentators have had difficulty in imagining persuasive theories that might be applicable. Much of the post-*Bush v. Gore* doctrinal commentary has focused on equal protection, not due process. But commentators who have addressed the procedural due process issue have done so, quite understandably, in the context of the manual recounting of ballots. And even there, where procedural problems might seem more apparent because of the adjudicatory or regulatory nature of the recount process (especially manual recounts), commentators have not been impressed.[213]

There are several problems confronting a successful procedural due process claim in the context of residual votes produced by modern voting technologies.[214] First, there is the requirement of establishing a constitutionally protected interest. One certainly might argue that an individual's right to vote (or "to have one's vote count") is a liberty or property interest, the "deprivation" of which requires procedural protection above and beyond that provided by applicable state law. The Supreme Court's modern voting cases establish that the "right to vote" is a protected liberty interest. As noted earlier in the context of equal protection analysis, even though the state has no affirmative duty to extend the right to vote, once it does, that right becomes "fundamental."[215] If the right to vote is fundamental for equal protection purposes—if, once created, there is a constitutionally recognized expectation that the right will be extended to all otherwise qualified voters on equal terms—it is hard to see why the right should not be viewed as a protected interest for procedural due process purposes.[216]

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212. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (stating three factors as: 1) private interest affected by official action; 2) risk of erroneous deprivation; and 3) government's interest). For general discussion, see Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

213. *See, e.g.*, Tribe, *supra* note 24, at 244-46 (criticizing notion that Florida Supreme Court's recount order raised plausible procedural due process defects).

214. The primary focus of this Section has been on the equal protection problems associated with a state's use of dual voting systems. Unlike an equal protection claim, which is concerned with the *disparities* in residual votes that flow from the use of different voting technologies, a procedural due process claim would focus on the fact and the nature of residual votes per se. That is, the focus would be on the actual deprivation of the right to vote that follows from the use of error-prone technology and the notion that the risk of deprivation could either be eliminated or substantially ameliorated with the presence of additional procedural safeguards.

215. *See supra* notes 126-31 and accompanying text.

216. This point is made, although somewhat obliquely, in Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 596-97 (2001) (discussing how Court could have easily

On the other hand, the Supreme Court has repeatedly held that one must look carefully at state law to determine the content or contours of the interest as to the deprivation of which procedural protection is claimed.[217] One might imagine an argument that, given the history and nature of vote tabulation, and the fact that even the best equipment cannot eliminate some statistical "margin of error," no voter has any clear expectation that his or her vote will actually be counted. According to this argument, all that one can expect is that one's vote will not be intentionally or systematically discounted.[218]

But even if one assumed that the "right to vote" was a protected interest to which procedural due process applied, an assumption that seems entirely plausible,[219] the question of "what process is due" must still be addressed. One of the principal concerns to which due process responds is the individual's interest in reducing the risk of error associated with government regulation. In determining whether new or additional procedural safeguards are required, the courts also evaluate the probable value of additional or substitute safeguards, as well as the government's interest in "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[220]

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made equal protection claims in fundamental rights cases substantive due process claims and stating "the importance of the right to vote informs the operation of the three-part procedural due process calculus of *Mathews v. Elridge*").

217. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) ("Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" (quoting Bd. of Regents v. Roth, 408 U.S. 564, 576-78 (1972))).

218. It is worth noting here that the Supreme Court has held that the Due Process Clause does not apply to the *negligent* conduct of state officials. *See* Davidson v. Cannon, 474 U.S. 344, 347 (1976) ("[W]here a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required."); *see also* Shannon v. Oneida County Bd. of Election, 394 F.3d 90, 97 (2d Cir. 2005) (holding unintentional breakdown in voting equipment does not give rise to due process claim).

One might argue that the right to vote is a "property" interest, but that argument is subject to the same qualifications just discussed. Although one prominent commentator has made such an argument under the specific Florida statutes at issue in *Bush v. Gore*, these issues tend to be very statutorily specific. *See* Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 562-63 (2001) ("The right to vote in Florida . . . is supported by explicit rules under Florida law. Section 97.041, *Florida Statutes*, prescribes the state's qualifications to register and vote . . . . There can be no doubt that Section 97.041 creates a protectible property interest for Fourteenth Amendment purposes."). Tellingly, Shane cites no election/voting cases in his discussion. Neither does Pamela Karlan, one of the country's leading voting rights scholars. *See* Karlan, *supra* note 216.

219. For more on this point, see Shane, *supra* note 218, at 563.

220. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *Mathews* also counts, on the individual's side of the balancing ledger, the nature and importance of the interest at stake, a factor that would surely be important in the context of the right to vote.

In the context of residual voting, it is unlikely that one could successfully argue that there is a right to a completely error-free voting system, one in which all voters would be assured that the votes they intended to register would actually be counted. To some extent, all existing voting technologies are prone to mistakes, and the Supreme Court has never held that due process requires absolute accuracy in government decision making and conduct.[221] On the other hand, in *Bush v. Gore*, the Court expressed particular concern with the fact that the state court had "ordered a statewide recount with *minimal procedural safeguards*."[222] Where a state uses voting equipment that is inherently unreliable[223]—equipment that produces high levels of residual votes in circumstances where alternative and readily available equipment is known to be more accurate—the concerns for fundamental fairness that underlie much modern due process doctrine must certainly come into play.[224] While these concerns may call for the sorts of additional safeguards that procedural due process doctrines require, they also animate more modern substantive due process doctrine. And it may well be that they are more appropriately addressed in that context.

2. *Substantive Due Process*

Due process also has a substantive component. While substantive due process doctrine is perhaps more controversial than its procedural cousin,[225] it is well established that beyond requiring procedural protec-

221. Implicit in the three-pronged balancing test prescribed in *Mathews* is the notion that the risk of erroneous decision making must be assessed in light of the nature of the government's interests in not providing additional procedural protection, a formula that contemplates the possibility that the government may sometimes be permitted to make mistakes. *See id.* (discussing Mathews step 2: "risk of an erroneous deprivation").

222. Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) (emphasis added). The Court also expressed concern that the recount ordered by the Florida Supreme Court was "not well calculated to sustain the confidence that all citizens must have in the outcome of elections." *Id.* The notion that processes of decision-making must have safeguards that ensure accuracy and instill confidence has long been deeply embedded in the Court's procedural due process jurisprudence. *See* Saphire, *supra* note 212, at 114-15.

223. The fact that the highest residual vote rates normally correspond to the use of so-called "nonnotice" voting technologies may well lend substantial weight to procedural due process concerns. Providing voters with an opportunity to check for and correct mistakes before they leave the polling place seems like quite a reasonable way for election officials to minimize the risk of error associated with the voting process.

224. The Supreme Court has often characterized the central concern of due process as assuring "fundamental fairness." *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (stating denial of fundamental procedural fairness violates due process).

225. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 525 (2d ed. 2002) (noting that while "concept of procedural due process never has been controversial, . . . the very idea of substantive due process has been contested").

tion, due process protects against "arbitrary" or "capricious" government action.[226] This may be expressed in terms of a requirement of "fundamental fairness," or that the government must not act "irrationally," or even "unreasonably."[227]

In its doctrinal formulations, substantive due process has two aspects, which are often expressed, as was true with equal protection, in terms of "standards of review." Whereas equal protection methodology entails (at least) three standards of review, due process methodology entails two. The first is applicable in the case of government regulation of so-called social or economic interests (sometimes referred to as "garden-variety" interests). This is the default standard, and it entails a heavy presumption that the regulation in question is constitutional, along with a very difficult-to-overcome burden on the plaintiff to show that the regulation is not "rationally related to a legitimate interest."[228] The second standard resembles equal protection's "strict scrutiny" standard. It entails a presumption against the constitutionality of the regulation in question, and imposes a very difficult-to-overcome burden on the state to establish that the regulation is "necessary to further a compelling interest."[229]

There was a time—and it may well be that this time has not yet passed—when courts were very reluctant to employ substantive due process in the context of voting or election regulations. A good deal of this reluctance can, no doubt, be attributable to the controversial nature of substantive due process in general, to its mushiness, and to the prospect

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226. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) (noting that Due Process Clause bars "certain government actions regardless of the fairness of the procedures used to implement them").

227. For a useful account of the development of substantive due process, and the various doctrinal formulations that have been articulated, see *Washington v. Glucksburg*, 521 U.S. 702, 755-73 (1997) (Souter, J., concurring) (providing history of substantive due process and noting persistence of substantive due process in precedent gives it legitimacy in modern context).

228. Substantive due process doctrines are not "unitary"; that is, there is no one-test-fits all standard that will invariably be applied. While courts often apply the standard referred to in the text, they sometimes simply ask whether the challenged regulation is "arbitrary" or "capricious."

229. *See, e.g.*, Charfauros v. Bd. of Elections, No. Civ. A. 95-1106, 97-023, 97-027, 1998 WL 34073646, at *13 (N. Mar. I. Nov. 27, 1998), *aff'd*, 249 F.3d 941 (9th Cir. 2001), *amended by* No. 99-15789, 2001 U.S. App. LEXIS 15090 (9th Cir. July 6, 2001). The case provides:

> The decision to find the right to vote to be constitutionally "fundamental" and subject to a meaningful form of judicial review may best be described as a substantive due process decision . . . [t]herefore, the procedure used by the Board of Elections in this case should be strictly scrutinized to determine if it was necessary to protect a compelling interest on the part of the Board of Elections . . . .

Id. A primary difference between equal protection and substantive due process analyses is that the former focuses on classifications (i.e., relative differences in treatment or deprivations) while the latter focuses on deprivations in an absolute sense.

that it is often thought to reduce to the subjective values of the judge.[230] In addition, judicially and constitutionally based concerns about federalism have helped contribute to judicial caution.

Still, there is no question that substantive due process challenges to election laws can be justiciable. For example, in a leading case, *Roe v. Alabama*,[231] the court invalidated, on due process grounds, an Alabama state court decision that effectively changed the law with respect to the counting of absentee ballots after an election had taken place. It reasoned that the *post hoc* change "would result in fundamental unfairness and would violate plaintiffs' right to due process of law," and that "this violation of 'the plaintiffs' rights to vote and . . . have their votes properly and honestly counted' constitutes a violation of the First and Fourteenth Amendments."[232] In dicta, the court emphasized what it saw as the extremely severe, disenfranchising consequences of the state court order, and acknowledged the fact that the case did not involve a "garden-variety election dispute." It cautioned that "[n]ot every state election dispute, however, implicates the Due Process Clause of the Fourteenth Amendment and thus leads to possible federal court intervention." For a federal court to intervene, a situation must go "well beyond the ordinary dispute over the counting and marking of ballots."[233]

As was true with equal protection, prior to *Bush v. Gore* it would have been difficult to predict that the courts would vigorously apply due process principles to the "nuts-and-bolts" of states' voting systems. But since the *Bush* decision, the nation has become increasingly aware of the fact that non-notice election technology, particularly in the form of punch card equipment, typically results in high levels of residual votes. Does *Bush* suggest the possibility of enhanced judicial scrutiny of this situation?

3. Bush v. Gore *and Due Process in Voting*

In *Bush*, so much attention was directed to equal protection (and, as in Chief Justice Rehnquist's concurring opinion, to Article II of the Constitution)[234] that it is easy to ignore the due process issue. In his main brief in the Supreme Court, Bush argued that "[t]he Florida Supreme Court's

230. For general discussion of these and related concerns, see Richard B. Saphire, *Doris Day's Constitution*, 46 WAYNE L. REV. 1443 (2000).

231. 43 F.3d 574 (11th Cir. 1995), *aff'd*, 68 F.3d 404 (11th Cir. 1995).

232. *Id.* at 580 (alteration in original).

233. *Id.* (quoting Curry v. Baker, 802 F.2d 1302, 1315 (11th Cir. 1986)). These cautionary and limiting comments were accentuated in a dissenting opinion. *Id.* at 585 (Edmonson, J., dissenting) ("Federal courts are not the bosses in state election disputes unless extraordinary circumstances affecting the integrity of the state's election process are clearly present in a high degree.").

234. Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam) (holding that there are constitutional problems with recount ordered by Florida Supreme Court in context of Article II, §1 of Constitution); *id.* at 112 (Rehnquist, C.J., concurring) (concluding that Florida Supreme Court's recount order infringed on power of Florida Legislature in violation of Article II, §1, cl. 2 of Constitution).

radical departure from the preexisting Florida law, and its failure to provide and apply clear and consistent guidelines to govern the manual recounts, also violates the Due Process Clause."[235] In large part, this argument was predicated on the notion that the Florida Supreme Court's departure from pre-existing state standards governing a recount was so extreme as to violate the due process principle of "fundamental fairness."[236]

The per curiam opinion in *Bush* acknowledged the presence of the due process claim. It identified the questions presented as "whether the Florida Supreme Court established new standards for resolving presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution . . . and whether the use of the standardless manual recounts violates the Equal Protection and Due Process Clauses."[237] But once the Court articulated the due process issue, the matter, at least formally or explicitly, was all but forgotten.

After identifying due process as an issue, the Court only once explicitly mentioned it in the balance of its opinion.[238] There are reasons to believe that due process played little role in the thinking or reasoning of the majority Justices. First, Gore's lawyers contested the relevance of due process for assessing the validity of the Florida Supreme Court's recount order. In his argument for Gore before the Supreme Court in *Bush v. Palm Beach County Canvassing Board*,[239] Professor Tribe stated: "I think I would want to note at the outset that the alleged due process violation which keeps puffing up and then disappearing . . . is really not before the Court."[240] Second, during the course of oral argument, the Justices expressed almost no interest in the due process issue. In addition, the per curiam opinion in *Bush v. Gore* did not address the due process issue in any

235. Brief for Petitioner at 45, *Bush*, 531 U.S. 98 (2000) (No. 00-949), 2000 WL 1810102, at 34.

236. *Id.* at 46 (citing Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995)). Bush's lawyers emphasized due process concerns, and not any equal protection theory in the federal court litigation they brought initially in their attempt to stop the recount. *See* Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000).

237. *Bush*, 531 U.S. at 103.

238. *See id.* at 110 ("Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection *and due process* without substantial additional work.") (emphasis added).

It is not uncommon for the Court to identify more than one constitutional question presented by a petition for certiorari but only decide one (or less than all) of them. But when the Court does this, it will often expressly indicate reasons for not resolving additional questions. In *Bush*, the Court initially reserved its "finding" to the equal protection issue. *See supra* notes 142-54 and accompanying text. Its rather offhanded return to due process near the end of its opinion arguably clouds the question whether it actually *decided* the due process issue at all.

239. Transcript of Oral Argument at 44-45, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836), 2000 WL 1763666.

240. *Id.*

direct or meaningful way; its reference to due process, as noted above, was very off-handed or casual.[241] And while the per curiam opinion included the Due Process Clause in its statement of the questions presented, this was immediately followed by the statement that "[w]ith respect to the equal protection question, we find a violation of the Equal Protection Clause."[242] Conspicuously absent was any reference to a Due Process Clause violation. Perhaps this explains why none of the dissenting Justices bothered meaningfully to address a due process issue in their opinions.[243]

Yet the fact that most of the per curiam opinion was trained on equal protection[244] does not mean that the opinion did not resonate with due process themes.[245] The Court referred to the absence of "minimum pro-

241. This fact led one commentator to claim that the due process claim "was never really addressed." *See* Karlan, *supra* note 216, at 599. It also led another to claim that "it [is] a fair statement that the majority gave no sustained thought to the Florida election from a due process standpoint." Shane, *supra* note 218, at 551 n.66.

242. *Bush*, 531 U.S. at 103 (per curiam) (recognizing petition presented question of "whether the use of manual recounts violates the Equal Protection and Due Process Clauses").

243. Justice Souter's dissent, joined by Justice Breyer, referred to due process in his identification of the issues presented. *Id.* at 129-30 (Souter, J., dissenting) ("[W]hether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for the President (the undervote ballots) violates the equal protection or due process guaranteed by the Fourteenth Amendment."). Souter later noted that "Petitioners have raised an equal protection claim or, alternatively, a due process claim." *Id.* at 134 (citation omitted). Thus, Justice Souter essentially conflated the equal protection and due process issues. He never returned to due process, and the fact that he found the recount order of the Florida Supreme Court not to serve any "legitimate state interest" would entail its unconstitutionality under equal protection or due process, in a way that would result in the latter's adding nothing to the former's analysis. Justice Stevens's dissent mentioned due process only as a part of a quoted sentence in an inconsequential footnote. *Id.* at 125 n.3 (Stevens, J., dissenting) ("The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so." (quoting Victor v. Nebraska, 511 U.S. 1, 5 (1994))). In addition, Justice Ginsburg's dissent did not address due process at all (with the exception of referring to the Due Process Clause in footnote characterizations of the holding of cited cases), and Justice Breyer's dissent referred only to equal protection in its discussion of the Fourteenth Amendment. *See id.* at 138 n.1 (Ginsburg, J., dissenting); *id.* at 145, 153 (Breyer, J., dissenting). It is problematic to maintain the notion that due process played an important role in the Justices' thinking when almost none of them seemed interested in talking much about it.

244. *See, e.g.*, *Bush*, 531 U.S. at 104 (referring to requirement that "equal weight [be] accorded to each vote," and to principle that "[e]qual protection applies as well to the manner" of exercise of franchise); *see id.* at 105, 108 ("For purposes of resolving the equal protection challenge . . . . That brings the analysis to yet a further equal protection problem. . . . A desire for speed is not a general excuse for ignoring equal protection guarantees.").

245. In his essay on *Bush v. Gore*, Professor Tribe argues that the Court's equal protection analysis was so weak that it needed bolstering by "what seems to be a due process argument," but one "pitched somewhat awkwardly." *See* Tribe, *supra* note 24, at 233-34. Tribe considers a number of due process theories that might have supported the outcome, but finds them all wanting. *Id.* at 233-47 (evaluating

cedures necessary to protect the fundamental right of each voter."[246] Elsewhere, the Court relied on the principle that "there must be at least some assurance that the rudimentary requirements of equal treatment *and fundamental fairness* are satisfied."[247]

While it might be an exaggeration to say, as does Professor Karlan, that "the decision to stop the recount had virtually nothing to do with equal protection,"[248] it is quite possible to imagine that *Bush v. Gore* might have come out the same way had the Court chosen to focus less on the *relative degrees* of arbitrariness to which voters in different parts of Florida might have been exposed (the concern of equal protection) and more on the potential arbitrariness faced by *any* voter in having his or her ballot assessed by an election official without the guidance of clearer standards. After all, if due process has had any core content, it has been as a safeguard against arbitrary government action, a concern that may be at its greatest when the government constrains physical liberty, but that surely must be present when the right to participate in democratic governance is at stake. While there may be plausible explanations for the *Bush* Court's de-emphasis of due process grounds for its intervention in the state's administration of Florida's election system, its due process implications are quite strong.[249]

Of course, even if one acknowledges the due process underpinnings of *Bush*, any assessment of its implications for the significant residual vote rates associated with punch-card and other forms of non-notice voting equipment must take into account the same question we noted in our equal protection discussion: To what extent will courts now be more inclined to enforce due process requirements in the context of the nuts-and-bolts of voting systems administration than before *Bush* was decided? In other words, how should one assess the precedential value of *Bush* once understood as a due process decision?

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possible procedural, substantive and hybrid due process explanations for outcome).

246. *Bush*, 531 U.S. at 109.

247. *Id.* (emphasis added). Professor Roy Schotland, in perhaps the most thorough effort to analyze *Bush* from a due process point of view, identifies other passages from the per curiam opinion that arguably sound in due process. *See* Roy A. Schotland, *In* Bush v. Gore*: Whatever Happened to the Due Process Ground?*, 34 LOY. U. CHI. L.J. 211, 214-16 (2002).

248. Karlan, *supra* note 216, at 600 (arguing that, despite Court's reliance on equal protection, challenged recount in fact treated alike all voters whose ballots had not been counted). Professor Karlan has suggested that while it purported to be grounded in Article II, even Chief Justice Rehnquist's concurring opinion in *Bush* is best understood as premised in due process. *Id.* at 599.

249. *See id.* at 600-01 (suggesting that Court was attempting to cast *Bush* as extension of its earlier one-person, one-vote cases). Professor Karlan makes a plausible argument for the Court's deemphasis of due process grounds for its intervention in *Bush*: She argues that the Court's reliance on equal protection instead of due process represented a political judgment that reflected the greater pedigree, in both precedent and popular approval, of the former. *See id.*

There is little reason to distinguish between the precedential implications of *Bush*'s equal protection and due process holdings.[250] All of the reasons already identified for refusing to assume that *Bush*'s equal protection analysis should and will be limited to the narrow and specific facts before the Court apply with equal force to the case understood in terms of its application of due process reasoning. But the tension between the Court's broad Fourteenth Amendment holding and the vagueness of the potentially limiting language it used left one thing quite clear: Lower courts would be left to identify the central meaning of the holding in *Bush* and to apply that holding to the variety of electoral practices that were all but certain to come under constitutional challenge.

V. LITIGATING *BUSH V. GORE* IN THE STATES

It took little time for voting rights lawyers to test the newly reinvigorated Fourteenth Amendment after *Bush v. Gore*. While there have been challenges in a number of states to a variety of electoral practices,[251] our focus will be on litigation in three states. In this Section, we discuss recent litigation in Illinois and California. In the next Section, we turn to litigation in Ohio.[252]

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250. Once again, this assumes that the Court actually decided the due process issue in *Bush*. For a further discussion of this point, see *supra* notes 234-39 and accompanying text.

251. Apart from cases challenging disparities in residual votes associated with dual election systems, the lower courts have divided on whether and the extent to which *Bush v. Gore* applies to a variety of election practices. *See, e.g.*, Walker v. Exeter Region Coop. Sch. Dist., 284 F.3d 42, 46 (1st Cir. 2002) (affirming district court refusal to apply *Bush v. Gore* to strike down state voting rule where case presented "no issue of a state-wide vote tabulated differently in constituent districts"); Green Party of the State of N.Y. v. Weiner, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) (refusing to apply *Bush v. Gore* in challenge to policy of conducting Green Party primary election on paper ballots while conducting major party primaries on voting machines); Graham v. Reid, 779 N.E.2d 391, 395-96 (Ill. App. Ct. 2002) (concluding that *Bush v. Gore* was "limited to the circumstances of that case" and upholding state-wide practice specifying treatment to be accorded missing ballots); Gallivan v. Walker, 54 P.3d 1069, 1092, 1096 (Utah 2002) (relying on *Bush* to strike down Utah's voter initiative law; *Bush* interpreted to require states "generally to treat voters similarly and not to unreasonably subject voters to disparate treatment").

252. In addition to litigation in Illinois, California and Ohio, one other suit was filed that raised a Fourteenth Amendment challenge to a dual voting system that produced disparities in residual votes during the 2000 presidential election. *See* Andrews v. Cox, No. 1:01-CV-0318-ODE (N.D. Ga. Aug. 20, 2001) (dismissing complaint without prejudice). In *Andrews*, the court granted the defendants' motion to dismiss the plaintiffs' Fourteenth Amendment claim, but denied a motion to dismiss the plaintiffs' federal statutory and state law claims. *See* Mulroy, *supra* note 172, at 361. Lawsuits also were filed in Florida, one each in federal and state courts. In Florida and Georgia, state officials ultimately undertook extensive election technology reform. *See* B.J. Palermo, *Suits Push 3 States to End Punch Card Voting*, NAT'L L.J., Mar. 4, 2002, at A1.

A. Black v. McGuffage

In *Black v. McGuffage*,[253] a number of minority plaintiffs brought suit to enjoin the Illinois Secretary of State and Chicago election officials from selecting, using, certifying and approving punch-card voting systems or any other system that did not provide voters with error notification and the opportunity to correct any errors on their ballots. All the plaintiffs were Latino or African-American voters who sought to represent all Illinois voters who were required to vote on punch-card equipment and other non-notice equipment.[254] The suit alleged violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The plaintiffs alleged that, for the November 2000 presidential election in Illinois, the state experienced an average residual vote rate of 3.85%, but that this rate varied considerably across election districts based on the nature of the voting technology used in those districts. According to the complaint, the error rates ranged from a low of 0.32% in counties that used optical scan systems with error notification to 7.06% in the City of Chicago, which used a punch-card system—"an error rate twenty times as great."[255]

The district court rejected the defendants' motion to dismiss. In a memorandum opinion and order addressing the plaintiffs' equal protection claim, the court considered the relevance of *Bush v. Gore*.[256] The court identified the issue presented as "whether a state may allow the use of different types of voting equipment with substantially different levels of accuracy, or if such a system violates equal protection."[257] While noting that the Supreme Court had purported to limit its *Bush* decision "to the then present circumstances," the court found that "the rationale behind the decision provides much guidance to the situation in this case."[258] The court construed *Bush* to stand for the proposition that once a state granted citizens the right to vote, it could not "by later arbitrary and disparate treatment value one person's vote over that of another."[259] The Court found "[t]hat is precisely what Plaintiffs allege the Defendants have done."[260] Because Illinois operated a system in which "voters in some counties are statistically less likely to have their votes counted than voters

253. 209 F. Supp. 2d 889 (N.D. Ill. 2002).

254. The named plaintiffs also sought to represent a sub-class of all African-American voters who were required to do the same. *See id.* at 892, 894. This claim was based on Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965). *See Black*, 209 F. Supp. 2d at 894.

255. Complaint ¶ 24, *Black*, 209 F. Supp. 2d 889 (N.D. Ill. Nov. 11, 2001) (No. 01C-0208), *available at* http://election2000.stanford.edu/illinois.aclu.pdf.

256. See *Black*, 209 F. Supp. 2d at 898 (noting applicability of *Bush* to circumstances present in present case). For discussions of the relevance of *Bush v. Gore* to the *Black* case, see *infra* notes 257-62 and accompanying text.

257. *Id.*

258. *Id.* The court noted that the case before it presented "a matter of first impression in this Circuit and, indeed, this country." *Id.*

259. *Id.* (citing Bush v. Gore, 531 U.S. 98, 104 (2000)).

260. *Id.*

in other counties in the same state in the same election for the same office," the court found that "[s]imilarly situated persons are treated differently in an arbitrary manner."[261]

Ultimately, the court in *Black* found *Bush v. Gore*'s equal protection holding not only applicable, but effectively controlling. Although it observed that it was "certainly mindful of the limited holding of *Bush*," the court concluded that the "situation presented by this case is sufficiently related to the situation presented in *Bush* that the holding should be the same."[262]

With respect to the plaintiffs' due process claim, the court found that the right to vote was constitutionally fundamental. The question was "whether or not such a fundamental right can be treated arbitrarily . . . ."[263] Alleged infringements on such a right "must be carefully and meticulously scrutinized."[264] Ultimately, the court concluded:

> [T]he right to vote, the right to have one's vote counted, and the right to have ones [sic] vote given equal weight are basic and fundamental constitutional rights incorporated in the due process clause of the Fourteenth Amendment to the Constitution of the United States. If Plaintiff's complaint is true, these rights are being substantially, adversely and arbitrarily affected by the challenged statutory scheme.[265]

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261. *Id.* at 899. The court also noted that, as in *Bush*, "[t]he state, through the selection and allowance of voting systems with greatly varying accuracy rates 'value[s] one person's vote over that of another.'" *Id.* (quoting *Bush*, 531 U.S. at 104-05) (alteration in original). Illinois thus maintained a system that "does not afford the 'equal dignity owed to each voter.'" *Id.* (quoting *Bush*, 531 U.S. at 104).

262. *Id.* The court in *Black* considered the question of which equal protection standard of review was appropriate under the circumstances. *See id.* at 897. As might have been expected, the defendants argued for the application of rational basis review while the plaintiffs argued for strict scrutiny. *See id.* The court concluded that "[s]ince Plaintiffs' complaints allege an arbitrary action by the Defendants it is not necessary to decide this issue at this time." *Id.*

263. *Id.* at 900. Actually, the court's complete identification of the due process question suggested some confusion between the standards applicable to due process and equal protection analysis. *Id.* (stating "[t]he question before us is whether or not such a fundamental right can be treated arbitrarily with the resulting vote dilution impacting disproportionately on the two groups defined by legally suspect criteria"). As noted earlier, the concern for relative deprivations ("disproportionate impact") and "suspect" criteria have been a focus of equal protection, not due process, analysis. For a discussion of effect of these and similar concerns on the equal protection standard of review, see *supra* notes 115-23 and accompanying text.

264. *Id.* (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

265. *Id.* In a number of places, the court's analysis suggests confusion about the proper focus of due process and equal protection analyses. Because due process is normally concerned with absolute—not relative—deprivations, the court's emphasis on the "equal weight" of votes in the quoted passage would seem misplaced. In addition, the court's due process analysis demonstrated concerns for the possibilities that "the votes cast in some districts will have a significantly greater chance of being counted than the votes cast in neighboring election districts" and

The plaintiffs, therefore, had "alleged a violation of their substantive due process rights."[266]

B. *The California Litigation*

In *Common Cause v. Jones*,[267] a number of public interest organizations and California residents filed suit to require the California Secretary of State to decertify the punch-card voting equipment in use in nine California counties. As in *Black*, the plaintiffs alleged that voters who were required to use punch-card equipment were substantially more likely than other voters not to have their votes counted[268] and that the system therefore violated the Fourteenth Amendment.[269] The defendants filed a motion for judgment on the pleadings.

In denying this motion, the court noted that, for purposes of equal protection analysis, the right to vote was fundamental. Much of its opinion was devoted to determining the appropriate standard of review, a question as to which it found United States Supreme Court decisions ambiguous.[270] After analyzing the Supreme Court opinions that it found most relevant, including *Bush v. Gore*,[271] the court found that "[e]ven if the more lenient standard is ultimately applied," given the plaintiffs' allegation that the defendant permitted counties to use "either punch-card voting procedures or more reliable voting procedures," the defendants' conduct was "unreasonable and discriminatory."[272]

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that the law allowed "significantly inaccurate systems of vote counting to be imposed upon some portions of the electorate and not others without any rational basis." *Id.* at 901. Despite the court's discussion of these possibilities in its due process analysis, such concerns more appropriately invoke considerations of equal protection issues.

266. *Id.* at 902. The court denied the defendants' motion to dismiss with respect to the plaintiffs' claim that the Illinois system discriminated against minority voters in violation of Section 2 of the Voting Rights Act of 1965. *Id.* at 897. It granted the defendants' motion to dismiss with respect to the plaintiffs' Fourteenth Amendment Privileges and Immunities Clause claim. *Id.* at 902.

267. 213 F. Supp. 2d 1106 (C.D. Cal. 2001).

268. *See* Common Cause v. Jones, No. 01-03470, 2002 WL 1766436, at *1 (C.D. Cal. Feb. 19, 2002) (summarizing plaintiffs' claims, which alleged that inefficiencies of punch-card balloting disproportionately affected African American, Asian American and Latino voters). In this order, the court found it feasible for the nine punch-card counties to convert to other certified equipment by the March 2004 elections. *Id.* at *3.

269. As in *Black*, the plaintiffs also claimed a violation of Section 2 of the Voting Rights Act. *See id.* at *6.

270. *See Common Cause*, 213 F. Supp. 2d at 1108 (suggesting that "[t]he Supreme Court, however, has not clearly articulated the level of scrutiny which courts are to give to alleged infringements of the fundamental right to vote").

271. The court found that *Bush* "did not articulate a standard of review," although it concluded that "it appears that perhaps the Court was using a heightened standard of scrutiny but also was finding the Florida recounts to be arbitrary and discriminatory." *Id.* at 1109.

272. *Id.*

Following the denial of the defendants' motion, the California Secretary of State decertified the punch-card equipment in the nine counties that were the subject of litigation.[273] The only issue remaining was the effective date of the decertification. The court ordered the parties to address the question whether it was feasible to replace the punch-card equipment with other certified voting equipment by either the 2004 primary election or the 2004 general election.[274] The court subsequently found that it was feasible to make the conversion by March 2004, and it ordered the entry of a consent decree to that effect.[275]

As things turned out, however, this was not to be the end of the matter. In July of 2003, following a quite volatile series of political events in his state, California's Secretary of State Kevin Shelley announced that critics of Governor Gray Davis had obtained the requisite number of signatures to require a recall election.[276] Following rules laid out in the state constitution, and acting with other state officials, Shelley determined that the recall election would take place on October 7, 2003.[277]

In response to the certification of the recall election, a number of public interest organizations sued in federal court to prevent the election from being held on October 7. The plaintiffs alleged that voters who lived in counties that used punch-card equipment faced a greater likelihood that their votes would not be counted, in violation of the their right to equal protection of the laws under the Fourteenth Amendment.[278]

In *Southwest Voter Registration Education Project v. Shelley*,[279] the district court rejected the plaintiffs' motion for preliminary injunction. The court noted that, during the pendency of litigation in *Common Cause v. Jones*,[280]

273. *See Common Cause*, 2002 WL 1766436, at *1 (noting that California Secretary of State had concluded that punch-card equipment failed "to meet the standards set forth in California election law") (internal quotation and citation omitted).

274. *See* Common Cause v. Jones, No. 01-03470, 2001 WL 1916729, at *1 (C.D. Cal. Oct. 12, 2001) (stipulation and order) (ordering parties to conduct discovery and present arguments on feasibility of replacing punch-card machines in advance of 2004 primary and general elections).

275. *See Common Cause*, 2002 WL 1766436, at *3 (finding that state could feasibly replace punch card machines before 2004 primary election). The court subsequently denied the defendants' motion for reconsideration. *See* Common Cause v. Jones, 213 F. Supp. 2d 1110, 1113-14 (C.D. Cal. 2002).

276. For an account of the facts set out in the text of this Article, see *Southwest Voter Registration Education Project v. Shelley*, 278 F. Supp. 2d 1131, 1133-35 (C.D. Cal. 2003), *aff'd en banc*, 344 F.3d 914 (9th Cir. 2003).

277. In addition to the recall, two other issues were certified to be on the ballot. *Id.* at 1134. For a general discussion of the wide range of legal issues presented, and adjudicated, in connection with the recall election, see generally Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons From the California Recall Experience*, 92 CAL. L. REV. 927 (2004).

278. The plaintiffs also asserted a claim of racial discrimination under the federal Voting Rights Act. *See Shelley*, 278 F. Supp. 2d at 1134.

279. 278 F. Supp. 2d 1131 (C.D. Cal. 2003).

280. Judge Wilson, who presided in *Shelley*, also presided in *Common Cause*.

Shelley's predecessor as Secretary of State had decertified the punch-card voting systems in nine California counties for all elections after July 1, 2005, and that the court had subsequently determined that it was feasible to decertify the equipment by March of 2004.[281] The court applied the rigorous standard appropriate for requests for preliminary injunction and concluded that the plaintiffs had not satisfied that standard. In finding that the plaintiffs had not proven a likelihood of success on the merits, the court assumed that the plaintiffs could establish that "the punch-card machines will suffer a higher error rate than other technologies."[282] The court, however, concluded that "such [error rate] would not amount to illegal or unconstitutional treatment."[283]

In assessing the strength of the plaintiffs' constitutional claim, the district court addressed the question of which equal protection standard of review to apply, an issue that it noted had not been explicitly decided in *Common Cause.* Once again, the court found it unnecessary to decide that question.[284] Because the plaintiffs had not sought to contest the general use of punch-card equipment in California, the state only had to justify the use of the equipment in the recall election. And because alternative technologies would not be available in time for the recall election, "the State's choice [was] between using punch-card machines in several counties and using nothing at all in those counties."[285] The court concluded that the state had a "compelling interest in not disenfranchising the voters" in the relevant counties, and that "the limited use of punch-card voting in this election [was] a narrowly tailored means to achieve that end."[286] Thus, even if a strict scrutiny standard were applied, the plaintiffs were not likely to prevail on the merits.[287]

On the plaintiffs' appeal in *Shelley,* the United States Court of Appeals for the Ninth Circuit reversed.[288] The court disagreed with the district court's negative assessment of the plaintiffs' likelihood of success on the

281. *See Shelley,* 278 F. Supp. 2d at 1135 (citing Common Cause v. Jones, No. 01-03470, 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002)) (describing action of state officials to decertify punch card voting machines).

282. *Id.* at 1138.

283. *Id.* at 1139. As noted earlier, the litigation in Common Cause v. Jones, which the judge in *Shelley* suggested might well have res judicata effect on the plaintiffs, terminated in a consent decree. *See id.* at 1136. Thus, the merits of the plaintiffs' constitutional claims were never adjudicated.

284. *See id.* at 1141.

285. *Id.*

286. *Id.*

287. The court also found that the plaintiffs had not satisfied the other standards—irreparable injury, balance of hardships, public interest—applicable to preliminary injunction motions. *See id.* at 1143, 1145-46.

288. *See* Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 888-90 (9th Cir. 2003) (per curiam) (beginning its unanimous opinion with extensive discussion of historical development of punch-card voting equipment and number of problems connected to that equipment), *rev'd en banc,* 344 F.3d 914 (9th Cir. 2003) (per curiam).

merits. It viewed the case as raising a "classic voting rights equal protection claim,"[289] a "mirror" of *Bush v. Gore*.[290] The evidence before the district court was "virtually undisputed" that pre-scored punch-card voting systems were significantly more error prone than systems used by California voters, and that the evidence was "more than sufficient" to satisfy the plaintiffs' burden for purposes of obtaining a preliminary injunction.[291] With respect to the appropriate equal protection standard of review, the court strongly suggested that it believed that strict scrutiny was appropriate, but found it unnecessary to decide that question because the plaintiffs' evidence established that, under the circumstances, there was no rational basis for continuing to use punch-card systems in some counties but not in others.[292]

Yet this was not the end of the matter. In an unusual move, a member of the court, *sua sponte*, called for rehearing en banc,[293] and eight days after the original panel's decision was handed down, it was reversed.[294] The en banc court began its opinion by emphasizing both the heavy burden on the plaintiffs imposed by the preliminary injunction standards and the "limited and deferential" nature of its power in reviewing the decision of the district court.[295] It then noted that it had not previously decided the "precise equal protection claim" raised by the case, and it went on to observe, somewhat oddly, that the unanimous opinion of the original

289. *See id.* at 895 (summarizing that classic voting rights equal protection claim occurs when weight given to votes in non-punch-card counties is greater than weight given to votes in punch-card counties).

290. *See id.* at 894 (noting similarities between plaintiffs' claim and *Bush*). Elsewhere, the court observed that "[p]laintiffs' claim presents almost precisely the same issue as the Court considered in *Bush*," and found that the plaintiffs' "theory is the same." *Id.* at 895.

291. *See id.* at 896, 898 (asserting sufficiency of plaintiffs' case for injunction delaying election). The court reviewed the record concerning the performance of punch-card machines and concluded that "a long line of studies establishes that the difference of error rates between pre-scored punchcard voting systems is of statistical significance at the highest level," and that "according to the best scientific studies analyzing voting techniques over the past thirty years, the significantly increased number of errors in punchcard voting as opposed to other methods cannot be explained by other factors, or chance." *Id.* at 898.

292. *See id.* at 900 (noting that punch-card equipment had already been decertified as unacceptable in some counties, that state had already conceded deficiencies of punch-card machines, and that there was no question of state's ability to replace equipment by next statewide election). In addition, the court analyzed the other factors relevant to the issuance of a preliminary injunction and found that the plaintiffs had satisfied all of them. *See id.* at 901-12.

293. *See id.* at 914 (order for en banc rehearing) (providing that Chief Judge Schroeder granted request for en banc rehearing).

294. *See id.* at 919 (per curiam) (en banc) (expressing reluctance to interfere with timing of ballot initiatives, which court considered matter for determination by state officials).

295. *See id.* at 917-18 (discussing that district court's interpretation of underlying legal principles is subject to de novo review and district court abuses its discretion when it makes error of law).

panel in favor of the plaintiffs "provides evidence that the argument is one over which reasonable jurists may differ."[296] Yet having once acknowledged the "reasonableness" of the original panel's conclusion (and presumably, of the plaintiffs' legal theory and argument), the court quickly and summarily dismissed it. The only reasoning it offered was to note that *Bush v. Gore*, "the leading case on disputed elections," had not addressed the specific issue presented; thus, "the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim."[297]

Shelley represents the first post-*Bush v. Gore* opportunity for a federal appellate court to determine the constitutionality of state dual balloting systems. Unfortunately, however, the authoritativeness and import of the court's interpretations of *Bush*'s equal protection principle are anything but clear. The unanimous original panel viewed *Bush* as having direct and compelling precedential effect. It saw the equal protection challenge to California's dual balloting system as a serious one, and as the mirror image of the successful challenge in *Bush*.[298] Further, it saw *Bush* as re-affirming a long line of cases establishing the constitutionally fundamental status of the right to vote and the principle that all votes be counted, and be counted equally. The strength of these principles was sufficient to overcome what were certainly viewed as plausible arguments—indeed, arguments that the district court found compelling—against the exercise of federal judicial power.[299]

296. *See id.* (announcing that court found that while plaintiffs demonstrated substantial likelihood of success on merits of equal protection claim, they made stronger showing on their Voting Rights Act claim).

297. *Id.* at 918 (noting that court had not previously had occasion to consider precise equal protection claim raised here).

298. The original panel's decision was, to be sure, not free from criticism. *See* Recent Case, *Constitutional Law—Equal Protection—Ninth Circuit Affirms Decision Not to Enjoin California Recall Election.*—Southwest Voter Registration Education Project v. Shelley, *344 F.3d 914 (9th Cir. 2003) (en banc) (per curiam)*, 117 HARV. L. REV. 2023, 2028 (2004) (arguing that "[t]he Ninth Circuit was thus wise to reconsider the three-judge panel's expansive interpretation of Bush"); *see also The Recall Reargued*, N.Y. TIMES, Sept. 23, 2003, at A30 (noting criticisms of original panel's opinion).

299. Perhaps the strongest arguments against the grant of preliminary injunction pertained to the extremely short time line against which the court and the parties were working, and the traditional reluctance of federal courts to enjoin the conduct of elections. *See* Daniel H. Lowenstein, *An Irresponsible Intrusion*, 1 FORUM (2003), *available at* http://www.bepress.com/forum/vol1/iss4/art4 (arguing that blocking of recall election in *Shelly* was intrusion on state's political system and that time period for recall election is much shorter resulting in high pressure for local officials and risks of breakdown on election day); *see also* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS, 1038-88 (Found. Press 2d ed. 2002) (1998) (discussing various alternatives arising when plaintiffs seek injunctive relief); Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092, 1103 (1974) (discussing federal judicial invalidation power regarding state elections as both providing more complete remedy by returning voters to status quo ante in which constitutional election can be conducted). On the other hand, and as the original

The en banc panel's determination is, at the very least, more equivocal.[300] The court's reasoning can hardly be viewed as a strong endorsement of the original panel's understanding of *Bush v. Gore* and the applicability of its equal protection principle to state dual voting systems. But neither can it be fairly understood as an unqualified endorsement of the district court's rejection of Bush's applicability. As Professor Amar has noted, "[t]he Ninth Circuit en banc panel never really said whether it agreed with the district court's interpretation of law . . . ."[301] In essence, the en banc opinion found the original panel's view of Bush "reasonable" ("one over which reasonable jurists may differ"[302]), but apparently not compelling enough under the special circumstances of the case to justify overturning the district court's equally reasonable interpretation.[303]

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panel in *Shelley* noted, the *Bush* Court's intervention in the Florida presidential election took place, if anything, against an even more compressed and politically-charged background—none of which deterred the Court's willingness to enforce the demands of the Fourteenth Amendment. *See Shelley*, 344 F.3d at 913 ("The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." (quoting Bush v. Gore, 531 U.S. 98, 108 (2000))).

300. The Ninth Circuit's order of rehearing en banc explicitly provides that the original panel decision, because the court did not adopt it, cannot be cited as precedent in the Ninth Circuit. *See Shelley*, 344 F.3d at 914 (9th Cir. 2003) (reasoning that this, of course, does not deprive original panel's decision of potentially persuasive effect outside Ninth Circuit).

301. *See* Amar, *supra* note 277, at 935 (discussing how Ninth Circuit's decision to defer to district court's rejection of broad reading of Bush was questionable).

302. *See Shelley*, 344 F.3d at 917 (noting that court concluded that district court did not abuse its discretion in holding that plaintiffs have not established clear probability of success on merits of their equal protection claim).

303. There are many respects in which the en banc panel's opinion might be viewed as quite unusual. For example, if in its judgment the district court had correctly interpreted *Bush*, which, of course, would have meant that the original panel had mistakenly interpreted the case, that in itself would surely have provided a sufficient basis to reinstate its decision. But the en banc panel did not say that the district court had the *better* interpretation of *Bush*; instead it implied that its interpretation, like the original panel's, was not unreasonable, which, quite arguably, was not the appropriate question. At best, and as noted by Professor Amar, "[t]he en banc panel only came close to saying what it needed to: that the plaintiffs' near absolutist reading of *Bush v. Gore* was wrong as a matter of law and that the district court was legally right to reject it." Amar, *supra* note 277, at 935.

Also, there is the interesting question of how the Ninth Circuit judges lined up. Recall that the original panel's decision was unanimous. It seems safe to assume that the judge who took it upon himself or herself to seek en banc review was not on the original panel. Under the rules of the Ninth Circuit, a limited en banc court consists of the Chief Judge and ten additional active judges to be chosen by lot.

VI. *STEWART V. BLACKWELL* AND THE CHALLENGE IN OHIO

A. *Background*

In *Stewart*, plaintiffs from three urban Ohio counties and one rural county[304] challenged Ohio's dual balloting system[305] by pointing to statistics from the 2000 presidential election showing that the punch card system yields two to three times the level of residual balloting of notice equipment.[306] The clearest evidence of discrimination came from an analysis of overvotes in the four urban counties where this data was available.[307] The three urban counties using punch cards had a total of 6,855 overvotes, while the county using notice technology had none.[308]

Shortly after the initial pleadings were filed, the trial court issued a stay of discovery to permit Ohio officials to "sign on" to the Help America Vote program and obtain federal funds for the replacement of punch card equipment.[309] But the uncertainty of full federal funding and delay in the

304. *See* Stewart v. Blackwell, 356 F. Supp. 2d 791, 796 (N.D. Ohio 2004). The urban counties are Montgomery (Dayton), Hamilton (Cincinnati) and Summit (Akron). The rural county is Sandusky.

305. *See Stewart*, 356 F. Supp. 2d at 795 (noting plaintiffs' allegations that Ohio's system violates Equal Protection and Due Process Clauses of Fourteenth Amendment). Plaintiffs also claim that the use of punch card equipment in three Ohio counties discriminates against minority voters in those counties in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a) (1965).

306. *See* BLACKWELL, *supra* note 9, at 14-17 (finding that according to official data, twenty-nine counties in Ohio with highest residual vote rates in 2000 presidential election all used punch cards, while seven counties with lowest rates all used notice equipment). The residual vote rate in the twenty-nine counties was 2.42% or above, placing them in Brady's "worrying" and "unacceptable" categories, while the seven lowest counties all used notice equipment and had residual vote rates of below .99%, placing them in Brady's "good" category. *Id.*; *see also* COUNTING ALL THE VOTES, *supra* note 8, at 22 (discussing how use of simple averages to characterize voting systems implies that allocation of voting systems is essentially random and counties using such systems are virtually similar, when in reality, such is not always true).

307. According to official statistics from the respective county Boards of Election, Franklin County, which uses notice technology, had no overvotes, while Hamilton County had 2,916, Montgomery had 2,469 and Summit had 1,470 overvotes. Hamilton, Montgomery and Summit Counties all use non-notice voting technology.

308. As of the 2000 census and general election, the demographic picture of these four counties was as follows:

County	*Summit*	*Franklin*	*Hamilton*	*Montgomery*
Total Population	558,733	542,899	1,068,978	845,303
Voting Age Population	420,847	406,923	800,642	627,129
% Without High School	85.7%	83.3%	84.0%	85.7%
Ballots Cast	232,252	378,963	384,336	218,329

Source: Ohio Secretary of State and U.S. Census Bureau, Summary Files 3 and 4.

309. All trial court rulings in *Stewart v. Blackwell* are available for a small fee through the Public Access to Court Electronic Records (PACER) system, at http://pacer.psc.uscourts.gov. They are also available from the authors.

creation of the Elections Assistance Commission persuaded the court that the action was not moot, and it lifted the discovery stay in the spring of 2003. Later that summer, Secretary of State J. Kenneth Blackwell filed Ohio's HAVA State Action Plan with the federal Elections Assistance Commission.[310] The plan documented the problems of punch cards and earmarked $130 million of Ohio's share of the state's HAVA funds for their replacement by the November 2004 general election. Blackwell also issued numerous public statements stressing the need for election technology reform and voicing fear of a "Florida-like calamity" in Ohio unless punch cards were phased out.[311] But unlike California Secretary of State Jones, he refused to decertify the punch card ballot, insisting instead that local officials make the decision whether to accept HAVA funds for the purchase of new equipment. Many counties balked at the prospect of changing to new equipment, resenting the mandate for change and fearing that federal funds would be insufficient to cover their expenses.[312] Others stressed security concerns about DRE equipment, and in the spring of 2004, the Ohio General Assembly passed new legislation requiring the use of a voter-verified paper trail for counties choosing to use electronic equipment.[313] By the 2004 general election, only two of Ohio's eighty-eight counties employed different voting technology than was used in the 2000 election.[314]

B. *The Expert Testimony*

The plaintiffs' case-in-chief consisted of testimony from four expert witnesses. Two experts focused on the empirical evidence for the Voting Rights Act challenge, which consisted of statistical estimates of the percentages of overvotes and residual votes by race in all precincts in the four comparison counties.[315] They concluded that African Americans were

310. Ohio's HAVA plan can be found in Blackwell, *supra* note 9.

311. Secretary Blackwell made this statement in a letter dated February 26, 2004 to the Honorable Doug White, President of the Ohio Senate. *See* Trial Exhibit 24 at 3, Stewart v. Blackwell, 356 F. Supp. 2d 791 (N.D. Ohio 2004).

312. *See, e.g.*, Doug Staley, *High-Tech Voting Too Costly*, MASSILLON INDEP., Feb. 25, 2005, at A-1 (discussing how state will have access to $100 million in grants provided by HAVA to buy optical scan equipment). According to the article, the Stark County (Canton, Ohio area) Board of Election voted to reject optical scan voting technology for elections in 2005 because the cost of paper ballots would be $255,000, whereas the cost of punch cards would be $50,000.

313. *See* H.B. 262, 125th Gen. Assem., Reg. Sess. (Ohio 2004) (discussing requirement that all direct recording electronic voting machines used in Ohio include voter verified paper audit trail and proposing changing process for counties to acquire voting systems using funds available under HAVA).

314. The two Ohio counties that used lever machines in the 2000 general election—Lucas and Huron—replaced them with optical scan equipment in the 2004 election.

315. *See Stewart*, 356 F. Supp. 2d at 793 n.3 (describing expert credentials). These experts were Dr. Mark Salling of the Maxine Levin College of Urban Affairs, Cleveland State University, and Dr. Richard Engstrom of the University of New Orleans.

seven to nine times more likely to engage in overvoting than white voters. Further, the other expert witnesses addressed the pitfalls of the punch card ballot throughout its four-decade history in American elections, and they also provided estimates of the level of intentional undervoting at the top of the ballot in presidential elections.[316] They concluded that the punch card ballot had a poor track record in close elections and that it contained inherent flaws, including a design that made it difficult for voters to check the accuracy of their votes and a physical ballot that was unstable and yielded different results on repeated tabulations. They estimated that the level of intentional undervoting at the top of the ballot was approximately three-quarters of one percent, which was substantially less than the 2-3% of undervotes that took place in the defendant counties. This testimony gave rise to an inference that the level of unintentional undervotes ranged between 1.25% and 2.25%.

The defendants challenged these assertions by stressing the performance of punch cards in down-ballot elections. Their expert witness, Dr. John Lott, assembled a database of up- and down-ballot elections from 1992, 1996 and 2000 that purported to show that punch cards in fact do better than notice forms of technology in down-ballot elections.[317] Table Five displays residual voting rates by balloting systems from two sets of elections, the election of 2000 alone, and combined statistics from the elections of 1992, 1996 and 2000.

TABLE FIVE A: PERCENTAGE OF RESIDUAL BALLOTS BY VOTING TYPE AND ELECTION: NOVEMBER 2000 OHIO GENERAL ELECTION

Voting System	*2000 Ballots Cast*	*For President*	*For Senator*
MVM	176,467	0.5%	8.2%
Electronic	537,474	0.7%	6.1%
Punch Card	3,593,958	2.3%	7.6%
Optical Scan	492,102	1.7%	5.2%

316. *See id.* (describing expert credentials). These experts were Roy Saltman, formerly of the National Bureau of Standards and Dr. Martha Kropf of the University of Missouri at Kansas City.

317. *See id.* at 803 (explaining how study indicates punch card voting fares well in comparison to other voting technologies). Dr. Lott is a research fellow at the American Enterprise Institute. *Id.* at 793 n.3.

TABLE FIVE B: PERCENTAGE OF RESIDUAL BALLOTS BY VOTING TYPE AND ELECTION: NOVEMBER 1992, 1996 AND 2000 OHIO GENERAL ELECTIONS

Voting System	*For President*	*For Senator*
MVM	1.04%	7.32%
Electronic	0.94%	6.13%
Punch Card	2.29%	5.89%
Optical Scan	2.05%	4.37%

On its face, Table Five indicates that optical scan ballot systems outperform Votomatic and Datavote systems for presidential and U.S. Senate contests in both datasets. But these data suggest that the electronic system is associated with more residual voting than the Votomatic system, at least in the U.S. Senate election. This finding squares with that of the CalTech/MIT researchers, who found that punch cards outperform electronic equipment, but not optical scan systems, in U.S. Senate and gubernatorial elections.[318] Lott also assembled data on three other down-ballot elections and developed a measure of "voter fatigue" for each of the voting systems.[319] He operationalized "voter fatigue" as the difference between the largest residual ballot rate in the down-ballot elections and that of the presidential election. These data are reported in Appendix A.

Ostensibly, Lott's data indicate that punch cards outperform electronic, lever and optical scan equipment in down-ballot elections. There are several reasons, however, to question this conclusion. First, while the level of intentional undervoting at the top of the ballot can be estimated with at least some precision, Lott makes no effort to separate the amount of residual ballots in down-ballot contests that represent intentional undervotes. As both the CalTech/MIT and the Brady studies found, intentional undervoting increases significantly in down-ballot contests, primarily because more voters lack information about the contest, and they are more likely to be indifferent about the outcome of these electoral contests. Second, the down-ballot contests that Lott examines are extremely uncompetitive. His measure of "ballot fatigue" depends heavily on the single down-ballot election with the highest level of residual votes in all three elections, the state senate election. Yet, the mean margin of victory for all 49 state senate elections in Lott's database is 27.61 percentage points, and the median level is 30.82 percentage points. Four of the elections were utterly uncontested.[320] Under these circumstances, inten-

318. CALTECH/MIT REPORT, *supra* note 8, at 21-22 (arguing that analysis implies that U.S. can lower number of lost votes by replacing punch cards and lever machines with optical scanning).

319. These elections included the congressional, Ohio Senate and Ohio House of Representatives contests for 1992, 1996 and 2000.

320. Information on these elections is available through the Ohio Secretary of State's web page, http://www.sos.oh.us/sos/electionvoter/electionresults.aspx.

tional undervotes increase dramatically, and this introduces an unacceptable level of noise into the equation. To the extent that the Lott study confuses intentional undervoting with "voter fatigue," it is spurious.

Overall, the empirical data from Ohio studies indicate that punch cards are associated with higher levels of residual votes than other, non-notice systems, both at the top of the ballot and in statewide down-ballot electoral contests. The contrary position of Dr. Lott is based on a research design that confuses residual balloting rates across voting equipment in competitive, high profile presidential elections with non-competitive, non-statewide electoral contests down the ballot. This is simply not a valid comparison.

C. *The Legal Argument*

Tracking the equal protection and due process arguments that have been advanced in this Essay, the plaintiffs claimed that the inter-county disparities flowing from Ohio's dual balloting system denied voters living in punch card counties the equal protection of the law, and that the high risk of spoiled ballots associated with the system arbitrarily deprived them of the right to due process.[321] The plaintiffs argued that the state's system for classifying voters denied them their fundamental right to vote and should therefore be evaluated under a strict scrutiny standard of review.

In response, the defendants contended that state certification of voting systems that lack error notification does not infringe directly upon the right to vote, and therefore the appropriate standard of review is the rational basis test. They identified a variety of possible state interests to justify the challenged classification, including: (1) at the time of the 2000 general election, state and local officials might not have realized that there were problems with punch cards; (2) punch card equipment is relatively inexpensive and easy to store; (3) the electronic DRE system has been found to contain security flaws; and (4) the state has an interest in avoiding repetitive litigation whenever plaintiffs seek the adoption of a more modern voting system. Finally, the defendants flatly denied that the Constitution requires state election systems to be free from error. They asserted that courts should not "be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law."[322]

321. *See Stewart*, 356 F. Supp. 2d at 795 (explaining plaintiffs' arguments that defendants illegally favor some citizens by employing notice voting in some counties and non-notice voting in others, and that through use of error-prone equipment, they are arbitrarily deprived right to vote). The plaintiffs also asserted a claim under Section 2 of the federal Voting Rights Act of 1965. 42 U.S.C. § 1973(a) (1965). This claim was directed to the racial disparities in spoiled ballots experienced within three punch card counties in Ohio.

322. *See Stewart*, 356 F. Supp. 2d at 797-98 (discussing defendant counties' arguments that neither plaintiffs' Fourteenth Amendment due process rights or equal protection rights were violated); *see also* Powell v. Power, 436 F.2d 84, 86 (6th

D. *The Trial Court's Decision*

In December of 2004, after a five day trial, the trial court issued its opinion in *Stewart*, ruling for the defendants on all claims.[323] It adopted a rational basis standard of review[324] and held that the state interest in cost efficiency, ballot security and experimentation justified any discrimination that attended the dual balloting system.

The court recognized the absolute nature of the disenfranchisement that arises from accidental overvoting or undervoting. It discounted the distinction, however, between notice and non-notice voting systems. Here, the court appeared to emphasize the fact that even in the case of counties with central count punch card equipment, "the voter has every opportunity to check the punch card ballot before submitting it to the election official at the polls and to be given a new ballot if a mistake is discovered."[325] In addition, while it found that seven to thirteen out of 1000

Cir. 1970) (discussing how absent clear authority from Congress mandating federal judicial review, court will not undertake to expand jurisdiction into areas typically within cognizance of state courts).

323. *See Stewart*, 356 F. Supp. 2d at 809.

324. *See id.* at 799 n.19 (citing Mixon v. Ohio, 193 F.3d 389, 402 (6th Cir. 1999)). The court did not enumerate its reasons for concluding that the rational basis test was applicable. Instead, it simply cited the *Mixon* decision. The court went on to note, also without supporting reasons, that "if the Court were to apply strict scrutiny, the Court's ruling would be the same." *Id.* at 809. For a number of reasons, the court's reliance on *Mixon* for the application of rational basis review is problematic. In *Mixon*, the court upheld a law providing that municipal school districts would be appointed rather than elected. *Mixon*, 193 F.3d at 393-94. The court made clear, however, that its application of rational basis review was based on the fact that there was no unequal treatment. *Id.* at 403. As the court put it: "[i]f the challenged legislation grants the right to vote to some residents while denying the right to others, then we must subject the legislation to strict scrutiny and determine whether the exclusions are necessary to promote a compelling state interest." *Id.* at 402. In *Mixon*, the state's decision to make school boards appointed rather than elected did not result in unequal treatment. All voters within the school districts were treated the same and no voter was disadvantaged in comparison to any other. With respect to dual balloting systems, this is clearly not the case. As noted earlier, in such systems, like those maintained in Ohio, voters residing in some counties are less likely to have their votes counted than voters in others based on the equipment on which they are required to vote.

325. *See Stewart*, 356 F. Supp. 2d at 802-04. This language was included in rather unusual section of opinion entitled "The Court's Post Trial Preliminary Observations," which consisted of court's "preliminary assessment of the testimony over the five day period" of trial that court recorded prior to parties submission of post-trial briefs.

Throughout the trial, the district judge repeatedly referred to his own experience as a voter using punch card equipment, a fact to which he alluded in his opinion. *Id.* at 801 n.11 ("It is difficult for the Court to divorce itself from its past experience."). Indeed, he acknowledged that "[h]aving voted that way for so many years, I think it's very simple to vote punch card. I've been doing it for many, many years, and I don't have any problem with it at all." Trial Transcript at 527, *Stewart*, 356 F. Supp. 2d 791 (N.D. Ohio 2004) (No. 5:02 CV 2028) (on file with authors). Not withstanding the extensive evidence produced by the plaintiffs to show that a wide range of factors having to do with the interaction between the

punch card voters unintentionally failed to record a vote in the 2000 presidential election, the court found this rate "de minimis" and insufficient to establish a constitutional violation.[326]

The court's decision is at odds with all other federal courts that have reviewed similar issues. In *Black*, for example, the court held that Illinois's dual balloting system was so arbitrary that it didn't make a difference what standard of review was used,[327] whereas in *Jones*, the court held dual balloting was irrational.[328] The only other reported decisions arose in *Shelley*, a case that is somewhat distinguishable because California officials had already decided to decertify the punch card ballot and the gubernatorial recall election was imminent. The trial court in *Shelley* noted that while the Secretary of State had already decided that the dual balloting system was irrational and should be abolished, the state had a compelling interest in conducting its recall election within the required timeframe. On appeal, the three-judge panel suggested that although strict scrutiny may have been the more appropriate test, the dual balloting system was irrational even under the rational basis test.[329] Subsequently, the en banc

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voter and the voting equipment were responsible for spoiled ballots, the judge apparently believed that any voter who, like him, could simply follow directions was assured of having his or her vote counted. More than once, the judge expressed incredulity at the possibility that ballots might be spoiled, even to the point of declaring that persons whose votes were ultimately not counted were either "dumb" or "stupid." *See, e.g., id.* at 912 ("[W]hy should stupidity be rewarded by declaring the inability to correctly use the machine therefore making it unconstitutional?").

326. *See Stewart*, 356 F. Supp. 2d at 807. While an extensive critique of the decision in *Stewart*, which is now on appeal to the Sixth Circuit, is beyond the scope of this Essay, we believe the court's conclusion that the unintentional residual vote rate in Ohio is "de minimis" is highly problematic. The court's finding with respect to the percentage of residual votes for the 2000 presidential election in Ohio translates into an uncounted vote rate of between 50,000 and 72,000 statewide, a figure that amounts to between approximately 60-80% of the margin of victory between Bush and Gore in the state. We are hard pressed to see how this rate can fairly be called de minimis. Viewed in the context of Ohio's 5,700,000 voters in the 2004 election, this represents between 52,000 and 72,000 votes, or over half the difference between George W. Bush and John Kerry statewide. Curiously, in *Bush v. Gore*, the Bush legal team presented no empirical evidence whatsoever that disparate recounting standards in the Florida counties would lead to disenfranchisement. Bush v. Gore, 531 U.S. 98, 127 (2000) (Souter, J., dissenting). Yet when the plaintiffs in *Stewart* presented a detailed empirical record in support of their claims, their findings somehow fell below the level of constitutional significance.

327. Black v. McGuffage, 209 F. Supp. 2d 889, 894 (N.D. Ill. 2002) (reasoning that majority of Illinois counties use punch card voting system, resulting in higher percentage of residual votes).

328. *See* Common Cause v. Jones, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001) (noting that even if more lenient standard is ultimately applied by this court, plaintiff has alleged facts indicating that Secretary of State's permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory).

329. *See* Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 900 (9th Cir. 2003), *vacated*, 344 F.3d 914 (9th Cir. 2003) (per curiam) (en banc) (acknowl-

court stated that the selection of a standard of review was a close question, and it ultimately decided for the state on other grounds.[330]

Finally, as a matter of judicial philosophy, the trial court portrayed the selection of "voting procedures" as being within the sole province of the legislature. Indeed, the court described the "thrust of this litigation" as "an attempt to federalize elections by judicial rule or fiat," an "invitation" to which the court "declined."[331] This characterization is reminiscent of Justice Frankfurter's futile effort to steer federal courts clear of the "political thicket" in the malapportionment cases.[332] Not only does this position misstate the history and role of federal courts in voting rights jurisprudence over the past 75 years—from *Nixon v. Herndon*[333] in 1927, through the civil rights movement, to the present day—but it also overlooks the uncertain line between process and substance that often arises in voting rights cases. Is the adoption of a poll tax to be regarded as merely a matter of voting process or is it a bar to a substantive right? Is it within the prerogative of the legislature, as a matter of cost savings, expediency or experiment, to treat some voters with greater dignity than others? As the umpires of our political system, federal courts have a historic and constitutional obligation to ensure that the democratic process is impartial, fair and equal. The burden of dual balloting systems is the prospect that the disfavored citizen's political voice will be utterly extinguished, while the voice of the favored counterpart is artificially enhanced. Because this state of affairs can lead to an electoral outcome that does not conform to the will of the majority, the burden is heavy and unacceptable, and its mere existence is an affront to the democratic process.

VII. CONCLUSION

The Supreme Court's decision in *Bush v. Gore* is a signature constitutional event. The scholarly criticism that the decision has engendered—which extends from disagreement about whether the Court should have accepted jurisdiction in the first instance to whether a remand for a state-

edging that three-judge panel in *Shelley* held that plaintiffs showed likelihood of success on merits of their claim that use of pre-scored punch card machines violates equal protection, relying on evidence that this equipment "eliminates some voters' ballots entirely").

330. *See Shelley*, 344 F.3d at 918 (presenting that *en banc* court held that postponing scheduled election would place unacceptable burden on state's voters, but on merits of equal protection claim, it characterized argument as one "over which reasonable jurists may differ").

331. *See Stewart*, 356 F. Supp. 2d at 804-05 (commenting that court declined invitation to declare certain voting technology unconstitutional).

332. *See* Baker v. Carr, 369 U.S. 186, 271 (1962) (Frankfurter, J., dissenting) (presenting action under civil rights statute, by qualified voters of certain counties of Tennessee, for declaration that state apportionment statute was unconstitutional deprivation of equal protection of laws, for injunction, and other relief).

333. 273 U.S. 536, 540 (1927) (interpreting federal courts' jurisdiction over subject-matter of suit for damages for refusal to permit negro to vote at primary election *held* not purely political).

wide recount was the proper remedy—should not obscure the effort to find in *Bush* a principle of fairness and equity in the process for casting and counting votes that can be used as a precedent in other cases. To use the Court's own words, the imperative of equal protection extends beyond "the initial allocation of the franchise" to "the manner of its exercise."[334] But the Court's failure to articulate a clear standard of review and its use of limiting language, make this a daunting task. While some scholars applaud this ambiguity and see in it an opportunity for legislative and judicial reform,[335] there are ample grounds for skepticism. The legislative history of the Help America Vote Act, and subsequent inaction, confusion and delay in the implementation of election reforms indicate that many policy makers may not be particularly anxious to use *Bush* as a basis for expanding the franchise or increasing judicial oversight in this area of the law.

But these circumstances only accentuate the need for judicial involvement. It may well be that whether, and the extent to which, the courts should be active in the voting rights area has been a controversial and contested issue.[336] Nonetheless, as John Hart Ely forcefully argued more than two decades ago, nowhere does the power of judicial review apply more legitimately than with respect to the effort to police the process of representation. Ely was largely concerned with the malapportionment cases, "where one person's vote counts only a fraction (and sometimes a very small fraction) of another's . . . ."[337] But the vigorous judicial role he defended in the voting rights area was especially important in cases, like those involving challenges to a wide range of voter qualifications, in which the aspirations of voters to exercise the franchise were given no weight at all because they were denied the right to cast a ballot. In a voting system characterized by significant disparities in residual vote rates, citizens may well have the ability to cast a ballot. But such a system systematically deprives thousands of otherwise qualified voters from actually having their votes count, thus making the right to cast a ballot meaningless. The maintenance of such a system represents a serious breach of one of the most fundamental prerogatives of citizenship in a democracy.

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334. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (noting that Court found having once granted right to vote on equal terms, State may not, by later arbitrary and disparate treatment, value one person's vote over that of another).

335. *See, e.g.*, Hasen, *supra* note 128 (explaining that *Bush* opinion engaged significant portion of public with concern about functioning of mechanics of our democracy).

336. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 116 (1980) (noting absence of strong "consensus among commentators on the propriety of judicial activism in the voting area").

337. *See id.* at 120; *see also* JOHN HART ELY, ON CONSTITUTIONAL GROUND 8 (1996) (characterizing *Democracy and Distrust* as defending judge's function to "sit primarily to safeguard democracy, to make sure that political incumbents do not manipulate things so as to deny others an effective right to participate in either the democratic process or its outcomes").

Ely's concern was primarily one of process. The area of voting rights represented an especially appropriate case for careful judicial scrutiny of government efforts to justify disfranchising practices: "We cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one."[338] Ely's arguments were developed in the context of practices that created and preserved serious power imbalances in the legislative process, imbalances that gave rise to deep skepticism and distrust in the prospects that the legislature would correct the problem without judicial intervention. The disenfranchising effects of dual balloting systems may not always work to the systematic disadvantage of an identifiable group.[339] Nonetheless, it is the case that incumbents who have benefited from such a system are unlikely to be enthusiastic about dismantling it on their own.

While process concerns support careful judicial scrutiny of dual balloting systems, other considerations do as well. Ely was concerned not only with the openness of the political process, but with its "equity."[340] And a voting system that, without compelling reasons, systematically excludes thousands of people from having their votes counted based upon the voting district to which they are assigned is surely inequitable. Such a system inflicts material harm by depriving many citizens of one of the most cherished rights that a democracy can confer. It also inflicts what have been termed "expressive harms" in that it reflects, and even communicates to those who live in disfavored voting districts, the message that their status as full and equal citizens is disrespected.[341]

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338. *See* ELY, *supra* note 336, at 120.

339. *But see* Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots*, 47 AM. J. POL. SCI. 46, 48-50, 58 (Jan. 2003) (arguing that dual balloting systems disproportionately disfranchise minority voters).

340. *See* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymandering*, 111 HARV. L. REV. 576, 579 n.7 (1997) (characterizing *Democracy and Distrust* as focusing on "openness and equity of the political process"). It is, of course, certainly not the case that Ely was arguing for a general judicial power to enforce a substantive theory of equity or fairness. In fact, a primary point of *Democracy and Distrust* was to argue that the Constitution's "open ended" provisions, like those found in the Fourteenth Amendment, did not yield any set of substantive rights that were susceptible to judicial elaboration and enforcement. What the Constitution did yield, Ely argued, was the framework for a political process in which every citizen is entitled to "equivalent respect," a goal that certainly can be understood in equitable terms. ELY, *supra* note 336, at 79.

341. For a general discussion of the principle of expressive harm and its application to the law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1528 (2000) (explaining that individuals suffer expressive harms when treated according to principles that express negative attitudes or inappropriate attitudes toward them). For an application of the principle to voting rights, see also Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-07 (1993) (defining expressive harm as one that results from ideas or attitudes expressed through governmental

Close elections are a continuing and inevitable part of the democratic process, and when elections are close, residual ballots, or the lack thereof, often separate winners from losers. As we have argued, the empirical evidence is unequivocal that notice and non-notice voting systems differ significantly in their ability to prevent residual votes. The evil of the dual balloting system lies in the uneven distribution of the risk of accidental nonvoting. Notwithstanding the best efforts of reformers, who have sought to eliminate non-notice systems, substantial percentages of voters continued to use this equipment in the 2004 general election. The "slot machine culture when it comes to voting"[342] that Senator Durbin attempted to dismantle in the congressional negotiations over HAVA remains alive and well in many parts of America today. Because individual voters usually do not know that they have cast an accidental nonvote, they often have little or no incentive to complain.

As we have noted, the several reported decisions in the post-*Bush* dual balloting cases feature inconsistent and incompatible standards of review. Some hint at strict scrutiny or mid-level review, some apply a rational basis test that leads to findings that the dual balloting system is arbitrary and irrational, while others see the problem as de minimis and fully consistent with constitutional protections. In the absence of guidance from the Supreme Court, the choice among these standards of review reflects different core values about federalism and judicial review. Given the absolute deprivation that accidental nonvoting represents and the significant impact that it can have on the majoritarian political process, these are choices that, ultimately, the Supreme Court must make. Because the absence of a level playing field in voting technology is a threat to the very legitimacy of the democratic process, and because legislative remedies have proven either non-existent or inadequate, it is a threat the Court should take seriously.

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action, rather than from more tangible or material consequences action brings about).

342. For further discussion of Senator Durbin's critique of punch cards, see *supra* notes 91-92 and accompanying text.

APPENDIX A:

PERCENTAGE OF RESIDUAL BALLOTS BY VOTING TYPE AND ELECTION IN 1992, 1996 AND 2000 OHIO DOWN-BALLOT ELECTIONS (DATA COLLECTED BY DR. JOHN LOTT, DEFENSE EXPERT IN *STEWART V. BLACKWELL*)

Voting System	*For U.S. Pres.*	*For U.S. Sen.*	*For U.S. House*	*For State Sen.*	*For State House*	*Voter Fatigue*
MVM	1.43	7.26	9.25	18.18	13.78	16.75
Electronic	1.0	6.29	8.41	17.81	12.82	16.81
Votomatic Punch Card	2.4	5.47	7.07	10.94	9.79	8.54
Datavote Punch Card	3.49	6.94	6.96	14.73	10.25	11.24
Optical Scan	2.01	4.88	6.17	10.95	7.93	8.94

All numbers measured in %
"Voter Fatigue" refers to the largest change in nonvoted ballots between presidential election and the election with the most nonvoted ballots.