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Double take: looking beyond the first glance at Bush v. Gore and the fourteenth amendment

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DOUBLE TAKE:
LOOKING BEYOND THE FIRST GLANCE AT
BUSH V. GORE AND THE FOURTEENTH AMENDMENT

INTRODUCTION

The presidential election of 2000 was not the first United States presidential election to end with uncertainty. The contest between George W. Bush and Al Gore was not the first to introduce Americans to disputed vote tallies in crucial swing states, to the possibility of separate and competing slates of potential electors, or even to the notion that one person's vote really might matter after all. History had already born witness to many of those prospects during the 1877 presidential race between Samuel Tilden and Rutherford B. Hayes, which Hayes ultimately won. The 2000 election *was* novel, however, in the sense that it inspired a series of legal battles that culminated in a landmark United States Supreme Court case. Bush v. Gore (531 U.S. 98) provoked questions concerning the legal meaning of equality, the nature of federalism, and the role the Supreme Court should play in determining how state courts should interpret state laws.

The legal path from Election Day to Bush v. Gore, which effectively decided the election, consisted of a series of legal battles, some waged by private citizens and some brought by the candidates themselves. The very first cases, filed on or after Election Day (November 7th), were brought by voters and concerned the legality of both the infamous butterfly ballot used in Palm Beach County and of absentee ballots that were partially, not to mention improperly, filled in by Republican Party workers.

At the same time, Gore's lawyers filed a "protest action" under Section 102.166 of the Florida Statutes, which allowed candidates to request manual recounts of ballots due to an "error in vote tabulation." According to the Gore camp, an "error in vote tabulation" included a machine's rejection of an improperly cast--but still legal--vote. Bush attempted to block these recounts by filing a federal lawsuit in Miami (Siegel v. LePore), but that request was ultimately denied by a U.S. District Court judge. The recount continued, but Florida Secretary of State Katherine Harris refused to extend the deadline for certification of votes. Since the manual recounts would by most accounts not have been completed by the statutory deadline of November 14th, the majority of recounted ballots would not be included in Florida's final tally. Gore sued for an extension, and in Gore v. Harris, the Florida Supreme Court ultimately decided that although Harris technically had statutory discretion under Section 102.111 on whether to accept the recounts, she had in fact abused that discretion. The Florida court set a new deadline for certification, November 26th, when all recounts would presumably be completed.

Bush in turn appealed to the United States Supreme Court, arguing that by changing the certification deadline, the Florida Supreme Court had essentially rewritten 102.111. Bush claimed that the "rewrite" violated Article II of the federal Constitution, which entrusts the state legislatures, not courts, with setting the time, place and manner of presidential elections. Bush also claimed that the Florida Supreme Court violated 3 U.S.C. 5, also known as the "Safe harbor" provision, which protects vote tallies from congressional challenges if they are filed before December 18th, according to Florida law as it read on Election Day. Bush argued that by

extending the deadline, the Florida Supreme Court had rewritten Florida law in violation of 3 U.S.C. 5. On December 4th, the United States Supreme Court unanimously remanded the case, Bush v. Palm Beach County Canvassing Board (531 U.S. 70), back to the Florida court, requesting clarification of the Florida court's original opinion.

A separate action undertaken by Gore concerned another section of the Florida statutes. Section 102.168, the "contest statute," allowed Gore to challenge either the inclusion of illegal votes or the rejection of legal votes in the final tally. In his official Complaint to Contest Election, Gore contended that Bush's certified 537-vote win in Florida was entirely due to four unlawful manipulations of the final vote tally: the rejection of 215 legal votes for Gore gleaned by the Palm Beach County manual recount; the inclusion of 50 net votes in Nassau County for Bush that were, according to Gore, in violation of Florida law and had in fact been previously rejected by the Nassau County canvassing board; the machine rejection of some 4,000 "dimpled" ballots in Palm Beach County (which would come to be known as "undervotes," or ballots that registered no vote for President in the machine tally but perhaps still conveyed the intent of the voter), 800 of which allegedly showed an intent to vote for Gore; and finally, the presence of 9,000 undervote ballots in Miami-Dade County that did not register any vote for president, but that had never been counted manually and that statistically should have resulted in an additional 600 net votes for Gore. Gore's request for an immediate hand count was rejected, and was again denied after a two-day trial conducted by Judge N. Sanders Sauls. Gore appealed to the Florida Supreme Court, which reversed the trial court's decision and

ruled 4-3 in favor of Gore. The Florida court ordered manual recounts in all counties where machines had failed to record undervotes on punch-card ballots.

Bush appealed to the United States Supreme Court, which on December 9th issued a stay of the manual recounts and set oral arguments for December 11th. Bush's lawyers again challenged the entire recount process on Article II and 3 U.S.C. 5 grounds, but also contended that the Florida Supreme Court violated the equal protection clause of the Fourteenth Amendment by ordering recounts of the undervotes, but not the overvotes--votes recording two or more selections for president. Bush's lawyers also argued that the county canvassing boards violated both the equal protection clause by using many arbitrary sets of standards to determine the "intent of the voter," and the due process clause of the Fourteenth Amendment by failing to establish sufficient procedures to govern the recount process. The Supreme Court's final 5-4 decision, Bush v. Gore, ruled in favor of Bush on the equal protection ground.[1]

Though the equal protection clause has certainly been applied to previous voting-rights cases, never had the Court held it to have authority over the most local of voting procedures--the actual counting and tallying of votes. Bush v. Gore's extension of equal protection to vote-counting procedures marks a new era of federal intervention into local government. This "new era," however, has somewhat ironic consequences. Bush v. Gore ensured the election of a conservative President, yet the precedents it appears to set blur the lines of federalism and asserts the federal

[1] Seven Justices—Rehnquist, Thomas, Scalia, O'Connor, Kennedy, Breyer and Souter—agreed that there were serious equal protection violations; however, Breyer and Souter disagreed with the other five in that they felt that the case should be remanded back to Florida so that proper standards could have been established and the recounts eventually completed.

judiciary's control over state and even county actions—something that might cause many conservatives, who often favor state's rights, to recoil in horror.[2] Bush v. Gore also produced some unlikely alliances. Liberal legal scholars like Lani Guinier and Vincent Bugliosi, who traditionally push for civil rights expansion under the Fourteenth Amendment, strangely adhered to an original-intent theory by claiming that the equal protection clause was enacted to protect African Americans from being denied their rights and was used inappropriately by the Court in Bush v Gore.[3] More specifically, many scholars pointed to what they perceived as a bitter irony—that a Constitutional provision intended to protect African Americans might actually have been used to disenfranchise them. "Undervote" rejection was nearly four times higher in predominantly black counties, a statistic partially attributed to the fact that these counties tended to be poorer and thus utilized older, less accurate voting equipment. Some conservatives like Roy Schotland, however, embraced Bush v. Gore, regardless of their tendency to traditionally favor limited federal intrusion into

[2] Interestingly, some of the strongest conservative "champions of states' rights" are William Rehnquist, Clarence Thomas and Antonin Scalia, who nonetheless saw fit to intervene in the Florida elections process.

[3] For example, Bugliosi, in The betrayal of America (2001, New York, NY: Thunder's Mouth Press; pp. 44-45) notes: "What makes the Court's decision even more offensive is that it warmly embraced, of all the bitter ironies, the equal protection clause, a constitutional provision tailor-made for blacks that these five conservative Justices have shown no hospitality to when invoked in lawsuits by black people, the very segment of the population most likely to be hurt by a Bush administration." In her article "And to the C students: The lessons of Bush v. Gore" (2002, in A badly flawed election, ed. Ronald Dworkin, New York: The New Press, p. 237), Lani Guinier writes: "As a result [of the inter-county differences in voting technology], black Americans—the people the equal protection clause was designed to protect—had their ballots disqualified at shockingly high rates in Florida. Antiquated voting technology, lack of trained clerks, and confusing instructions in many counties adversely affected black voters' ability to cast a 'legal vote,' meaning a vote worth counting."

state matters.[4] These conservatives are often criticized for allowing their political positions to affect their legal reasoning.

Some Bush v. Gore commentators have accused the Justices themselves of employing the same politically motivated decision-making. Vincent Bugliosi, for example, makes no secret of his opinion that the five conservative Justices went completely against their political ideologies in order to get their candidate into office.[5] Bugliosi calls the Court's equal protection ruling "untenable"[6], "criminal"[7], and "a legal gimmick."[8] As noted before, Bugliosi also believes that the Court's ruling goes against its own precedents concerning equal protection.[9]

Those who oppose Bush v. Gore's equal protection ruling, however, do more than merely speculate about the Justices' motives. One of the strongest arguments against the ruling points to a series of Supreme Court decisions on equal protection that seem to say that for any kind of discrimination to rise to the level of a Fourteenth Amendment violation, it must be intentional. The vast majority of these cases deal with racial discrimination, and though neither Bush nor Gore accused each other of racial discrimination in their court briefs or oral arguments, there still remains a clear pattern of cases emphasizing the importance of intentional discrimination. Neither party accused the other of racial discrimination, and the Court's final opinion did not

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[4] Schotland, Roy. 2002. In Bush v. Gore: Whatever happened to the due process ground?, 34 Loy. U. Chi. L.J. 211.
[5] The very first sentence of Bugliosi's original essay "None Dare Call it Treason" (published in The betrayal of America) reads: "In the December 12 ruling by the U.S. Supreme Court handing the election to George Bush, the Court committed the unpardonable sin of being a knowing surrogate for the Republican Party instead of being an impartial arbiter of the law."
[6] Bugliosi, p. 16.
[7] *Ibid.*
[8] *Ibid,* p. 22.
[9] See, for example, *Ibid*, pp. 44-45.

address it, there were harsh allegations of such discrimination from African Americans who claimed that they had been disenfranchised from the onset. Moreover, members of both parties testified to witnessing the false interpretation, mishandling, and even "disappearance" of disputed ballots, with these actions presumably being undertaken by members of one party to sabotage the votes of the other.

If the differences in intra-county vote counting are not enough to sustain an equal protection violation, perhaps they are enough to sustain a violation of the due process clause. Roy Schotland points to several specific instances where he believes the Palm Beach County canvassing board violated voters' procedural due process in two important ways: in that the recount process lacked guarantees of impartiality in that they did not strive to be non- or bipartisan; and in that the canvassing boards used "high-risk" standards that rested the citizen's right to have his or her vote counted not in the safety of codified law, but in the hands of small groups of people who may or may not have been free of political motivation. Schotland also hints that substantive due process may have been violated, since the right to vote for president, though not articulated in the federal Constitution, was clearly outlined in the Florida constitution, and that the right was effective denied to some.

It is my argument that the Florida Supreme Court and the county canvassing boards violated the equal protection rights of voters only if they intentionally discriminated against a specific class of persons. I contend that petitioners were unable satisfactorily prove evidence of intentional discrimination, and thus there is little merit to Bush's equal protection claim.

The due process claim, on the other hand, seems to rest on firmer legal ground. A due process claim does not have to rely on intentional discrimination, and there is evidence that both procedural and substantive due process was violated by the county canvassing boards. I will show that to argue that there was no due process violation is to argue that the right to vote does not extend beyond the right to mark a ballot. There are a few scholars who espouse this definition of the "right to vote," but their logic is not only weak, it is anathema to democracy. Though the Supreme Court ultimately decided to base their decision on equal protection, it is my contention that their analysis was superficial. Had the justices done a "double take" at Bush v. Gore and decided the case on a due process ground, their argument would have been stronger, and perhaps even less suspect.

EQUAL PROTECTION

Rational Basis versus Strict Scrutiny

Ratified in 1868, the fourteenth amendment was part of a trio of additions to the Constitution commonly known as the Civil War Amendments: the thirteenth amendment, which prohibited slavery and involuntary servitude except as punishment for a crime; the fourteenth amendment, which in its first paragraph guarantees due process of law and equal protection of the laws[10]; and the fifteenth amendment, which prohibited disenfranchisement on the basis of race or involuntary servitude. The

[10] The fourteenth amendment also grants citizenship to all persons born or naturalized in the United States; denies the states from making any laws that abridge the privileges or immunities of citizens of the United States; apportions representatives according to the number of adult males eligible to vote; disqualifies persons who have been found guilty of treason from holding government offices, elected or appointed; assures the validity of the United States' debt, and prohibits the United States or any state from paying a debt incurred in any insurrection against the United States or for the loss or emancipation of a slave; and gives Congress the power to enforce all the above provisions by appropriate legislation.

fourteenth amendment's equal protection clause, which served as the legal basis for the Supreme Court's decision in Bush v. Gore, prohibits any state from denying the equal protection of the laws to any person within its jurisdiction. The Court's concept of "equality," however, has changed dramatically over time. The 1896 case Plessy v. Ferguson, in which a man was denied the right to ride with other white passengers on a train because of his mixed, but predominantly white, racial heritage, proved that the Court did not associate equality with integration.[11] In Plessy, the Court rejected the argument that "the enforced separation of the two races stamps the colored race with a badge of inferiority" and upheld a policy of segregation that later came to be known as the separate but equal doctrine. Segregation persisted as official policy in many southern states until the second half of the twentieth century, when the Justices began to chip away at the separate but equal doctrine. In Sweatt v. Painter, 339 U.S. 629 (1950), the Court decided that a hastily established all-black law school did not satisfy the requirements of the equal protection clause. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), which struck down a University of Oklahoma policy segregating blacks and whites in order to prevent "miscegenation," was decided on the same day as Sweatt. The landmark desegregation cases, however, were Brown v. Board of Education I, 347 U.S. 483 (1954), and Brown v. Board of Education II, 349 U.S. 294 (1955), which declared public school segregation unconstitutional and mandated that school boards take effective and immediate steps to desegregate. Though all these cases are in some way considered "turning points" in the interpretation of the equal protection clause, the clause in no way is limited to cases

[11] 163 U.S. 537.

concerning racial discrimination. So long as a petitioner can prove state action taken to unjustifiably discriminate against a particular class, an equal protection claim is viable.

Before any conclusions can be drawn as to whether the Supreme Court's equal protection ruling in Bush v. Gore was correct, the appropriate level of scrutiny to be applied to their ruling must be determined. Fourteenth amendment claims are generally subject to rational basis, heightened scrutiny, or strict scrutiny review. For a claim to merit a strict scrutiny review, the petitioners must show that they are part of an "inherently suspect" class, or that a fundamental right has been violated. The "inherently suspect" designation, as articulated by the Supreme Court in United States v. Carolene Products, 304 U.S. 144 (1938), is conferred only upon groups of "discrete and insular" minorities that have historically experienced unequal and unfair treatment by the State and have historically been deprived of political power.[12] If the group or group representative bringing suit meets these qualifications, the burden falls upon the State to prove that its discriminatory action achieves a compelling state interest, and that the action has been narrowly tailored to address only the issue at hand (i.e., there is no other less restrictive course of action the State could have taken to address the issue and avoid discriminating against the affected group).[13]

Certain groups may meet to a lesser degree the criteria required for strict scrutiny review. The Supreme Court has ruled that classifications such as gender and age merit a slightly lesser degree of review, referred to as intermediate or heightened

[12] Epstein, Lee and Thomas G. Walker. 2001. Constitutional law for a changing America. Washington, DC: CQ Press. Page 622.
[13] *Ibid.*

scrutiny. While Frontiero v. Richardson, 411 U.S. 677 (1973) held that gender, being "an immutable characteristic determined solely by the accident of birth,"[14] deserves a strict scrutiny review, later cases have upheld gender discrimination by the State when said discrimination was shown merely to be substantially related to an important government interest.[15] For example, Craig v. Boren, 489 U.S. 190 (1976), which deemed an Oklahoma law allowing females eighteen and over, but males twenty-one and over, to purchase beer, officially articulated the heightened scrutiny requirements of a substantial relation to an important government interest.[16] Discrimination based on gender was not thought to merit a strict scrutiny review, likely because while gender indeed is an immutable characteristic and women have historically been denied political power, females are not a discrete and insular *minority*. Often, gender discrimination hinges—or purports to hinge—on the biological differences between men and women, or upon societal differences or perceptions that could not be altered by a single court opinion.[17] Age, too, is a

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[14] *Ibid*, page 675.

[15] The requirements for the heightened scrutiny test are easier to meet than are the requirements for strict scrutiny. First of all, a state interest may be "important" (thus passing heightened scrutiny) but not "compelling" (the strict scrutiny requirement). Second, when the government must prove only that its action is substantially related to the end it hopes to achieve (its "interest"), there is no narrow tailoring requirement. In other words, under heightened scrutiny, the state does not have to prove that its action is the only possible action, nor does the state have to prove that its means are the least restrictive toward achieving the desired end. Under strict scrutiny, the government is required to demonstrate that there is no other less discriminatory option that would allow the state to achieve its goal .

[16] Justice Ruth Bader Ginsburg views the heightened scrutiny test for gender discrimination as 'temporary.' In Harris v. Forklift Systems, Inc, 510 U.S. 17 (1993), Ginsburg wrote: "it remains an open question whether 'classifications based on gender are inherently suspect.'" In United States v. Virginia, 518 U.S. 515 (1996), she required the government to provide a "exceedingly persuasive justification for gender classification."

[17] For instance, Michael M. v. Superior Court of Sonoma County, 450 U.S 464 (1981) upheld a California statute that held males alone responsible for the act of statutory rape, based upon the State's contention that the statute was intended to prevent teenage pregnancy. Rostker v. Goldberg, 453 U.S. 57 (1981) precluded women from being forced to register for the draft mainly because Congress, having refused to enact such requirements, has the sole authority to "raise and regulate armies" under

classification that merits heightened, but not strict, scrutiny. The government can most often defend discriminatory action against persons under the age of eighteen (or, in certain circumstances, twenty-one) based upon the contention that children, teenagers and very young adults lack the mental capacity to make certain decisions for themselves or to enter into binding agreements. The same can be said of the elderly, who lose physical strength and stamina as they age and might necessarily be excluded from performing certain jobs, such as law enforcement, in which speed and strength are crucial.[18] Moreover, the elderly have never historically been denied political power as a group and thus would not satisfy all the criteria of an inherently suspect class. Youths under the age of eighteen *have* been denied political power, but the still-developing mental skills of children and young adults sometimes prevent them from making informed and rational decisions, and thus the government certainly would have a "compelling interest" in denying them political power.

When the petitioners fail to meet any of the above criteria, the court weighs the equal protection claim using a rational basis test. Unlike strict or heightened scrutiny, rational basis usually defers to the state and places the burden of proof on the petitioners and assumes that the government has a rational reason for undertaking discriminatory action.[19] Should the petitioners demonstrate that there is no rational

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Art. 1, §8, cl. 12-14 of the United States Constitution, but also because the military at that point in time excluded women from combat (and still excludes them from certain areas). Many of these exclusions, such as barring women from submarines, are due to biological differences that would make cohabitation between the sexes difficult and detrimental to one's military performance.

[18] See, for example, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307(1976), where the Court upheld a Massachusetts state law that required certain law enforcement officials to retire at age fifty, and McGowan v. Maryland, 366 U.S. 420 (1961), ruling that the government has a rational basis for preventing minors under the age of 18 from entering into legally binding contracts.

[19] McGowan v. Maryland, 366 U.S. 420 (1960), establishes this burden-of-proof rule.

basis for the discrimination, and that the discrimination is random and arbitrary, the State action will be ruled unconstitutional.[20]

It is not immediately obvious what test should have been applied to Bush v. Gore, or even what test the Justices themselves applied. The Justices did make some references to voting as a fundamental right, including an assertion that that right "is protected in more than the initial allocation of the franchise" (meaning, presumably, that the right to vote includes more than the right to place a ballot in a ballot box—it also might include the right to register to vote, to place the ballot in the box, and to have that vote noticed). A violation of a fundamental right generally triggers strict scrutiny, but the Justices chose to focus their equal protection concerns on a characteristic associated with rational basis review—the seeming arbitrary nature of the manual recounts. Indeed, the majority concluded their defense of voting rights by writing "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."[21]

When any equal protection claim seems to meet some but not all of the qualifications for both strict scrutiny and rational basis, there is no exact formula for determining which standard is to be applied. In Bush v. Gore, the petitioners themselves were certainly not part of any inherently suspect class, nor did they claim to represent any such group of people. Moreover, even if petitioners could identify the class of people discriminated against—presumably, either Republicans or

[20] Epstein and Walker, page 621.
[21] Bush v. Gore, 531 U.S. 98 at 105: "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the state may not, by later and arbitrary disparate treatment, value one person's vote over that of another."

Democrats—membership in a political party is not inherently suspect, and thus their claim would be ineligible to merit a strict scrutiny review on the grounds of being a member of a suspect class. However, if voting is to be considered a fundamental right, the petitioner's claim might indeed merit a strict scrutiny review. "Fundamental rights," as first defined in Palko v. Connecticut, 302 U.S. 319 (1937), are rights that are "of the very essence of a scheme of ordered liberty." In Skinner v. Oklahoma, 316 U.S. 535 (1942), for example, certain "repeat-offender" criminals who had committed "felonies involving moral turpitude" were subject to castration, but other felons were not. The Court determined that since "[m]arriage and procreation are fundamental to the very existence and survival of the race…strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[22] Whether or not the right to vote falls into that category is, interestingly enough, a question that has never been definitively answered by the Court. That question will be addressed in more depth later in this work, but even if voting were considered a fundamental right, it might not automatically merit strict scrutiny.

First and foremost, unlike other fundamental-rights cases where the State defends its action on the grounds that it had a compelling interest to do so, the question in Bush v. Gore was whether or not any action had been taken that interfered with the right to vote at all. Petitioners contended, both in their brief and in their oral

[22] Under Oklahoma law, a stranger who stole twenty dollars from a cash register had committed felony grand larceny and could be subject to the sterilization law; an employee who stole twenty dollars from the same register was only responsible for that twenty dollars, had committed a misdemeanor, and would not be sterilized. The Court found this distinction unacceptable.

arguments, that the recount standards were arbitrary and resulted in similarly situated ballots being treated in markedly unequal ways; respondents claimed that the "intent of the voter" standard was as specific as the State needed to be (Florida statute 101.5614(5) mandates that the "intent of the voter" must be the standard during a manual recount), that the recount process merely followed the rules of a legal standard, and that the incorrect interpretation of person A's vote in no way affects person B's right to vote. Thus, since by the time the case reached the Supreme Court, there had been no factual determination as to whether or not there had actually been any discrimination, the Court should have rightly chosen to give the State the benefit of the doubt and apply a rational basis test.

A second possible reason for applying rational basis review to the equal protection issue in Bush v. Gore is that perhaps the right to vote had not been disturbed in such a gross and purposeful way as to rise to the level to be called a "violation of a fundamental right." Ballots had already been cast and counted once, and then counted again in accordance with state law.[23] Neither the petitioners nor the respondents had outright accused the other of conspiring to deprive any group of voters, racial, political or otherwise, of their right to vote. The briefs raised no allegations of intentional discrimination on behalf of the canvassing boards or on the legislators who authored the "intent of the voter" standard. Legal scholar Nick Levin argues that it is only when a gain in Gore votes gleaned from the manual recounts "is accompanied by…an intent to discriminate that this relative gain would be subject to

[23] Section 102.166 of the Florida Statutes mandates that ballots be mechanically recounted when the margin of victory is less than one-quarter of one percent.

strict scrutiny…"[24] Moreover, the Court's own assertion that the State may not "value one person's vote over that of another" implies that the Court believed that the votes of those who cast "legal" ballots (where chads were punched through) were diluted by the votes of those who cast "illegal ballots" (where chads were left hanging or dimpled), but not necessarily an outright, intentional denial of the right to vote. It is possible that the Court might only consider an outright denial of the right to vote or an intentional attempt to discriminate against certain voters to merit strict scrutiny. Given the fact that states, counties and local municipalities for years have used differing voting methods (e.g., closed versus open primaries), equipment (optical scanners, lever systems, and punch-cards) and standards (objective requirements concerning how the ballot is marked versus subjective "intent of the voter" standards mandated by the Florida Supreme Court in Gore v. Harris), the Court might not consider the mere existence of discrepancies to be indicative of a violation of the fundamental right to vote, and thus might have deferred to the State unless the petitioners could prove that those discrepancies were arbitrary and served no rational state interest.

In either case, it is my conclusion that whether or not the right to vote is fundamental, the petitioner's claim did not merit a strict scrutiny review. Either the right to vote is fundamental, or it is not. If the right to vote is not fundamental, then petitioners could claim neither a violation of a fundamental right nor discrimination against an inherently suspect class of persons, and thus could not satisfy either requirement of the strict scrutiny test. If voting is indeed a fundamental right, the

[24] Levin, Nick. Symposium: The Kabuki mask of Bush v. Gore. 111 Yale L.J. 223 (2001), p. 228.

lack of agreement as to whether there actually was a violation, coupled with lack of evidence of intentional discrimination and the existence of many discrepancies in voting that have never been judged Constitutional violations, should have steered the Justices away from the strict scrutiny test and towards a rational basis review. Petitioners would still have to prove discrimination against some class of persons, however.

It appears that the Justices did indeed use a rational basis review, concentrating on the arbitrary nature of the manual recounts[25], and that even though they made references to voting as a fundamental and protected right, they felt that whatever violation may have occurred did not occur with the seriousness or intent necessary to merit a strict scrutiny review.

Intentional Discrimination

Intentional discrimination might be a requirement for the use of strict scrutiny, but is it a requirement for an equal protection violation to have occurred in the first place? A cursory glance at precedent seems to answer this question in the affirmative. Critics of Bush v. Gore have cited a number of Supreme Court cases in an attempt to demonstrate a pattern of intentional discrimination requirements for equal protection violations. Jonathan Entin, for example, cites a 1959 Supreme Court case where the Justices unanimously refused to strike a literacy test as a requirement for voting.[26] In that case, Lassiter v. Northampton Election Board, the Court reasoned that there was

[25] Bush v. Gore, 531 U.S. 98 at 105: "The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."

[26] Entin, Jonathan L. Symposium: Litigating the presidency: The election 2000 decision and its ramifications for the Supreme Court: Equal protection, the conscientious judge, and the 2000 presidential election. 61 Md. L. Rev. 576 (2002), pp. 591-592.

no evidence of intentional racial discrimination, and that had there been such evidence, their decision would have been different.[27] Richard Posner echoes the intentional discrimination mantra, citing the following footnote from Personnel Administrator v. Feeney, 442 U.S. 256 (1979): "An innocent law that just happens to have an unequal impact is not actionable as a denial of equal protection."[28] In fact, Alan Dershowitz points out that the central holding in Lassiter—that "absent racial discrimination, a state has broad powers to establish voting qualifications"—has never been overturned by any subsequent Supreme Court decision.[29] Dershowitz also enthusiastically cites McCleskey v. Kemp, 481 U.S. 279, in which McCleskey, an African-American condemned to Death Row, presented statistical evidence at his appeal that black defendants who had killed white victims were four times more likely to be sentenced to die than were white defendants who had committed murder against black victims. The Court ruled 5-4 against McCleskey, stating that even if the statistical evidence was theoretically enough to prove a pattern of discrimination, the uniqueness of each chosen jury would have made it impossible to determine whether or not certain juries had engaged in racial discrimination, while others had merely weighed the facts as instructed by the judge. Dershowitz insists "it cannot be the case that the equal protection clause…imposes a higher burden of proof on blacks seeking its protection against discrimination in life-or-death cases than on voters who claim that their vote may have been diluted by an unknown and tiny amount in a random,

[27] 360 U.S. 45 (1959).
[28] Posner, Richard A. 2001. Breaking the deadlock: The 2000 election, the constitution, and the courts. Princeton, NJ: Princeton University Press, p. 129.
[29] Dershowitz, Alan. 2001. Supreme injustice: How the high court hijacked election 2000. New York: Oxford University Press, p. 72.

nondiscriminatory manner."[30] The Court in McCleskey cited Washington v. Davis, 426 U.S. 229 (1976), the first case to directly address the constitutionality of "a law that is passed to accomplish a legitimate governmental purpose, with no racially discriminatory intent."[31] In that case, where black applicants to the Washington, D.C. police academy complained that required tests were biased against African-Americans and bore no relation to one's future job performance, Justice White pointed out that no precedent case appeared to accept the notion that state action without a racially discriminatory purpose is unconstitutional because of a disproportional impact upon members of a particular race. Disparate impacts are not "irrelevant," wrote Justice White, but they are not "the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[32] Dershowitz also cites Clarence Thomas' opinion in M.L.B. v. S.L.U., 519 U.S. 102 (1996), in which the conservative Justice wrote that the "Equal Protection Clause shields only against purposeful discrimination. A disparate impact, even upon members of a racial minority…does not violate equal protection."[33] Dershowitz also calls the individual Justices on their voting patterns, identifying conservatives Anthony Kennedy and Sandra Day O'Connor as the two Supreme Court Justices who have most traditionally held fast to the intentional discrimination principle.[34] Dershowitz's assumptions

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[30] *Ibid*, p. 75-76.
[31] Epstein and Walker, p. 659.
[32] Washington v. Davis, 426 U.S. 229 (1976). Justice White did go on to say that under Title VII of the 1964 Civil Rights Act, which at that time was not applicable to the federal government, petitioners may be able to base future cases upon disparate impact alone. See Epstein and Walker, p. 660.
[33] M.L.B. v. S.L.U., 519 U.S. 102 (1996), quoted in Dershowitz, p. 147.
[34] *Ibid*, pp. 138-139: "[Kennedy]…has insisted that an equal protection claimant must show purposeful discrimination based on race (or another invidious classification…); p. 133: "According to [O'Connor's] consistent pattern of decisions…a discriminatory *effect*, even if proved conclusively, is simply not enough."

about the Justices' political motivations aside, however, there seems little doubt that there exists a clear pattern of Supreme Court rulings requiring a showing of intentional discrimination to win equal protection claims.[35]

The only seeming exception to this rule is Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). In Harper, the Supreme Court ruled that "a poll tax is unconstitutional even absent evidence that its intent was to discriminate against voters on the basis of race or wealth."[36] Poll taxes, however, precluded voters from even reaching the ballot box, thus preventing the actual *exercise* of a fundamental right, whereas in Bush v. Gore, the discrimination addressed by the courts—the result of differing standards—occurred *after* the ballots had been cast. This distinction is important, because while a poll tax preventing certain citizens from registering to vote certainly is disenfranchisement, discrimination that occurs after votes have been cast cannot be as easily defined as disenfranchisement, depending on how extensively one views "the right to vote." More importantly, however, Harper indicates *not* that evidence of purposeful discrimination isn't required at all, but that it is perhaps not necessary to definitively identify the class of persons being discriminated against. A poll tax might be enacted to discriminate against African-Americans (who are less likely to afford the tax), or against citizens of lesser intelligence (who wouldn't have the skills to hold a job that would afford them enough money to pay the tax), or

[35] See further Akins v. Texas, 325 U.S. 398 (1945) (lack of proportional representation of African-Americans on grand juries is not enough to sustain a claim of intentional discrimination and thus does not violate the Fourteenth Amendment); and City of Mobile, Alabama, v. Bolden, 446 U.S. 55 (1980) (petitioners must prove intentional discrimination in order to sustain claim that "at-large" system for electing city officials diluted the African-American vote and violated the Fourteenth Amendment).

[36] Hasen, Richard L. Symposium: The law of presidential elections: Issues in the wake of Florida 2000: Bush v. Gore and the future of equal protection law in elections. 29 Fla. St. U.L. Rev. 377 (2001), p. 395.

against the poor in general, or against all three of these categories. According to Harper, discrimination must exist—the poll tax was surely enacted to discriminate against *some* people by preventing them from voting—but it is not necessary to identify the exact target of the discrimination and classify them as a group.

For petitioners to advance a successful equal protection claim, then, one of two things must be true: there either must have been intentional discrimination during the manual recount process, or there must be no requirement for intentional discrimination under the rational basis test. The latter possibility does not seem legally sound. It cannot be that in strict scrutiny cases, where there is a *higher* burden of proof upon the government, the respondents must demonstrate the presence of intentional discrimination, whereas in rational basis cases, where the burden of proof shifts to the respondents, there is no need for respondents to demonstrate intentional discrimination. That leaves only one possibility: that sufficient evidence of intentional discrimination exists. Several groups have raised different allegations of discrimination, some more serious than others, during the 2000 presidential election. There do seem to be four specific claims of purposeful discrimination (although they may have been brought by different people, and at different times, between November 17 and December 21 of 2000): inappropriate challenges to absentee ballots (with presumably Republican votes) arriving from overseas military installations; actions by Vice President Gore's legal team that seemed to favor counting votes only in heavily Democratic counties; overt racial discrimination at the polls; and, finally, discrimination by members of the county canvassing boards against voters who voted for certain candidates.

It is on the issue of intentional discrimination that Bush v. Gore's equal protection argument first appears shaky. Neither petitioners nor respondents raised the issue of intentional discrimination in their brief[37], even though both sides "unofficially" accused the other of purposely misreading ambiguous ballots, manipulating vote totals, and even stealing ballot boxes.[38] *Washington Times* reporter Bill Sammon recounts several instances where apparent mistakes by both Republican and Democratic party workers were blown out of proportion; however, he specifically points to the Democrats' attempts to disqualify overseas military ballots that were partially (and improperly) filled out by Republican party workers,[39] or those that were improperly postmarked, as one example of intentional discrimination.[40] Sammon claims that Democrats, assuming that the overseas military ballots were likely to yield more votes for Bush, applied particularly detail-oriented regulations to these ballots that they did not apply to other absentee ballots. Sammon cites what he refers to as the "Herron memo"—a five-page document authored by Mark Herron, one of Al Gore's lawyers, that reportedly "instructed Democratic lawyers to make all sorts of pettifogging objections to the military ballots (which have traditionally boosted vote totals for the Republican candidate), especially those that arrived without a

[37] The Gore brief even cited the Bush brief's lack of accusations: "It is important to note that petitioners do not claim that the Florida Supreme Court's order is discriminatory in any invidious manner; they do not claim that any citizens of Florida were improperly denied their right to vote; and there is no claim of any fraudulent interference with the right of anyone to vote."
[38] Sammon, Bill. 2001. At any cost: How Al Gore tried to steal the election. Washington, DC: Regnery Publishing.
[39] See Taylor v. Martin County Canvassing Board, 773 So. 2d 517 (2000), and Jacobs v. Seminole County Canvassing Board, 773 So.2d 519 (2000),in which voters accused both boards of allowing the Republican Party unfettered and unsupervised access to alter absentee ballots.
[40] Sammon, p. 147.

postmark."[41] According to Sammon, Gore's lawyers, armed with the Herron memo, "literally…objected if an 'i' was not dotted or a 't' was not crossed in exactly the same manner…on the signature cards" as on the absentee ballots of overseas military personnel.[42] The postmark issue seemed more legitimate—ballots lacking a postmark could conceivably have been cast after Election Day—but, as the *Washington Post* reported, it was no secret, and usually not an issue, that overseas military units, especially ships, often did not postmark their mail.[43] Democrats like Florida Senator Bob Graham, Florida Attorney General Bob Butterworth, and even Gore's own running mate, Joe Lieberman, condemned the Democrats' tactics, with Lieberman stating on *Meet the Press* that military ballots should be given the benefit of the doubt.[44] Though Palm Beach County Canvassing Board v. Harris, 772 So.2d 1273 (2000), precluded the disqualification of absentee ballots based on "hypertechnicalities," that decision was not rendered until November 21, 2000. Bush's lawyers received the Herron memo on November 17—three days earlier. On November 17, Florida law clearly stated that a ballot without a postmark was no ballot at all. As deplorable as some may have found the Gore camp's tactics, and as much as they may have ran counter to Gore's "count every vote" mantra, it would be hard to make a case for intentional discrimination against overseas military voters, since Gore's lawyers *were* following the letter of Florida law. Additionally,

[41] Sammon, p. 144.
[42] Sammon, p. 145.
[43] Balz, Dan, David Von Drehle, Jo Becker and Ellen Nakashima. 2001. "For Bush camp, some momentum from a memo." The Washington Post, 31 January, A01.
[44] *Ibid.*

Fourteenth Amendment claims require state action[45], and though Gore was Vice President, he filed all his suits in the state of Florida as a candidate and as a private citizen, and even though the Supreme Court has traditionally embraced a very broad conception of "state action,"[46] none of the actions he undertook were as a government actor. Therefore, no matter how discriminatory the Gore camp's tactics were in trying to disqualify military ballots—even if the issue were framed as an example elective enforcement of the law—those tactics would not amount to state action and thus could not be counted as intentional discrimination as required to satisfy an equal protection violation. Had Gore sued for and won the right to have the overseas military ballots disqualified, Bush could have appealed the decision on the ground that the lower court's ruling violated equal protection, but Gore did not take any legal action against the overseas military ballots.

Sammon points to yet another possible example of intentional discrimination by the Gore camp. The Recount Primer, a book authored in 1994 by Timothy Downs, John Hardin Young and Chris Sautter, three "veteran Democratic trenchfighters," as the Washington Post referred to them,[47] was seen as the definitive handbook on recounts. The book, however, did not instruct candidates on how to correctly

[45] See the Civil Rights Cases, 109 U.S. 3 (1883), which established the distinction between public and private actions and held that only public (state) action was subject to regulation under the Fourteenth Amendment. The Supreme Court went on to further define "public" and "private" spheres in subsequent decisions. As a side note, though the Civil Rights Act of 1875 was struck down by the Supreme Court as a violation of the Fourteenth Amendment, its provisions are today upheld by the Commerce Clause.

[46] See Shelley v. Kraemer, 334 U.S. 1 (1948) (state action exists when police are called in to enforce a private restrictive housing covenant); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private restaurant inside parking garage cannot deny service to African-Americans under Fourteenth Amendment because parking garage received "mutual benefits" from and paid annual rent to the city).

[47] Balz, Dan, David Von Drehle, Jo Becker and Ellen Nakashima. 2001. "A wild ride into uncharted territory." The Washington Post, 28 January, A01.

interpret and abide by the various state recount laws, thereby assuring a fair, accurate and inclusive recount, as much as it suggested how a candidate might cherry-pick geographic locations to be recounted and might employ recount standards that would be likely to yield favorable results. The book even included separate instructions for candidates who were either leading or trailing after the initial vote count. "If a candidate is ahead, the scope of the recount should be as narrow as possible, and the rules and procedures ... should duplicate the procedures of election night," reads Downs, Young, and Sautter's guide. However, "if a candidate is behind," the authors continue, "the scope [of the recount] should be as broad as possible, and the rules should be different from those used election night."[48] In other words, a leading candidate confronted with a recount should seek restrictive recount standards and should not deviate from any pre-established rules in order to see that his or her opponent gains the minimum number of votes, but a losing candidate confronted with (or seeking) a recount should press for very broad recount standards and should utilize new or different "rules." After the initial vote count of November 17, Vice President Gore was in the losing position, and thus his team, following the advice of the Primer's authors (who, accompanying the Gore team on the flight to Tallahassee, tore pages from their book, copied them using airborne fax machines, and gave lectures on election recounts via intercom[49]) sought broad standards. The book also advised the losing candidate to "befriend" the county canvassing boards and to offer them "expert advice," all the while gaining knowledge about the different recount

[48] *Ibid.* The Recount Primer is not available by mass distribution.
[49] Balz, Dan, David Von Drehle, Jo Becker and Ellen Nakashima. "A wild ride into uncharted territory." The Washington Post, Sunday, January 28, 2001, page A01.

standards employed in that county or state, discerning which standards would be most beneficial to the losing candidate, and seeking to have those standards applied to every ballot.[50] Much like the strategy of challenging the predominantly Republican absentee ballots, this strategy was perhaps a bit manipulative, and certainly not as honorable as the image projected by the Gore camp's "count every vote" battle cry, but it does not rise to the level of intentional discrimination required by the courts. Again, whatever discrimination may have existed was advanced by Gore and Gore's lawyers as private citizens, not as agents of the government. Yes, the actual discrimination would have been enacted by the canvassing boards, but the canvassing boards themselves, had they been truly "befriended" and subsequently "tricked" by the Democrats, would not have *intended* to discriminate. Moreover, had Bush's team ignored the private-versus-public distinction first advanced in the 1883 Civil Rights Cases and actually claimed that Gore's use of The Recount Primer was evidence of intentional discrimination, it undoubtedly would have come back to haunt them, since the Republicans themselves had had their own experience with Downs, Sautter and Young's playbook. Democrats had used it during the 1984 recount of Indiana's Eighth congressional district. Though the Democratic candidate eventually won the seat, one of the Republican lawyers who emerged from that battle a little wiser—and all too familiar with the Primer—was Ben Ginsberg, one of George W. Bush's lawyers during the 2000 election.[51] Had the Republicans challenged Gore's use of the Primer, Gore surely could have come up with some evidence (or at least illuminated the extreme possibility) that Bush's team was using the booklet in the

[50] *Ibid.*
[51] *Ibid.*

same exact fashion. However, whether or not both parties influenced the canvassing boards using The Recount Primer as gospel, such manipulation still would not rise to the level of intentional discrimination for the simple fact that there was no government action.[52]

That leaves only the most serious allegations of purposeful discrimination—racial bias at the polls and party discrimination by the canvassing boards. The issue of racial discrimination was not addressed directly by any of the parties, but many in the African-American community complained of various impediments to voting on Election Day, including roadblocks, malfunctioning voting machinery, and problems with the voting rolls.[53] Some African-Americans reported that their voting rights had not been restored after serving criminal sentences, and still others claimed that they were misidentified as felons when they had never been convicted of any crime at all.[54] The "confusion" apparently resulted from a bungled attempt by the state of Florida to purge current felons from the voting rolls. Database Technologies, the private corporation hired by Florida to remove the felons, apparently mishandled the purge so badly that the Civil Rights Commission eventually held a series of hearings and, in June of 2001, issued a lengthy report detailing the various civil rights

[52] Along a similar vein is the claim that Gore "cherry-picked" predominantly Democratic counties (Palm Beach, Miami-Dade, Broward and Volusia) in which to stage a manual recount. Not only is this point moot because Gore v. Harris, 773 So.2d 524 (2000), ordered recounts in all counties, but because this allegation, like the previous two, lack the state action component.

[53] Conaway, Laura, and James Ridgeway. November 29-December 5, 2000. "Democracy in chains." [online] The Village Voice; www.villagevoice.com/issues/0048/fridgeway.php; accessed on April 6, 2004.

[54] Pierre, Robert E. 2001. "Botched name purge denied some the right to vote." The Washington Post, 31 May , A01.

violations in Florida.[55] Even before this report was issued, however, the Washington Post reported that eighty-five per cent of African-Americans believed that there was "a deliberate attempt to dilute their political power," presumably by Florida Governor Jeb Bush's administration.[56] These charges are not to be taken lightly, and the Civil Rights Commission, under the leadership of Mary Frances Berry, did an incredibly thorough job of cataloging the various complaints lodged against Florida and proposing reforms to the voting system. However, as much as the observed evidence provided to the Commission, as well as to various media outlets, paints a chilling portrait of mismanagement, apathy, and ignorance by Florida and the private contractor it hired to "correct" the voting rolls, according to the Supreme Court's logic in precedent cases, if statistics showing gross disparities in how Caucasian and African-American murders are sentenced to death are not enough to prove intentional discrimination in violation of the Fourteenth Amendment[57], observed evidence in absence of fact-finding by a trial court judge certainly cannot be enough to prove intentional discrimination, either. Moreover, assuming that overt racial discrimination did take place in Florida, it would not bear on Bush v. Gore's outcome. Bush v. Gore was concerned with recount procedures after the election; roadblocks were set up and botched felon purges occurred before voters had a chance

[55] "Voting irregularities in Florida during the 2000 presidential election." The United States Commission on Civil Rights, http://www.usccr.gov/pubs/vote2000/report/main.htm, issued June 2001, accessed February 24, 2004.
[56] Pierre, "Botched name purge denied some the right to vote." The Post conducted its own poll in conjunction with Harvard University and the Henry J. Kaiser Foundation, but this particular article does not specify whether the "85 per cent" figure comes from a poll of African-Americans across America, only in Florida, or confined to Tampa, from where the report originates.
[57] McCleskey v. Kemp, 481 U.S. 279 (1987).

to get to the polls. The allegations of disenfranchisement are serious, but should be dealt with separately.

The final allegations of intentional discrimination during the recount process are the claims advanced by various members of both parties that canvassing board members applied the "intent of the voter" standard in such a way as to count more votes that were likely for their party's candidate. For example, Democratic canvassing board members would argue that a "dimpled chad" next to Vice President Gore's name was a vote for Gore, while a dimpled chad next to Governor George Bush's name was not a vote at all, while Republicans would treat ballots that were likely to reflect a vote for Bush in the same manner. Some of the accusations, however, were more serious than questions about just how ballots were interpreted. It would be very difficult to prove that vote counters intentionally misread ballots, rather than that they were merely subjectively interpreting those ballots, to the best of their ability, under the intent of the voter standard mandated in Gore v. Harris. Republicans in Palm Beach County accused canvassing board member and Palm Beach County Commissioner Carol Roberts of having "poked, twisted, and manipulated ballots" in an attempt to secure more votes for Gore.[58] The Washington Times reported that Roberts, a Democrat, was observed by other vote counters as handling the ballots "aggressively" in such a manner as to change the physical appearance of the ballots.[59] Five observers filed affidavits in Palm Beach County

[58] Meadows, Karin. 2000. "GOP accuses election board member." The Associated Press, 15 November.
[59] Miller, Steve. 2000. "Observers say ballots manipulated by examiner." The Washington Times, 16 November. It should also be noted that the Times has a reputation as being a fairly "conservative" paper.

stating that Roberts actually poked her finger at ballots in order to extricate "hanging chads" that had been punched for Gore.[60] Mark Klimer, a Republican observer and banker from West Palm Beach, swore in his affidavit that Roberts had actually taken ballots from an uncounted stack and mixed them with ballots that had been counted for Gore to make Gore's stack look bigger.[61] Moreover, statistician and nuclear engineer Robert Cook released a report of his own findings on the Palm Beach County recount. Cook claimed that there were ten times more "double-punched" ballots (overvotes) in Palm Beach County than the national average of less than one-half percent.[62] Cook's claims could be nothing more than statistical manipulation—since Palm Beach County is one of the country's largest counties, there would no doubt be more double-punched ballots than the national average, because Palm Beach County's population is greater than the national average—and moreover, his report was never peer-reviewed, published in a journal, or otherwise verified by other experts, thus casting a shadow of doubt upon the author's credibility, but the five sworn affidavits filed by recount observers should not be dismissed as easily. Those affidavits were never advanced to civil charges, perhaps only because Bush ultimately won the election, but these affidavits, coupled with various other charges by both Republican and Democratic observers or party members, could have been enough to prompt an evidentiary hearing or other legal fact-finding expedition that could have ultimately found evidence of intentional discrimination against Republicans, or those

[60] *Ibid.*

[61] "Gore offers to accept manual recounts as final, meet Bush." CNN.com (www.cnn.com), November 15, 2000. Also see "Democrat election official manipulated ballots, witnesses swear." NewsMax.com: America's News Page (www.newsmax.com), November 16, 2000.

[62] Limbacher, Carl. "Evidence of mass ballot tampering in Palm Beach County." NewsMax.com: America's News Page (www.newsmax.com), November 25, 2000. (The same information also comes from a November 24th press conference given by Ms. Roberts and broadcast live on MSNBC.)

voting for Republican candidates, among canvassing board members of Palm Beach County, or any other Florida county for that matter. Tampering with ballots that showed a vote for Bush would be evidence that Democratic canvassing board members were attempting to disenfranchise voters who cast ballots for the Republican presidential candidate. This attempt at disenfranchisement could be construed as evidence of intentional discrimination against Republicans, or against voters who voted for Bush. Of course, the same logic holds true were Republicans tampering with ballots that had registered votes for Gore. Moreover, ballot tampering is an illegal, not unconstitutional, action, and the appropriate remedy would not be to find a violation of equal protection, but to put Carol Roberts, or any other official found guilty of ballot tampering, in jail.[63] The Supreme Court, of course, was in a rush to decide Bush v. Gore in time to make the "safe harbor" deadline, and so it is doubtful that the Justices, at least not the five conservatives, would have consented to any procedure that would have extended the proceedings. Such a decision may have been a mistake, however, since finding evidence or indication of intentional discrimination would have gone a long way toward legitimizing the Court's equal protection holding. Without such fact finding, though, it only *appears* that there *may* have been some intentional discrimination acted out by one member of the Palm Beach County canvassing board. This "appearance" is most likely not enough to sustain the intentional discrimination component required to sustain an equal protection violation. As with the allegations of racial discrimination, anecdotal evidence in the absence of proof is not enough to sustain a charge of intentional

[63] Thanks to Dr. Tunick for pointing out this distinction.

discrimination. Yes, in this case there were sworn affidavits filed by observers who claim to have seen Roberts mishandling the ballots, but to date no one has unearthed any sort of "smoking gun," such as a memo, recorded telephone call, or piece of physical evidence proving once and for all that Roberts and other Democrats (or Republicans, for that matter) manipulated ballots to produce their desired vote totals. Therefore, the entire matter would be left up to judicial interpretation. Choosing to identify intentional discrimination in these actions might largely be a function of a Justice's political leanings, but the affidavits and testimony of various observers, once investigated, could have been enough for some Justices to rule that there had indeed been a component of intentional discrimination during the manual recounts. Even if an investigation yielded evidence of only a few instances of intentional discrimination against Republican voters, as long as there was proof that a small group of people had their ballots treated differently than other similarly situated ballots, an equal protection claim could be tenable. The discrimination might not even have to be systematic. In Willowbrook v. Olech, 528 U.S. 568 (2000), the Court held that one property owner could not be forced to comply with regulations that did not apply to the other similarly situated property owners. One isolated event against one isolated property owner was enough to sustain an equal protection violation. The Court's logic in Willowbrook could potentially be applied to a small "class of five." However, the five Republicans who filed affidavits could never have proved that *their* ballots had been treated differently than other similarly situated ballots, and thus while Willowbrook demonstrates that intentional discrimination does not necessarily have to be systematic to merit equal protection, no court could use Willowbrook to

grant those five Republicans standing to bring an equal protection complaint without proof that *their* ballots had been tampered with.

Nick Levin presents circumstantial evidence of Democratic discrimination in Broward County. He points out that Broward, which reported a significantly higher number of dimpled chads than did Palm Beach, Volusia, or Miami-Dade, "never presented any evidence specific to its machines as to why they might have produced more dimples than other counties' machines."[65] The build-up of chads in the Votomatic machines might have contributed to Broward's higher number of dimpled chads, but Broward did not explain why chad build-up was a problem unique to Broward County. Broward also "counted dimples in more circumstances than other counties using the same type of voting machine, and…Broward recovered a disproportionally high number of Gore votes relative to these other counties."[66] At the very least, writes Levin, "these aspects make one seriously consider the possibility that Broward was not just legitimately remedying the undervote but had in fact crossed the line into viewpoint discrimination."[67] Whether or not that circumstantial evidence would be enough to satisfy the intentional discrimination criteria would, of course, be left up to judicial interpretation.

Victims of Discrimination

Even if one were to assume, however, that the five affidavits filed by Republican observers were enough to clearly prove intentional discrimination, whom exactly did

[65] Levin cites Bush v. Gore at 107 for his evidence that Broward reported a disproportionate number of new votes for Gore. As to whether Broward produced any evidence to account for that disproportionality, Levin concedes that "perhaps Broward could have produced this evidence if given more time."
[66] Levin, p. 229.
[67] *Ibid.*

that discrimination affect? For some critics of Bush v. Gore, this question has been a favorite sticking point. Most critics addressed the issue as a matter of standing: that Governor Bush, who had himself voted in Texas, could not possibly have had his vote diluted, mishandled, or miscounted by Florida canvassing board members and thus had no standing to bring the lawsuit that eventually became Bush v. Gore. Because the issue of standing is quite complex, and because my focus here is limited to fourteenth amendment issues, I assume that George W. Bush did indeed have standing to bring an equal protection claim.[68] If Bush did have standing to bring an equal protection claim as a third party, though, it still would be important to determine exactly whom the intentional discrimination, if it existed, affected. Vincent Bugliosi, one of the harshest Bush v. Gore critics, maintains throughout his book The Betrayal of America that there could not have been any intentional discrimination against anyone. "[W]ithin each county all voters were treated equally," he writes. "No one in any county could possibly have been thinking about discriminating against residents of other counties. Therefore, the alleged discrimination, if any, was totally unintentional and innocent."[69] Bugliosi's view is, however, somewhat simplistic, and it is unclear how he logically jumps from point A (no intra-county discrimination) to point B (no inter-county discrimination and thus no intentional discrimination at all). Additionally, he seems to be addressing intra-county discrimination in the first part of his argument and inter-county discrimination in the second part of his argument. Bugliosi's first statement, that all the voters in a

[68] I defer to the Court's assumption that Bush has standing only because to address the issue would be to expand this paper beyond its scope.
[69] Bugliosi, p. 72.

given county were treated equally, seems quite presumptuous, especially when Palm Beach County admitted to changing its standards at least once during the manual recount,[70] and the "intent of the voter" standard set forth in Gore v. Harris would at least theoretically allow different teams of vote-counters within the same county to apply different standards. Though members of both parties observed the recount process, the presence of observation does not negate the possibility of ballot tampering. Observers who disagreed with the vote counters' conclusions could not simply jump over the railing and move the disputed ballot from the Gore pile to the Bush pile (or vice versa), and some of those observers, as stated earlier, *did* file affidavits claiming that they had witnessed ballot tampering.

Ronald Dworkin poses a more complex syllogism than does Bugliosi. "Suppose the machines in County X and County Y had failed to detect any vote on the ballots of X and Y, citizens of the two counties," he writes.

> "Is the fact that the two counties use different rules of thumb in their manual recounts unfair to X vis-à-vis Y? Or Y vis-à-vis X? Each county's rule of thumb runs a risk—in County X that an unintended vote will be counted, and in County Y that an intended vote will not be counted."[71]

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[70] Bush v. Gore, 531 U.S. 98 at 107: "[T]estimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment."

[71] Dworkin, Ronald (2002). "Introduction." In A badly flawed election: Debating *Bush v. Gore*, the Supreme Court and American democracy, ed. Ronald Dworkin. New York: The New Press, p. 12.

Dworkin's hypothetical poses an interesting philosophical question. He seems to suggest that the equal possibility of discrimination against two members of two counties—counting X's vote at the expense of diluting Y's, or counting Y's vote at the expense of diluting X's—somehow negates the existence of discrimination in the first place, as if the two instances of dilution "cancel out" any discrimination that may have existed. The answer to his question, though, seems to be that the candidate whose vote is not counted is the one who was disadvantaged. If County X counts dislodged chads and hanging chads but not dimpled chads, and County Y counts dislodged, hanging *and* dimpled chads, and both citizens X and Y cast ballots with dimpled chads in their respective counties, only citizen Y's vote will be counted. Such a scenario would not even require citizens X and Y to have cast ballots for different candidates. Both X and Y could have cast votes for Gore, but only Y's vote would be counted, and X would have a very viable claim that the "intent of the voter" standard did not afford his vote the required constitutional guarantee of equal protection—provided, of course, that X could demonstrate that said discrimination was intentional, as required by Court precedent. However, Bugliosi would be right to point out that even in this hypothetical, no one in County X was thinking about discriminating against someone in County Y, or even against someone in County X. The above scenario proves that citizen X was *harmed* in that his ballot was not counted, but it does not prove that he was *discriminated* against.

Like Bugliosi, Dworkin also fails to consider the possibility of such discrimination occurring within the bounds of one county. Suppose that X and Y are both citizens of County Z. X's ballot reflects a clearly dislodged chad for candidate

A; Y's ballot reflects a dimpled chad for candidate B. By counting both X and Y's ballots as legal votes, has not X's vote been diluted, since undoubtedly some "dimples" will reflect valid intentions to vote for candidate B, but some "dimples" may in fact reflect mistakes, changed minds, or other damage to the ballot? Under such a scenario, citizen X's vote has been diluted within County Z. Again, however, dilution is not evidence of intentional discrimination, and moreover, there is no proof that some dimples were not intended to be cast as valid votes (unless voters could testify with certainty that they did dimple one chad or another, but ultimately punched through a chad for a different candidate or chose not to vote for a candidate at all, and assumed that the dimpled chad would not be counted as a legal vote).

Not all Bush v. Gore commentators are as loathe to identify a distinct class of disadvantaged voters, however. Mark Tushnet, in asking whose votes were "diluted" by the (presumably intentional) incorrect inclusion of unclear votes, answers tentatively,

> "One obvious answers is that the Florida Supreme Court's procedures would dilute the votes for Governor Bush because…the Florida Supreme Court devised a recount system that gave a systematic advantage to Vice President Gore by making it likely that more votes would be added to the preliminary count from counties where Vice President Gore appeared to have an advantage[.]"[72]

[72] Tushnet, Mark. Beyond election 2000: Law and policy in the new millennium: The history and future of Bush v. Gore. 13 J. Law & Pub. Pol'y 23 (2001), p. 31.

Tushnet postulates that such a procedure—which appears to have come straight out of The Recount Primer—would conceivably be "akin to stuffing ballot boxes or throwing boxes of ballots away."[73] Tushnet does not, however, view this argument as a lock, because there is no guarantee (besides a statistical probability) that votes that went uncounted in the machine count would be distributed in even proportion to votes that were counted the first time.[74] Were that distribution off, there would be no point towards devising a recount system favorable to one candidate or another, because that system could just as likely yield results for the opposing candidate as it could for the favored one. This possibility would also likely preclude the Florida court's "recount system" from being viewed as evidence of intentional discrimination by the Supreme Court. Charles Fried is even more convinced than Tushnet that the Florida Supreme Court's recount system constituted intentional discrimination. Fried, relying on Harper, ventures that "disparate treatment may violate the constitution's guarantee of equal protection even if no identifiable class of persons is the target of the intentional disparity."[75] If members of the county canvassing boards employed procedures that appeared to be discriminatory—such as counting one ballot with a dimpled chad, but not counting the next ballot with a dimpled chad, and the first ballot lacked any pattern of dimpled chads that would convey that particular voter's intent—then it might not be necessary, according to Harper, to identify whether those canvassing board members were intending to disqualify or dilute the votes of Bush supporters,

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[73] *Ibid.*
[74] *Ibid.*
[75] Abramowicz, Michael, and Maxwell L. Stearns. 2001. Beyond counting votes: The political economy of Bush v. Gore. 54 Vand. L. Rev. 1849, October. Fried relies on Willowbrook.

Gore supporters, African-Americans, Hispanics, the elderly, or whatever class of voters could have posed a "threat" to that canvassing board member's interests. Coupled with the affidavits filed by the five Republican observers (once investigated and deemed valid), such an interpretation of Harper could lead the Court to find an equal protection violation. Fried also relies on the unanimous per curiam opinion in Willowbrook v. Olech, decided a mere eight months before Bush v. Gore. As long as the "class of one" articulated in Willowbrook consists of one person who has been treated differently by the state than anyone else without any kind of rational state interest, an equal protection claim is sustainable.[76] Willowbrook does not specify whether multiple, similarly situated persons who have been treated differently (such as voters whose dimpled chads were not counted in one county, while other dimpled chads were) can bring multiple suits under a "class of one," or whether the existence of multiple "classes of one" necessitates that those classes form one class, which then must be suspect to merit equal protection. Such a conclusion (that the state may not treat one person differently for wholly arbitrary reasons, but *may* treat two or more differently for wholly arbitrary reasons) does not seem logical. If canvassing boards in a particular county applied one set of standards to the first ballot counted and then a new set of standards to the remaining ballots without a rational basis for the disparity in treatment, under Willowbrook there could be a potential equal protection violation. It seems to reason that if the first five, or five hundred, or any five hundred ballots were counted differently for no rational reason, that could also be a potential equal protection violation under Willowbrook. However, there is a larger problem

[76] Willowbrook at 564.

with Fried's admittedly appealing suggestion: no voter would ever be able to bring such a "class of one" suit alleging differing treatment, since all ballots are anonymous. The chances are slim that a voter using the Votomatic would even be able to recall whether he or she punched the chads all the way through, much less be able to identify their ballot from a stack of thousands. Without direct evidence that any voter was treated unequally, a court would have to decide whether standing could be granted on the basis that the petitioner's ballot was *likely* to have been treated unequally, but still, the possibility remains that upon proof of intentional discrimination, Fried's hypothesis could prove to be an avenue by which a voter could have pursued an equal protection claim.

Fairness

Another attack on the Court's equal protection reasoning concerned the majority's natural assumption that all voters deserved to have the same standards applied to their ballots during the manual recounts. Dworkin, using the example of different cities and towns within the state adopting different laws, quite clearly states that "[f]airness requires not that all a state's citizens be treated the same, but that none of them be disadvantaged—vis-à-vis other citizens—by laws[.]"[77] The Brennan Center in its brief goes so far as to assert that treating all voters the same would be a violation of the law in and of itself. "Petitioners completely ignore [both] the equal protection violation that would occur if differently situated counties were treated the same and the need for county-based discretion in discerning voter intent to address Florida's

[77] Dworkin, p. 10.

patchwork quilt of an election system," reads the brief.[78] Florida's counties are differently situated "when it comes to the probability of a vote registering as a nonvote…it is the raison d'etre of the contest proceeding."[79] The existence of this disparity necessitates that "different standards for 'intent of the voter' be used in order to avoid a violation of the equal protection clause."[80] The Brennan Center also asserts that Florida's election system is an equal protection (and First Amendment) violation in and of itself, and that "[a]llowing local officials to tailor recount procedures to meet technical, county-specific challenges is, indeed, the only way that Florida can reconcile its decentralized electoral scheme with the demand of equal treatment the Fourteenth Amendment requires."[81]

Florida's counties were differently situated in the fact that some used Votomatic punch-card machines, some used optical scanners and some used other methods of voting. With that in mind, the Brennan Center's assertion that differing standards were necessary is a bit obvious, as of course a vote counter in an optical-scan county would presumably not be checking a ballot for dimpled or hanging chads.[82] However, the crux of the equal protection claim was that voters in *similarly situated punch-card counties* were treated differently, and that there was no reason to employ different standards in Palm Beach County than in Broward or Miami-Dade. One

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[78] Brief of Amicus Curae of the Brennan Center for Justice in Support of Respondent Gore, p. 16.
[79] *Ibid*, p. 17.
[80] *Ibid*, pp. 16-17.
[81] *Ibid*, p. 18, continuing: "A state that allows votes to be erroneously counted as nonvotes in some counties based on the combined arbitrariness of voting machinery and the absence of compensatory administrative and judicial remedies violates equal protection and the First Amendment rights of voters to have their expressed preferences on the ballot 'heard' through the official tally."
[82] Perhaps the Brennan Center meant that failure to perform a manual recount would in fact discriminate against punch-card voters, who have their votes rejected at alarmingly higher rates than do voters who use other methods of voting.

could still argue among all the counties using the Votomatic system, poorer counties were more likely to employ older, error-prone machines, thus increasing the risk that legal votes would not be tallied and requiring a less restrictive standard to be applied to those counties. However, there is no reason to conclude that the higher *probability* of undervotes in one county means that a less restrictive standard should be applied in that county, while more restrictive standards should be applied in counties with a lower probability of undervotes. Both counties contain undervotes, and the goal of anyone concerned with equal protection, one would assume, would be to count all votes *that correctly relayed the voter's intent* fairly and accurately, and to employ a standard that would best assist in accomplishing that goal. Employing a less restrictive standard in a county with a high probability of undervotes certainly goes a long way toward wanting to count all the votes, but narrowing that standard in other counties does not. Yes, counties using newer machinery would have a lower probability of undervotes, but they would still have some undervotes, and applying the least restrictive standard to all counties would in no way cause anyone harm.[83] Rates for vote dilution may increase in counties with fewer undervotes, since for every undervote counted there is a possibility that it is either a legal vote or a mistake. That is why objective standards specifying the criteria for admitting a ballot into the tally would go a long way in accomplishing the goal of "counting all the votes" (and, inversely, *not* counting mistakes as legal votes). Objective standards could include provisions for patterns (e.g., a ballot with a dimpled chad for president would be

[83] If, by law or by mandate, each canvassing board had the power to create its own set of standards, the constitutionality of that law could be called into question. Can a law that allows, even perhaps requires, similarly situated voters to have their votes counted using different standards be consistent with equal protection?

counted only if there were a pattern of dimpled chads for other candidates on the same ballot), and a "catch-all" "intent of the voter" phrase would make sure that any ballots that did not fit any of the specifications but did clearly state the intent of the voter (such as a voter who circled his chads with a pencil instead of punching them), but the objectivity would go a long way to excluding illegal votes that did not fit specified patterns and otherwise did not clearly convey the intent of the voter.

Arbitrariness of Manual Recounts

It is this lack of objective standards that gives rise to the largest equal protection claim in Bush v. Gore: that the Florida Supreme Court's manual recount order in Gore v. Harris advanced an unconstitutionally vague standard that allowed for enough arbitrariness during the manual vote tally to violate the equal protection clause. The rational basis test requires that the state's action be reasonably related to a legitimate government interest, and that the state action not be random or arbitrary. The United States Supreme Court assumed that the Florida Supreme Court had a legitimate state interest (ensuring that all votes were counted fairly and accurately), but that they allowed voters to be treated arbitrarily under a vague "intent of the voter" standard. Most critics of Bush v. Gore begin their analyses by acknowledging that the presence of different standards in similarly situated counties is troubling, and on the surface it *seems* like an equal protection violation. "The equal protection claim does have considerable appeal, at least in the abstract and as a matter of common sense," writes

[84] The rational basis test requires that the state's action be reasonably related to a legitimate government interest, and that the state action not be random or arbitrary. The United States Supreme Court assumed that the Florida Supreme Court had a legitimate state interest (ensuring that all votes were counted fairly and accurately), but that they allowed voters to be treated arbitrarily under a vague "intent of the voter" standard.

Cass Sunstein. If a vote is not counted in one area when it would be counted in another…some voters can legitimately object that they are being treated unequally for no good reason. On what basis are their ballots not being counted, when other, identical ballots are being registered as votes?"[85] Richard Posner is even more critical of the entire process, calling the Florida Supreme Court's recount order "farcical," but also believes that the entire Florida election, not just the manual recounts, had been arbitrary in that the election "had produced large differences across and probably within counties in the percentage of ballots that had actually been recorded as votes."[86] Dworkin asserted that the order in Gore v. Harris "treated persons' votes in a senselessly variable manner"[87]. Posner is also disturbed by the differing standards between counties. Palm Beach, for example, counted dimpled chads in ballots with at least three other dimples, assuming that three dimples suggested a pattern of voter intent,[88] while Broward allowed counters to be completely subjective in their judgment and to count whatever they thought *was* a vote *as* a vote.[89] Entin acknowledges that such a "use of inconsistent standards…does raise legitimate concerns about the arbitrariness and possible lack of integrity in the process."[90] Entin actually goes on to identify four of the Court's major equal protection concerns regarding arbitrariness: the fact that the "intent of the voter" standard allowed some counties to use a very restrictive standard while others

[85] Sunstein, Cass (2002). "Lawless Order and Hot Cases." In A badly flawed election: Debating *Bush v. Gore*, the Supreme Court and American democracy, ed. Ronald Dworkin. New York: The New Press, p.83.
[86] Posner, p. 208.
[87] Dworkin, p. 66.
[88] Posner, p. 63.
[89] *Ibid*, p. 54.
[90] Entin, p. 586.

could use a more permissive one; the fact that Palm Beach County changed standards at least once and that voting teams in the same county used varying standards[91]; the fact that some counties examined undervotes and overvotes, while others concentrated solely on the undervotes; and finally, that "inexperienced and untrained election judges" were hired to count the votes.[92] The Court's first three concerns, as outlined by Entin, are certainly valid equal protection concerns and have already been addressed at some length here, but absent evidence of intentional discrimination, it is doubtful that the arbitrariness of the "intent of the voter" standard alone rises to the level of an equal protection violation. The Court's fourth concern is somewhat more of a due process concern and will be addressed in the next section. Florida Supreme Court Chief Justice Wells also listed a number of concerns about the manual recount in his Gore v. Harris dissent. While many of the problems he identified also seemed to merit review under the due process clause, Wells did sum up his equal protection concern quite succinctly: "The majority returns [Gore v. Harris] to the circuit court for this partial recount of undervotes on the basis of unknown, or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown."[93] Subjectivity, of course, is not in and of itself an equal protection violation. Friedman points out that juries use subjective standards like "beyond a reasonable doubt" all the time.[94] The Supreme Court addressed this and conceded that in some cases, the subjectivity of the law requires no

[91] Bush v. Gore, 531 U.S. 98 at 105.
[92] *Ibid*, p. 582.
[93] Gore v. Harris, 773 So.2d 524.
[94] Friedman, p. 827-828.

further confinement.[95] However, the Court in Bush v. Gore held that in this particular case, the "search for intent was limited to the evidence on the fact of the ballot" (since no voter could be called in to testify about their anonymous ballot) and could be "confined by specific rules designed to ensure uniform treatment."[96]

Not everyone, however, is as willing to embrace or acknowledge the above equal protection concerns. Florida Attorney General Bob Butterworth denied that the Florida Supreme Court violated equal protection, much less any common-sense notion that there should be at least some objective component to the standard. "The Florida Supreme Court followed state law governing election contest provisions…in fact, Circuit Judge Lewis requested each county canvassing board to submit their standards for counting the ballots and determining 'voter intent' as provided by Florida statutes. Unfortunately, this process was interrupted by [the Supreme Court]'s stay of the election contest."[97] Butterworth's point underscores that at least some entity in Florida intended to regulate the recount, but still, the fact that Judge Lewis stepped in to fill a void left by the Florida Supreme Court does not in and of itself absolve the Florida Supreme Court of violating equal protection by issuing a recount order that allowed canvassing boards to use differing standards, or at the very least, following a state law that in and of itself violated equal protection by allowing for arbitrary recounts. Butterworth isn't the only person willing to contend that Gore v. Harris merely followed state law and thus did not violate equal protection, however. Richard Friedman calls the inter- and intra-county variation "unfortunate,"

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[95] *Ibid.*
[96] Bush v. Gore, 531 U.S. 98 at 106.
[97] Brief of Amicus Curae Butterworth in Support of Respondent Gore, p. 11.

but also calls it inevitable[98], as if no one in Florida had the power to lay down any sort of objective standard. And if the loss of legal votes was inevitable, where would the harm be in trying to limit that loss by restricting the arbitrariness of the recount process?

Schotland notes that other states *do* try to limit this loss by employing objective standards. While the statutes of most other states usually include an "intent of the voter" catch-all phrase, that phrase usually comes at the end of a long list of objective criteria for determining what is a legal vote. For example, Indiana's statute specifically excludes dimpled chads from being counted as legal votes at all.[99] A Republican in Indiana looking for votes for a Republican candidate could not claim that a dimpled chad was a clear indication of the voter's intent if Indiana law specifies that a dimpled chad is *not* a clear indication of voter intent. Were the dimpled chad accompanied by something not addressed by Indiana law—such as writing on the margin of the ballot that read "I intend this dimple to count as a vote for the Republican candidate"—the catch-all phrase would kick into effect, and the ballot would be counted. While Florida's standards need not be exactly like Indiana's—and, in fact, due to Florida's large elderly population, perhaps dimples, or a pattern of dimples, should be counted—the Florida Supreme Court should have given the canvassing boards at least some objective guideline, and the Court could have easily taken a look at Indiana's or any other state's standards, changed what they felt was necessary to accommodate Florida's unique population make-up, and issued a set of

[98] Friedman, Richard D. Symposium: The law of presidential elections: Issues in the wake of Florida 2000: Trying to make peace with Bush v. Gore. 29 Fla. St. U.L. Rev. 811 (2001), p. 831.
[99] Schotland, p. 224.

guidelines along with it's opinion in Gore. Friedman decries this suggestion and seems to think that any set of objective standards would be useless. "Even on the face of a single ballot," he notes, "there is an infinite range, across several dimensions, of evidence bearing on the intent of the voter. How much of the chad is left attached, and where? If it is attached, how deeply indented is it?…Any complex rule will inevitably lead to variations in application, even if one entity makes all the decisions…"[100] Friedman, however, is overstating the case. There would not be an "infinite range" of possibilities for, say, a dimpled chad. At least one county at least at one point in time required that for a ballot to count as dimpled, light must pass through it.[101] Besides, a "pattern standard" like the one employed by Palm Beach County for part of the recount process would go a long way toward eliminating the "infinite complexities" of the recount process. Of course had the Florida Supreme Court mandated a pattern standard and declared any ballot with three or more dimpled chads to show a pattern of intent, voters could have objected that "three dimples," and not two or four, is an arbitrary determination that violates equal protection itself, but the state certainly has a rational interest in limiting the subjectivity of the vote counters (in order to ensure that their political motivations do not influence their interpretations of the ballots), thereby protecting the voter's ballot from being purposely misread to suit one counter's particular political motivations. Moreover, it is important to note that though the state of Florida declares the right to vote to be fundamental, this does not preclude the state from defining the term "legal

[100] Friedman, p. 828.
[101] Bush v. Gore, 531 U.S. 98 at 106: Palm Beach County "switched to a rule that considered a vote to be legal if any light could be seen through a chad[.]"

vote" and enforcing that definition. There is no reason why calling voting a fundamental right necessarily negates the adoption of objective standards.

The arbitrariness of the recounts, as addressed in the previous section, is troubling in the fact that voters in similarly situated counties—counties that used punch-card machines—had their votes tallied differently. It is also troubling in that the subjective recount scheme allowed vote counters to exercise their personal biases during the recount[102], and that these counters, without any objective standards to "rein them in," so to speak, could have deliberately counted ballots for their favored candidate while at the same time opposing similar ballots for the other candidate. However, without evidence of intentional discrimination, there is no reason to believe that petitioners have a sustainable equal protection claim. Whether or not there is evidence of that intentional discrimination, however, is debatable.

DUE PROCESS

The Right to Vote as Fundamental

Though petitioner's equal protection claim is questionable in that it does not definitively satisfy the requirement for intentional discrimination, the possibility does remain that petitioners could have legitimately stopped the manual recounts by using the due process clause. In their brief, petitioners in fact did argue that the Florida Supreme Court's manual recount order violated both equal protection and due process. Bush and Cheney's brief identified three specific violations of due process

[102] Again, the procedural protections against this possibility—monitors from members of both parties—were apparently not foolproof, as the five Republican affidavits alleged. Further investigation would be needed to determine if these affidavits were in fact valid, and if an equal protection complaint could be brought.

that occurred during the manual recount. First, petitioners claim that voters relied on the permanence of pre-existing election rules when casting their votes, only to have those rules changed during the manual recounts. Second, petitioners claimed that "the chaotic and unfair procedures mandated by the Florida Supreme Court effectively den[ied] the parties any meaningful opportunity to raise objections to ballot determinations made by nonjudicial counters during the manual recount, and preclude any chance for judicial review of those determinations."[103] Third, petitioners asserted that the subjective nature of the recount process increased the risk that "the method for determining how to count a vote will be influenced, consciously or unconsciously, by individual desire for a particular result. That risk is heightened significantly here because of the irreversible damage done to the ballots during the recount processes and the clear errors that have occurred during the manual recounts."[104]

The due process clause prevents a state from denying to any person within its borders "life, liberty or property without due process of law." Is the right to vote included in one of those categories? Surprisingly, there is no case law that definitively answers that question, even though the answer does not seem complicated. Palko defined fundamental rights as those rights necessary to the very scheme of ordered liberty. Arguably, a people cannot be called "free" if they are prohibited from exercising that freedom in some substantive and influential manner (as opposed to being called "free" because they have, for example, many consumer choices)—presumably in their right to vote. The right to vote, therefore, is an

[103] Brief of Petitioners Bush and Cheney.
[104] *Ibid.*

exercise of liberty, which is protected by the due process clause. Perhaps the American association of liberty with the right to vote is so permanently ingrained into every citizen that no Supreme Court justice ever felt the *need* to put it into words, or perhaps the Court has never found an appropriate opportunity to issue the definition. Nevertheless, because the right to vote under Palko is fundamental, strict scrutiny would be triggered in a Bush v. Gore due process claim. And unlike in equal protection claims, the aggrieved party in a due process claim need not prove intentional discrimination against a specific class of voters. Since Bush v. Gore's equal protection argument runs into problems because of the lack of discrimination against a particular class, the due process clause is more applicable.

Types of Due Process

The Court has identified two types of due process—procedural and substantive. Procedural due process ensures that laws are fairly applied, that no person is denied access to any channels of government, and that reasonable people can understand and interpret laws, so that they cannot be held accountable for breaking a law they cannot understand. Procedural due process is often associated with the Fifth and Sixth Amendments, as the constitutional laws of criminal procedure—right to a fair and speedy trial, right against self-incrimination, right to confront one's accuser—are considered parts of the "due process of law" that no person can be denied before being denied life, liberty or property (i.e., being convicted of a crime and sentenced to death or incarceration). In fact, it was through the due process clause that most of the Bill of Rights became incorporated—that is, became applicable to the states, and not just to the federal government.

Substantive due process, on the other hand, can trump procedural due process. For example, even if the government creates a law that can be reasonably understood by the population, passes it through the proper channels, and arrests, tries and convicts someone for breaking that law without denying that person procedural due process, the courts can still find that the law itself violates due process. In Roe v. Wade, 410 U.S. 113 (1973), for example, the Supreme Court held that a Texas law prohibiting abortion violated due process. Even though the law properly enacted, the Court held that a woman's right to privacy was so important that no "due" law could infringe upon it. The Supreme Court has also held marriage rights and contract rights to be immune from infringement under the due process clause.[105]

A Change of Rules

Petitioners' first claim, that the rules were changed after the election, does have considerable due process appeal. Petitioners' brief states that

> "Florida voters in, for example, Palm Beach County relied upon the definition of a legally valid vote reflected in the voter instructions they were given [to punch the chad all the way through]. Pursuant to those standards, voters who made some minor mark [presumably a dimpled chad] on their ballot but ultimately determined not to vote for any presidential candidate had no notice whatsoever that the minor mark could later be counted as a vote. If they had received

[105] See Griswold v. Connecticut, 381 U.S. 475 (1965) for marriage rights and Lochner v. New York, 198 U.S. 45 (1905) for contract rights.

> such notice, they could have examined their ballots after voting…and requested a new one or otherwise corrected the stray mark."[106]

Petitioners claim "it cannot seriously be argued that there have not been post-election changes to the "standards" used to count votes."[107] Palm Beach County, for example, has employed a standard that explicitly excludes dimpled chads from being counted as legal votes since 1990; however, the Palm Beach County canvassing board changed that standard once the recount process had commenced. It is unlikely that the average Palm Beach County voter would have known about the 1990 standard, but he or she would have known, based upon the instructions printed on their ballots, that they were required to fully perforate all chads before placing their ballots in the ballot box. Thus, any voter in Palm Beach County could have logically concluded that dimpled or hanging chads would *not* be counted as legal, valid votes, and had they made such marks as a mistake, they would have seen no reason to correct them or to ask for a new ballot.

There is precedent to support such a charge. In Briscoe v. Kusper, 435 F.2d 1046 (1970), the United States Court of Appeals for the Seventh Circuit ruled that when an elections board changed the policies for accepting petition signatures to include certain candidates on the ballot without notification, due process had been violated. "Regardless of whether the more restrictive position of the Board was statutorily or constitutionally valid," reasoned the Court, "the application of the new…rule to nullify previously acceptable signatures without prior notice was unfair and violated

[106] *Ibid*, p. 47.
[107] *Ibid.*

due process."[108] Briscoe dealt with the nullification of previously acceptable signatures; Bush v. Gore dealt with the acceptance of previously *unacceptable* ballots.[109] The issues are the same, only reversed. Yes, Briscoe dealt with the right to run for office, which is not the same as the right to vote. The Constitution guarantees the right to run for office (provided the candidate meets certain age, citizenship and residency requirements); it does not explicitly guarantee the right to vote, save for interpreting the due process clause to guarantee that right as an exercise of liberty. Under Palko, the right to vote is fundamental; the individual right to run for office might not be "necessary to a scheme of ordered liberty," or at least not *as* necessary as the right to vote. The Court's reasoning in Briscoe could, then, be applied to Bush v. Gore, for if anything, changing the rules before the election (as in Briscoe), while candidates would perhaps still have time to adapt to the new rules, is less serious than changing the rules *after* the election, when votes have already been cast and voters can no longer correct their mistakes. Voters in Palm Beach County had every reason to assume that dimpled ballots would not be counted, and a voter who initially dimpled his or her ballot but then decided not to cast any vote for president would, in having that ballot counted erroneously as a legal vote, effectively dilute the votes of others who had intended to vote for a presidential candidate, and had cast their ballots accordingly. True, in a 1998 case, Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720, the Florida Supreme Court held that failure to follow voting

[108] Briscoe v. Kusper, p. 24-25.

[109] Voters were instructed to make sure their chads were punched all the way through. A voter who had dimpled a chad for one candidate, then decided to vote for the other candidate or not to vote at all, could reasonable infer from these instructions that the only chads that would be counted would be the fully dislodged chads, and that the "dimple" would be passed over. Thus, a ballot with previously unacceptable dimpled chads (as per the voting instructions) would now possibly be acceptable in counties that used the dimpled-chad standard.

instructions—in essence, failure to cast a legal vote—did not invalidate the vote. However, the average voter would not know about the Beckstrom ruling (or Florida's intent of the voter statute, for that matter) and would have no reason to assume that the rules printed on the back of the ballot were, per Beckstrom, not binding and would not result in the invalidation of the ballot. Beckstrom may protect the ballots of voters who fail to follow the rules, but voters still *do* follow those rules and expect certain results, and there is no reason to invert the logic and assume that because Beckstrom prevents voters from being punished when they don't follow the rules, it also provides that voters *should* be punished (by having the rules discarded and thus, their votes diluted) because they *did* follow the rules.

However, one major difference between Bush v. Gore and Briscoe would be the lack of direct evidence. No voter in this case can go back, retrieve his or her ballot, and point to the "stray mark" made. Additionally, the voters who had cast the dimpled ballots would not be the only ones harmed, and therefore not the only ones to have standing under the due process clause. The voters who cast their votes correctly, and who thus harmed because their votes had been votes diluted, could also bring suit. If they did, however, it appears from the precedent set by Briscoe that they would have a valid due process claim.

Judicial Review

The second claim is that voters were denied judicial review inasmuch as there was no provision for anyone to object to the recounts. According to petitioners, "the trial court delegate[d] its judicial role under Florida statute 102.168 to various county officials and other counters, and the trial court lacks the opportunity to review the

ballots itself to form its own understanding of a particular voter's intent. Such sweeping denial of the opportunity to raise objections and obtain meaningful judicial review plainly violates the due process clause."[110] While it is disturbing that the trial court would see fit to delegate its authority to a congregation of unorganized, untrained and perhaps politically motivated group of people, there is nothing to indicate that anyone was outright denied their right to object to the vote tally. True, neither the Florida Supreme Court, the trial court nor the canvassing boards themselves set out any specific guidelines as to how one would object *within* the recount process, but at no time did any court specifically rule that voters or vote-counters were barred from bringing suit against other vote-counters or canvassing board members, or against the trial court itself for delegating the power to the canvassing boards and thus making the process of objection all the more difficult. Petitioners base this particular due process claim, which received less than a paragraph's attention in their brief, on a 1930 Supreme Court case, Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673. In Brinkerhoff-Faris, the Court established the principle that "a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."[111] There is no indication, first of all, that the trial court gave any notice to anyone that they would lose their right to protest to the trial court if they didn't file suit within the few days remaining before authority would be transferred to the canvassing boards and to the vote-counters. Moreover, as stated above, the actual "right to protest" was not entirely lost

[110] *Ibid*, p. 49.
[111] Brinkerhoff-Faris, p. 682.

once the trial court delegated its authority downward, as Brinkerhoff-Faris requires. Those who wished to formally object to the count would merely have to climb one more rung on the ladder before having their grievances heard in a court of law. By neglecting to produce a specific set of guidelines for objecting to the recount process, the Florida Supreme Court no doubt made things more difficult for anyone wishing to lodge an objection, but the Court in no way made it *impossible* for anyone to object, and thus there was most likely no violation of procedural due process.

Arbitrary Recounts

Petitioners' third objection, unlike the previous two, relies on substantive due process rather than procedural due process: That the arbitrary and subjective nature of the recounts violated due process by allowing vote counters to impose their own political leanings, consciously or subconsciously, on their interpretations of the ballots. Additionally, since the Florida Supreme Court in no way mandated that the canvassing boards be politically balanced, voters had essentially rested their ballots in the hands of canvassing boards that were in many cases dominated by members of one party (two partisan elected officials and one elected official who appeared on the ballot as non-partisan, but who may very well have had had political leanings) and that had full power to call votes the way they saw them—or the way they wanted to see them.

Roy Schotland takes a special interest in the voters' lack of protection from the political motivations of the canvassing board members. One of the first things Schotland notes is that the concern is not negligible, because twenty other states make provisions to ensure that their canvassing boards are either non-partisan or politically

balanced.[112] For example, sixteen states require that local election boards be multi-party, while four require state boards to be multi-party, and eight require both boards to be multi-party. Michigan, uniquely, nominates three persons for a seat for each major political party.[113] Schotland relies heavily on a dissent written by Judge Tjoflat of the Eleventh Circuit Court of Appeals in Touchston v. McDermott, 234 F.3d 1133 (2000). Tjoflat's dissent noted that "Florida's boards were composed of three elected officials, serving ex officio: The county commission chairperson, a county judge, and the county's supervisor of elections. Although Florida's county judges appear on the ballot as nonpartisans…they are all chosen by or acceptable to the local establishment[.]"[114] Tjoflat also worries that the subjective standards allowed politically skewed canvassing boards to more easily impose their own opinions or political motivations upon the recount process. "A candidate will want dimple votes counted in counties where he captured a greater proportion of the machine tabulated vote than did his opponent," writes Tjoflat. "A candidate will favor counties where the most ballots were cast because those counties will have the most dimple votes…Thus, a candidate is more likely to have his request for a manual recount granted, and to receive favorable interpretations of voter intent, in counties where the candidate shares a political party affiliation with the majority of the canvassing board."[115] Tjoflat also writes that "[t]he selective dimple model, as applied, is tailor-made for unconstitutional party-based discrimination" and "puts voters in no better position than children in a schoolyard game yelling 'Pick me, pick me!' The

[112] Schotland, p. 228.
[113] *Ibid*, footnote 82, referencing http://www.fec.gov/pages/tech3.htm.
[114] *Ibid*, p. 227.
[115] *Ibid*, pp. 219-220.

candidates, as team captains, will only choose those who are sure to help them win."[116] The dissent by Justices Stevens, Ginsberg and Breyer in Bush v. Gore dismissed Tjoflat's objections with the guarantee that a "single impartial magistrate will ultimately adjudicate all objections arising from the recount process."[117] Voters may not have had their procedural due process denied in that there were roadblocks to judicial interpretation. Of course a single magistrate could be called in to review objections to the canvassing boards' findings. However, it is important that Stevens, Ginsberg and Breyer concede that that review will come "ultimately," not "immediately." There was no guarantee of when the "impartial magistrate" would hear those objections, or even that they would be heard before the election results were certified. Even if the Supreme Court had remanded the case back to Florida, at some time a president would have to have been selected, whether through an official, certified tally, a vote in Congress, or appointment by Florida's governor (in the event that Congress deadlocked).[118] Was there any guarantee that that "impartial magistrate" would hear these objections before electors were certified and either Bush, Gore, or someone from President Bill Clinton's line of succession were inaugurated in the interim? If those objections were in fact heard after the recounts had ended once and for all, procedural due process might have remained intact, but what about substantive due process? What about the voter's right to have his vote counted as part of his exercise of liberty, which is protected by the due process clause? Without a guarantee that all objections would be resolved before Florida's

[116] *Ibid*, p. 220.
[117] Bush v. Gore, 531 U.S. 98 at 126.
[118] Dworkin, p. 34. Also see my conclusion for further notes on this scenario.

election results were certified and sent to Congress, the dissenting Justices' promise of a "single impartial magistrate" would be meaningless. The substantive right to have one's vote counted (or not diluted by the presence of included illegal votes) would already have been denied.

Are a person's substantive due process rights violated every time a case comes before a judge? Judges, after all, can never be completely impartial, and yet we allow them to adjudicate conflicts concerning fundamental rights. The Supreme Court, for example, has the authority to decide whether or not a right is fundamental, and yet there is no constitutional requirement mandating that the Supreme Court be politically balanced. Is that somehow a violation of due process? The answer is probably no. By the time a substantive due process case reaches the Supreme Court, the right to substantive due process has long since been violated—by a law, procedure, or yes, a politically motivated canvassing board. The lower court that adjudicated the original claim could be accused of violating due process, especially if the court was called in to make a judgment about a private matter, such as a contract. The lower court's decision would trigger state action, and then a due process violation could be alleged. Lower court judges are, however, allowed to judge cases without recusing themselves. Is it a violation of substantive due process to have a case heard by a judge who is not impartial? As stated above, no judge can ever be completely impartial. However, we might ethically consider a judge impartial when he risks no immediate, close gain or loss (immediate meaning reasonable and not found through a long series of syllogisms that ultimately somehow connect the judge to the results of the case, and "close" meaning for themselves, their friends or their family members)

by deciding a particular case. If the judge does risk an immediate and close gain or loss, he is ethically expected to recuse himself from the case. For example, a judge might be entrusted with deciding whether or not Republican canvassing board members manipulated vote totals. The judge will likely be a member of either the Republican or Democratic parties. If she is a Republican, she might ignore evidence of the Republican's culpability; if he is a Democrat, he might ignore exculpatory evidence. However, membership in one party or another is not enough to call a judge "biased," as millions of Americans are members of one particular party but do not always vote for or support that party's candidates. Without the risk of an immediate and close gain or loss, the judge is unlikely to be swayed by his political sympathies, especially if the facts clearly point in the other direction and the judge runs the risk of being overturned on appeal, or even penalized, if the decision is found to be without merit. The judge would be ethically bound to recuse himself, however, if he perhaps held a position in a certain political party that would be jeopardized by his ruling, or if he stood to gain or lose money, or if his friends, associates or family members would be directly affected. If a judge in that position did not recuse himself, and if that state had a law requiring the judge to remove himself from conflict-of-interest cases, the aggrieved party could then potentially claim a due process violation. Without the immediate and close risk of gain or loss, however, the judge would have nothing personal to lose and would likely not want to be overturned on appeal, and thus would be more likely to follow the law primarily and to let his personal feelings affect his decision-making only insofar as all persons are to some degree influenced by their personal feelings.

The county canvassing boards had no such requirements for recusal. According to Florida law, the boards were to consist of two elected officials and one appointed official. It is indeed possible that at least one, if not both, of these elected officials—of either party—stood to collect substantial political gains (or suffer substantial political losses) as a result of their judgment, perhaps in the form of rewards for their "loyalty" or the loss of a coveted position. Where was the legal or ethical code requiring canvassing board members to recuse themselves in the event of an immediate and close risk of gain or loss? Where was the guarantee that these canvassing board members would not impose their own political motivations upon the recount, save the partisan observers, who were powerless to stop the recounts themselves and could only file affidavits testifying to what they saw, then wait until the "single impartial magistrate" stepped in—perhaps until after the recounts had ended and the votes had been certified?

These questions have not gone completely unaddressed. The National Task Force on Election Reform, for example, recommended "that each state examine the makeup of canvassing boards and give consideration to restructuring them into bipartisan or nonpartisan bodies. These boards may take any number of forms and replace existing partisan canvassing boards, partisan recount boards or partisan officials."[119] Such a change would require a change to only one Florida statute (102.141). Without that change, however, and without any guarantees that substantive due process violations would be addressed before it was too late, Florida voters had their ballots subject to a system that was ripe for partisan "cherry-picking" of votes to favor one particular

[119] Schotland, p. 228.

candidate over another. Such a system, "protected" only by after-the-fact safeguards, cannot be called "due."

CONCLUSION

Though on the surface, the Court's decision to identify Bush v. Gore as an equal protection case seems correct, a more thorough analysis—in essence, a "double take"—reveals that the Court's rationale is weak. Unless a "class of a few" voters, presumably the five Republicans who filed affidavits alleging intentional discrimination by the canvassing boards, could adopt the reasoning in Willowbrook and get a trial court to evaluate their claims and deem them valid, Bush failed to prove that the Florida Supreme Court in any way violated the equal protection clause. However, the due process claim raised by petitioners is a better argument. Voters participated in the election under an assumed set of rules, which were then invalidated when the Florida Supreme Court, in Gore v. Harris, issued its "intent of the voter" standard in accordance with section 101.5614(5) of the 2000 Florida Statutes. In fact, section 101.5614(5) is in itself unconstitutional, since it mandates that canvassing boards use a vague "intent of the voter" standard that allows counting teams to make arbitrary and subjective determinations about the ballots, and possibly to impose their own political beliefs on the recount process to ensure a favorable result for their preferred candidate.

The "Safe Harbor" Deadline and the Court's Unjustifiable Decision Not to Remand

The weakness of Bush's equal protection argument, however, does not mean that no equal protection violations occurred during the thirty-six days after the November

7 election. In fact, Vincent Bugliosi correctly stated that "the real equal protection violation, of course, took place when they [the Supreme Court] cut off the counting of the undervotes."[120] Bugliosi refers to the stay issued on December 9, which halted the recounts on the grounds that they could cause irreparable harm to George W. Bush's campaign.[121] After deciding Bush v. Gore in favor of the plaintiffs, the Supreme Court refused to follow what would have been normal procedure: to remand the case back to the Florida Supreme Court so that the recounts could continue under constitutional standards. Instead, the Supreme Court halted all manual recounts, thus disenfranchising voters who had cast undervote ballots that had never been tallied during the machine count. The Court reasoned that it had no chance to halt the recounts and mandate the certification of the previously submitted totals in order to comply with the deadline imposed by 3 U.S.C. 5, also known as the Safe harbor provision. 3 U.S.C. 5 sets a deadline for the appointment of a state's electors after a presidential election. In 2000, that deadline would have been December 12. Under 3 U.S.C 5, slates of electors accepted by the December 12 deadline would be granted immunity—"safe harbor"—from contests by members of Congress. Slates of electors submitted after the December 12 deadline would be subject to Congressional challenge. The Court viewed December 12 as an ironclad deadline and refused to let the recounts continue.

The Court's interpretation of the Safe harbor deadline is inexcusable and unjustifiable. 3 U.S.C. 5 does not impose a binding time limit on accepting state electors. The only "penalty" for missing the December 12 deadline is the loss of the

[120] Bugliosi, p. 46.
[121] Order Granting Petitioner's Application for Stay, No. 00-949, 00A504.

safe harbor, meaning that those electors would be open to challenges by members of Congress. The "horror story" defense of the Court's interpretation holds that had the Court remanded the case back to Florida, the recounts would never have been counted in time, the electors would not have been submitted by December 12, and a challenge would have ensued in Congress, which in such a situation is entrusted with the responsibility of voting on whether to accept the electors. Had the recounts shown Gore to be the winner, and Gore electors been sent to Congress, the Republican Florida legislature might have sent its own Bush slate of electors to Congress, under its Article II authority to regulate presidential elections. In Washington, D.C., the House of Representatives, which in 2000 was predominantly Republican, would likely have voted for the Florida legislature's slate; however, the Senate, which at that time was equally divided, might have been deadlocked. The tie-breaking vote would have gone to none other than Vice President Gore, who presumably would have cast the vote in his own favor for the Gore slate of electors. With Congress divided, the slate of electors certified by the governor of Florida—at that time, Jeb Bush, George W. Bush's brother—would be the slate seated. However, the Florida Supreme Court could have ordered Jeb Bush to certify the Gore slate in accordance with the will of the voters, and Bush could have refused.[122] The "horror story" could have ensued indefinitely, until either a court stepped in to issue an appropriate ruling or the Congress enacted legislation that would not be retroactive in nature but would nevertheless put an end to the constant back-and-forth that both Dworkin and Posner contend could have been the outcome had the Supreme Court not ended the recounts

[122] Dworkin, p. 34.

with Bush v. Gore. Though this chain of events is decidedly undesirable, it is in fact the chain of events addressed by the federal laws that give Congress the right to debate and vote on slates of electors that did not make the safe harbor deadline. In fact, 3 U.S.C. 5 is one of those federal laws that are designed to prevent such a "horror story" from going any further. 3 U.S.C. 5 is *not* designed to give any court the authority to stop recounts, ignore legal votes, and otherwise circumvent the legal, codified process for dealing with late-received electoral slates. By ending the recounts in order to preserve Florida's safe harbor, the Court allowed some but not all of Florida's votes to be counted. If, by the Court's own reasoning, subjecting two identical ballots to different standards was a violation of equal protection, than counting only one of two identical ballots *must* be an equal protection violation as well. In its decision not to remand the case, the Supreme Court majority never explained why counting all the votes—enfranchising all the voters—at the expense of safe harbor was an equal protection violation, yet not counting all the votes—disenfranchising some voters—to secure safe harbor was not. At least under the first scenario, all the votes would have been counted. Those votes may have been challenged and rejected, but that is the procedure mandated by federal law. Instead, the Court was content to send a partial and possibly unrepresentative (meaning that the partial tally might not have proportionally represented the *actual* number of votes cast for Bush and Gore) vote tally to Congress and to *ensure* that the inaccurate tally would be safe from challenges! The Supreme Court must have believed that the tallies as they stood on December 12, when Bush v. Gore was decided, were possibly unrepresentative; otherwise, the Court would not have used 3 U.S.C 5 as the only

excuse for stopping the recounts. Had the Court believed the December 12 tallies to be fair and accurate, they could have just said so, perhaps offered statistical proof that the tally was proportionally representative of the total number of votes cast in Florida, and ended their opinion there. However, the Court's reliance on 3 U.S.C. 5 as an excuse for halting the recount shows that the Court did not consider the December 12th tally to be accurate, even though the Justices who wrote the majority took an "oh well" attitude towards this fact and demanded the results certified anyway. The Court therefore *knowingly sent electors who represented an inaccurate and incomplete tally to* Congress and protected them from challenge, rather than allow the recounts to proceed between December 9th and December 12th and send a *possibly* inaccurate and incomplete tally (assuming the recounts could not be completed within those three days) to Congress, subject to challenge. Does not the congressional right to challenge electors exist to protect the voters from having their votes misrepresented by an inaccurate slate of electors? Didn't the Supreme Court take this right away from the Florida voters by issuing its stay and refusing to remand the case back to the Florida Supreme Court?

The Future of Bush v. Gore and Voting Rights

One interesting phenomenon of Bush v. Gore was that its critics, who loathed the Court's shoddy interpretation of the equal protection clause, admitted that at the very least, Bush v. Gore could be used as precedent to expand voting rights. Dworkin admits that the "equal protection ruling, for all its flaws, might do some later good. Many electoral arrangements and practices are unfair in exactly the way the equal protection clause condemns: They do disadvantage some groups in the exercise of the

fundamental right to vote."[123] Mark Tushnet argues that before Bush v. Gore, the equal protection clause only applied to voting rights cases on two levels, the first level being "categorical exclusions" (for example, denial of the right to vote based on race or gender) and the second level being "the effectiveness of votes cast by people with the right to vote" (for example, the kind of arbitrary vote dilution prohibited by Harper)[124]. Bush v. Gore, claims Tushnet, established a third level of equal protection as applied to voting rights: concern over the mechanics of voting.[125] Cass Sunstein hopes that Bush v. Gore will "help to spur corrective action from Congress and state legislatures" regarding inequalities in voting technology.[126] In fact, Sunstein's concern over inequalities in voting technology was addressed in 2003 by the Ninth Circuit Court of Appeals. In Southwestern Voter Registration Education Project et. al. v. Kevin Shelley, California Secretary of State I, a three-judge panel held that the use of punch-card machines during the California gubernatorial recall violated the equal protection clause. Wrote the panel, "forty-four percent of the electorate will be forced to use a voting system so flawed that the Secretary of State has officially deemed it 'unacceptable.'" The panel cited Bush v. Gore's interpretation of Harper and held that by employing punch-card machines with high rates of producing undervotes in some parts of California, the state was arbitrarily and disparately valuing one person's vote over that of another. However, the full Ninth

[123] Dworkin, pp. 15-16.
[124] Tushnet, p. 30.
[125] *Ibid.*
[126] Sunstein, p. 76.

Circuit Court later reversed the panel's holding.[127] Again, Bush v. Gore was cited, as the Court noted that in Bush, "the question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[128] The Ninth Circuit called the possibility that the punch card machines could yield dramatically higher rates of undervotes than other voting machinery "merely speculative."

When President George W. Bush assumed office in January of 2001, the United States had seemingly been turned backwards and upside-down by one single judicial ruling. Conservatives were advocating the federal government's right to intrude into matters of state law, liberals were advocating original-intent theories of the Constitution, and the candidate who had received the lesser popular vote had ultimately won the presidency. Not only did Bush assume the presidency without a clear mandate (and, in the opinion of some, without having legally won the office), he also had the unfortunate circumstance of becoming the first president to lead the nation through a homeland terrorist attack. For a few brief months after September 11, 2001, it seemed as though Bush might fulfill his touted campaign promise and bring unity, not divisiveness, to the country after all. However, as the memory of September 11 became overshadowed by concerns about a sluggish economy, a troubled job market, a war justified by possibly faulty intelligence, and a new presidential campaign, the discord that Bush v. Gore brought to the United States in

[127] Southwestern Voter Registration Education Project et. al. v. Kevin Shelley, California Secretary of State II, 344 F.3d 914 (2003).
[128] Bush v. Gore, 531 U.S. 98 at 109.

2000 appears to be back full force. Bush v. Gore has already left its mark on George W. Bush's presidency, as many Americans see him as an illegitimate commander-in-chief. The impact of Bush v. Gore on America's electoral system, though hinted at in Shelley, has yet to be felt. Perhaps Bush v. Gore will be quickly overturned by the next slate of Justices; perhaps it will become the leading precedent in future voting rights and equal protection cases. Whatever the outcome, it seems ironic that a case that was supposed to be "limited to the present circumstances,"[129] according to the five conservative who wrote the majority opinion, has become the subject of such controversy and attention. "Limited to the present circumstances?" Whatever the Justices' motivations were when they penned that short sentence, they certainly did not get their wish.

[129] Bush v. Gore, 531 U.S. 98 at 109.

APPENDIX A

1. 3 U.S.C 5: Determination of Controversy as to Appointment of Electors

> "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or nay of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors by such State is concerned."

APPENDIX B

1. TITLE IX: ELECTORS AND ELECTIONS, SECTION 101.5614(5), FLORIDA STATUTES (2000):

> "If any ballot card of the type for which the offices and measures are not printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot card in the presence of witnesses and substituted for the damaged ballot. Likewise, a duplicate ballot card shall be made of a defective ballot which shall not include the invalid votes. All duplicate ballot cards shall be clearly labeled "duplicate," bear a serial number which shall be recorded on the damaged or defective ballot card, and be counted in lieu of the damaged or defective ballot. If any ballot card of the type for which offices and measures are printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy may be made of the damaged ballot card in the presence of witnesses and in the manner set forth above, or the valid votes on the damaged ballot card may be manually counted at the counting center by the canvassing board, whichever procedure is best suited to the system used. If any paper ballot is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, the ballot shall be counted manually at the counting center by the canvassing board. The totals for all such ballots or ballot cards counted manually shall be added to the totals for the several precincts or election districts. *No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.* [emphasis added] After duplicating a ballot, the defective ballot shall be placed in an envelope provided for that purpose, and the duplicate ballot shall be tallied with the other ballots for that precinct."

2. TITLE IX: ELECTORS AND ELECTIONS, SECTION 102.111, FLORIDA STATUTES (2000):

> "(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are

compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

(2) The Division of Elections shall provide the staff services required by the Elections Canvassing Commission."

3. TITLE IX: ELECTORS AND ELECTIONS, SECTION 102.166, FLORIDA STATUTES (2000):

1) Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

(2) Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.

(3) Before canvassing the returns of the election, the canvassing board shall:

(a) When paper ballots are used, examine the tabulation of the paper ballots cast.

(b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.

(c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the

outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

(c) The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.

(d) The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

(5) If the manual recount indicates an *error in the vote tabulation which could affect the outcome of the election* [emphasis added], the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two

political parties. A candidate involved in the race shall not be a member of the counting team.

(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

(8) If the county canvassing board determines the need to verify the tabulation software, the county canvassing board shall request in writing that the Department of State verify the software.

(9) When the Department of State verifies such software, the department shall:

(a) Compare the software used to tabulate the votes with the software filed with the Department of State pursuant to s. 101.5607; and

(b) Check the election parameters.

(10) The Department of State shall respond to the county canvassing board within 3 working days.

4. TITLE IX: ELECTORS AND ELECTIONS, SECTION 102.168, FLORIDA STATUTES (2000):

(1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1), whichever occurs later.

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result

of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) *Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.* [emphasis added]

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed

within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

REFERENCES

Abramowicz, Michael, and Maxwell L. Stearns. Beyond counting votes: The political economy of Bush v. Gore. 54 Vand. L. Rev. 1849 (October, 2001).

Akins v. Texas, 325 U.S. 398 (1945).

Balz, Dan, David Von Drehle, Jo Becker and Ellen Nakashima. 2001. "A Wild Ride into Uncharted Territory." The Washington Post, 28 January, A01.

Balz, Dan, David Von Drehle, Jo Becker and Ellen Nakashima. 2001. "For Bush Camp, Some Momentum From a Memo." The Washington Post, 31 January, A01.

Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (1998).

Brief of Amicus Curae Butterworth in Support of Respondent Gore et. al., 2000 U.S. Briefs 949.

Brief of Amicus Curae Brennan Center for Justice at New York University School of Law in Support of Respondents, 2000 U.S. Briefs 949.

Brief of George W. Bush and Richard Cheney, Petitioners, 2000 U.S. Briefs 949.

Brief of Respondent Albert Gore Jr., 2000 U.S. Briefs 949.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930).

Briscoe v. Kusper, 435 F.2d 1046 (1970).

Bugliosi, Vincent. 2001. The betrayal of America: How the Supreme Court undermined the constitution and chose our president. New York: Thunder's Mouth Press.

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

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

Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000).

City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980).

Conaway, Laura, and James Ridgeway. November 29-December 5, 2000. "Democracy in chains." [online] The Village Voice; www.villagevoice.com/issues/0048/fridgeway.php; accessed on April 6, 2004.

"Democrat Election Official Manipulated Ballot, Witnesses Swear." November 16, 2000. [online] NewsMax.com: America's News Page; www.newsmax.com; Internet; accessed on February 22, 2004.

Dershowitz, Alan. 2001. Supreme injustice: How the high court hijacked election 2000. New York: Oxford University Press.

Downs, Timothy, Chris Sautter and John Hardin Young. 1994. The recount primer.

Dworkin, Ronald. 2002. Introduction. In A badly flawed election: Debating Bush v. Gore, the Supreme Court and American democracy, ed. Ronald Dworkin, pp.1-56. New York: The New Press.

Dworkin, Ronald. 2002. Early responses. In A badly flawed election: Debating Bush v. Gore, the Supreme Court and American democracy, ed. Ronald Dworkin, pp. 57-74. New York: The New Press.

Entin, Jonathan L. Symposium: Litigating the presidency: The election 2000 decision and its ramifications for the Supreme Court: equal protection, the conscientious judge, and the 2000 presidential election. 61 Md. L. Rev. 576 (2002).

Epstein, Lee and Thomas G. Walker. 2001. Constitutional law for a changing America. Washington, DC: CQ Press.

Friedman, Richard D. Symposium: The law of presidential elections: Issues in the wake of Florida 2000: Trying to make peace with Bush v. Gore. 29 Fla. St. U.L. Rev. 811 (2001), p. 831.

Frontiero v. Richardson, 411 U.S. 677 (1973).

"Gore Offers to Accept Manual Recounts as Final, Meet Bush." November 15, 2000. [online] CNN.com; www.cnn.com; Internet; accessed on February 3, 2004.

Gore v. Harris, 773 So.2d 524 (2000).

Guinier, Lani. 2002. "And to the C students: The lessons of Bush v. Gore." In A badly flawed election: Debating Bush v. Gore, the Supreme Court and American democracy, ed. Ronald Dworkin, pp. 231-264. New York: The New Press.

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).

Hasen, Richard L. Symposium: The law of presidential elections: Issues in the wake of Florida 2000: Bush v. Gore and the future of equal protection law in elections. 29 Fla. St. U.L. Rev. 377 (2001), p. 395.

Jacobs v. Seminole County Canvassing Board, 773 So. 2d 519 (2000).

Lassiter v. Northampton Election Board, 360 U.S. 45 (1957).

Levin, Nick. Symposium: The Kabuki mask of Bush v. Gore. 111 Yale L.J. 223 (2001), p. 229.

Limbacher, Carl. "Evidence of Mass Ballot Tampering in Palm Beach County." November 25, 2000. NewsMax.com: America's News Page; www.newsmax.com; Internet; accessed on February 22, 2004.

M.L.B. v. S.L.U., 519 U.S. 109 (1996).

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

McCleskey v. Kemp, 481 U.S. 279 (1987).

McGowan v. Maryland, 366 U.S. 420 (1961).

Meadows, Karin. November 15, 2000. "GOP Accuses Election Board Member." The Associated Press.

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

Miller, Steve. 2001. "Observers Say Ballots Manipulated by Examiner." The Washington Times, 16 November.

Order Granting Petitioner's Application for Stay, No. 00-949, 00A504 (2000).

Palko v. Connecticut, 302 U.S. 316 (1937).

Palm Beach County Canvassing Board v. Harris, 772 So.2d 1273 (2000).

Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

Pierre, Robert E. 2001. "Botched Name Purge Denied Some the Right to Vote." The Washington Post, 31 May, A01.

Posner, Richard A. 2001. Breaking the deadlock: The 2000 election, the constitution, and the courts. Princeton, NJ: Princeton University Press.

Rostker v. Goldberg, 453 U.S. 57 (1981).

Sammon, Bill (2001). At Any Cost: How Al Gore tried to steal the election. Washington, DC: Regnery Publishing.

Schotland, Roy. 2002. In Bush v. Gore: Whatever Happened to the Due Process Ground?, 34 Loy. U. Chi. L.J. 211.

Shelley v. Kraemer, 334 U.S. 1 (1948).

Siegel v. LePore, 120 F. Supp. 2d 1041 (2000).

Southwestern Voter Registration Education Project et. al. v. Kevin Shelley, California Secretary of State (II), 344 F.3d 914 (2003).

Sunstein, Cass. 2002. "Lawless order and hot cases." In A badly flawed election: Debating Bush v. Gore, the Supreme Court and American democracy, ed. Ronald Dworkin, pp. 75-104. New York: The New Press.

Taylor v. Martin County Canvassing Board, 773 So. 2d 517 (2000).

Touchston v. McDermott, 234 F.3d 1133 (2000).

Tribe, Laurence. 2002. "Freeing eroG v. hsuB from its hall of mirrors." In A badly flawed election: Debating Bush v. Gore, the Supreme Court and American democracy, ed. Ronald Dworkin, pp.105-154. New York: The New Press.

Tushnet, Mark. Beyond election 2000: Law and policy in the new millennium: The history and future of Bush v. Gore. 13 J. Law & Pub. Pol'y 23 (2001), p. 31.

U.S. v. Carolene Products, 304 U.S. 144 (1938).

"Voting irregularities in Florida during the 2000 presidential election." The United States Commission on Civil Rights, http://www.usccr.gov/pubs/vote2000/report/main.htm, issued June 2001, accessed February 24, 2004.

Washington v. Davis, 429 U.S. 229 (1976).

Willowbrook v. Olech, 528 U.S. 562 (2000).