

RACE AGAINST THE MACHINE: AN ARGUMENT FOR THE STANDARDIZATION OF VOTING TECHNOLOGY

BY JASON BELMONT CONN

“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.”

-- Chief Justice Earl Warren (1963)¹

INTRODUCTION: AMBIGUITIES WITHOUT ANSWERS

On November 3, 2004,² Senator John Kerry conceded the presidential election to President George W. Bush,³ and the nation exhaled a deep sigh of relief that the presidential election would not end in another lengthy and contentious legal battle like the one that cast a dark cloud over the 2000 presidential election.⁴ Although his decision to forgo litigation helped unify a politically divided nation in the wake of a contentious election cycle,⁵ Kerry also closed the door on a judicial dissection of the balloting process and a potential opportunity for the Supreme Court to revisit many of the lingering questions from its controversial and tangled

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¹ Gray v. Sanders, 372 U.S. 368, 381 (1963).

² The election was held on November 2, 2004. However, as Americans went to sleep that night, the election was still too close to call given the close margins of victory in a number of key states. See Tracy Grant, Election Is Too Close to Call, WASHINGTON POST, C15, Nov. 3, 2004.

³ See Nagourney, Bush Voices Pride, Humility and Optimism, N.Y. TIMES, Nov. 3, 2004.

⁴ See Bush v. Gore, 531 U.S. 98 (2000); Jeffrey Toobin, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2001); Alan M. Dershowitz, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED THE NATION (2000); Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

⁵ Senator Kerry said: “In America, it is vital that every vote count . . . But the outcome should be decided by voters, not a protracted legal fight.” Charles Hurt, *As Night Wore On, Glee Became Gloom*, WASHINGTON TIMES, A11, Nov. 4, 2004.

decision in *Bush v. Gore*.⁶

In this article, I examine one of these lingering questions: Does *Bush v. Gore* and the relevant equal protection case law open the door for an equal protection challenge to a state's use of different voting machines/technologies and how do the racial disparities in error rates impact this analysis?⁷ As we reflect on the fiftieth anniversary of *Brown v. Board of Education*,⁸ and the fortieth anniversary of the Voting Rights Act of 1965,⁹ and legal scholars continue to debate the lessons, value, and legacy of these landmark accomplishments of the civil rights movement, it seems particularly important to continue scrutinizing our electoral process to ensure that all Americans are not only given equal access to the ballot, but also an opportunity to uniformly impact who is elected to serve as our representatives. Standardization of voting technologies at

⁶ See Hurt, *supra* note 5. A group of prominent House Democrats, including Rep. John Conyers of Michigan, strongly objected to the counting of Ohio's electoral votes in the 2004 election and encouraged legal challenges. See Amy Fagan, *Kerry Rebuffs Protest of Ohio Electors*, WASHINGTON TIMES, Jan. 5, 2005.

⁷ Following *Bush v. Gore*, one scholar published a self-proclaimed "short Essay" in 2001 noting the "significance of the racial disparities reflected in machine-rejected ballots." Given developments in the case law and political science data regarding these disparities since 2001, this issue deserves greater scrutiny. See Spencer Overton, *Symposium: The Law of Presidential Elections: Issues in the Wake of Florida 2000: A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U.L. REV. 469 (2001).

⁸ 347 U.S. 483 (1954) [hereinafter *Brown I*]; see, e.g., Genna Rae McNeil, *Essay: Before Brown: Reflections On Historical Context and Vision*, 52 AM. U.L. REV. 1431 (2003); Honorable Robert M. Bell, Chief Judge, Ct. of App. of MD, *Speech: Journey To Justice: Fiftieth Anniversary of Brown v. Board of Education*, 34 U. BAL. L. REV. 1 (2004); Ronald S. Sullivan Jr., *Multiple Ironies: Brown at 50*, 47 HOW. L.J. 29 (2003).

⁹ Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. 1973 (2000)); see Karyn L. Bass, Note & Comment, *Are We Really Over the Hill Yet? The Voting Rights Act at Forty Years: Actual and Constructive Disenfranchisement in the Wake of Election 2000 and Bush v. Gore*, 54 DEPAUL L. REV. 111 (2004).

the state-level is central to accomplishing this goal.¹⁰

Given the current partisan political divide in the country,¹¹ the documented closeness of recent elections at all governmental levels,¹² and the recognized impact that a single vote or single jurisdiction's returns can have on our national elections,¹³ the Court should strictly apply "one person, one vote" to the jurisprudence on election machines. Whereas the courts have been willing to scrutinize reapportionment plans to ensure that electoral districts are unexceptionally even,¹⁴ the courts have largely looked the other way when confronted with one of the largest threats to the ideal that every person's vote counts equally: Errors in voting machine technology

¹⁰ According to Election Data Services, "Over the years, several states have moved to establish uniform voting systems. Oklahoma led the way by establishing a uniform optical scan voting system in the early 1990s. Delaware's three counties have used electronic systems since 1996. Hawaii and Rhode Island established uniform optical scan systems in 1998. Georgia established a uniform electronic voting system in 2002. Nevada will establish a uniform electronic voting system in 2004; Maryland, in 2006. Although Maryland's uniform system won't be fully implemented until 2006, all 24 election jurisdictions, including the city of Baltimore, are expected to use some type of electronic system in 2004." "New Study Shows 50 Million Voters Will Use Electronic Voting Systems, 32 Million Still with Punch Cards in 2004," Election Data Services, Press Release, [available at http://www.electiondataservices.com/content/votingequipment.htm](http://www.electiondataservices.com/content/votingequipment.htm).

¹¹ For example, in 2000, the United States had the closest presidential election in the modern history of the Electoral College. On election night, the national news media first declared Vice President Al Gore the winner, only to retract the prediction a few hours later. Eventually, George W. Bush would be declared the winner, but only after five weeks of legal debates, recounts, and political mayhem. The 2000 election was the first time in over 100 years that the candidate who won the Electoral College and the election, was not the candidate that won the popular vote. See Jeffrey Toobin, *TOO CLOSE TO CALL* (2001). The 2000 and 2004 election showed that there is currently no overwhelming mandate for either party's political platform.

¹² See Jason Belmont Conn, *The Partisan Politics of Ex-Felon Disenfranchisement Laws* (2003) (unpublished undergraduate honors thesis, Cornell University), at 58, [available at http://www.sentencingproject.org/pdfs/connfvr.pdf](http://www.sentencingproject.org/pdfs/connfvr.pdf).

¹³ See Tim Jones & Andrew Zajac, *Vote Ordeal for Ohio Begins, Ends in the Dark*, CHICAGO TRIBUNE, C12, Nov. 3, 2004; see also Chris McGann, *Gregoire Sworn In Amid Legal Challenge*, SEATTLE POST-INTELLIGENCER, Jan. 13, 2005, [available at http://seattlepi.nwsourc.com/local/207695_governor13.html](http://seattlepi.nwsourc.com/local/207695_governor13.html) (discussing the closeness of the 2004 Washington State Governor's race).

¹⁴ See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); for a discussion of the court's entrance into the "political thicket" of reapportionment and gerrymandering, see Daniel R. Ortiz, Symposium, *The Law of Democracy: Redistricting: Case Law and Consequences: Got Theory?*, 153 U. PA. L. REV. 459 (2004).

compromising one's vote do not strike evenly across type of voting machine, and the error rates within a state often correlate with race and socioeconomic status.

The Supreme Court hinted in *Bush v. Gore* that it wanted Congress and the state legislatures to address the problems associated with varying voting technology,¹⁵ but it is time for the Supreme Court to hand down a mandate and force each state to use the same voting technology.¹⁶ This article suggests that one legacy and lesson of *Brown v. Board of Education*¹⁷ is that giving the nation's legislatures leeway to rectify serious constitutional inadequacies "with all deliberate speed" is a formula for failure; the court must mandate change.¹⁸ In mandating standardization, the Court will protect "one person, one vote" and ensure voting equality across race.

¹⁵ See *Bush*, 531 U.S. at 104 ("After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting").

¹⁶ The argument in this paper focuses on standardization at the state level, as opposed to national standardization. States have always had the power to regulate elections. Given the individualities of elections in each state, a single type of machine might not work for every state. Because electoral districts are apportioned based on census data and not the number of people voting, a state would not lose any congressional seats because a higher percentage of their population was disenfranchised through machine errors. Furthermore, because we have an Electoral College voting system, and the popular vote is meaningless in presidential elections, disparities in error rate would not impact a state's influence on the presidential election. In other words, many of the "one person, one vote" arguments discussed in this paper would be cured by standardization at the state level, and there would be no extra benefits from nationwide standardization in terms of one's statistical impact on an election. Furthermore, the nation might benefit from varying technologies in different states because there would be an incentive for companies to develop more accurate machinery, thus winning additional state contracts. Ideally, machines will some day have a zero percent error rate. This day is far off, but national standardization might not encourage the development of new technologies. Of course, these arguments all revolve around the practical impact of one's vote and not the abstract value of having one's vote counted, thus some of the arguments in this paper could certainly suggest that nationwide standardization is the only constitutional system.

¹⁷ 347 U.S. 483 (1954).

¹⁸ See Philip Elman, *Colloquy: Response*, 100 HARV. L. REV. 1949 (1987); Michael A. Berch, Symposium, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L.J. 493 (2004).

SYLLABUS

Thus far this article has suggested that the quick resolution of the 2004 presidential election helped unify the nation and did not provide a forum in which the courts could review and clarify the Supreme Court’s controversial and factionalized decision in *Bush v. Gore*.¹⁹ PART I examines the current state of voting technology in the United States and argues that statewide variation in technology is problematic in a democracy. PART II of this article explores, albeit briefly given the large amount of litigation in this area, the Supreme Court’s “one person, one vote” standard that has been used as a template for reviewing election laws and disparate treatment at the ballot box, and argues that using voting machines with different error rates is a violation of this standard. PART III demonstrates that the worst machines in a state are often found in districts with a large proportion of racial minorities and economically disadvantaged areas, suggesting that the racial impact of the variation should elevate the level of scrutiny the use of these machines receives. Although this article is primarily concerned with the impact of *Bush v. Gore*, PART IV briefly examines the possibility of a Voting Rights Act challenge to voting machines. PART V examines some of the key law suits that have been brought since *Bush v. Gore* challenging the use of disparate voting machines. PART VI draws a connection between dicta in the majority opinion in *Bush v. Gore*²⁰ and the famous “all deliberate speed”²¹ order after *Brown v. Board of Education*,²² and suggests that despite the expense and logistical difficulty of standardizing voting machines within a state, the lesson of *Brown* is that when a judicial order is so important that it goes to the core of equal protection values, the Court should not give any

¹⁹ See 531 U.S. 98 (2000).

²⁰ 531 U.S. 98 (2000).

²¹ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (holding that the District Courts should proceed with “with all deliberate speed” in its implementation of *Brown I*) [hereinafter *Brown II*]

²² See 347 U.S. 483 (1954).

leeway to the states to take their time in changing policy. PART VII summarizes the arguments made in this article and concludes by making recommendations to the Court.

PART I. THE PROBLEM: VARIATIONS IN VOTING TECHNOLOGY

In today's elections, voters' ability to impact an election varies depending on the type of voting machine used in their locality.²³ According to Election Data Services, which has monitored election administration for the last twenty years, there were six broad categories of machines used by counties in the United States during the 2004 election: punch card,²⁴ lever, paper ballots, optical scan, electronic, and mixed equipment.²⁵ Political Scientists and legislators have documented significant differences in error rates for each type of machine, but voters do not choose which type of machine they will use to vote.²⁶ The determining factor behind which type of machine is used within a locality is largely a combination of funding, politics, number of voters per polling place, and the standards set by state law.

There are a number of reasons why the intent of a voter entering a voting booth might not be reflected in what is eventually tallied by the election administrator and sent to state officials. Although some of these reasons might be attributed to election fraud by the onsite administrator

²³ For a discussion of the various problems associated with different types of voting machines, see Stewart v. Blackwell, *Amicus Curiae Brief of Electronic Frontier Foundation, The Verified Voting Foundation, and Votersunite! and Citizens' Alliance for Secure Elections*, available at http://www.eff.org/Activism/E-voting/20040805_Ohio_Amicus_Brief.pdf.

²⁴ Kerry might have brought a legal action in Ohio based on the use of punch card balloting had the final vote count been slightly closer. Prof. Dan Tokaji found that: "Overall, there were a total of 94,488 residual votes in Ohio's November 2004 presidential election. Of those, the substantial majority (76,398) were cast using punch card equipment." The total residual votes, even if completely for Kerry, would not have turned Ohio "blue." See Dan Tokaji, *How Did Ohio's Voting Equipment Fare in 2004?*, Feb. 8, 2005, available at <http://moritzlaw.osu.edu/electionlaw/comment0208.html>.

²⁵ "New Study Shows 50 Million Voters Will Use Electronic Voting Systems, 32 Million Still with Punch Cards in 2004," Election Data Services, Press Release, available at <http://www.electiondataservices.com/content/votingequipment.htm>.

²⁶ See Eric A. Fischer, *CRS Report: RL30773: Voting Technologies in the United States: Overview and Issues for Congress*, March 2001.

or poll workers, this article does not seek to address these problems.²⁷ State and federal law already deters, punishes, and seeks to rectify the fraud associated with these types of errors.²⁸ Rather, this article discusses two general categories of voting frustration caused or enhanced by voting technology: (1) errors when the voter votes, and (2) errors caused during the counting process.

First, the type of machine impacts one's ability to overvote, undervote, or make an unintended choice,²⁹ for example:

Lever machines can prevent overvoting through the use of interlocking mechanisms that prevent a voter from pulling a lever for more than one candidate for a given office. Electronic systems can prevent overvoting through an electronic equivalent of such a mechanism. Some marksense systems can reduce overvoting by permitting a ballot to be checked by the tabulator (sometimes called a "smart ballot box") before submission and indicating if there is an overvote; the voter can then be given a new ballot.³⁰

Although there are no machines that absolutely prevent an undervote, since voters are not required to vote for every office on the ballot, some machines indicate the races for which a voter has not selected a candidate, thus providing the voter with an opportunity to correct his "mistake." These machines, often electronic, force the voter to make a conscious decision to

²⁷ For a discussion of voting fraud in recent elections, see Lori Minnite & David Callahan, "Securing the Vote: An Analysis of Election Fraud," available at http://www.demos-usa.org/pubs/EDR_-_Securing_the_Vote.pdf.

²⁸ See *Disputes and questions linger 3 weeks after presidential vote; Election 2004*, THE SEATTLE TIMES, A1, Nov. 25, 2004 (noting that "state officials regulate elections and the Justice Department prosecutes voting-rights violations and election fraud").

²⁹ See Fischer, supra note 26, at CRS-8 ("There are three basic kinds of error that a voter might make: overvote, undervote, and unintended choice. An overvote is a vote for more candidates for a particular office than is permitted, such as voting for two candidates for President, and is usually considered an error. An overvote on a ballot item invalidates the vote for that item. An undervote is a vote for fewer than permitted, such as voting for no candidate for President. An undervote may or may not be an error -- a voter might, on the one hand, have tried to vote for a candidate but was unsuccessful in marking the ballot unambiguously, or might, on the other hand, have chosen not to vote for any candidate. An unintended choice is inadvertently voting for a candidate other than the one intended").

³⁰ See id.

leave a section of the ballot blank.³¹ Unintended choice was a large problem in the 2000 election in Florida; most notably, the infamous “Butterfly Ballot.”³² Although machines generally cannot warn a voter about an unintended choice, since the machine cannot possibly know the voter’s intention, machines that allow for misalignment of ballots may cause more of these errors, and voting technology that allows a voter to review his selections prior to submission would help reduce them. In all these ways, the type of voting technology that is used greatly impacts the accuracy of the manifestation of one’s intention.³³

The second broad category of error caused by a machine is created by the counting mechanism associated with each machine. This category is arguably more problematic since the voter has often left the polling place before her vote is tallied and the error is often attributable to

³¹ It is true, that even if the warn-and-correct technology is part of the machine’s package, it is still subject to human error. In Florida during the 2000 election some election administrators did not understand the function or never turned it on. See Walter Mebane, *The Wrong Man is President! Overvotes in the 2000 Presidential Election in Florida*, PERSPECTIVES ON POLITICS, September 2004.

³² See id.; see also Steven J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got it Wrong in the Butterfly Ballot Case*, 14 STAN. L. & POL’Y REV 203 (2003); Siegel v. LePore, 234 F.3d 1163, 1201 (11th Cir. 2000) (“It was stated in the Palm Beach recount request that the particular configuration of the ballot in that county (the so-called ‘butterfly ballot’) had confused Palm Beach’s voters, producing two bad results: a substantial number of votes were disregarded because more than one choice was punched in the presidential race; and some voters may have inadvertently voted for someone other than their true choice”).

³³ After the 2000 election debacle, I purchased a voting machine that had been used by a Florida polling site that utilized punch-card ballots, the ballots that caused the problems with “hanging chads.” In fact, I found many chads littered around the machine’s packaging. After having watched months of controversy and litigation regarding the standard that should be used to count these ballots, I was surprised to find clear instructions attached to the inside of the machine telling voters that they must fully punch through the card before submitting their ballot. Although there could have been additional safeguards to ensure that voters fully punched their ballots, the voters were not without instruction or warning if they failed to vote properly without leaving “hanging chads.”

a machine/technological failure, not human error.³⁴

Consider an automated assembly line at an American factory. If all of the machines operate perfectly, then a perfect product will emerge at the end of the line. But, as is true of almost anything with an automatic function, there is an error rate. Some miniscule percentage of products will emerge from the assembly line with imperfections. In business, manufacturers factor in this error rate and understand that they will have to take a loss on some number of defective products. In vote counting, failing to count these “defective” votes may significantly impact a close election.

Different tabulation error rates have been associated with each type of machine,³⁵ for example:

In the 2000 elections, 53.4 percent of California voters used punch-card machines, while the remainder used DRE or optical scan technologies. The punch-card machines suffered error rates of 2.2 percent, more than twice that of the other technologies. Thus, for every 10,000 votes cast in a punch-card county, approximately 200 were discarded; in the other counties, fewer than 100 were lost to machine error.³⁶

³⁴ These two categories are largely intended as guideposts as this paper discusses types of errors. It is not clear which category some errors fall into. For example, consider the “hanging chad” in Florida. This system was problematic at the time of voting since the technology failed to allow the voter to make a clear selection and did not warn the voter of potential errors, but it was also problematic during counting since the counting technology did not count many ballots that would have been votes if counted by a human. See Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFFALO L. REV. 393, 393-94 (2002) (“The hanging chad became a running joke, a symbol of everything that was wrong with a process that had been badly bungled and was now running amok, and which was irretrievably corrupt. The skepticism that met the canvassing boards was ferocious. Indeed, to many around the country - whether in favor of or against recounting, whether Democrat or Republican - the pictures of individuals sitting at card tables in gymnasiums trying to decipher punch-card ballots were simply not consistent with their vision of American democracy at work”).

³⁵ See *Residual Votes Attributable to Technology: An Assessment of the Reliability of Existing Voting Equipment* (2001), The Caltech/MIT Voting Technology Project, available at http://www.hss.caltech.edu/~voting/CalTech_MIT_Report_Version2.pdf; Fischer, supra note 26, at CRS-11.

³⁶ Marshall Camp, Note, *Bush v. Gore: Mandate for Electoral Reform*, 58 N.Y.U. ANN. SURV. AM. L. 409, 436 (2002).

Furthermore, a state’s decision to tabulate the votes at the precinct or county level further impacts the number of errors.³⁷ Indeed, given the closeness of today’s elections, “the difference between the numbers of votes cast for the two leading candidates may be less than the error rates in the balloting and vote counting processes and machinery.”³⁸ The wide variation in voting machines forces us to reassess what type of “equality” we want when it comes to the electoral process.

UNSTANDARDIZATION

Currently there are six main types of voting technologies being utilized throughout the United States.³⁹ Each type of machine is associated with a certain error rate, and the error rates vary significantly. Certainly in law, we accept a certain level of error in our proceedings and standards. For example, in criminal cases, our standard of proof is “beyond a reasonable doubt.” This is not absolute certainty, and we recognize that it is not a perfect system.⁴⁰ Indeed, rarely in law do we find ourselves facing absolute certainty about any standard that is applied.⁴¹ However, we hope that our judicial standards are applied equally across race, socioeconomic factors, and jurisdiction.

In the case of voting machines and the error rates the court accepts, there is not standardization. Even across precinct within a locality, there may be very different machines and procedures when one arrives at the polls. Analytically, the very fact that voting machines vary

³⁷ See Brian Kim, *Recent Development: Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 586 (2003); Mebane, *supra* note 31, at 6.

³⁸ Joseph W. Little, *Essay: Election Disputes and the Constitutional Right to Vote*, 13 J. LAW. & PUB. POL’Y 37 (2001).

³⁹ See Table 1, *infra*.

⁴⁰ See, e.g., Linda Greenhouse, *High Court Warns About Test for Reasonable Doubt*, N.Y. TIMES, Mar. 22, 1994, at B8.

⁴¹ See Richard D. Friedman, EVIDENCE, 3rd ed., 39-42 (2004).

significantly across the voting body for a given election seems particularly troubling to our notion of equality and “one person, one vote.” After all, equal access and the ability to impact an election is the very basis of the Supreme Court’s continuous review of election laws and voting procedures through the lens of the 14th Amendment’s equal protection clause.⁴²

STANDING: DEFINING THE INJURY

Thus far, this article has demonstrated that certain voters have a greater likelihood that their vote will not count as a result of the voting machines they use when they arrive at the polls. Because this article lays out a constitutional challenge to the variation in voting machines, and a challenge cannot go forward without establishing standing,⁴³ it is important to more specifically define the injury.⁴⁴ As the Supreme Court has noted:

The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact,” an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not “conjectural” or “hypothetical.” Second, there must be a causal connection between the injury and the conduct complained of, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”⁴⁵

No voter can know for sure whether or not their vote was counted; anonymity remains an

⁴² See Board of Estimate v. Morris, 489 U.S. 688, 693-94 (1989) (noting “[e]lectorate systems should strive to make each citizen’s portion equal”).

⁴³ For discussion of standing in voting rights litigation, see Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court’s View of the Right to Vote*, 4 MICH. J. RACE & L. 389 (1999); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996).

⁴⁴ See Heather K. Gerken, *Understanding The Right To An Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (discussing the tension in the caselaw between “the highly individualistic view of rights developed by the Rehnquist Court and the group-based conception of harm evident in many other areas of the law”).

⁴⁵ Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

essential part of the electoral process. Thus, after an election,⁴⁶ no voter could argue that their individual vote had not been counted as a result of the machine malfunction. But if the standard was proving individual harm to a certainty, almost no vote dilution case could go forward: A voter in a precinct where the pollworkers threw away all but one ballot when the polls closed would have no redress in the courts under this narrow conception of standing. For this reason, defendants in voting cases that challenge standing on the basis that a voter has failed to allege an injury to his own individual rights have not succeeded on this ground:

Because the voting process is anonymous, it is impossible for any one voter to know with more certainty that their intended votes were not counted. If standing in cases like this one required more, then no one would have standing to challenge a system with, for example, a 20% or 30% or 60% residual vote rate, or a policy under which every tenth ballot was systematically discarded instead of counted. Such results would be contrary to both voting rights and standing law. Further, the injury here alleged, is not the State's failure to count any one person's vote, but the higher probability of that vote not being counted as a result of the voting systems used, i.e., vote dilution. That injury is both provable and traceable . . . Vote dilution as "directly related to voting, the most basic of political rights, is sufficiently concrete and specific."⁴⁷

Indeed, the probabilistic injury, which has been demonstrated throughout this PART of the article, is enough to establish standing, as is consistent with court decisions in other areas of the law.⁴⁸

⁴⁶ Some defendants in cases challenging voting mechanisms have even suggested that the case should be dismissed on account of "mootness" because the case was either brought before an injury could be shown or after the injury had occurred and the election could not be undone. These arguments have been rejected. See, e.g., Stewart v. Blackwell, 356 F. Supp. 2d 791 (N.D. Ohio 2004) (refusing to dismiss the case "on the issue of mootness"); Toney v. White, 488 F.2d 310 (5th Cir. 1973) (finding that the claim was properly considered even though the litigation was filed one month after election in question had occurred).

⁴⁷ Black v. McGuffage, 209 F. Supp. 2d 889, 895 (N.D. Ill. 2002).

⁴⁸ Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 61 n.10 (1976) ("Clearly there is no difference for purposes of Art. III standing - personal interest sufficient for concrete adverseness - between a small but certain injury and a harm of a larger magnitude discounted by some probability of its nonoccurrence. If the probability of the more ultimate harm is so small as to make the claim clearly frivolous, the plaintiff can be hastened from the court by summary judgment"); McGuffage, 209 F. Supp. 2d at 895 (citing Bryant v. Yellen, 447 U.S. 352 (1980) and finding that voters had standing to bring a challenge to the use of different voting mechanisms based on a probabilistic injury).

This article repeatedly revisits and refines this description of the injury, but many courts have found the injury, as described thus far, sufficient for the purpose of establishing standing under Article III.⁴⁹ Certainly, standardization of voting machines would remediate this injury. Of course, even with standardization, there would still be a chance a vote would not be counted, since no machine has a 0% error rate. However, the injury asserted here, in the equal protection sense, is really the relative probabilistic chance that one's vote will not count in comparison with other voters in the same state. This is a definable injury with a remedial solution, and because there is a definable injury and a remedial fix, the question that remains is whether the courts can mandate this fix using the Fourteenth Amendment or Voting Rights Act.

PART II. "ONE PERSON, ONE VOTE"

Throughout the last fifty years, the courts have routinely stepped in when fundamental voting rights have been impeded. Election law is largely left up to the states, but according to the Supreme Court:

[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.⁵⁰

The "one person, one vote" standard is repeated today throughout legal scholarship and has

⁴⁹ See, e.g., McGuffage, 209 F. Supp. 2d at 895 ("Plaintiffs have standing to raise the claims asserted"); Stewart, 356 F. Supp. 2d 791 (acknowledging the strength of the defendant's argument, but declining "the invitation to dismiss the case on standing").

⁵⁰ Gray, 372 U.S. at 381.

become a mainstream maxim when it comes to election policy.⁵¹ However, the words “one person, one vote” do not appear in Article I, Section 2 of the Constitution,⁵² the section the Supreme Court has relied upon in formulating its “one person, one vote” standard, and its strictness in application and scope are not always clear. The application of the “one person, one vote” standard has evolved through the case law, and a better understanding of its development, will facilitate this article’s discussion of how a legal challenge to variations in voting machines could fit into the “one person, one vote” jurisprudence.

ENTERING THE “POLITICAL THICKET”

Historically, the federal courts stayed away from issues they perceived as political in nature and were reluctant to review issues related to elections for fear of impeding on local autonomy.⁵³ However, the *laissez faire* period in the Court’s elections law jurisprudence has long passed.⁵⁴ Today, the courts decide many issues related to the election and rarely shy away from reviewing the electoral process.⁵⁵ Using equal protection analysis, the Court has said that States cannot treat voters differently in three respects: (1) Right to cast a vote; (2) Right to an equally-weighted vote; (3) Right to have vote counted.⁵⁶ However, the Court is constantly

⁵¹ When American and Iraqi leaders recently developed election policy for Iraqi elections, many analysts and even Grand Ayatollah Ali Sistani argued that in order for the election to be fair, it must operate on a one person, one vote system. See Robin Wright, *President Hails Election As a Success and a Signal*, WASHINGTON POST, Jan. 31, 2005, at A1. This demonstrates how universally recognized the American “one person, one vote” principle has become.

⁵² U.S. Const. art. I, 2.

⁵³ See Colgrove v. Green, 328 U.S. 549 (1946) (providing a number of justifications for the judiciary staying out of political apportionment questions).

⁵⁴ See, e.g., Bush, 531 U.S. 98.

⁵⁵ See Bush, 531 U.S. 98 (Breyer, J., dissenting) (“When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront”).

⁵⁶ Camp, supra note 36, at 418.

refining and expanding the amorphous “right to vote,”⁵⁷ and “history has seen a continuing expansion of the scope of the right of suffrage in this country.”⁵⁸ Recognizing that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,” the Court seeks to attain greater equality in all aspects of the electoral process.⁵⁹

THE IMPOSSIBILITY OF “ABSOLUTE EQUALITY” IS NOT AN IMPEDIMENT

However, while striving to achieve greater equality in the electoral process, the courts have been reluctant to require “absolute equality” when conducting their equal protection analysis.⁶⁰ In the reapportionment line of equal protection cases, the Supreme Court recognized that despite even the most genuine efforts to create equality between electoral districts, other factors would create some level of inequality. For example, the *Karcher* Court found that “[a]ny standard, including absolute equality, involves a certain artificiality. . . [E]ven the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed.”⁶¹ Applying this reasoning to voting machines, one might conclude that the Court would be willing to allow a certain level of inequality when it comes to error rates, and that we should just accept that there are a number of factors that are uncontrollable, and machine error rate is just one of such factor. However, as the Court recognized in *Karcher*, the distinction between apportionment inequality

⁵⁷ See id.

⁵⁸ Reynolds v. Sims, 377 U.S. 533, 555 (1964).

⁵⁹ Id.

⁶⁰ See Karcher v. Daggett, 462 U.S. 725, 778 (1983) (J. White dissenting) (“by extending *Kirkpatrick* to deviations below even the 1% level, the redistricting plan in every State with more than a single Representative is rendered vulnerable to after-the-fact attack by anyone with a complaint and a calculator”).

⁶¹ Id. at 732.

made by the legislature and imperfections in census data is that the latter “apply equally to any population-based standard we could choose.”⁶²

As one court recently noted:

Neither the federal courts, nor likely anyone, can guarantee to every eligible voter in this country a perfect election with 100% accuracy. The courts can, however, by enforcing the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act of 1965, guarantee the equal treatment of voters who attempt to have their votes counted, their voices heard.⁶³

The error rates made during machine vote counting line up with the apportionment inequality in *Karcher* which the Court found unacceptable, because the errors are tolerated by the state, and do not strike evenly across jurisdiction. The Court recognizes that in all elections there are certain uncontrollable factors that lead to “inequality” it is the controllable ones that do not “apply equally” across a population that must be weeded out through legislative changes and judicial review. Disparate voting technology is one such controllable problem.

HAVING ONE’S VOTE COUNT AS A FUNDAMENTAL RIGHT

“The United States Supreme Court has clearly stated that the right to vote is a fundamental right protected by the Fourteenth Amendment.”⁶⁴ If voting is a fundamental right, then it would seem that having one’s vote count equally is a natural extension of this right, and thus triggers strict scrutiny. Although grounded in the 15th Amendment,⁶⁵ not the 14th Amendment, the Court in *Gray v. Sanders* specifically linked the right to cast a vote with the right to have one’s vote counted:

⁶² Id.

⁶³ McGuffage, 209 F. Supp. 2d at 891.

⁶⁴ Common Cause v. Jones, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001) [hereinafter Common Cause I]; see Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (discussing the “close constitutional scrutiny” for voting restrictions).

⁶⁵ See Gray, 372 U.S. at 376 (“this case . . . does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature”).

The Court has consistently recognized that all qualified voters have a constitutionally protected right to cast their ballots and have them counted at Congressional elections. Every voter's vote is entitled to be counted once. It must be correctly counted and reported. The right to have one's vote counted has the same dignity as the right to put a ballot in a box. It can be protected from the diluting effect of illegal ballots. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have.⁶⁶

This linkage between the casting and counting of a vote is consistent with a long line of court decisions.⁶⁷

Bush v. Gore seriously enhanced the equal protection arguments with regard to vote counting:

First, *Bush* establishes that state action regarding vote-counting is fully subject to the equality principles it perceives inherent in the right to vote. Second, *Bush* expands upon existing doctrine in defining those principles. The opinion finds an equal protection violation in unequal treatment despite the absence of any discrete and articulable voter "classification" (arguably the pith of the Court's voting rights doctrine prior to *Bush*), ignores whether uneven treatment is intentional in assessing whether the Equal Protection Clause is violated, and employs an elevated standard of review in assessing purported justifications for any uneven treatment. The extension of evolutionary equality norms to the context of vote-counting, combined with a heightened standard of inquiry into purported justifications, represents the essential equal protection "rule" of *Bush*.⁶⁸

The fundamental right that must be protected according to *Bush v. Gore* is the right to an equal valuation of one's vote at all stages of the voting process: "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."⁶⁹

⁶⁶ *Id.* at 380.

⁶⁷ See *United States v. Mosley*, 238 U.S. 383, 386 (1915) ("the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box"); *United States v. Classic*, 313 U.S. 299 (1941).

⁶⁸ *Camp*, *supra* note 36, at 417.

⁶⁹ *Bush*, 531 U.S. at 104-105. Note that the use of the term "arbitrariness" seems to suggest that a lower standard of review should be applied. See *Mulroy*, *supra* note 32, at 374.

One of the challenges made in *Bush v. Gore* was whether disparate manual counting methods without uniformity violated the Equal Protection Clause.⁷⁰ Similarly, a challenge to the variation of voting machines would hinge on whether machines with different counting methods without uniformity violate the Equal Protection Clause. Thus if one equates humans counting votes in Florida after the 2000 election with voting machines, the legal challenges look basically identical. Although one might question whether the *Bush* rule “actually applies to the mechanics of vote-counting or whether it is limited to systemic concerns such as methods of election and districting . . . *Bush v. Gore* seems to invite this analogy.”⁷¹ Thus, it would appear from the language in *Bush* that the use of different voting machines may violate the Equal Protection Clause. Whether states can fashion a sufficiently compelling justification for continuing to use such diverse technologies when they have defined different consequences for recording votes is one of the “important questions of Equal Protection and the right to vote that *Bush v. Gore* now opens up.”⁷²

BUSH v. GORE APPLIES TO MACHINES

Some scholars have suggested, quite persuasively, that *Bush v. Gore* applies only to the “expressive harm” caused by the public and poorly managed recount in Florida.⁷³ Arguably, the expressive harm caused by perceptions of illegitimacy due to the widespread publication of stories about faulty machines and the reality that when minorities go to the polls to vote they are more likely to see these faulty machines is just as large as the “expressive harm” discussed in *Bush*. At the time of the holding, it is possible that the Court was less focused on the voting

⁷⁰ See 531 U.S. 98.

⁷¹ Mulroy, *supra* note 32, at 371-72.

⁷² Samuel Issacharoff, Pamela Karlan, & Richard Pildes, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 306-07 (2nd ed., 2002).

⁷³ See Gerken, *supra* note 44, at 411.

machinery than it was on the laughable manual recount process. However, most scholars and courts have argued that *Bush v. Gore* applies to vote counting processes more generally, and that even if it was not intended, the language of *Bush* is applicable generally to voting standards and technologies, not just the specific expressive harm caused by the Florida recounts:

[The Supreme Court] has asserted a new constitutional requirement: to avoid disparate and unfair treatment of voters. And this obligation obviously cannot be limited to the recount process alone. The court condemns the fact that ‘standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county.’ That criticism surely would apply to the variations in voting machines across Florida, and, for that matter, to similar variations in all other states. The court’s new standard may create a more robust constitutional examination of voting practices.⁷⁴

Bush was about vote counting procedures and inequality. The varied use of the *Bush* decision in the last four years demonstrates that there is no general consensus on the applicability of *Bush* to voting machines, but beyond its general limiting language, almost nothing in the opinion suggests that it cannot be extended to vote counting mechanisms generally:⁷⁵

Only Justice Souter writing in dissent advances justifications for the distinction between recounting and balloting that seem, if not persuasive, at least arguable. Souter suggests that local variety in balloting technology is justified by “concerns about cost, the potential value of innovation, and so on,” a claim that echoes the much less explicit reference by the majority to “local expertise.”⁷⁶

Certainly, without any explicit and convincing argument that the language in *Bush* cannot be applied to voting machines, the courts should, and have, broadly interpreted its application:

What is missing from the opinion is an explanation of why the situation in the case is distinctive, and hence to be treated differently from countless apparently similar situations involving equal protection problems. The

⁷⁴ Samuel Issacharoff, “The Court’s Legacy for Voting Rights,” N.Y. TIMES, at A39 (Dec. 14, 2000).

⁷⁵ See Samuel Issacharoff, Pamela Karlan, & Richard Pildes, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 309 (2nd ed., 2002); see also “Subsequent Use of *Bush v. Gore* in the Courts,” *infra*.

⁷⁶ Camp, *supra* note 36, at 441.

effort to cabin the outcome, without a sense of the principle to justify the cabining, gives the opinion an unprincipled cast.⁷⁷

This conclusion will be unpacked further below in PART V.

BUSH'S LIMITING LANGUAGE

In *Bush v. Gore*, the Court limited the precedential value of the decision by noting that “[the Court’s] consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”⁷⁸ The Court reasoned that its decision should be limited because of the “many complexities” of equal protection analysis,⁷⁹ but even if one does not believe that *Bush*’s precedential value is limited, perhaps the Court would be willing to cite its decision in *Bush v. Gore* in the context of voting machines since the challenges to different counting procedures and different counting machines are so similar.⁸⁰ At least one court has already reasoned that the answer is that *Bush v. Gore* can, and should, be cited in this context.⁸¹

Bush stands as more than just a fact-specific result, more than a meaningless judicial coin-toss. Seven of nine Supreme Court Justices

⁷⁷ Cass R. Sunstein, *Symposium, Bush v. Gore: Order Without Law*, 68 U. CHI. L. REV. 737, 765 (2001).

⁷⁸ *Bush*, 531 U.S. at 109; *see* William C. Smith, *Bush vs. Gore: Evermore: Plaintiffs Use High Court Voting Case in Other Lawsuits*, ABA Law Journal, 87 A.B.A.J. 16 (May 2001), [available at http://www.pawalaw.com/assets/aba_journal_article.pdf](http://www.pawalaw.com/assets/aba_journal_article.pdf).

⁷⁹ *Bush*, 531 U.S. at 109; *see* Smith, *supra* note 78 (“the High Court seemed to be expecting a one-hit wonder”).

⁸⁰ *See* Elizabeth Garrett, *Symposium, The Law of Democracy: New Issues In The Law of Democracy: Democracy In The Wake of The California Recall*, 153 U. PA. L. REV. 239, 267 (arguing that “Justice Ruth Bader Ginsburg’s prediction that *Bush v. Gore* was a “one of a kind case” was premature (or perhaps wishful thinking”).

⁸¹ *McGuffage*, 209 F. Supp. 2d at 898 (“Although the [*Bush v. Gore*] Court limited its decision to the then present circumstances, the rationale behind the decision provides much guidance to the situation in this case, which presents, as far as this Court can tell, a matter of first impression in this Circuit and, indeed, this country. That question is whether a state may allow the use of different types of voting equipment with substantially different levels of accuracy, or if such a system violates equal protection”); *see also* *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 895 (9th Cir.) (relying on *Bush v. Gore*), vacated by 344 F.3d 914 (9th Cir. 2003).

concluded on the equal protection holding, and if the Court insists on saying something is so, then it is so. What the majority said, precisely, was explained in a nearly 4,000 word, twelve-page per curiam opinion - an opinion by which it and all other courts ostensibly are now bound in interpreting the Constitution. Such a pronouncement by the United States Supreme Court can not flippantly be ignored. Moreover, widespread public approval of the Bush decision may do more to assure its long-term legitimacy than will the firmness of its doctrinal footing.⁸²

LEVEL OF SCRUTINY: A SEVERE INFRINGEMENT ON THE RIGHT TO VOTE

As is true in any Fourteenth Amendment challenge, the court must determine what level of scrutiny should be applied during review. For example, classifications based on race are subject to strict scrutiny,⁸³ classifications based on sex are subject to intermediate scrutiny,⁸⁴ and those classifications which affect fundamental rights are subject to strict scrutiny.⁸⁵ Although I will consider the impact that race may have on a potential challenge later in this article, in the wake of *Washington v. Davis*, disparate impact alone on racial minorities is not enough to trigger strict scrutiny without intent under the Fourteenth amendment.⁸⁶ Thus, any argument that strict scrutiny should apply would probably have to be grounded in a fundamental rights line of reasoning.

The Court has been somewhat ambiguous as to the level of scrutiny that should apply when examining potential violations of the fundamental right to vote. Certainly, *Bush* has

⁸² Camp, *supra* note 36, at 411 [internal citations omitted].

⁸³ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁸⁴ See *Craig v. Boren*, 429 U.S. 190 (1976).

⁸⁵ See, e.g., *Griswold vs. Connecticut*, 381 U.S. 479 (1965).

⁸⁶ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (finding that “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations); see also *Johnson v. Governor of Florida*, 2005 U.S. App. LEXIS 5945 (11th Cir. 2005) (“Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race”); but see Camp, *supra* note 36, at 425 (“By ignoring the emergence of intent-based review, Bush wipes away another potential objection by clearly implying that intent is not a requirement for an equal protection violation in the vote-counting context”).

confused many constitutional scholars and lower courts that have looked to see what level of scrutiny was applied by the Court. This is discussed further in PART V.⁸⁷

Although *Bush* appears to address the fundamentality of the right to have one's vote counted,⁸⁸ if the Court truly treated its opinion in *Bush* as unprecedential, then under the pre-*Bush* jurisprudence courts could still apply strict scrutiny. In *Burdick*, a 1992 case, the Court outlined the balancing of interests that it considered in determining whether to apply strict scrutiny in the election law context:

Under this standard of weighing the character and magnitude of the asserted injury against the constitutional rights sought to be vindicated, the rigorousness of the court's inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens U.S. Const. amend. I and XIV rights. Thus, when those rights are subjected to "severe" restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the U.S. Const. amend. I and XIV rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions.⁸⁹

This methodology suggests that if the restriction is not "severe" enough, heightened review, or the requirement of a "compelling importance," do not apply.⁹⁰ In the pre-*Bush* jurisprudence a challenge to disparities in voting machines would probably include a discussion of the severity of the harm caused by the variation.⁹¹ However, any notion that the burden on the right to vote is not severe enough to warrant strict scrutiny is strongly rebutted by evidence demonstrating the large disparities that error rates and variation of technology have on individuals and communities

⁸⁷ See "PART V. Subsequent Use of *Bush v. Gore* in the Courts," *infra*.

⁸⁸ See *Bush*, 531 U.S. at 105, 108 (referring to voting as a "fundamental right").

⁸⁹ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

⁹⁰ See *id.*

⁹¹ See *id.*

with less accurate technology.⁹²

FATAL IN THIS CASE: APPLICATION OF STRICT SCRUTINY

Although strict scrutiny does not invalidate all laws,⁹³ absent a showing of a compelling state interest that is narrowly tailored, a law will be deemed unconstitutional.⁹⁴ Unlike earlier voting rights cases where the Court was forced to consider strong arguments from the State with regard to the compelling purpose of a law being challenged, most of the arguments for maintaining dissimilar voting technology are grounded in the practicality of replacing the voting machines. States have made a number of procedural and constitutional arguments against the application of heightened review, based on a lack of standing, and even based on the absence of “invidious intent,” but if the court was at the point of applying strict scrutiny, the laws allowing disparate technologies would almost definitely be struck down.⁹⁵ In the face of a fixable infringement, the Court should apply heightened review and force compliance.⁹⁶

THE COUNTER-ARGUMENTS: COST AND LOCAL AUTONOMY

Even though a fundamental right is implicated, the costs of instituting standardization would be unprecedented in elections administration and cannot be ignored in any considerations of standardization.⁹⁷ With the current budgetary problems facing state governments and the

⁹² See id. (“when those rights are subjected to *severe* restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance”) [emphasis added].

⁹³ See Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (reminding the parties that “strict scrutiny is not strict in theory, but fatal in fact”).

⁹⁴ Johnson v. California, 125 S. Ct. 1141 (2005).

⁹⁵ See McGuffage, 209 F. Supp. 2d at 900 (considering the main arguments that States make in support of upholding their statutes).

⁹⁶ See Dillard v. Baldwin County Board of Education, 686 F.Supp. 1459 (M.D. Ala. 1988) (finding that in the face of a racial dilution constitutional violation “the selection of a plan with seven, rather than five, single-member districts reflects a conservative remedy limited to only those measures necessary to cure the violation”).

⁹⁷ Sunstein, supra note 77, at 765.

growing federal deficit, many political leaders would probably argue that American tax dollars could be spent better elsewhere.⁹⁸ Although this argument might suggest that the courts need to order standardization, since Congress and the legislatures will not, it is also a somewhat convincing justification for a gradual move to better, and more standardized, voting technology; rather than a complete overhaul prior to the next election cycle.⁹⁹ This may ultimately rest on a public policy consideration by the Court, but given that the election is the focal point of American democracy, “replacing voting systems that deprive individuals of the right to vote is clearly in the public interest.”¹⁰⁰

As was described above, election administration has traditionally been left to local autonomy.¹⁰¹ Thus, if Congress or the courts entered the “thicket” of voting mechanisms, one might argue that they had overstepped the powers of the federal government.¹⁰² However, this argument seems extremely unlikely. If there is one lesson from *Bush v. Gore*, it is that the federal courts will not hesitate to get involved in elections and any exit from the “political thicket” would be difficult for the courts at this point.¹⁰³ Certainly, there is no reason to believe the courts would restrain from involvement in a challenge to voting machines, when they have become so deeply involved in the enforcement of equality in elections.¹⁰⁴

⁹⁸ Id.

⁹⁹ See “Part VI. *BushBrown* and Lessons Learned from “All Deliberate Speed,” infra.

¹⁰⁰ Common Cause v. Jones, 213 F. Supp. 2d 1110, 1113 (C.D. Cal. 2002) (finding that the only question was the feasibility of replacing the machines before the next election) [hereinafter Common Cause II].

¹⁰¹ Sunstein, supra note 77, at 766 (considering the implications of *Bush v. Gore* on “longstanding rules of local autonomy”).

¹⁰² See id.

¹⁰³ See Pamela S. Karlan, *Symposium, Federal Courts and Electoral Politics: Exit Strategies in Constitutional Law: Lessons for Getting The Least Dangerous Branch Out of The Political Thicket* 82 B.U.L. REV. 667 (2002).

¹⁰⁴ See “Entering the ‘Political Thicket,’” infra.

In summation, using the “one person, one vote” standard and applying strict scrutiny, the courts should strike down any state law that does not require equal error rates in the voting machines it uses. The disparity in voting machines is altering the likelihood that a vote will be counted, thus violating that voter’s fundamental right to vote without a compelling justification for doing so.¹⁰⁵ This is consistent with other cases implicating a fundamental right,¹⁰⁶ and with previous cases where voting was found to be a fundamental right.¹⁰⁷

At least one court has already suggested, even if strict scrutiny is not the standard, under any standard of review, the use of disparate voting machines would be unconstitutional:

Even if the more lenient standard is ultimately applied by this Court, Plaintiff has alleged facts indicating that the Secretary of State’s permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory.¹⁰⁸

After all, in the face of a blatant inequality, the two most proffered reasons for maintaining the disparity in machines, cost and local autonomy, seem insufficient.

¹⁰⁵ See Bush, 531 U.S. at 105, 108 (referring to voting as a “fundamental right”).

¹⁰⁶ See, e.g., Griswold vs. Connecticut, 381 U.S. 479 (1965).

¹⁰⁷ Reynolds, 377 U.S. at 562 (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized”); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966) (“the political franchise of voting as a fundamental political right, because preservative of all rights”); Anderson v. Celebrezze, 460 U.S. 780 (1983); see also Duke v. Massey, 87 F.3d 1226, 1232 (11th Cir. 1996) (finding that “when a state election law burdens a fundamental constitutional right severely, that law may survive only if it satisfies strict scrutiny”). But see Common Cause I, 213 F. Supp. 2d 1106 (“The Supreme Court, however, has not clearly articulated the level of scrutiny which courts are to give to alleged infringements of the fundamental right to vote”); Burdick, 504 U.S. at 432 (“Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold”).

¹⁰⁸ Common Cause I, 213 F. Supp. 2d at 1109.

PART III. THE PROBLEM REVISITED: WHERE THE WORST MACHINES ARE FOUND AND AN ARGUMENT FOR HEIGHTENED SCRUTINY

Although it remains unclear whether the Court would accept a “mathematical equality”¹⁰⁹ “one person, one vote” or fundamental rights argument as justification for requiring the standardization of voting technology, the addition of a race-based argument would significantly increase the pressure on the Court under the 14th Amendment:¹¹⁰ After all, when a system has a “greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.”¹¹¹ There is significant evidence that the lack of standardized voting technology has a disparate impact on urban and minority communities.¹¹² This PART of the article demonstrates this impact and examines the effect it should have on a legal challenge.¹¹³

¹⁰⁹ See Baker v. Carr, 369 U.S. 186, 258 (1962). But see Reynolds, 377 U.S. at 566 (“We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us).

¹¹⁰ See Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) (searching for evidence that Blacks “had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice”); see also Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whitaker, J., concurring) (finding “that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution”).

¹¹¹ McGuffage, 209 F. Supp. 2d at 899.

¹¹² Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, AMERICAN JOURNAL OF POLITICAL SCIENCE, Vol. 47, No. 1. (Jan. 2003), at 46-60; Special Investigations Division, Committee on Government Reform, *Income and Racial Disparities in the Undercount in the 2000 Presidential Election*, Report for the U.S. House of Representatives, Jul. 2001; see *A Racial Gap in Voided Votes, Precinct Analysis Finds Stark Inequity in Polling Problems*, WASHINGTON POST, Dec. 27, 2000.

¹¹³ It is interesting that efforts to introduce internet voting have met substantial resistance from civil rights activists who question the impact that internet voting will have on different communities, given the differences in access to the internet based on the economic, and thus racial, makeup of particular constituencies. However, these same concerns do not appear in the mainstream press regarding the differences in access to traditional voting technologies. See Kristen E. Larson, *Fulfill Your Civic Duty Over The Internet*, 27 WM. MITCHELL L. REV. 1797, 1814 (2001) (finding that some of the litigation in this area “arose from the idea that poor and minority voters do not have equal access to Internet voting systems, because they do not have computers or Internet access at home or work”).

As new voting technology reaches the market, wealthy jurisdictions pride themselves on providing it to their voters;¹¹⁴ but the poorer neighborhoods end up with the old, and less accurate, voting machines that the wealthier neighborhoods pass down. As one journalist aptly noted, “votes don’t spoil because they’re left out of the fridge. It comes down to the machines. Just as poor people get the crap schools and crap hospitals, they get the crap voting machines.”¹¹⁵ Because the worst machines and technologies are employed in poorer jurisdictions and inner cities where voting technology upgrades are not a high budgetary priority, the lack of an upgrade hinders, in a statistically significant way, the effectiveness of the urban, and thus minority, vote.¹¹⁶ Classes of voters who should be “similarly situated” are not being treated similarly.¹¹⁷

CONGRESSIONAL FINDINGS

After the 2000 election, Rep. Roybal-Allard requested the first report at the national level to investigate race and income’s connection to the number of undercounted and uncounted votes in the 2000 election.¹¹⁸ The investigation examined forty congressional districts in twenty states; twenty of the districts had high poverty rates and a large minority population, twenty had low

¹¹⁴ See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435-36 (suggesting that the ratifiers of the Fourteenth Amendment “did believe that caste or class legislation was forbidden; but they did not fully unpack the category” and that they thought it was a “small subset of legislation, involving illegitimate grounds for differential treatment”).

¹¹⁵ See Greg Palast, *An Election Spoiled Rotten*, BALTIMORE CHRONICLE & SENTINEL, Nov. 1, 2004, available at <http://baltimorechronicle.com/110204Palast.shtml>.

¹¹⁶ Special Investigations Division, Committee on Government Reform, *Income and Racial Disparities in the Undercount in the 2000 Presidential Election*, Report for the U.S. House of Representatives, Jul. 2001; see *A Racial Gap in Voided Votes; Precinct Analysis Finds Stark Inequity in Polling Problems*, WASHINGTON POST, Dec. 27, 2000.

¹¹⁷ See generally, Sunstein, *supra* note 114 (discussing the development of the equal protection doctrine to mean that “similarly situated” Americans must be treated “similarly” under the Fourteenth Amendment).

¹¹⁸ *Income and Racial Disparities in the Undercount in the 2000 Presidential Election*, Minority Staff, Spec. Investigations Division, Comm. on Gov’t Reform, U.S. H.R., prepared for Rep. Roybal-Allard, Jul. 9, 2001, at 2 [hereinafter Roybal-Allard Report].

poverty rates and a small minority population.¹¹⁹ The report made three significant findings: (1) Voters in low-income, high-minority districts were significantly more likely to have their votes discarded than voters in affluent, low-minority districts; (2) Better voting technology significantly reduced uncounted votes in low-income, high minority districts; and (3) Better voting technology significantly narrowed the disparity in uncounted votes between low-income, high-minority districts and affluent, low-minority districts.¹²⁰ Essentially, voters in low-income, high-minority districts had worse machines and these machines caused more minority votes to be discarded.¹²¹

The findings of the report are consistent with other studies of elections.¹²² In a recent study of the racial gap in voting errors, Tomz and Van Houweling found that “the black-white gap in voided ballots depends crucially on the voting equipment that people use.”¹²³ They found that the use of DRE and lever machines cut the gap in the voting errors by a factor of ten.¹²⁴ Although they found that the machines were not the only factor in differences in error rates, citing African-Americans’ propensity to intentionally undervote at a higher rate than Whites,

¹¹⁹ In order to create the sample of congressional districts, “information was obtained from the Congressional Research Service” and the districts were selected based on the 1990 census data. Districts were not selected if their boundaries had changed prior to the 2000 election. See Roybal-Allard Report.

¹²⁰ Roybal-Allard Report at i.

¹²¹ See Roybal-Allard Report.

¹²² See Mebane, supra note 31, at 3 (finding “[i]t is well established that throughout Florida blacks and Democrats tended to be disproportionately affected by voting problems”); see Stephen Knack & Martha Kropf, *Invalidated Ballots in the 1996 Presidential Election: A County-Level Analysis*, Working Paper, University of Maryland & University of Missouri, Kansas City (May 2001), available at <http://unofficial.umkc.edu/kropfm/invalidv.pdf>, at 31 (finding “counties with more African Americans and Hispanics have higher rates of invalidated ballots” and discussing similar election studies); see also McGuffage, 209 F. Supp. 2d at 899 (finding the variation is “impacting African American and Hispanic groups disproportionately”).

¹²³ Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, AMERICAN JOURNAL OF POLITICAL SCIENCE, Vol. 47, No. 1. (Jan. 2003), at 58.

¹²⁴ Id.

they found that when machines were standardized, the gap was between 0.3 and 0.7 percentage points,¹²⁵ suggesting that standardization would basically eliminate any racial differences. Thus, standardization would be one the easiest fixes to a serious state-supported racial disparity in American history.

FUNDAMENTAL RIGHT + RACE = HEIGHTENED STRICT SCRUTINY?

The studies are enlightening and arguably unsurprising, but the current widespread consensus in political science that voting machines dilute the minority vote suggests a breach of the Fourteenth and Fifteenth Amendments. The racial impact of a system that uses a variety of machines is now certainly foreseeable.¹²⁶ Indeed, although it is unlikely that intent on the part of the legislatures could be shown,¹²⁷ the combination of a fundamental right and race suggests that an extremely high level of scrutiny should be applied.

Although the Court has historically separated its analysis of classifications and fundamental rights as two separate strands of equal protection,¹²⁸ when a fundamental right is implicated, a classification in effect, not necessarily intent could be enough to further heighten

¹²⁵ Id.

¹²⁶ Cf. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 511 n.17 (1979) (“To add the word ‘foreseeable’ does not change the analysis, because the police department in Davis would be hard pressed to say that the disparate impact of the examination was unforeseeable”).

¹²⁷ Cf. Washington v. Davis, 426 U.S. 229, 242 (1976) (finding that “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations).

¹²⁸ See Mobile v. Bolden, 446 U.S. 55 (1980).

the level of review.¹²⁹ The use of the levels of scrutiny is formulaic, but in application, the levels are extremely abstract and open to interpretation as to how they should be applied. When considering race and voting laws the Court should be immediately suspect of any laws that have a large disparate impact on a “discrete and insular” group’s ability to access the political process.¹³⁰

PART IV. A POTENTIAL CHALLENGE UNDER THE VOTING RIGHTS ACT

Although this analysis of the constitutionality of the variation of voting machines focuses on the implications of *Bush v. Gore*, and *Bush* does not focus on the Voting Rights Act,¹³¹ any analysis of the intersection of elections and race would be incomplete without a discussion of the Voting Rights Act’s impact on a constitutional challenge.¹³² After all, the Voting Rights Act was enacted to “ensure that minority voters no longer will have to raise their voices against judicial tyranny,”¹³³ and was the most important legislation passed by Congress during the Civil Rights

¹²⁹ See *id.* at 114 (Marshall, J. dissent) (arguing that “[u]nder the Equal Protection Clause, if a classification impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny is required, regardless of whether the infringement was intentional. As I will explain, our cases recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution. Proof of discriminatory purpose is, therefore, not required to support a claim of vote dilution. The plurality’s erroneous conclusion to the contrary is the result of a failure to recognize the central distinction between *White v. Regester* and *Washington v. Davis*: the former involved an infringement of a constitutionally protected right, while the latter dealt with a claim of racially discriminatory distribution of an interest to which no citizen has a constitutional entitlement”).

¹³⁰ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

¹³¹ See *Bush*, 531 U.S. at 103 (establishing up front that “[t]he petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses”).

¹³² See Samuel Issacharoff, Pamela Karlan, & Richard Pildes, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 306-07 (2nd ed., 2002) (asking “[i]s there also a role for courts in policing voting technologies, both before and after *Bush v. Gore*?”).

¹³³ James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of The Voting Rights Act*, 7 WM. & MARY BILL OF RTS. J. 443, 611 (1999).

Era. President Lyndon Baines Johnson called the Act “one of the most monumental laws in the entire history of American freedom.”¹³⁴ Despite lofty descriptions of the Voting Rights Act, the Act’s applicability to the unintentional disparate impact on protected minorities created by a statewide variation of voting machines is not unequivocal, and may reach beyond the scope of Congress’ enforcement powers.¹³⁵ In this PART, I argue that the Voting Rights Act should be “interpreted in a manner that provides the broadest possible scope” and should be used by the courts to standardize voting machines.¹³⁶

SCOPE OF CONGRESS’ ENFORCEMENT POWERS UNDER THE RECONSTRUCTION AMENDMENTS

The scope of Congress’ enforcement powers under the Fourteenth and Fifteenth amendments has been heavily litigated over the last decade with respect to the Voting Rights Act.¹³⁷ “[T]he Supreme Court has instructed . . . that statutes should not be construed to alter the constitutional balance between the states and the federal government unless Congress makes its intent to do so unmistakably clear.”¹³⁸ Indeed, because there is no explicit standard for determining whether an application of the Voting Rights Act would extend beyond the scope of

¹³⁴ Ken Gormley, *Essay, Racial Mind-Games and Reapportionment: When can Race be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 793 (2002).

¹³⁵ Essentially, the applicability of the Voting Rights Act to this type of challenge could be framed by asking the question: If Congress passed a bill to standardize voting technology at the state level, or even at the federal level, would this action be beyond the scope of Congress’ powers? (Thanks to Professor Katz for pointing out this structuring of the constitutional question.)

¹³⁶ See Chisom v. Roemer, 501 U.S. 380, 403 (1991).

¹³⁷ See Muntaqim v. Coombe, 366 F.3d 102, 104 (2d Cir. 2004) (finding that a number of recent Supreme Court decisions have looked at the scope of the enforcement powers under the Reconstruction Amendments); see also South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) (“States have broad powers to determine the conditions under which the right of suffrage may be exercised. The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right”).

¹³⁸ See Muntaqim, 366 F.3d at 104.

congressional power:

Congress does not enforce a constitutional right by changing what the right is. It has been given the power to enforce, not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the provisions of [the Fourteenth Amendment]. While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.¹³⁹

Because the scope of the Voting Rights Act is often ambiguous, the Circuits have been divided in some important areas of election law.¹⁴⁰

Congress originally enacted the Voting Rights Act, under its enforcement powers, to eliminate discriminatory practices based on race.¹⁴¹ As the Supreme Court stated in *South Carolina v. Katzenbach*:¹⁴²

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by “appropriate”

¹³⁹ *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

¹⁴⁰ See *Johnson v. Governor of Florida*, 2005 U.S. App. LEXIS 5945 (finding that whether Section 2 of the Voting Rights Act applies to felon disenfranchisement provisions has divided the Circuits); e.g., cf., *Muntaqim*, 366 F.3d 102 (deciding that Section 2 did not reach New York’s felon disenfranchisement statute) with *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (deciding that Section 2 applied to Washington’s felon disenfranchisement law).

¹⁴¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); see *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct”).

¹⁴² *South Carolina v. Katzenbach*, 383 U.S. 301.

measures the constitutional prohibition against racial discrimination in voting.¹⁴³

But because many states continued to enact discriminatory practices under the auspices of neutrality with respect to race, “[i]n 1982, Congress amended § 2 of the Voting Rights Act to make clear that certain practices and procedures that result in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge.”¹⁴⁴ Thus, the 1982 amendments relieved “plaintiffs of the burden of proving discriminatory intent,”¹⁴⁵ even though a plurality of the Supreme Court had held in *City of Mobile v. Bolden* that the Voting Rights Act and Fifteenth Amendment had an intent/purpose requirement.¹⁴⁶ However, even as amended, “Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect,”¹⁴⁷ and just because intent does not need to be shown, does not mean that disparate impact alone is always enough.¹⁴⁸

Today, it certainly appears that a “state practice could survive Equal Protection Clause scrutiny but fail Section 2 Voting Rights Act scrutiny.”¹⁴⁹ Thus, it is an attractive platform for challenging the use of different machines, should the equal protection argument fail.

A VOTING RIGHTS ACT CHALLENGE: WHY NOW?

¹⁴³ Id. at 308.

¹⁴⁴ Chisom, 501 U.S. at 384; see also 42 USCS § 1973 (2005).

¹⁴⁵ Chisom, 501 U.S. at 403.

¹⁴⁶ See Bolden, 446 U.S. 55.

¹⁴⁷ Johnson v. Governor of Florida, 2005 U.S. App. LEXIS 5945; see Chisom, 501 U.S. at 383 (1991) (“certain practices and procedures that result in the denial or abridgment of the right to vote are forbidden”).

¹⁴⁸ The vote dilution cases that used the *Zimmer* factors were not looking for outright intent, but they were looking for something more than just a disparate impact when looking at the *Zimmer* factors and the totality of the circumstances. This suggests that the Court’s history indicates there might be a need to show something more than disparate impact. See Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

¹⁴⁹ Johnson v. Governor of Florida, 2005 U.S. App. LEXIS 5945.

As we approach the twenty-fifth anniversary of the 1982 amendments to the Voting Rights Act, the most obvious question raised by the possibility of a challenge to disparate voting machines is: Why now? The courts have been particularly skeptical as to whether a challenge falls outside the scope of congressional intent when the challenged practice was in place at the time of the Voting Rights Act's enactment, no specific mention of the practice was made at the time of enactment, and no challenge was brought immediately after the Act was passed;¹⁵⁰ after all, the use of different voting machines has been commonplace over the last century, if this practice was in violation of the Voting Rights Act, then why have not more challenges been brought? There are two answers to this question: First, the Voting Rights Act *has* been used before to challenge problems with voting technology, but the cases have usually garnered little attention and been focused on a small geographic area.¹⁵¹ Second, many of the problems now associated with voting technology have come to light since the 2000 election and with advancements in technology.¹⁵² Of course, these two answers are not unconnected; ironically, challenges to voting technology under the Voting Rights Act could not succeed on a large-scale until the technology and modeling were in place to properly review and understand the

¹⁵⁰ Id. (discussing the role that the Voting Rights Act should play in the court's review of felon disenfranchisement laws in Florida, since construing the Act to invalidate felon disenfranchisement laws might be "clearly contrary to Congressional intent").

¹⁵¹ See, e.g., Roberts v. Wamser, 883 F.2d 617 (8th Cir. 1989).

¹⁵² See Samuel Issacharoff, Pamela Karlan, & Richard Pildes, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 311 (2nd ed., 2002); see also "The Problem: Variations In Voting Technology," infra.

deficiencies of the system.¹⁵³ Now that the courts can “identify and remedy the burdens,” a challenge under the Voting Rights Act is more likely to succeed.¹⁵⁴

ANATOMY OF A CHALLENGE TO DISPARATE VOTING TECHNOLOGY UNDER THE VOTING RIGHTS ACT

“The essence of a claim under § 2 of the Voting Rights Act of 1965, 42 U.S.C.S. § 1973, is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”¹⁵⁵ When scrutinizing a voting practice, courts generally look to the “non-exclusive list of factors relevant to a claim under § 2” which were codified in the Voting Rights Act:

[T]he history of official voting-related discrimination in the political subdivision; the extent to which voting is racially polarized; the extent to which the political subdivision has used electoral practices that tend to enhance the opportunity for discrimination; whether minorities have been excluded from any candidate slating process; the extent to which minority groups bear the effects of discrimination in such areas as education, employment and health; the extent to which political campaigns have been characterized by overt or subtle racial appeals; the extent to which minority members have been elected to public office; whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of minority groups; whether the policy underlying the use of such voting qualification, prerequisite to voting, or standard, practice or

¹⁵³ Even though this conclusion may seem ironic, it is not unlike what has occurred in recent gerrymandering cases. As technology for finding inequality has emerged, the standards have gotten more stringent. See Vieth, 541 U.S. at 327 (Kennedy, J., concurring) (“Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards”).

¹⁵⁴ See Vieth, 541 U.S. at 327 (Kennedy, J., concurring).

¹⁵⁵ Thornburg v. Gingles, 478 U.S. 30, 47 (1986); see Roberts v. Wamser, 679 F. Supp. 1513, 1528 (E.D. Mo. 1987) (looking at whether the punch card voting system denies blacks an equal opportunity for participation in St. Louis).

procedure is tenuous.”¹⁵⁶

A plaintiff must show that there is a disparate impact on minority voters, but a disparate impact alone, is not enough. In order to challenge a voting practice under “Section 2[,] plaintiffs must show a causal connection between the challenged voting practice and the prohibited discriminatory result.”¹⁵⁷ In cases where the “causal connection” is glaring, the court does not need to pay as much attention to the codified factors, as is consistent with Congressional intent that “intent” not be a factor in Voting Rights Act inquiries:¹⁵⁸ The Senate Judiciary Committee Report “emphasized . . . that this list of factors was not a mandatory seven-pronged test; the list was only meant as a guide to illustrate some of the variables that should be considered by the court. As stated in the Report, ‘there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.’”¹⁵⁹ Thus, any suggestion that a challenge to disparate voting mechanisms does not fit perfectly into the Act’s “factors” is rebutted by the strong “causal connection” that can be shown using the vast amount of data on the disparate impact.

As this article described above, political scientists have demonstrated that minorities are disproportionately affected by the disparities in voting machines, and that in any given election minority voters are having their votes discounted at a much higher rate than white voters.¹⁶⁰

¹⁵⁶ Ortiz v. City of Philadelphia Office of the City Comm’rs Voter Registration Div., 28 F.3d 306, 309-10 (3d Cir. 1994); see Gingles, 478 U.S. at 45 (“this list of typical factors is neither comprehensive nor exclusive”).

¹⁵⁷ Ortiz, 28 F.3d at 312; see Farrakhan, 359 F.3d at 1117-19 (citing *Ortiz* and discussing the different Circuits’ treatment of this “causal connection” inquiry).

¹⁵⁸ See Farrakhan, 359 F.3d 1116.

¹⁵⁹ Gomez v. Watsonville, 863 F.2d 1407, 1412 (9th Cir. 1988).

¹⁶⁰ Perhaps one of the advantages of bringing this claim under the Equal Protection Clause, as opposed to the Voting Rights Act, is that in more homogeneous states a claim under the Voting Rights Act might fail. Without a *racial* disparate impact, the Voting Rights Act claim would likely be dismissed on the pleadings.

Thus a finding of disparate impact is certainly supported;¹⁶¹ and there is a “causal connection” between the use of disparate voting technologies and the disproportionate discounting of minority votes. Minority voters have their votes discounted disproportionately because they disproportionately reside in precincts using the worst machinery;¹⁶² were the machines standardized, the disparate impact would disappear. Although no one could blame the machines for the geographical polarization that has led to the disparate impact in discounted votes; geographic homogeneity is the result of centuries of discriminatory social, economic, governmental, private, and political practices that are deeply connected with the history of racial bigotry in the United States. Because the use of different machinery by geography “interacts with social and historical conditions to cause an inequality,” the practice violates the Voting Rights Act.¹⁶³

PART V. SUBSEQUENT USE OF *BUSH V. GORE* IN THE COURTS

In the four years that have past since *Bush v. Gore*,¹⁶⁴ a number of suits challenging voting practices and the adequacy of voting machines have been filed in state and federal

¹⁶¹ See “The Problem Revisited: Where the Worst Machines are Found and an Argument for Heightened Scrutiny,” *infra*.

¹⁶² There is also some very undeveloped political and social science data suggesting that certain machines even disproportionately impact Black voters when there is standardization because Blacks tend to undervote/overvote by accident at a slightly greater rate than Whites when the machinery is held constant. Although this paper has not sought to answer what possible changes should be made beyond standardization, and standardization would help remedy the overall discrepancy greatly, this area of research’s applicability to a judicial challenge should be explored further in the future. See Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, AMERICAN JOURNAL OF POLITICAL SCIENCE, Vol. 47, No. 1. (Jan. 2003).

¹⁶³ *Gingles*, 478 U.S. at 47.

¹⁶⁴ 531 U.S. 98 (2000).

courts.¹⁶⁵ Although many of these suits are quoted in this article and the arguments presented in this article reflect their contributions to the caselaw, a few of these decisions are more explicitly discussed in this section. As is true of many of the Court’s decisions based on elections and voting rights law, the lower courts have struggled to apply *Bush v. Gore*’s amorphous language,¹⁶⁶ but as this PART demonstrates, their reliance on *Bush* in examining voting mechanisms is significant in itself.

BLACK v. MCGUFFAGE

In *Black v. McGuffage*, the District Court for the Northern District of Ohio, scrutinized a motion to dismiss in a suit seeking an injunction that challenged the use of punch card ballots and the variation of voting systems at the county level, and examined “whether a state may allow the use of different types of voting equipment with substantially different levels of accuracy, or if such a system violates equal protection.”¹⁶⁷ The plaintiffs, who were “Latino and African American voters in counties throughout Illinois,” alleged that minorities were “disproportionately forced to use--and are disproportionately injured when they use--the challenged voting systems.”¹⁶⁸ Although the litigation did not ultimately play out in the courts because the suit was settled after the motion to dismiss failed, the District Court’s discussion of the motion is revealing.¹⁶⁹

¹⁶⁵ Stewart, 356 F. Supp. 2d 791 (finding that “[i]n the wake of the 2000 presidential election, several suits, including the present action, were filed challenging the use of punch card ballots as violative of § 2 of the Voting Rights Act, the Equal Protection Clause, and/or the Due Process Clause. Additionally, voters filed suits leading up to the 2004 presidential election challenging the adequacy of the voting systems that replaced the punch card ballots).

¹⁶⁶ See, e.g., Vieth, 541 U.S. at 279 (“Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate”).

¹⁶⁷ McGuffage, 209 F. Supp. 2d at 898.

¹⁶⁸ Id. at 891.

¹⁶⁹ Stewart, 356 F. Supp. 2d at n.8 (noting that *Black v. McGuffage* “was subsequently settled by the parties”).

The Court denied the Defendants' motion with respect to the claims under the Voting Rights Act, Equal Protection Clause, and the Due Process Clause, and only dismissed the count based on the privileges and immunities clause.¹⁷⁰ Quoting *Bush v. Gore*, and analogizing to the human ballot counting in Florida, the court found:

That people in different counties have significantly different probabilities of having their votes counted, solely because of the nature of the system used in their jurisdiction is the heart of the problem. Whether the counter is a human being looking for hanging chads in a recount, or a machine trying to read ballots in a first count, the lack of a uniform standard of voting results in voters being treated arbitrarily in the likelihood of their votes being counted. The State, through the selection and allowance of voting systems with greatly varying accuracy rates “value[s] one person’s vote over that of another,” even if it does not know the faces of those people whose votes get valued less. This system does not afford the “equal dignity owed to each voter.” When the allegedly arbitrary system also results in a greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.¹⁷¹

Not only did the court treat *Bush v. Gore* as precedential, but it also found that the harm in *Bush* went beyond an expressive harm, and directly implicated the use of varying voting technology that created different probabilities that one’s vote would be counted. The court explicitly found that by demonstrating a “disproportionate risk of having their votes not counted” the plaintiffs had established an injury and thus had standing.¹⁷² Furthermore, the court found that because this probabilistic injury impacted traditionally protected groups, the injury was constitutionally problematic. Thus, *Black v. McGuffage* strongly suggests that *Bush* can be used to challenge the use of disparate voting technology under a number of constitutional provisions.

COMMON CAUSE v. JONES

In *Common Cause v. Jones*, the court denied the state’s motion for judgment on the

¹⁷⁰ *McGuffage*, 209 F. Supp. 2d at 889.

¹⁷¹ *Id.* at 899 (quoting *Bush v. Gore*, 431 U.S. at 104-05).

¹⁷² *Id.* at 894 (“Probabilistic injury is enough injury in fact to confer standing in the undemanding U.S. Const. art. III sense”).

pleadings after the plaintiffs challenged California’s use of the less reliable punch card ballots under the Fourteenth Amendment and Voting Rights Act.¹⁷³ In looking at the Fourteenth Amendment challenge in *Jones*, the court looked at previous decisions by the Supreme Court to try and find the correct level of scrutiny that should be applied. Ignoring the Court’s instruction that *Bush* should not hold precedential weight, the District Court found significance in the Supreme Court’s citation of *Harper* in *Bush* because that case adopted a “standard of at least intermediate, and possible, strict scrutiny.”¹⁷⁴ In looking at *Bush* the court was unsure which level of scrutiny the Court had applied and found “that perhaps the Court was using a heightened standard of scrutiny but also was finding the Florida recounts to be arbitrary and discriminatory.”¹⁷⁵ Thus, based partially on *Bush* the court found that the plaintiffs “alleged facts indicating that the Secretary of State’s permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory.”¹⁷⁶ The Fourteenth Amendment challenge was allowed to move forward.

With regard to the Voting Rights Act challenge, the state argued that because the claim did not fit the *Gingles* factors, it should be denied.¹⁷⁷ However, the court rejected this argument, finding that the *Gingles* factors apply to “apply to redistricting and vote dilution cases,” and that a challenge based on the disparate impact of voting machines is more analogous to a voting

¹⁷³ 213 F. Supp. 2d 1106 (C.D. Cal. 2002).

¹⁷⁴ Common Cause I, 213 F. Supp. 2d at 1109; see Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966).

¹⁷⁵ Common Cause I, 213 F. Supp. 2d at 1109.

¹⁷⁶ Id.

¹⁷⁷ Id. at 1110 (“the three part test articulated in *Thornburg v. Gingles*: 1) the minority group is sufficiently large and geographically compact to constitute a majority in single-member district; 2) the minority group is politically cohesive; and 3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate”).

qualifications challenge and thus the test outlined in *Gingles* does not apply.¹⁷⁸ The court was convinced that arguments should proceed with regard to the Voting Rights Act and Fourteenth Amendment claims.

Unfortunately, “[t]he issues in this case were subsequently rendered moot because the Secretary decertified punch card ballots” for use in elections occurring after March 2004.¹⁷⁹ However, due to the campaign to recall Governor Gray Davis in the summer of 2003, the battle over California’s voting mechanisms was anything but moot.¹⁸⁰

SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT v. SHELLEY

In *Southwest Voter Registration Education Project v. Shelley*, the Ninth Circuit, sitting en banc, would not allow a preliminary injunction based on the California’s use of different voting mechanisms in the upcoming gubernatorial recall election of 2003.¹⁸¹ A circuit panel, relying heavily on *Bush* had previously found that the election should be postponed because the “choice between holding a hurried, constitutionally infirm election and one held a short time later that assures voters that the rudimentary requirements of equal treatment and fundamental fairness are satisfied is clear.”¹⁸² The plaintiffs based their challenge on the equal protection clause and the Voting Rights Act, and a circuit panel noted that they were likely to succeed on the “merits of their equal protection claims.”¹⁸³

The Ninth Circuit quoted *Bush* and held that because the question in *Bush* did not implicate “whether local entities, in the exercise of their expertise, may develop different

¹⁷⁸ Id.

¹⁷⁹ Stewart, 356 F. Supp. 2d at n.10.

¹⁸⁰ See Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003).

¹⁸¹ Id.

¹⁸² Id. at 912.

¹⁸³ Id. at 907.

systems for implementing elections” an injunction was not appropriate because the plaintiffs had not shown that there was a high likelihood of success that their challenge would ultimately succeed.¹⁸⁴ After all, in determining whether to impose an injunction, the standard of review requires that the court speculate as to the likelihood that the plaintiffs will ultimately succeed in their action.¹⁸⁵ However, the Ninth Circuit *did not* say that there was not a constitutional violation,¹⁸⁶ or that machinery was not implicated in *Bush* just “that plaintiffs will suffer no hardship that outweighs the stake of the State of California and its citizens in having this election go forward as planned and as required by the California Constitution.”¹⁸⁷ In other words, in the face of potential competing constitutional interests, the Ninth Circuit erred on the side of allowing the election to proceed.¹⁸⁸ The decision certainly did not foreclose future challenges to the use of disparate voting technologies; in fact, the court hints that if the evidence of disparate impact had been further developed at the time of litigation, a Voting Rights Act claim might

¹⁸⁴ *Id.* at 918.

¹⁸⁵ *Id.* at 917-18 (finding that “[a] preliminary injunction is appropriate where plaintiffs demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in their favor. The district court must also consider whether the public interest favors issuance of the injunction. This alternative test for injunctive relief has also been formulated as follows: a plaintiff is required to establish (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiffs if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiffs, and (4) advancement of the public interest (in certain cases). This analysis creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor”).

¹⁸⁶ *Id.* at 918 (finding “[t]here is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election. The decision to enjoin an impending election is so serious that the United States Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation” and citing *Ely v. Klahr*, 403 U.S. 108, 113, 115 (1971); *Whitcomb*, 396 U.S. 1055; *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (per curiam)).

¹⁸⁷ *Id.* at 920.

¹⁸⁸ *Id.* at 918 (holding that “[i]f the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election’s proceeding on the announced date”).

have succeeded,¹⁸⁹ and that *Bush* leaves open the question of whether an equal protection challenge to the use of the machines would succeed.¹⁹⁰

WEBER v. SHELLEY

In another case in the Ninth Circuit, *Weber v. Shelley*,¹⁹¹ the plaintiff argued that a “lack of a voter-verified paper trail in the Sequoia Voting Systems AVC Edge Touchscreen Voting System that [Riverside] county installed violate[d] her rights to equal protection and due process” because that system was more prone to fraud.¹⁹² In rejecting the plaintiff’s argument the Ninth Circuit applied a low level of scrutiny because their use was nondiscriminatory and had only a minor impact on the right to vote. Quoting *Burdick*, the court found:

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the Fourteenth Amendment that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights. Under this standard, the rigorousness of the court’s inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens Fourteenth Amendment rights. Thus, has been recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.¹⁹³

Weber can be distinguished from the type of challenge recommended in this article in two ways: First, no racial disparate impact was shown. The analysis in this article has suggested that

¹⁸⁹ *Id.* at 919 (“There is significant dispute in the record, however, as to the degree and significance of the disparity. Thus, although plaintiffs have shown a possibility of success on the merits, we cannot say that at this stage they have shown a strong likelihood”).

¹⁹⁰ *Id.* at 918.

¹⁹¹ *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003).

¹⁹² *Id.* at 1103.

¹⁹³ *Id.* at 1106.

when race is implicated the standard of review should be heightened and the protections under the Voting Rights Act can be triggered. Second, *Weber* was a challenge based on the possibility of fraud, not on the possibility that a vote would not be counted. As was discussed above, there are already laws in place to deal with and deter fraud, thus the justification for standardization in this case was much weaker than the race-based challenge developed in this article.

STEWART v. BLACKWELL

In *Stewart v. Blackwell*, the District Court for the Northern District of Ohio considered a challenge that was more comparable to the one suggested in this article.¹⁹⁴ A group of plaintiffs, which included African-American voters, challenged the use of punch card voting and “central-count” optical scanning devices under the Due Process Clause, Equal Protection Clause and the Voting Rights Act.¹⁹⁵ After reviewing the post-*Buskcaselaw*, the court determined that rational basis review should be applied, and that the “primary thrust of this litigation is an attempt to federalize elections by judicial rule or fiat via the invitation to this Court to declare a certain voting technology unconstitutional and then fashion a remedy. This Court declines the invitation.”¹⁹⁶ Indeed, in the *Blackwell* decision the court “declines the invitation” for some extremely foolish reasons and the decision reads like a long excuse.

First, the court denied the Voting Rights Act claim because the plaintiffs only asserted a “vote denial” claim and neglected to assert a “vote dilution” claim.¹⁹⁷ While implying that the vote dilution claim might have succeeded, the court dismisses any potential for success under the

¹⁹⁴ *Stewart*, 356 F. Supp. 2d 791.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (finding “[t]here are two separate and distinct theories under which a plaintiff can assert a claim under the Act, vote denial and vote dilution” and citing *Holder v. Hall*, 512 U.S. 874 (1994)).

Voting Rights Act because the plaintiffs failed to call their challenge a “vote denial” claim.¹⁹⁸ The court quickly notes that there certainly is no vote denial because minorities have not been denied access to the polls.¹⁹⁹ This seems like an excuse so that the court did not have to consider what was obviously meant to be a vote dilution claim.

Second, the court finds that the “operation of different voting systems by different counties within the same state does not amount to a violation of the Equal Protection Clause.”²⁰⁰ In making this finding, the court cites *Bush v. Gore*, but cites Justice Souter’s *dissenting* opinion, not the majority.²⁰¹ It seems strange that the court would rely so heavily on the dissenting opinion of a case that was not even supposed to have precedential value.

Finally, in assessing where race fits into the challenge, the court considered a variety of conflicting social science studies and concluded that “the highest frequency in Ohio of residual voting bears a direct relationship to economic and educational factors,” not race.²⁰² However, the court fails to recognize that even though race did not match up perfectly with the numbers on residual votes, the strong correlation between race and economic/educational, suggests that race is implicated by the studies. Racial inequality, facilitated by economic/educational inequality, is exactly the type of social and historical inequality that the Voting Rights Act was meant to address. The court selected the study that would make it easiest to decline the invitation and then applied an extremely narrow interpretation of the Voting Rights Act.²⁰³

¹⁹⁸ See id.

¹⁹⁹ Id.

²⁰⁰ See id.

²⁰¹ Id. (citing *Bush* 531 U.S. at 134 (Souter, J., dissenting)).

²⁰² Id.

²⁰³ Cf. Chisom, 501 U.S. at 403 (finding Voting Rights Act should be “interpreted in a manner that provides the broadest possible scope”).

CONCLUSIONS DRAWN FROM LITIGATION AFTER *BUSH v. GORE*

This small survey of the cases that have most closely considered the arguments presented in this article provides little guidance as to how the Supreme Court would come out were it to examine the constitutionality of the variation in voting technology.²⁰⁴ Because these types of cases are politically motivated and are either settled or dismissed without an opportunity for appeal prior to the certification of the next election, they have not been litigated to their fullest potential.²⁰⁵ However, there is one very significant common thread throughout these cases: Each of these cases cites and relies heavily on *Bush v. Gore* and each court believes that *Bush* applies to voting machines in some fashion. Even if this survey of cases does not convincingly support an interpretation of *Bush* in favor of standardization, it certainly suggests that the Supreme Court needs to revisit its confusing analysis in *Bush* because any prior expectation that the lower courts will not look for meaning in its language, has been shattered at this point. Any desire that the language of *Bush v. Gore* be limited to the 2000 election or any specific type of voting rights challenge seems to have been overridden by the large amount of litigation in the aftermath of *Bush v. Gore* in all areas of election law. As the Dean of Stanford Law, Kathleen Sullivan, stated “[*Bush v. Gore* was] an invitation to lawyers across the country to bring an avalanche of lawsuits claiming that [counting] people’s votes differently and with different rates of error in different counties violates the equal protection clause.”²⁰⁶ Many scholars believe that the lasting legacy of *Bush v. Gore* will be its “reinvigoration” of voting rights law:

The lasting significance of *Bush v. Gore* is likely to be the reinvigoration of the line of cases from the 1960’s that deemed voting a fundamental right. The court’s language has now opened the door for constitutional challenges

²⁰⁴ See Smith, supra note 78 (detailing some of the initial challenges to voting machines immediately after the 2000 election that arose out of *Bush v. Gore*).

²⁰⁵ See Garrett, supra note 80, at 265 (discussing the use of lawsuits as “political weapons”).

²⁰⁶ Smith, supra note 78.

of flawed election methods. The spotlight on Florida revealed just how infirm the operations of elections are. The legacy of this case could be a substantial jolt of justice into the voting arena.²⁰⁷

PART VI. *BUSH, BROWN* AND LESSONS LEARNED FROM “ALL DELIBERATE SPEED”

PART VI presents two significant parallels between *Brown v. Board of Education* and *Bush v. Gore* that are not explored in the literature discussing these two landmark decisions.²⁰⁸ First, in both cases, the Court was forced to review two separate systems that seemed facially equal with regard to the broad purposes of the systems, getting an education and placing a vote, when in reality the impact of the systems seriously infringed upon the ends of that purpose. Second, in each case, the Court recognized state action as unconstitutional, but provided weak language that created little impetus for change. These two parallels are considered here because the Court has an opportunity to learn from its mistakes in *Brown*, in remedying the constitutional problems associated with voting technology presented in this article. Although this article does not attempt to rehash the long and complicated history of school desegregation/integration,²⁰⁹ the lessons of *Brown* and school desegregation should not be ignored, lest the judicial system repeat its mistakes.

BACKGROUND ON *BROWN V. BOARD OF EDUCATION*

In 1954, the Court handed down what scholars consider the most important civil rights

²⁰⁷ Samuel Issacharoff, “The Court’s Legacy for Voting Rights,” N.Y. TIMES, at A39 (Dec. 14, 2000).

²⁰⁸ In making the comparisons between voting rights and education, it is worth noting that some courts have been reluctant to “extend the education line of cases to other areas,” especially when there is specific precedent in the area of law. See Johnson v. Governor of Florida, 2005 U.S. App. LEXIS 5945 (discussing the 11th Circuit’s reluctance to extend the standards in the education cases to felon disenfranchisement laws since “there is specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement”).

²⁰⁹ For this type of discussion, see James L. Hunt, *Brown v. Board of Education After Fifty Years: Context and Synopsis*, 52 MERCER L. REV. 549 (2001); Karl A. Cole-Frieman, *A Retrospective of Brown v. Board of Education: The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation*, 6 KAN. J.L. & PUB. POL’Y 23 (1996).

decision in American history,²¹⁰ *Brown v. Board of Education*.²¹¹ *Brown* decided a collection of challenges to school segregation based on race. Relying on strong social science data, the Court found that although the schools had similar buildings, curricula, qualifications, and teacher salaries, the doctrine of “separate, but equal” had no place in the public school system:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.²¹²

The Court would eventually extend its reasoning in *Brown* to other areas of segregation and the unanimous decision in *Brown* would change the nation.

SEPARATE BUT UNEQUAL

Although not exactly state sanctioned segregation of the kind that existed in the public schools before *Brown*, the variation in voting technology today is similar. Recognizing that neighborhoods in America today are still extremely segregated, a parallel could be made between the school system of the first half of the 20th century and voting machines today.

Looking at the broad entitlement implicated in *Brown*, the states argued that there was an equal right to receiving an education. Furthermore, they were able to demonstrate that if the doctrine of “separate, but equal” manifested itself in the educational system correctly, the tangible outcome of receiving a quality public school education would result. Similarly, in the case of voting, all voting technology provides an opportunity to cast one’s vote in the broadest

²¹⁰ See Christopher P. Banks, *Symposium Article: The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 440 (2003) (finding that *Brown* is “arguably [the Court’s] most important civil rights ruling”).

²¹¹ 347 U.S. 483 (1954).

²¹² *Id.* at 494.

sense. One can cast a vote no matter what machine is used, and if the machinery works perfectly there is really no difference between machines. However, the problem is that separate is inherently unequal, because the chance of failure, whether in an education system or voting machine, is not equal once there is a separation. This is the takeaway from *Brown*.

Unlike school segregation cases, where the Court had to look to social science data in order to find qualities “incapable of objective measurement,” that were being provided unequally by the segregated schools,²¹³ in the case of voting machines, social science has provided conclusive evidence that machines are creating inequality in voting. On tangible factors alone, inequality can be demonstrated. Combining this with the large body of literature demonstrating the somewhat intangible affect of minority vote dilution on political influence, it is easy to see how the current system of voting machines is inherently unequal.

LESSONS FROM “ALL DELIBERATE SPEED”

In *Brown*, the Court overruled the “separate, but equal” doctrine²¹⁴ which had buttressed segregated schools throughout the United States, and without providing a decree for immediate desegregation, left it to the lower courts and state government to implement the process.²¹⁵ However, the Southern states did little to implement the Court’s changes, the courts refused to strengthen the decision without further guidance from the Supreme Court, and ultimately

²¹³ Id. at 493.

²¹⁴ See Plessy v. Ferguson, 163 U.S. 537 (1896) (announcing the “separate but equal” doctrine).

²¹⁵ Brown I, 347 U.S. at 495 (“Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment”).

“stagnation resulted.”²¹⁶ As a result, *Brown* returned to the Supreme Court in 1955 for the Court to decide how its first decision should be implemented. Faced with unwilling state governments and a divided nation, the Court wrote in *Brown II* that the States, through the enforcement of the District Courts, must desegregate with “all deliberate speed.”²¹⁷

A few years later, in *Cooper v. Aaron*,²¹⁸ after the Governor and the legislature of Arkansas defied the Supreme Court’s decision in *Brown I*, the Court affirmed its authority, and forced Arkansas’ schools to desegregate. However, the decision in *Cooper* and the subsequent history of school desegregation are a testament to the failure of the “all deliberate speed” “order” from the Court. Indeed, ten years after *Brown I*, “few schools were even marginally integrated.”²¹⁹ It was not until *Green v. County School Board*,²²⁰ that the Court actually said that its decision in *Brown* required integration and had “teeth,” and it took two more decisions in 1969 and 1970, *Alexander v. Holmes County Board of Education*²²¹ and *Carter v. West Feliciana Parish*,²²² to make it clear to the States that the Court meant what it said when it came to desegregation and integration.²²³

Today, the *Brown II* “all deliberate speed” order is considered one of the greatest failures of the Court during the civil rights era: “Both at the time of the decision and in subsequent

²¹⁶ Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968-1974*, 32 AKRON L. REV. 471, 471 (1999) (finding that “[s]outhern opposition to desegregation, combined with a lack of direction from the Supreme Court, had left the lower federal courts unwilling, or unable, to demand rapid action. Stagnation resulted”).

²¹⁷ See *Brown II*, 349 U.S. at 301.

²¹⁸ *Cooper v. Aaron*, 358 U.S. 1 (1958).

²¹⁹ Zelden, *supra* note 216, at 471.

²²⁰ 391 U.S. 430 (1968).

²²¹ 396 U.S. 19 (1969).

²²² 396 U.S. 290 (1970).

²²³ Zelden, *supra* note 216, at 486.

appraisals, *Brown II* was criticized for delegating too much authority to the district courts and relying unduly on state and local authorities.”²²⁴ In the face of a constitutional violation, the Court bowed to State governments that did not want to desegregate, and failed to create a timeframe that would counter the “massive resistance” to desegregation around the country.²²⁵ After all, if segregation was unconstitutional, it did not follow that the Court would allow it to continue for any time period. The “all deliberate speed” order diminished the seriousness of the constitutional violation and allowed the state governments leeway in their remedial efforts.

The Court must have known that its “all deliberate speed” order would not force immediate state action. Politically, given the public opinion of desegregation at the time, without a strong order from the Court, state officials were savvy (and potentially motivated by animus) in their decision to delay desegregation as long as possible.²²⁶ Additionally, given the large cost of desegregating, busing students, and revising the entire educational system of a state, the officials were constrained by considerations of practicality.

The lesson that can be taken away from the Court’s experiences with desegregation is that in the face of a constitutional violation with racial implications, the Court must provide language with “bite” to counteract the strong political, practical, and structural obstacles to change. It is not enough for the Court to recognize a law or policy that is constitutionally problematic; in order to seriously catalyze change, the language of the Court must be decisive and guiding.

²²⁴ Judith A. Hagley, *Massive Resistance: The Rhetoric and the Reality*, 27 N.M.L. REV. 167, 182 (1997).

²²⁵ *Id.*

²²⁶ *Id.* at 186 (finding that politicians were unwilling to support desegregation and whites formed groups in the South to actively oppose the process).

“LIKELY . . . WILL EXAMINE WAYS”²²⁷

This is a lesson the Court did not heed in its decision in *Bush v. Gore*.²²⁸ In *Bush* the Court identified the variation in voting machines and said that “[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”²²⁹ There is a strong parallel that can be made between this language and the “all deliberate speed” order in *Brown*. Both orders provide an ambiguous timeline for the States to cure a constitutional violation.

In *Bush*, the Court indicated, but did not hold, that the use of disparate voting machines is unconstitutional, and the Court did not immediately force the states to standardize.²³⁰ The Court’s decision argued that:

The right to vote is protected in more than the initial allocation of the franchise to choose electors for the President of the United States. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.²³¹

As described above, almost any reading of this language suggests that voting machines with disparate error rates are unconstitutional. By counting a vote on a machine that has a high error rate in comparison to other machines in the state, a state dilutes the value of that person’s vote, thus contradicting the language of this passage. But the Court did not state outright that the States needed to standardize their technology, rather it said the States “will . . . likely” examine

²²⁷ *Bush*, 531 U.S. at 104 (2000).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See “PART I. The Problem: Variations in Voting Technology,” *supra*.

²³¹ *Bush*, 531 U.S. at 105.

this issue.

Most likely, the Court was surprised by the vast amount of political science data that was presented to them throughout the arguments and briefs in *Bush v. Gore* on the variation of voting machines and its impact on elections. Because much of the statistical studies of voting machines would be close to impossible without computers and a wide network for sharing data across states, the nascent research in the area of voting machines became more prominent in the months leading up to the 2000 election, and certainly immediately following the election. Thus, the Court may not have considered voting technology as a potential equal protection violation prior to its decision in *Bush v. Gore*. In *Bush* had the Court held outright that the use of varying voting machines was unconstitutional, the already forming specter of illegitimacy over the presidency in 2000 might have been too much for the country to handle. The entire election system in every state would be invalid, and nationwide challenges under the new doctrine, might have forced another election. Like the Court did almost fifty years earlier in *Brown*, the Court chose the solidarity of a divided nation, and the practicalities of widespread change, over a constitutional mandate that would have been difficult to implement immediately.

Just as the decision in *Brown*, without a firm mandate, was a “shot over the bow” to the states to begin the desegregation process, the language implicating the voting machines in *Bush* indicated to the States that they needed to thoroughly examine their voting machines. Just as the change after *Brown* was mired in state politics, funding issues, and left an impacted class without a substantial political influence with nowhere to turn but back to the Courts, changes to voting technology in the states have been slow and the states, burdened with large deficits, have

struggled to meet the standards recommended to them and those of HAVA.²³² If *Brown* is an indicator, the Court will likely be forced to revisit the issues discussed in this article soon, and in the face of a constitutional violation, the Court should not tell the States to standardize machines with “all deliberate speed,” rather it must provide an ultimatum, mandating change prior to the next election.²³³

PART VII. CONCLUSION

John Hart Ely wrote, “[u]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.”²³⁴ As technology advances, new voting technologies will be utilized in American elections. Although these new technologies provide for greater accuracy, faster voting, and quicker results, as long as voting machinery is not standardized across a given State, some voters will be left behind. There is significant evidence today that the voters being left behind are disproportionately minorities in socio-economically disadvantaged areas. When the right to vote is infringed, and especially when that infringement has racial implications, the courts must step in to protect the equal protection rights of those affected. Under the Equal Protection Clause, “we have seen the eradication of numerical malapportionment, the enfranchisement of minority

²³² Camp, supra note 36, at 443 (finding that “many states have failed to undertake ballot reform efforts, and . . . some have done so in an incomplete fashion”); see Dan Tokaji, *What Voting Equipment Will Ohio’s 10 Largest Counties Be Using?*, available at http://moritzlaw.osu.edu/electionlaw/equipment_machines03.html (“When the polls open on November 2, 2004, most Ohio voters will find the same voting equipment that they used four years ago”).

²³³ See Camp, supra note 36, at 443 (arguing that “the question of whether Bush itself mandates reform will remain significant”).

²³⁴ John Hart Ely, *DEMOCRACY AND DISTRUST* 117 (1980). Even though we do not necessarily want the Court getting involved in political issues, “[t]he party that controls the process has no incentive to change it,” and sometimes it is important for the Courts to step in. Vieth, 541 U.S. at 327 (Breyer, J., dissenting).

voters, and the erosion of discriminatory electoral systems.”²³⁵ But just because our electoral processes have improved and become more inclusive over the last fifty years, does not mean that we cannot do better. Because the closeness of the 2000 election and subsequent studies of voting technology have “brought into sharp focus a common, if heretofore unnoticed, phenomenon,”²³⁶ the Court has an opportunity to shape the law and institute change using its equal protection jurisprudence. As we learned from *Brown*, in the face of a constitutional violation, the Court must step in and not sit back and wait for the legislatures to act. No matter what the cost, it is important that we commit the funds necessary to protect the democratic ideals that we purport to advance. If Congress and the legislatures will not, the Court must.

²³⁵ Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 U. ILL. L. REV. 683, 686 (1995).

²³⁶ Bush, 531 U.S. at 103.

TABLE 1: UNITED STATES VOTING TECHNOLOGIES²³⁷

EQUIPMENT	DESCRIPTION
Paper Ballots	Candidates' names are printed next to boxes which voters mark, on large ballot forms that are counted manually. Because counting by hand is time intensive, these remain in use mostly in small counties with few contested offices.
Lever Machines	Each candidate name is assigned to a lever on a rectangular array of levers on the face of the machines. The voter pulls down selected levers to indicate choices. Interlocks in the machines prevent overvoting.
Punch Card	Information about the ballot choices is provided in a booklet attached to a mechanical holder and centered over a punch card, which is inserted by the voter. To cast a vote, a stylus or other punching device provided is used to punch holes at the appropriate locations on the card, forcing out the inside of a pre-scored area in the shape of a rectangle.
DataVote	In this variation on punch-card ballots, a stapler-like tool creates holes on the card with sufficient force that pre-scoring of ballot cards is unnecessary. Unlike standard punch card systems, information on candidates and ballot questions is printed directly on the DataVote card, so it is easier for voters to ascertain after completing their ballot whether they voted as intended.
Optical Scanning ²³⁸	Large ballots similar to those of paper ballot systems are used, allowing information about candidates to be printed directly on the ballot. Voters mark their choices using a pen or pencil. Ballots are counted by a machine that uses light or infra-red as a sensor to discern which oval or rectangle the voter marked from a set of choices. Some precinct-based scanning machines are programmed to allow voters to check their ballots for overvotes.
Electronic Systems (DRE)	With electronic voting, voter choices directly enter electronic storage, using touch screens, push buttons or keyboards. Machines are typically programmed to prevent overvoting. The most common models are "full faced," showing all contests at once, like lever machines, and a flashing red light alerts voters to the contests in which they have not yet voted.

²³⁷ Stephen Knack & Martha Kropf, *Invalidated Ballots in the 1996 Presidential Election: A County-Level Analysis*, Working Paper, University of Maryland & University of Missouri, Kansas City (May 2001), at 8, available at <http://unofficial.umkc.edu/kropfm/invalidv.pdf>.

²³⁸ A great deal of literature has discussed the differences between optical scan machines that tabulate at the precinct-level and those that tabulate at a central location. See, e.g., Mebane, supra note 31, at 8.

TABLE 2: RELATIVE STRENGTHS AND WEAKNESSES OF VOTING TECHNOLOGIES²³⁹

TYPE OF MACHINE	POTENTIAL FOR ACCIDENTAL OVERVOTE	POTENTIAL FOR ACCIDENTAL UNDERVOTE	COST OF CORRECTING A MISTAKE
Punch Card	High	High	High
Central Optical Scan	Medium	Medium	Medium
Precinct Optical Scan	Low/Medium	Low/Medium	Medium
Level	Low	Medium	Low
DRE	Low	Low	Low

²³⁹ Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, AMERICAN JOURNAL OF POLITICAL SCIENCE, Vol. 47, No. 1. (Jan. 2003), at 48.