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EQUA L PROTECTION, THE CONSCIENTIOUS JUDGE, AN D THE 2000 PRESIDENTIAL ELECTION

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In Bush v. Gore,1 the Supreme Court effectively resolved the 2000 presidential election by stopping the recount in Florida.2 The Court relied on the Equal Protection Clause in support of this result.3 Seven of the nine Justices concluded that county-by-county variations in vote-counting procedures raised equal protection concerns.4 Only five, however, supported an immediate cessation of counting on the theory that there was insufficient time to conduct the recount in a constitutionally acceptable fashion.5 For all practical purposes, then, Bush v. Gore was a 5-4 ruling.

For the chattering and scribbling class, this decision has taken on a Rashomon-like air: those who favored the election of Texas Governor George W. Bush generally praised the ruling, whereas those who preferred Vice President Al Gore denounced it.6 Some of the critics accused the Court’s five-member majority of acting in an unprincipled,

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1. 531 U.S. 98 (2000). For the sake of clarity, this decision hereinafter will be referred to as Bush II.
2. Id. at 110-11 (per curiam).
3. Id. at 103. The per curiam opinion was apparently written by Justices O'Connor and Kennedy, who did not subscribe to any of the other opinions. Justices Scalia and Thomas joined Chief Justice Rehnquist's concurrence. Id. at 111 (Rehnquist, C.J., concurring). Justices Ginsburg and Breyer joined Justice Stevens's dissent. Id. at 123 (Stevens, J., dissenting). Justice Souter's dissent was joined in full by Justice Breyer and in part by Justices Stevens and Ginsburg. Id. at 129 (Souter, J., dissenting).
4. See id. at 111 (per curiam). In addition to the drafters of the per curiam opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, agreed that the vote-counting procedures raised equal protection concerns. See id. at 111 (Rehnquist, C.J., concurring). However, these Justices went on to conclude that the Florida Supreme Court's recount order violated Article II, Section 1 of the Constitution by interfering with the state legislature's authority to determine the method for selecting presidential electors. Id. at 115. This Article will not directly address the Article II argument except to the extent that it affects the discussion of equal protection.
5. Id. at 111 (per curiam). Justices Souter and Breyer also agreed that the case posed equal protection concerns. Id. at 134 (Souter, J., dissenting); id. at 145-46 (Breyer, J., dissenting).
6. Id. at 110-11 (per curiam). Justices Souter and Breyer thought that there was sufficient time to conduct an acceptable recount. Id. at 134-35 (Souter, J., dissenting); id. at 146 (Breyer, J., dissenting).
even corrupt, fashion to deliver the presidency to their preferred candidate. Even commentators who favored the result found the majority’s equal protection theory less than entirely convincing.

The attack has run along the following lines. First, the majority’s equal protection analysis was novel: never before had the Court suggested that variations in vote-counting procedures raised constitutional concerns. Second, it was far from clear that the variations that did exist were based on invidious factors, such as a desire to disadvantage supporters of one candidate or to disenfranchise voters of a particular race or ethnic group, that are typically required as a predicate for finding an equal protection violation. Third, the majority’s novel and expansive approach in *Bush v. Gore* was surprising in light of the generally restrictive approach to equal protection that these particular Justices have taken in other cases. Fourth, the weakness of this theory is suggested by the Court’s refusal even to entertain arguments on equal protection in *Bush v. Palm Beach County Canvassing*


9. See *Bush II*, 531 U.S. at 125 (Stevens, J., dissenting) ("[W]e have never before called into question the substantive standard by which a State determines that a vote has been legally cast."); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 Cal. L. Rev. 1721, 1727 (2001) (arguing that the Court’s equal protection rationale "creates entirely new law" because it has never before implied that vague vote-counting standards violate the Equal Protection Clause).

10. See *Posner*, supra note 7, at 128-29 (arguing that the Court’s reliance on the equal protection argument is not persuasive because differences in voting procedures has not traditionally been actionable as a denial of equal protection); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L.J. 1407, 1427 (2001) (stating that the Court did not claim that invidious factors entered the recount process); Epstein, supra note 8, at 16–17 (finding that “no one can identify the determinate class of individuals who benefit from or are burdened by the choice of this or that standard for counting ballots”).

Board, the earlier phase of the Florida vote-counting litigation, and by the lack of priority given to the argument by Bush's lawyers in their written submissions in Bush v. Gore. Fifth, while professing profound concern over variations in vote-counting standards, the majority appeared completely indifferent to the substantial county-by-county differences in voting technology that had a much larger impact on the election than did disparities in counting standards between counties that used the same voting methods. Sixth, the remedy ordered by the majority—an immediate halt to the count instead of a remand for

13. In Bush I, the Court granted review only on two questions:
[W]hether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause or 3 U.S.C. § 5, and whether the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, § 1, cl. 2, of the United States Constitution.
14. Bush's brief on the merits devoted slightly more than 5 of its 50 pages to equal protection. See Brief for Petitioners at 40–45, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), LEXIS, 2000 U.S. Briefs 949. By way of comparison, that brief devoted 22 pages to Article II and related arguments. Id. at 19–40. Indeed, in the Florida courts, Bush's lawyers only reluctantly raised the equal protection issue and then almost "as an afterthought." Klarman, supra note 9, at 1750; see also Gillman, supra note 6, at 186-87.
15. See Bush II, 531 U.S. 98, 126 n.4 (2000) (Stevens, J., dissenting) ("The percentage of nonvotes in this election in counties using a punch-card system was 3.92%; in contrast, the rate of error under more modern optical-scan systems was only 1.43."); id. at 147 (Breyer, J., dissenting) (describing the inequity that results from different counties employing different voting systems); Posner, supra note 7, at 128 (stating that different counties often use different voting equipment, ballots, instructions, and procedures, which understandably results in a different rate of error); Balkin, supra note 10, at 1427–28 (contending that the Supreme Court's decision is puzzling because it focuses on states creating uniform manual recount procedures rather than "uniform technologies for counting votes"); Samuel Issacharoff, Political Judgments, in The Vote: Bush, Gore, and the Supreme Court, supra note 8, at 55, 70 (arguing that "the disparity in the standards for counting contested ballots, pales before other disparities in access to a meaningful vote, most notably the well-documented failure of voting machines used in one part, but not in another, of many states, Florida included"); Karlan, supra note 11, at 90 (stating that the Court acknowledged the need for a uniform standard with respect to the manual recount, but it failed to address the problems that stemmed from Florida's use of unequal voting technologies throughout the state); Klarman, supra note 9, at 1729 ("One principal objective of the court-ordered manual recount in Florida was the amelioration of inequalities that resulted from the use of disparate voting technologies in different counties.").

Several studies have documented disparities in the error rates of different kinds of voting technology. In particular, punch-card voting systems, which were used in many of the Florida counties that were the subject of dispute in Bush v. Gore, are more likely than others to fail to record votes accurately. See, e.g., CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS—WHAT COULD BE 20-22 (2001); U.S. GENERAL ACCOUNTING OFFICE, ELECTIONS: STATISTICAL ANALYSIS OF FACTORS THAT AFFECTED UNCOUNTED VOTES IN THE 2000 PRESIDENTIAL ELECTION 7-9 (2001) [hereinafter GAO REPORT]; see also Martin
further tabulation using appropriate standards—appeared strikingly inconsistent with a genuine concern for equal protection. Finally, language in the majority opinion purporting to limit the ruling's precedential value implied to some observers that the decision was, as Justice Roberts put it in an earlier election case to which we shall return, "good for this day and train only."

This Article seeks to transcend the debate over the correctness and legitimacy of the per curiam opinion that spoke for the five-member majority in *Bush v. Gore*. For better or worse, that decision is on the books. The opinion's reasoning must stand or fall on its merits, not on the motivations of the Justices who wrote or subscribed to it.

16. See *Bush II*, 531 U.S. at 135 (Souter, J., dissenting) (stating that there was no justification for denying Florida the right to count the disputed ballots); id. at 146–47 (Breyer, J., dissenting) (arguing that there was no justification for halting the recount, and by doing so, the majority "harms the very fairness interests the Court is attempting to protect"); see also id. at 126–27 (Stevens, J., dissenting) (stating the appropriate decision would have been to remand the case, and noting that a desire for speed is not a sufficient reason to deny constitutional equal protection guarantees); id. at 143–44 (Ginsburg, J., dissenting) (arguing that the Court's decision to halt the recount was based on its own judgments about the feasibility of a recount, rather than on the opinions of people closer to the process). Commentators of diverse views shared this concern. See, e.g., Balkin, supra note 10, at 1429–31; McConnell, supra note 8, at 117–20; Strauss, supra note 11, at 187–89.

17. See *Bush II*, 531 U.S. at 109 (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

18. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). See, e.g., *Dershowitz*, supra note 7, at 81–84 (noting that the Court clearly desired to limit the precedential value of the decision because if they did not do so, every close election would stand the chance of being invalidated); *Gilman*, supra note 6, at 162–63 ("The fact that the majority made it a point to say that its discussion on key points may only apply in this special case was more evidence that the commitment to those principles was political rather than principled."); Issacharoff, supra note 15, at 70 (stating that it is especially difficult to grasp the scope of the majority's new equal protection right because the Court limited its ruling in a way that exposes that right "as a cynical vessel used to engage in result-oriented judging by decree"); Strauss, supra note 11, at 198–99 (pointing out that the Court went out of its way to narrow its holding to the facts of *Bush v. Gore* not because the majority was unconcerned with principle, but rather because they questioned the motives of the Florida Supreme Court).

Indeed, some critics have seized on this fact as evidence of the majority's partisan motivations and maintained that those Justices ruled as they did only because the decision benefited Bush; had the situation been reversed, they would not have issued a decision favorable to Gore. See *Gilman*, supra note 6, at 188–90; Balkin, supra note 10, at 1429–35; Klarman, supra note 9, at 1725; cf. Posner, supra note 7, at 180 (rejecting the accusation of blatant partisanship but conceding that ideology might have made the majority Justices more sympathetic to Governor Bush's arguments than they otherwise would have been).

19. By way of disclosure, I was one of the many supposed experts who told reporters that the Court should not involve itself in the Florida dispute. After the Justices granted review in *Bush I*, 531 U.S. 70 (2000) (per curiam), I expressed the "hope that the Court will
Accordingly, this Article considers whether a conscientious judge, reasoning in good faith, could have reached the same conclusion as did the *Bush v. Gore* majority. It answers that question tentatively in the affirmative: there is a respectable argument for the result, but reasonable people could legitimately disagree with every aspect of the majority's analysis.

The discussion proceeds as follows. Parts I and II provide necessary background, summarizing the Court's reasoning and examining some of the cases from which the majority constructed its equal protection theory. Part III addresses the narrowness of the result, focusing on the seemingly ironic fact that the Court vindicated its theory by ending the Florida count instead of requiring a properly conducted tabulation. This section considers both the conventional wisdom that the history of voting rights has been one of consistent expansion and the more general issue of how to remedy an equal protection violation. Part IV assesses the contention that, whatever the defects of the majority's reasoning, the result can be defended as a form of "rough justice" in the face of an imminent constitutional crisis.

I. **Equal Protection in *Bush v. Gore***

Before turning to the majority's equal protection analysis, it is helpful to review how *Bush v. Gore* reached the Supreme Court. Due to the closeness of the Florida vote, an automatic recount was conducted as required by the Florida election code. Vice President Gore sought manual recounts in three counties pursuant to the statutory procedure for filing a protest. Secretary of State Katherine Harris ruled that those counties were required to file their returns within seven days of the election, but the Florida Supreme Court unanimously held that she had abused her discretion and extended the fill-
ing deadline an additional twelve days, until November 26. The local recounts continued, although Miami-Dade County never completed its tabulation. Secretary Harris certified Bush as the winner in Florida shortly after the extended deadline passed. Gore then filed a contest action in state court to challenge Harris's certification of the result.

Meanwhile, the United States Supreme Court, at Bush's behest, granted review of the Florida Supreme Court's extension of the deadline. The order granting certiorari explicitly declined to consider Bush's equal protection arguments. On December 4, three days after oral argument, the Court vacated the Florida ruling and remanded for clarification of the basis for that decision. The unanimous per curiam opinion specifically referred to the potentially preemptive effect of Article II, Section 1 of the Constitution.

Gore's contest action was rejected by the trial court, but a divided Florida Supreme Court reversed on December 8. The four-justice majority held that the trial judge had applied the wrong legal standard in dismissing Gore's suit and ordered the recount to continue. Bush immediately sought review in the United States Supreme Court, which granted a stay that stopped further counting on December 9, and the case was decided late in the evening of December 12.

The per curiam opinion, which relied exclusively on equal protection, began by observing that there is no federal right to vote in presidential elections but that when a state provides for popular vote in such elections (as every state has done), principles of equality come into play. Moreover, the state must structure its election so as not to
arbitrarily weigh one person’s vote more than another’s.36 The opinion then proceeded to the heart of the matter. Even if the state courts had authority under Article II to resolve disputes involving the presidential election—a question that need not be decided37—the ruling of the Florida Supreme Court had to be set aside because it failed to provide “specific standards” to promote “equal application” in the county-by-county recounts.38

The opinion identified several specific defects that raised equal protection concerns. First, the absence of clear standards for determining a legal vote meant that some counties might use a relatively strict standard while others were using a more permissive one.39 Second, at least one county changed its standard during the course of the count, and there was variation between counting teams in the same county.40 Third, there were differences in the ballots that were being counted: some counties looked only at undervotes, others included overvotes in their review.41 Fourth, the hazy procedures authorized by the Florida Supreme Court allowed the inclusion of numbers based on incomplete recounts, thereby leaving out whatever results might have come from examining all of the subject ballots.42 Finally, the magnitude of the task and the short time available within which to complete it necessitated the hiring of inexperienced and untrained election judges whose work would be subject to observation but not objection by other persons.43 The fault for all this lay with the Florida Supreme Court, which had “the power to assure uniformity” but failed to do so.44 Accordingly, “the rudimentary requirements of equal treatment and fundamental fairness [were not] satisfied.”45

Justices Souter and Breyer shared the majority’s equal protection concerns.46 Souter expressed a willingness to tolerate local variations in voting technology, but was troubled by inconsistencies in the treatment of the same kind of ballots.47 Breyer also found the absence of

36. Id. at 104–05.
37. Id. at 105. As indicated above, the concurring opinion by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, did address Article II and concluded that the state court had overstepped its authority. See supra note 4.
39. Id. at 107.
40. Id. at 106–07.
41. Id. at 107–08.
42. Id. at 108.
43. Id. at 109.
44. Id.
45. Id.
46. Id. at 134 (Souter, J., dissenting); id. at 145 (Breyer, J., dissenting).
47. Id. at 134 (Souter, J., dissenting).
uniform standards to be constitutionally disturbing. Their agreement with the majority ended at this point, however, because they believed that there was still time to try to complete a proper count.

On the question of remedy, the per curiam concluded that nothing could be done. Finding that the Florida legislature wanted to take advantage of the safe-harbor provision of the Electoral Count Act, the majority held that it would be impossible to finish the recount according to procedures that met the requirements of equal protection by the safe-harbor day, which just happened to be the very day that the case was decided. Suggestions to allow counting to continue until December 18, when the Electoral College would meet, were therefore not legally "appropriate."

II. VOTING RIGHTS PRECEDENTS

In holding that the recount procedures authorized by the Florida Supreme Court violated principles of equal protection, the per curiam opinion invoked four precedents. None of those cases dealt with the issues raised in Bush v. Gore, although they did contain language and reasoning that might have supported greater judicial concern about vote-counting variations.

The first case, Harper v. Virginia Board of Elections, found that poll taxes violate the Fourteenth Amendment because they discriminate based on wealth, a factor that is unrelated to qualification for voting. The Bush v. Gore majority cited Harper for the proposition that states "may not, by later arbitrary and disparate treatment, value one person's vote over that of another."

A difficulty arises because the situations in the two cases are not analogous. In Harper, the inability to pay the poll tax of $1.50 per year completely disqualified a person from voting. Moreover, although the Court did not make the point explicitly, there is some reason to suspect that the poll tax was used for the purpose of systematically

48. Id. at 145–46 (Breyer, J., dissenting).
49. Id. at 135 (Souter, J., dissenting); id. at 146 (Breyer, J., dissenting).
50. Id. at 110 (per curiam).
51. 3 U.S.C. § 5 (2000). This is the so-called "safe harbor" provision, and it provides that once a state has made a "final determination of any controversy . . . at least six days before" the electors meet, the determination is conclusive. Id.
52. Bush II, 531 U.S. at 110 (per curiam).
53. Id. at 111.
55. Id. at 666.
56. Bush II, 531 U.S. at 104–05 (per curiam).
biasing election results.\textsuperscript{58} The poll tax was more likely to affect less affluent persons who could least afford to pay, and less affluent voters might be expected to have somewhat different political preferences than their richer neighbors.\textsuperscript{59} In \textit{Bush v. Gore}, on the other hand, there is no reason to suspect that variations in vote-counting standards were intended to skew election results in any particular direction.\textsuperscript{60} There does not seem to be any evidence that the selection of any particular vote-counting standard was designed to favor one candidate or discriminate against an identifiable voting group.\textsuperscript{61} At least the Court failed to cite such evidence if it existed.

Perhaps recognizing the weakness of the analogy to \textit{Harper}, the majority quickly moved on to \textit{Reynolds v. Sims},\textsuperscript{62} which held that both branches of state legislatures must be apportioned on the basis of population.\textsuperscript{63} The per curiam opinion in \textit{Bush} quoted language in \textit{Reynolds} which warned 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."\textsuperscript{64} This language is closer to the mark, but there is still a large gap between the two cases.

\textit{Reynolds} dealt with a legislature that had not been redistricted in more than sixty years despite a state constitutional requirement for decennial reapportionment\textsuperscript{65} and where barely one-fourth of the voters could elect a majority of both houses.\textsuperscript{66} These facts suggested that the system for choosing state legislators was systematically biased in

\textsuperscript{58} See \textsc{Alexander Keyssar}, \textit{The Right To Vote: The Contested History of Democracy in the United States} 228 (2000) (stating that the poll tax helped to disenfranchise virtually all blacks and many poor whites).

\textsuperscript{59} See \textit{id.} at 236-37 (describing how the movement to abolish the poll tax in the late 1920s was "galvanized by southern white liberals" to "enfranchise poor whites and blacks, democratize politics in the South, and hasten the downfall of conservatives"). Although \textit{Harper} does not directly discuss this point, there is good historical evidence that the poll tax was designed to deter African-Americans from voting. \textit{See infra} note 96 and accompanying text (describing the discriminatory effects of literacy tests, poll taxes, residency requirements, and complex voting procedures on African-American voters).

\textsuperscript{60} See Epstein, \textit{supra} note 8, at 16 (stating that \textit{Bush v. Gore} does not amount to "electoral skewing" because "there is no conscious form of ex ante discrimination").

\textsuperscript{61} \textit{Id.} at 16-17 (stating that the standards for vote counting did not appear to benefit or burden any one determinate class, nor was there "one standard . . . used for Gore voters and another for Bush voters").

\textsuperscript{62} 377 U.S. 533 (1964).

\textsuperscript{63} \textit{Id.} at 568.


\textsuperscript{65} \textit{Reynolds}, 377 U.S. at 539-40.

\textsuperscript{66} \textit{Id.} at 545.
favor of particular interests or groups. The situation in *Bush v. Gore* looks quite different. The per curiam opinion cited no evidence supporting the hypothesis that county-by-county variations in counting standards (or even intra-county variations) systematically pushed the tally in one direction or another.

Later in the opinion, the majority cited *Gray v. Sanders* and *Moore v. Ogilvie* for the proposition that a state may not afford "arbitrary and disparate treatment to voters in its different counties." Both of these cases, however, also dealt with systematic efforts to skew the voting process. *Gray* invalidated the so-called county unit rule, under which nominations for statewide offices were determined on the basis of how many unit votes candidates received rather than on the basis of how many popular votes they got. Each county was assigned a certain number of units, the candidate who carried a county received all of that county's units, and the winner had to receive a majority of the unit votes statewide. Counties containing one-third of the population controlled a majority of the units and therefore had effective control over the nominating process.

*Moore* struck down an Illinois law that required new political parties seeking to qualify for the ballot to get approximately 25,000 signatures and to obtain a minimum of 200 signatures from each of fifty counties. At the time, 93.4% of the state's voters resided in only 49 counties, whereas 6.6% lived in the remaining 53 counties. The Court found that the statute discriminated against those residing in populous counties and therefore violated the Fourteenth Amendment.

In both cases, therefore, the state had adopted political ground rules that systematically favored smaller counties. The per curiam opinion in *Bush v. Gore*, however, cited no evidence that Florida's vote-counting variations were designed to give an advantage to any particular candidate or interest.

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67. See id. at 563 (stating that people living in disfavored parts of the state do not have the same right to vote as those living in the more favored parts of the state).
72. *Gray*, 372 U.S. at 370-72. The system also contained complex tie-breaking rules requiring the winner to receive a majority of the popular vote in the event that two candidates received the same number of unit votes. *Id.* at 372.
73. *Id.* at 373.
75. *Id.* at 816.
76. *Id.* at 819.
In short, the precise issue in *Bush v. Gore* had never been dealt with before. Perhaps the haphazard counting rules were result-oriented, at least in the sense that the party controlling the local canvassing boards hoped its side would benefit from the recount, but the majority opinion never said even that much. Lurking below the surface might have been a sense that the whole operation in Florida smacked of Keystone Kops, but incompetence and unconstitutionality are not synonymous.\(^7\)

### III. The Conscientious Judge and the Majority's Approach

As we have seen, the relevant precedents did not clearly support the majority's conclusion that variations in vote-counting standards implicate the Equal Protection Clause. Yet the use of inconsistent standards, which changed in at least one county while the recount was still going on, does raise legitimate concerns about the arbitrariness and possible lack of integrity of the process.\(^8\) This does not look very much like a traditional equal protection problem, but it does reflect a concern for regularity in the selection of the nation's most powerful official.\(^9\) The concern is underscored by comparison with the handling of another tight federal election that occurred at the same time as the Florida dispute was unfolding. In the State of Washington, incumbent Republican Senator Slade Gorton was locked in a close contest with his Democratic opponent, Maria Cantwell, for a seat that would determine control of the Senate: if Gorton won, the GOP would have a bare majority of fifty-one members; if Cantwell triumphed, the upper chamber would be equally divided. In short, the outcome of the Gorton-Cantwell race had serious implications for the direction of the federal government no matter who won the presidency. Despite the high stakes of that election, the recount proceeded with none of the contention that characterized the Florida proceedings.\(^80\) If Washington was able to resolve a crucial election in an orderly fashion, the argument goes, Florida should also have been able to do so. The Sunshine State's inability to do this suggests a fail-

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77. *Cf.* James v. Strange, 407 U.S. 128, 133 (1972) ("Misguided laws may nonetheless be constitutional.").

78. *See Bush II*, 531 U.S. 98, 106-07 (2000) (per curiam) (describing how the standard in Palm Beach County changed over the course of the recount process, therefore questioning the equality of the process).


ure of state procedures of sufficient magnitude that federal constitutional intervention might be appropriate.

The preceding argument rests on a series of controversial assumptions about the Florida situation, particularly that the Florida Supreme Court had failed to provide adequate standards for conducting the recount. For the dissenting Justices as well as many critics, however, the principal difficulty with the majority opinion was its insistence on shutting down the count immediately rather than allowing Florida authorities to work under proper standards. Let us therefore focus on this issue, which goes to the heart of the controversy about Bush v. Gore.

There are two aspects to the remedial issue. One has to do with how expansively we view the right to vote, the other with how to resolve an equal protection violation. The next two sections suggest that a restrictive remedy could be defended as a matter of principle, although such a conclusion is certainly not obvious.

A. Restrictive Views of Suffrage

One way to understand the restrictive remedy in Bush v. Gore is to focus on how user-friendly the majority Justices believe the voting system should be. Although those Justices did not expressly address this subject, there are hints that they had little sympathy for voters who were unable to cast their ballots properly. For example, Chief Justice Rehnquist questioned whether it was “reasonable” to count a vote as lawfully cast “when electronic or electromechanical equipment . . . fails to count those votes that are not marked in the manner that [the] voting instructions explicitly and prominently specify.” Similarly, at oral argument an exasperated Justice O’Connor asked: “Well, why isn’t the standard the one that voters are instructed to follow, for goodness sake? I mean, it couldn’t be clearer. I mean, why don’t we go to that standard?” Finally, the per curiam opinion expressed skepticism about the reliability of hand recounts because “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.” In other words, voters who fail to comply with the

81. See supra note 16 and accompanying text.
84. Bush II, 531 U.S. at 106 (per curiam) (emphasis added). The emphasized language might be taken to mean that hand recounts are unconstitutional due to the inevitable subjectivity of the persons examining the ballots. The majority is unlikely to have intended
rules and cast their ballots in a way that the technology cannot process have no grounds for complaining if their votes are not counted.

To be sure, most states follow a more forgiving approach. For that matter, so does the National Labor Relations Board in its supervision of union representation elections. But this fact does not necessarily undermine the validity of the stricter view. Consider the debate over the National Voter Registration Act, better known as the Motor Voter Law. Opponents have consistently attacked this measure as an invitation to electoral fraud and argued for greater restrictions on eligibility. It is not necessary to resolve the merits of the debate about Motor Voter to recognize that there remains a respectable argument against excessively easy electoral participation. Indeed, the very idea of universal suffrage has been a topic of perennial debate in this country. Although the Supreme Court has discerned "a continuing expansion of the scope of the right of suffrage in this country," the record is decidedly mixed.

such a strong reading, however, because that reasoning would effectively outlaw paper ballots, which are still used in many parts of the country. See Merzer et al., supra note 15, at 72-73 (reporting that 13% of U.S. counties used paper ballots in 1998); GAO Report, supra note 15, at 7 (noting that 9% of U.S. counties used paper ballots in the 2000 election). 85. Bush II, 531 U.S. at 124 n.2 (Stevens, J., dissenting) (citing statutes from thirty-two states in addition to Florida that use more generous vote-counting standards). State courts have applied standards similar to Florida's in a surprisingly large number of cases. One example that received widespread attention during the 2000 presidential brouhaha is Delahunt v. Johnston, 671 N.E.2d 1241 (Mass. 1996), in which the Massachusetts Supreme Court examined nearly 1000 punch-card ballots and affirmed a trial judge's ruling that many of them contained valid votes even though they had not been counted by the tabulating machines, thus changing the outcome of a congressional primary election. Id. at 1243. Other examples of generous county standards abound. See, e.g., Finkelstein v. Stout, 774 P.2d 786 (Alaska 1989); Pullen v. Mulligan, 561 N.E.2d 585, 609-13 (Ill. 1990); Wright v. Gettinger, 428 N.E.2d 1212 (Ind. 1981); Duffy v. Martenson, 497 N.W.2d 437 (S.D. 1983). 86. See NLRB v. Americold Logistics, Inc., 214 F.3d 935, 939 (7th Cir. 2000) (demonstrating the NLRB's willingness to consider the intent behind a vote improperly cast); TCI West, Inc. v. NLRB, 145 F.3d 1113, 1115 (9th Cir. 1998) (citing the policy of the NLRB as that when a voter's intent is clear despite irregularities in the voter's mark, the ballot should be counted); NLRB v. Duriron Co., 978 F.2d 254, 257 (6th Cir. 1992) ("A ballot should normally be counted if there is a clear expression of preference, regardless of an irregularity in the voter's mark."); Wackenhut Corp. v. NLRB, 666 F.2d 464, 467 (11th Cir. 1982) (discussing the court's acceptance of the NLRB's policy of "counting irregularly marked ballots whenever the intent of the voter is clearly apparent"). 87. 42 U.S.C. §§ 1973gg to 1973gg-10 (1994 & Supp. V 1999). 88. See, e.g., Christopher S. "Kit" Bond, "Motor Voter" Out of Control, WASH. POST, June 27, 2001, at A25 (discussing flaws in the accuracy and maintenance of voter rolls resulting from attempts to comply with the motor voter legislation). 89. See, e.g., Keyssar, supra note 58, at 223-315 (discussing the checkered history of universal suffrage in the United States). 90. Reynolds v. Sims, 377 U.S. 533, 555 (1964) (footnote omitted).
Consider first the issue of voting rights for African-Americans. This is an appropriate place to begin because of the controversy over whether Florida's electoral system discriminated along racial and ethnic lines in connection with the 2000 presidential election. Before the Civil War, of course, most African-Americans were slaves. Even free blacks, however, confronted significant barriers to voting. When they were not barred from the franchise, they often had to satisfy more stringent eligibility requirements than did whites. The adoption of the Fifteenth Amendment after the Civil War did not guarantee voting rights for African-Americans. The Supreme Court construed Reconstruction civil rights laws so narrowly that efforts to intimidate blacks seeking to exercise the franchise went unpunished. Not until 1915 did the Court actually invalidate a state law under the Fifteenth Amendment. Meanwhile, white Redeemers regained power in the South as Reconstruction came to a close. Beginning in 1890, Redeemer governments began a systematic effort to disenfranchise African-Americans using devices such as literacy tests, poll taxes, stringent residency requirements, and complex registration and voting procedures, most of which were subject to discretionary, and therefore discriminatory, enforcement by racist white officials.


92. See Keyssar, supra note 58, at 54–60 (discussing various antebellum efforts to disenfranchise African-Americans).

93. See, e.g., United States v. Cruikshank, 92 U.S. 542, 555-56 (1875) (reversing convictions of conspiring to injure, oppress, threaten, and intimidate two African-American voters because the indictment failed to allege that the defendants were motivated by racial animus); United States v. Reese, 92 U.S. 214, 220-21 (1875) (striking down key provisions of the Enforcement Act of 1870 for exceeding congressional power under the Fifteenth Amendment).

94. Guinn v. United States, 238 U.S. 347, 364-65 (1915) (voiding an Oklahoma grandfather clause because it violated the Fifteenth Amendment); Myers v. Anderson, 238 U.S. 368, 380 (1915) (striking down a Maryland statute that established qualifications for voting that excluded African-Americans from voting).


The Supreme Court’s 1915 rulings dealt with only one of the disenfranchisement schemes, the so-called grandfather clause. The grandfather clause exempted from other registration requirements those men who were eligible to vote before the adoption of the Fifteenth Amendment or who were descended from such men (recall that the Nineteenth Amendment would not take effect until 1920). Even those rulings were easily circumvented.

At the same time, in a series of cases from Texas, the Court struggled with the problem of the white primary, under which African-Americans were excluded from participating in the Democratic primary, the only election that mattered in the Solid South. Invalidating state laws forbidding blacks from voting in primaries was easy and unanimous in Nixon v. Herndon, but the road soon became bumpier. Justice Holmes’s opinion in Herndon emphasized that the state could not use race as “the basis of a statutory classification affecting the right [to vote],” so the legislature withdrew from regulating primaries and instead authorized political parties to set their own membership requirements.

In Nixon v. Condon, a 5-4 Court held that a party executive committee could not exclude blacks; only the party convention could make such policies. The Texas Democratic Convention responded with alacrity by adopting a whites-only membership rule, which the Court unanimously upheld in Grovey v. Townsend. The party’s decision was not state action, Justice Roberts explained, as the party had set its own membership requirement; the whites-only primary was conducted by the party with no direct governmental support. This last point became the basis for overruling Grovey less than a decade later.

XXIV (outlawing poll taxes in federal elections); supra notes 54-61 and accompanying text (discussing Harper v. Virginia Bd. of Elections).

97. See Bernard Grofman et al., Minority Representation and the Quest for Voting Equality 9 (1992) (discussing the use of the grandfather clause to allow illiterate whites to vote without passing the literacy tests that were used to disenfranchise blacks).

98. For example, Oklahoma responded to the Court’s ruling in Guinn by requiring anyone who had not voted in 1914, but was otherwise qualified to do so, to register within a twelve-day period or forever forfeit the franchise. See Lane v. Wilson, 307 U.S. 268, 275-76 (1939). This draconian requirement survived for nearly a quarter-century before the Supreme Court struck it down. Id. at 277.

100. 273 U.S. 536 (1927).
101. Id. at 541.
103. Id. at 84-85, 88-89.
104. 295 U.S. 45 (1935).
105. Id. at 48, 50.
In *Smith v. Allwright*, where Justice Roberts complained about decisions "good for this day and train only," the Court found the necessary state action in the statutes that authorized and structured primary elections. By allowing a whites-only party to select candidates for the general election, those laws effectively gave the state's imprimatur to the party's racial discrimination.

There are several useful lessons in the story of the white primary. First, the Supreme Court proceeded in fits and starts in dealing with this phenomenon. It began by rejecting statutes that defined voter eligibility in explicitly racial terms, but later rulings reached inconsistent results and were often cast in fairly narrow terms that gave comfort to proponents of a more restricted franchise. Second, although *Smith v. Allwright* did not eliminate efforts to keep African-Americans from voting in primary elections, it did facilitate black voting in some areas. Nevertheless, numerous other obstacles kept blacks from registering to vote for many years afterward. Not until passage of the Voting Rights Act of 1965 did African-Americans in the South gain effective suffrage.

This brief history of black voting rights has implications beyond the racial context. In one of the grandfather clause cases, for example, the Court saw no constitutional infirmity in a requirement that voters be taxpayers, and as late as 1959, in a unanimous ruling, the Court could not find any basis for striking down a literacy require-

107. *Id.* at 669 (Roberts, J., dissenting).
109. *Id.* at 664-65.
110. In 1953, the Court struck down a scheme under which a private, whites-only club effectively controlled the local Democratic Party, although none of the three opinions supporting the judgment commanded a majority. *Terry v. Adams*, 345 U.S. 461 (1953).

We put all question of the constitutionality of this standard out of view as it contains no express discrimination repugnant to the Fifteenth Amendment and it is not susceptible of being assailed on account of an alleged wrongful motive on the part of the lawmaker or the mere possibilities of its future operation in practice . . . .

*Id.*
ment for voting. In both instances, the Court was careful to point out that there was no reason to believe that these requirements were pretexts for racial discrimination, implying that a different result would have been reached if there had been evidence of biased administration. In fact, the 1959 case cited residence, age, and criminal record as "obvious examples" of permissible voting criteria.

The Court's apparent tolerance for racially neutral voting requirements reflects America's continuing ambivalence about universal suffrage. It was not only race, after all, that prevented many people from voting in this country. Gender is another notable example that had to be addressed with a constitutional amendment. Widespread property qualifications for voting existed at the time of the Revolution, but they were gradually replaced by taxing requirements by the middle of the nineteenth century. Property was thought to demonstrate a voter's independence, whereas taxing symbolized membership in the political community. Still, the democratic impulse that led to the demise of freeholder requirements also eventually undermined taxpayer rules. The expansion of the franchise in the decades before the Civil War was not uniform, though. This period saw the enactment of laws that forbade paupers, criminals, and newcomers from voting. The first literacy requirements were also adopted before the Civil War, as were restrictions on voting rights for naturalized citizens. It was at this time that the Supreme Court ruled, in Luther v. Borden, that disputes arising under the Guarantee Clause are not justiciable. That case arose as an outgrowth of a long-running conflict over voting rights in Rhode Island.

115. See id. at 51 (stating that the right to vote "is subject to the imposition of state standards which are not discriminatory," and a literacy requirement is "neutral on race, creed, color, and sex"); Myers, 238 U.S. at 379 (stating that "there is a reason other than discrimination on account of race or color discernible upon which the [taxpayer] standard may rest.
116. Lassiter, 360 U.S. at 51.
118. Keyssar, supra note 58, at 28-29.
119. Id. at 29.
120. Id. at 50-52.
121. Id. at 61-65.
122. Id. at 86.
123. 48 U.S. (7 How.) 1 (1849).
125. Luther, 48 U.S. at 39-41.
126. Keyssar, supra note 58, at 71-76 (tracing the sources of social and political conflict underlying Luther v. Borden).
The period between the Civil War and World War I also showed the tension between expansive and restrictive approaches to suffrage. A number of states adopted economic qualifications for voting in at least some elections, and significant restrictions on paupers continued. Further restrictions were imposed on naturalized citizens, and concerns about immigrant voting played a role in the adoption of restrictive federal immigration and naturalization laws. Several states outside the South adopted formal literacy tests; in others, the adoption of the Australian ballot owed much to the desire of good-government advocates to restrict the political influence of less educated men who would have difficulty marking a secret ballot. Two other reforms also restricted suffrage: durational residency requirements and formal systems of voter registration containing elaborate procedural mechanisms that discouraged or disqualified many potential electors. Few significant changes occurred until the late 1950s. By the early 1970s, legislation, judicial rulings, and public opinion had moved toward universal suffrage, at least in theory. Still, as the Motor Voter controversy suggests, not everyone believes in absolutely un-

127. Id. at 132-34.
128. Id. at 134–36. During this era, the definition of “pauper” was generally limited to persons who were receiving public assistance at or very near election day, but even this approach excluded large numbers of less affluent men from voting. Id. at 134–35.
129. Id. at 138–41.
130. Id. at 142.
131. Id. at 142–45. Professor Keyssar describes the effect of the Australian ballot as follows:
For much of the nineteenth century, voters had obtained their ballots from political parties: since the ballots generally contained only the names of an individual party’s candidates, literacy was not required. All that a man had to do was drop a ballot in a box. Since ballots tended to be of different sizes, shapes and colors, a man’s vote was hardly a secret . . . . The Australian ballot was an effort to remedy this situation and presumably the corruption and intimidation that flowed from it: it was a standard ballot . . . containing the names of all candidates for office; the voter, often in private, placed a mark by the names of the candidates or parties for whom he wished to vote.
Id. at 142 (footnote omitted).
132. Id. at 148–51. The Supreme Court has since imposed stringent limits on durational residency requirements for voting. See Dunn v. Blumstein, 405 U.S. 330, 348–49 (1972) (striking down a Tennessee law that required an individual to live in the state for one year before he or she could vote); see also Burns v. Fortson, 410 U.S. 686, 687 (1973) (per curiam) (upholding a fifty-day residency requirement, but stating that this long a period “approaches the outer constitutional limits in this area”); Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (upholding a fifty-day limit).
134. Id. at 256. One exception was the expansion of voting rights for soldiers during World War II. Id. at 246.
135. See id. at 268–84 (discussing the gradual achievement of universal suffrage via the elimination of economic and literacy barriers and long durational requirements).
fettered voting rights. Today much of the debate focuses on voter registration, which many observers regard as a bulwark of electoral integrity and others condemn as an obstacle to meaningful political participation.\textsuperscript{136}

In short, this history suggests that there remains a respectable, albeit limited, argument in favor of moderate restrictions on voting. It does not imply that the Justices who subscribed to the per curiam opinion in \textit{Bush v. Gore} favor literacy tests, lengthy residency requirements, or some of the other stringent requirements that have long since gone by the boards. Even under a system of liberal voter eligibility, a conscientious judge might still favor strict compliance with the rules for casting ballots that count. This is especially so when the alternative is a seemingly chaotic scheme of inconsistent and ever-changing counting rules. Whether such rules implicate equal protection or some other constitutional value remains debatable, particularly because of our traditional acceptance of local administration of elections. The point is, though, that the issue \textit{is} debatable.

\textbf{B. Remedies for Equal Protection Violations}

Granting the legitimacy of a modestly restrictive view of voting does not necessarily justify the majority's restrictive remedy—stopping the count. Preferring an admittedly incomplete and inaccurate tally to a presumably more accurate one obtained using consistent standards seems incompatible with the idea of equal protection that animated the per curiam opinion.\textsuperscript{137}

In fact, courts have two choices in fashioning remedies for equal protection violations: they may either \textit{extend} the benefit to the person or group from whom it was improperly withheld, or they may \textit{remove} the benefit from the person or group to whom it was improperly granted.\textsuperscript{138} The former approach might be referred to as "leveling up," the latter as "leveling down."\textsuperscript{139} The most influential judicial formulation of this framework was given by Justice Harlan in a concurring opinion in \textit{Welsh v. United States},\textsuperscript{140} an important case that helped to define the term "conscientious objector" under the military draft law:

\begin{footnotesize}
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\item \textsuperscript{136} See \textit{National Comm'n on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process} 26-49 (2001); \textit{Keyssar, supra} note 58, at 311–15.
\item \textsuperscript{137} The difficulties in identifying precisely who was harmed and how they would benefit from the Court's remedy are explored in \textit{Karlan, supra} note 11, at 83–90.
\item \textsuperscript{138} \textit{Id. at} 89.
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} 398 U.S. 333 (1970).
\end{itemize}
\end{footnotesize}
Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.141

Although Harlan regarded the statutory preference for adherents to theistic religions over followers of nontheistic religions or secular ethics as raising concerns under the Establishment Clause,142 he applied “an equal protection mode of analysis.”143 Faced with the choice of eliminating the exemption for conscientious objectors and expanding its reach, Harlan opted for the expansive alternative.144

Leveling up was also typical in the Supreme Court’s gender discrimination cases. For example, Frontiero v. Richardson145 invalidated a statutory provision that required married female, but not married male, members of the armed forces to establish their spouses’ economic dependency in order to qualify for increased housing and health benefits.146 Having concluded that this gender-based differential was unconstitutional, the Court excised the provision requiring servicewomen to prove their husbands’ dependency, meaning that all married soldiers automatically qualified for the increased benefits.147

Similarly, Weinberger v. Wiesenfeld148 struck down a provision of the Social Security Act that awarded benefits to widows with child-care responsibilities but not to widowers with such duties.149 In doing so, the Court effectively deleted the gender references so that what had previously been a mother’s benefit became a parent’s benefit.150 Most recently, in United States v. Virginia,151 the Court required the admission of women to the Virginia Military Institute after finding that the

141. Id. at 361 (Harlan, J., concurring).
142. Id. at 356–57.
143. Id. at 357 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).
144. Id. at 362–63.
146. Id. at 690-91.
147. See id. at 691 n.25.
149. Id. at 653. According to the version of 42 U.S.C. § 402(g) in effect at that time, women and mothers were entitled to social security survivor benefits upon their husband’s death, but men and fathers were not covered by the act. Id. at 637-38 n.1.
150. See id. at 653.
school's all-male admissions policy denied equal protection to women.\textsuperscript{152}

The Court took a similar approach in \textit{Skinner v. Oklahoma ex rel. Williamson},\textsuperscript{153} perhaps the earliest case in the fundamental interests strand of equal protection jurisprudence. Oklahoma's Habitual Criminal Sterilization Act authorized sterilization for any person convicted of a third felony "involving moral turpitude," but excluded embezzlement and certain other offenses from its terms.\textsuperscript{154} Finding the line between larceny and embezzlement to be "conspicuously artificial,"\textsuperscript{155} the Court invalidated the statute and relieved the defendant of the prospect of sterilization.\textsuperscript{156}

This expansive approach is not confined to individual rights cases. A notable illustration is \textit{Iowa-Des Moines National Bank v. Bennett},\textsuperscript{157} in which state officials erroneously assessed higher tax rates on two corporations than were applied to domestic competitors.\textsuperscript{158} In fact, the local companies should have paid the higher rates assessed on the corporate petitioners.\textsuperscript{159} The Court, in an opinion by Justice Brandeis, in effect leveled up: the state had to charge the plaintiff corporations the lower rates because that is what their competitors were charged; the alternative of compelling the competitors to pay the higher rate was inappropriate.\textsuperscript{160}

\begin{itemize}
\item\textsuperscript{152} \textit{Id.} at 557–58. The Court reached this conclusion after finding that the state's proposed all-female alternative program, the Virginia Women's Institute for Leadership, was not substantially equal to VMI. \textit{Id.} at 554.
\item\textsuperscript{153} 316 U.S. 535 (1942).
\item\textsuperscript{154} \textit{Id.} at 536–37.
\item\textsuperscript{155} \textit{Id.} at 542.
\item\textsuperscript{156} \textit{Id.} at 541–42.
\item\textsuperscript{157} 284 U.S. 239 (1931).
\item\textsuperscript{158} \textit{Id.} at 240–41. The Iowa statute at issue impose[d] upon "state, savings and national bank stock and loan and trust company stock and moneyed capital," an \textit{ad valorem} tax based upon twenty per cent. of the actual value thereof, computed at the same rate at which tangible property is taxed under the consolidated levy for local, county and state purposes. \textit{Id.} at 241. According to the statute, taxes of the same rate should have been levied on the competing domestic corporations. \textit{Id.} Instead, the taxes laid upon the competing domestic corporations were at a rate of one-fifth to one-seventh of that levied on the petitioner corporations. \textit{Id.} at 242.
\item\textsuperscript{159} \textit{Id.} at 241.
\item\textsuperscript{160} \textit{Id.} at 247. Another early example of apparent judicial hostility to leveling down might be \textit{Cumming v. Richmond County Board of Education}, 175 U.S. 528 (1899), which rejected a challenge to the closing of the only high school for black children while high schools for whites remained open. \textit{Id.} at 545. The plaintiffs sought to force the closure of the white schools, but the Court said that this "would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools." \textit{Id.} at 544.
\end{itemize}
If the Supreme Court had always leveled up in response to equal protection violations, serious questions would have arisen about the restrictive remedy in *Bush v. Gore*. The Court has emphasized, however, that there is no blanket rule requiring extension rather than removal to cure unconstitutional inequality.\(^{161}\) Some cases have in fact leveled down, and occasionally the Court has tried to finesse the question.

*Skinner* is an early example of a type of remedial avoidance. Although setting aside the sentence in that case, the Court offered no view on whether the statute could be redrafted to avoid constitutional objections by either expanding or shrinking the class of sterilization-eligible criminals.\(^{162}\) Two gender discrimination cases also illustrate this kind of avoidance. *Stanton v. Stanton*\(^ {163}\) invalidated a Utah law that established a higher age of majority for males than for females—a law that made sons eligible for child support until they were twenty-one whereas daughters lost their entitlement at eighteen.\(^ {164}\) After finding the differential unconstitutional, the Court refused to decide on a cutoff age and left that issue to the state.\(^ {165}\) Similarly, *Orr v. Orr*\(^ {166}\) struck down an Alabama statute making only husbands, but not wives, liable to pay alimony to their ex-spouses on divorce.\(^ {167}\) Again, however, the Court left it up to the state to decide whether to level up (by making either spouse liable for alimony) or down (by making neither spouse liable).\(^ {168}\)

A good example of leveling down is *Griffin v. County School Board*,\(^ {169}\) which involved a school district that was a defendant in

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161. *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 738 (1984) ("We have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program’s benefits to the excluded class.").


164. *Id* at 8, 9.

165. *Id* at 17–18. The Utah Supreme Court ultimately determined that the age of majority should be 18 for both males and females. *Stanton v. Stanton*, 564 P.2d 503 (Utah 1977). Meanwhile, the legislature amended the statute prospectively to the same effect. *See* 1975 Utah Laws ch. 39, § 1. As a result, Sherri Stanton, the daughter on whose behalf the case was brought, never got the additional child support she would have received had she been her father’s son. Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 323 (1979).


167. *Id* at 283.


**Brown v. Board of Education.** In *Griffin*, the local white authorities closed the public schools to avoid a desegregation order and provided both tuition grants and tax credits to support children attending the whites-only private school that was established when the public schools were shut down. After finding that the closure of the public schools violated the Equal Protection Clause, the Court went on to hold that it was "appropriate and necessary" to prohibit tuition grants and tax credits that supported the segregation academy.

Perhaps the most complete discussion of the remedial question appears in *Califano v. Westcott*, another gender discrimination case involving a provision of the Social Security Act. Although the Justices unanimously invalidated the provision affording benefits to dependent children whose fathers—but not their mothers—lost their jobs, they divided 5–4 on the proper remedy. The majority leveled up, concluding that children should be able to obtain benefits no matter which of their parents had become unemployed. Four Justices dissented on this point, arguing that only Congress could resolve the momentous policy matters implicated by the dispute and that the legislative branch less than a dozen years earlier had actually rejected the approach embodied in the Court’s decision.

The dissenters’ reluctance to level up in the face of congressional rejection of a similar proposal not very long before drew on Justice Harlan’s discussion in *Welsh*. In *Welsh*, Justice Harlan suggested that courts must consider the “intensity of commitment” and the “degree of potential disruption” of underlying policies that would result from alternative remedial approaches. Leveling up is appropriate, he explained, if it can be done “without impairing other [governmental] goals.”

The majority in *Bush v. Gore* identified an important governmental goal as the reason for stopping the count rather than allowing it to

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172. *Id.* at 232.
173. *Id.* at 233.
175. *Id.* at 78.
176. *Id.* at 89.
177. *Id.* at 90-91. The majority also rejected an alternative remedy that would have made benefits available to children only if the parent was both unemployed and the family’s principal wage earner. *Id.* at 91–93.
178. See *id.* at 94–96 (Powell, J., concurring in part and dissenting in part).
179. *Id.* at 94.
181. *Id.* at 366.
proceed under proper standards: Florida’s desire, articulated by the Florida Supreme Court, to bring itself within the safe-harbor provision of the Electoral Count Act. That provision immunizes from challenge the selection of presidential electors made at least six days before the date established for the Electoral College to meet. In 2000, that deadline was December 12, the day of the Supreme Court’s ruling. Because it was impossible to complete a proper count by the deadline, the only proper remedy was to bring down the curtain immediately.

This analysis is contestable on several points. To begin with, a significant reason for the state’s inability to complete the count was that the majority had issued a stay that halted the count three days before the case was decided. A quick response to this objection is that an unconstitutional recount deserves no weight at all, and the propriety of the counting standards was one of the crucial issues to be resolved when the stay was issued. The stay is of peripheral significance to the larger issue, though. Two other objections loom larger. One is that the majority overstated the significance of the December 12 deadline, both to the Florida Supreme Court and to the statutory scheme governing the Electoral College. Nothing in the Electoral Count Act disqualifies a state’s electoral votes if its electors are not chosen within the safe-harbor period; that deadline merely prevents their selection from being challenged “by judicial or other methods or procedures.”

184. The Electoral College is required by statute to meet “on the first Monday after the second Wednesday in December.” Id. § 7. In 2000, that day was December 18.
185. See Bush II, 531 U.S. at 110 (per curiam).
186. See id. at 143 (Ginsburg, J., dissenting); id. at 150 (Breyer, J., dissenting); Bush v. Gore, 531 U.S. 1046 (2000) (per curiam).
187. This observation is not intended to resolve whether such an argument would justify the issuance of the stay under the Court’s customary standard. Four Justices saw no justification for the stay. See Bush, 531 U.S. at 1047-48 (Stevens, J., dissenting). For a defense of the stay along the lines suggested in text, see Posner, supra note 7, at 163-66 (explaining that the harm which may result from an unconstitutional recount is a political harm for which the courts do not have a remedy).
188. See Bush II, 531 U.S. at 143–44 (Ginsburg, J., dissenting); id. at 155 (Breyer, J., dissenting); see also Issacharoff, supra note 15, at 71 (stating that the Court inappropriately invoked the safe-harbor date because resolving the presidential election is a function of the political branches); McConnell, supra note 8, at 118 (“As a matter of federal law, the December 12 date is not a strict deadline, but merely a ‘safe harbor’ date insulating electors chosen by that date from congressional challenge.”).
189. 3 U.S.C. § 5.
The other objection is that the Florida Supreme Court might have been dissuaded from issuing clearer counting standards due to the discussion of Article II, Section 1 in Bush v. Palm Beach County Canvassing Board, which strongly implied that state courts had little or no power to do anything that might be taken as revising state election procedures. Evaluating this objection is difficult because there is no direct evidence bearing on the point. A conscientious judge presumably would take the record as it appeared and ask whether coming within the safe-harbor provision was of paramount importance to the Florida authorities. If the answer were yes, the next question would have been whether it was possible to complete a proper count by December 12.

Even if these objections are cogent, there remains one other basis on which a conscientious judge might have stopped the recount. Some defenders of the result in Bush v. Gore have praised the decision less for the cogency of its reasoning than out of a sense that the Court saved the nation from a constitutional or political crisis. Critics, including the dissenting Justices, have rejected this argument. Let us consider, therefore, whether a conscientious judge might have found such a pragmatic basis for stopping the count in Florida.

IV. Averting a National Crisis

Assuming that the appropriate remedy was to remand for a count using suitable standards, it is not clear that this task could have been

191. See Gillman, supra note 6, at 158-59; Balkin, supra note 10, at 1413; Strauss, supra note 11, at 196.
192. The only data available are the opinions of the Florida Supreme Court. Its initial ruling, which was vacated by the U.S. Supreme Court in a per curiam opinion containing the not so veiled reference to Article II, was unanimous. Harris I, 772 So. 2d 1220 (Fla. 2000). Its second ruling was a 4-3 decision. See Harris II, 772 So. 2d 1243 (Fla. 2000) (per curiam), rev'd sub nom. Bush v. Gore, 531 U.S. 98 (2000). The first paragraph of the majority's legal analysis quoted Article II and the Electoral Count Act and explained: "We consider these [state] statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 . . . ." Id. at 1248. One of the dissenters argued that the majority's recount order was unconstitutional because it contravened Article II, Section 1. Id. at 1268 (Wells, C.J., dissenting).
193. Most observers agree that a full recount by December 12 would probably have been impossible because of the December 9 stay. See, e.g., Bush II, 531 U.S. at 146 (Breyer, J., dissenting).
194. See, e.g., Posner, supra note 7, at 143-47; Sunstein, supra note 8, at 217-18; John C. Yoo, In Defense of the Court's Legitimacy, in The Vote: Bush, Gore, and the Supreme Court, supra note 8, at 223, 225.
195. See, e.g., Bush II, 531 U.S. at 144 (Ginsburg, J., dissenting); id. at 155 (Breyer, J., dissenting); Elizabeth Garrett, Leaving the Decision to Congress, in The Vote: Bush, Gore, and the Supreme Court, supra note 8, at 38, 53-54; McConnell, supra note 8, at 119-20.
completed by the December 18 deadline when the Electoral College was to meet. The dissenters in *Bush v. Gore* recognized this possibility, and the difficulty that some county canvassing boards had earlier experienced in finishing their work before the extended certification deadline gives credence to this prospect. At the same time, however, a proper count might have been done within a few days. What really matters is what would have happened next, regardless of whether the recount was full or only partial.

The only certainty about what would have occurred next is that Florida could not have enjoyed the protection of the statutory safe harbor because its electors would not have been appointed within six days of the Electoral College date. Beyond this lies the realm of speculation.

First, the recount either would or would not have been finished by December 18. Even if it were finished, the losing side might not have accepted the result. If it were not finished, the parties might well have argued over whether the partial recount could be used. Both issues might well have wound up in court. Even with expedited procedures, the result of the presidential election would remain uncertain.

Second, whatever the judiciary might have decided, the validity of the Florida electoral votes would have been subject to challenge in Congress under the Electoral Count Act. Indeed, the *Bush v. Gore* dissenters and many critics believed that this was where the entire dispute should have been resolved anyway. Let us therefore consider what might have happened had the matter gone to Congress for ultimate resolution.

Section 15 of the Electoral Count Act establishes the basic ground rules. Section 15 provides that the electoral votes shall be opened at a joint session of Congress. Written objections, signed by at least one Senator and one Representative, are allowed. Only if both

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196. Richard H. Pildes, *Democracy and Disorder, in The Vote: Bush, Gore, and the Supreme Court*, supra note 8, at 140, 147 (suggesting that it would have been nearly impossible to finish counting votes by December 18).


198. See, e.g., Gillman, supra note 6, at 70, 73–74 (explaining that the Miami-Dade Canvassing Board could not count all of the 654,000 ballots and were instead focusing on the 10,000 “undervote” ballots).

199. See, e.g., Klarman, supra note 9, at 1745 (stating that a recount most probably would have been finished by December 18).


201. *Bush II*, 531 U.S. at 127 (Stevens, J., dissenting); id. at 130 (Souter, J., dissenting); id. at 144 (Ginsburg, J., dissenting); id. at 153–55 (Breyer, J., dissenting); Gillman, supra note 6, at 194-95; Garrett, supra note 195; Issacharoff, supra note 15, at 70–73; McConnell, supra note 8, at 120.
chambers, voting separately, agree to reject a state's electoral votes will
an objection be sustained. If two or more competing slates of electoral votes are presented, the House and Senate, again voting separately,
must agree on which slate should be accepted. If the two chambers
disagree, then the slate certified by the governor of the state is to be
counted.202

If the result of the further recount—whether complete or partial—favored Gore, there would have been two competing sets of Florida electoral votes: one based on the recount, the other based on Secretary of State Harris's certification of the original result.203 It is conceivable that there might have been two separate gubernatorial
documents certifying the competing slates. Governor Jeb Bush had
signed papers, on the expiration of the extended deadline for Secretary Harris to certify the vote, attesting that his brother had carried the state.204 Presumably he would have been asked to certify the results of the recount as well. If he complied, Congress would have had
to decide which of these documents embodied the certification “by
the executive of the State” that Section 15 deems controlling.205 If he refused to certify the recount figures, there might have been satellite litigation over whether to hold him in contempt. Even without that additional proceeding, Congress would have had to determine
whether there was a proper gubernatorial certification.

There is one last wrinkle to this hypothetical scenario. While
Bush v. Gore was working its way through the courts, the Florida legislature was preparing to hold a special session to adopt a resolution awarding the Sunshine State's electoral votes to George W. Bush.206
This idea was based on Article II of the Constitution, which provides that “[e]ach State shall appoint [its presidential electors] in such Manner as the Legislature thereof may direct.”207 That move would have raised another series of daunting questions. For example, would a retroactive legislative award of electoral votes have been consistent with the constitutional language? There is no legal authority on this

203. See Fla. Stat. Ann. § 102.111(1) (West Supp. 2002) (amended 2002) (providing that the Elections Canvassing Commission, composed of the Governor, the Director of the Division of Elections, and Secretary of State, shall certify the election); id. § 102.141(4) (amended 2002) (stating that an automatic recount is mandated when a candidate is defeated by one-half of a percent or less); id. § 102.168(1) (amended 2002) (stating that a certification of election can be contested).
204. See Gillman, supra note 6, at 77.
206. See Gillman, supra note 6, at 71, 80, 107–08. The legislature abandoned this course after the Supreme Court's ruling in Bush II.
207. U.S. Const. art. II, § 1, cl. 2.
issue, so this step almost certainly would have provoked widespread controversy. Even if it were constitutional, would the action preempt congressional challenges? The answer is almost certainly no. The legislative resolution would have been adopted on December 13 at the earliest, which was only five days before the date for the Electoral College to meet. Accordingly, the measure would not enjoy the safe-harbor protection reserved for the appointment of electors at least six days before that meeting.\textsuperscript{208}

A conscientious judge might well have contemplated the possibility of at least two (and possibly three) different sets of electors from Florida. It would have fallen to Congress to unscramble the situation.\textsuperscript{209} The Congress that convened on January 6, 2001, would be closely divided: the Republicans controlled the House by a narrow margin, while the Senate was equally divided but effectively under Democratic control with Vice President Gore in the chair. If the election remained unresolved at that point, there was the prospect of gridlock if both chambers, voting along party lines, disagreed over how to allocate Florida’s electoral votes.\textsuperscript{210} It is, of course, possible that a few members would have transcended pure partisanship.\textsuperscript{211} On the other hand, party discipline was virtually unanimous during the Clinton impeachment, an episode where the stakes were not as high because the outcome would not have changed partisan control of the executive branch.\textsuperscript{212} In any event, the political maneuvering involved in resolving the election might have prompted widespread suspicion of corruption that would undermine the new chief executive. This happened to John Quincy Adams and Rutherford B. Hayes after the contested elections of 1824 and 1876, the latter of which inspired the adoption of the Electoral Count Act.\textsuperscript{213}

This bleak prospect was not the only plausible resolution of the 2000 presidential election. Those who regard a political resolution with distaste might well regard politics as unacceptably disorderly and in need of domestication by the judiciary.\textsuperscript{214} This view ignores Mr.
Dooley's famous observation that "[p]olitics . . . ain't bean bag," as well as our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The selection of the President is a profoundly political act with potentially significant implications for the direction of public policy. The process is necessarily messy, but it is not clear that the Supreme Court is more capable of sorting out those issues than is Congress, which under both the Twelfth Amendment and the Electoral Count Act has been given responsibility to unsnarl presidential election disputes.

Nonetheless, a conscientious judge faced with the situation before the Supreme Court in Bush v. Gore might well have believed that shutting down the count on December 12 was a statesmanlike way of preventing a prolonged national crisis. If this premise is correct, then the weaknesses of the legal reasoning supporting the result might be much less important to the judge than the long-term benefits to the country accruing from the least messy resolution of the election.

CONCLUSION

Events have begun to diminish the passions about Bush v. Gore. Analyses of the ballots undertaken at the behest of various press outlets suggest that George W. Bush probably would have carried Florida even if the Supreme Court had not stopped the count on December 12. Moreover, the election was so close that numerous factors other than those at issue in the Supreme Court could have changed the outcome. For instance, Gore lost his home state of Tennessee and the traditionally Democratic stronghold of West Virginia, either of which would have given him enough electoral votes to propel him

imposed order, would be consistent with each of the Court's interventions into the election.

215. FINLEY PETER DUNNE, MR. DOOLEY: IN PEACE AND IN WAR, at xiii (1898).
into the White House.\textsuperscript{219} In Florida, Gore lost approximately 26,000 votes in Duval County (Jacksonville) due to overvotes resulting from confusing ballot instructions and several thousand more in Palm Beach County due to the infamous butterfly ballot, a total that was orders of magnitude larger than the margin by which he was found to have lost in the Sunshine State.\textsuperscript{220}

Those of us who are nonetheless troubled by \textit{Bush v. Gore} should put the case into perspective. The majority opinion is not a modern analogue of \textit{Dred Scott v. Sanford}.\textsuperscript{221} Unlike that ruling, there is a basis on which a conscientious judge could have resolved the equal protection issue in Florida.\textsuperscript{222} Several important aspects of the reasoning leading to the result are contestable, but few critics really disagree with the principle underlying this aspect of the case. Regardless of the sincerity of the \textit{Bush v. Gore} majority, the per curiam opinion can be a useful tool to promote electoral reform in the United States. We should treat it as an opportunity that might not otherwise have come along.

\begin{footnotesize}
\textsuperscript{219} Zell Miller, \textit{The Democratic Party's Southern Problem}, N.Y. TIMES, June 4, 2001, at A17 (stating that Gore lost "every state in the old Confederacy" and that if he had won any of those states or "one more border state, he would be president today").
\textsuperscript{220} See \textit{Gillman}, supra note 6, at 23, 231 n.34; \textit{Merzer et al.}, supra note 15, at 33-34, 37-38.
\textsuperscript{221} See \textit{Dershowitz}, supra note 7, at 173.
\textsuperscript{222} Professor Dershowitz thinks that Chief Justice Taney's opinion in \textit{Dred Scott} was defensible as a matter of principle, whereas \textit{Bush v. Gore} is "uniquely corrupt." \textit{Id.} at 173-74. That position is controversial, to say the least. See Don E. Fehrenbacher, \textit{The Dred Scott Case: Its Significance in American Law and Politics} 340-64, 367-88 (1978) (providing withering criticism of Chief Justice Taney's \textit{Dred Scott} opinion); see also Erik M. Jensen, \textit{The Extraordinary Revival of Dred Scott}, 66 WASH. U. L.Q. 1 (1988) (rejecting the view that Chief Justice Taney's opinion can be defended on any principled ground).
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