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Bush v. Gore and Equal Protection

Martin D. Carcieri
University of North Florida

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BUSH V. GORE AND EQUAL PROTECTION

MARTIN D. CARCIERI

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I. INTRODUCTION

The Presidential election of 2000 was unprecedented. The outcome of the election came down to the result in Florida. In the end, the State's popular vote was so close that the election became as much a legal as a political matter. Mighty lawyers were arrayed, and the Florida and United States Supreme Courts rendered opinions in two cases each.

The first case involved a decision by the Secretary of State of Florida concerning the deadline for submitting county election returns.1 To allow sufficient time for contest lawsuits under Florida law, the Florida Supreme Court extended the deadline imposed by the Secretary to November 26, 2000.2 George W. Bush challenged that ruling, which the United States Supreme Court then vacated with a request that the Florida Supreme Court clarify the federal questions plausibly raised in the litigation.3 Since this unanimous opinion was measured and

*Assistant Professor of Political Science, University of North Florida; Adjunct Professor, Florida Coastal School of Law. J.D., Ph. D., University of California, Hastings and Santa Barbara. I wish to thank Pat Plumlee, Terry Bowen, Matt Corrigan, Don Berglund, and Alaina Dartt for their feedback on this project.

1. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1225-27 (Fla. 2000). The closeness of the election had triggered not only the automatic recount for which Florida law provides, but a request by the Florida Democratic Executive Committee for manual recounts in select counties. Id. at 1225. Concerned that the recounts would not be completed before the statutory deadline, the Palm Beach County Canvassing Board sought an advisory opinion from the Florida Division of Elections interpreting that deadline. Id. Based on that advisory opinion, which ruled that returns must ordinarily be received by 5 p.m. on the seventh day following the election, Secretary of State Katherine Harris issued a statement that she would ignore returns after Tuesday, November 14, 2000, at 5 p.m. Id. at 1226. In response, the Volusia County Canvassing Board sought a declaratory judgment that the county was not bound by this deadline, and the trial court ruled that though the deadline was mandatory, the Secretary could exercise discretion whether to accept late returns. Id. The Florida Supreme Court invalidated that ruling and extended the deadline for final certification of county ballots. Id. at 1240.

2. Id. at 1240.

3. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam). The three federal questions ultimately considered are rooted in Article II, Section 1, Clause 2, of the United States Constitution, which entrusts to state legislatures the manner of selecting electors for President and Vice
appropriate, it was not the focus of much debate. The second case, however, has been the center of great controversy.

Bush v. Gore\(^2\) picked up where Palm Beach County v. Harris left off. On November 26, 2000, the deadline imposed in Palm Beach County v. Harris for receiving all county voting returns,\(^6\) the Florida Election Canvassing Commission certified the results of the Florida election and declared Mr. Bush the winner of Florida's electoral votes.\(^7\) The next day, Vice President Al Gore filed suit in Leon County under the contest provision of Florida law\(^8\) seeking a manual recount on grounds that the Canvassing Commission had included a number of illegal votes and excluded a number of legal votes.\(^9\) Following a two-day evidentiary hearing, the trial court denied all relief, and its judgment was appealed and the issue certified to the Florida Supreme Court.\(^10\) On December 8, 2000, the Florida Supreme Court reversed the trial court, ordering the adjustment of vote totals in particular counties and an immediate statewide manual recount of undervotes, using the "clear indication of the intent of the voter" standard of Florida law.\(^11\) Mr. Bush challenged this ruling under the federal questions cited above, and the next day the United States Supreme Court issued a stay of the order pending briefing and oral argument.\(^12\) On December 11, 2000, the Court vacated the order, terminating the election and leaving Bush the winner.\(^13\)

The majority opinion presented the views of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas on the Equal Protection Clause and 3 U.S.C. § 5 issues.\(^14\) The Chief Justice filed the only concurrence, in which Justices Scalia and Thomas joined.\(^15\) Justices Stevens, Souter, Ginsberg, and Breyer dissented from the majority opinion.\(^16\) Unlike Stevens and Ginsberg, Souter and Breyer agreed with the majority that the Florida court's order violated the Equal Protection Clause.\(^17\) Like Stevens and Ginsberg, however, Souter and Breyer

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6. Palm Beach County v. Harris, 772 So. 2d at 1240.
9. See Gore v. Harris, 772 So. 2d 1243, 1247 (Fla. 2000).
10. Id.; see Gore v. Harris, No. 00-2808, 2000 WL 1770257, at *1 (Fla. Cir. Ct., Dec. 4, 2000).
13. Id. at 111.
14. Id. at 100-11.
15. Id. at 111-22.
16. Id. at 123-58.
17. Id. at 123, 133.
rejected the majority’s disposition of the case based on their analysis of 3 U.S.C. § 5.\textsuperscript{18}

The legal implications of the 2000 election are sprawling. Indeed, the discussion is not exhausted by an entire collection of essays on \textit{Bush v. Gore}.\textsuperscript{19} The procedural questions raised in the litigation include not only threshold case or controversy issues like standing\textsuperscript{20} and political question,\textsuperscript{21} but also subsequent remedial questions, where Article II, Section 1\textsuperscript{22} and 3 U.S.C. § 5\textsuperscript{23} come into play. Yet after the case or controversy matters and before the remedial issues, the substantive core of \textit{Bush v. Gore} is a Fourteenth Amendment issue: whether the Supreme Court correctly held that the Florida Supreme Court’s manual recount order violates equal protection.\textsuperscript{24} This limited question will be the primary focus of this Article. Though several scholars have critiqued the ruling, this Article argues that the Court basically got it right on the equal protection merits. The Court could not fully develop its case, of course, since it was under a tight deadline. With the luxury of time and a range of critiques to answer, I shall attempt to analyze more fully the equal protection implications raised by \textit{Bush v. Gore}.\textsuperscript{25}

\textsuperscript{18} Bush v. Gore, 531 U.S. at 130.


\textsuperscript{20} \textit{See generally} Pamela S. Karlan, \textit{The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in The VOTE, supra note 19, at 77, 85-87} (arguing that, not being a registered Florida voter, Mr. Bush simply could not show the type of injury required for standing to challenge the Florida court’s ruling, and that some tenuous theory of “third party” standing would have been required to withstand this hurdle). Regardless of how a majority of federal courts might have ruled on that issue, none of the dissenters even mentioned standing, making it unclear whether they thought very much of the argument.

\textsuperscript{21} \textit{See generally} Samuel Issacharoff, \textit{Political Judgments, in The VOTE, supra note 19, at 55} (discussing the United States Supreme Court’s struggle with the political question doctrine).

\textsuperscript{22} \textit{See generally} Richard A. Epstein, \textit{“In such Manner as the Legislature Thereof May Direct”: The Outcome in Bush v. Gore Defended, in The VOTE, supra note 19, at 13, 14} (discussing Article II, Section 1, Clause 2 of the Constitution as a basis for the decision).

\textsuperscript{23} \textit{See generally} Issacharoff, \textit{supra note 21}, at 65-66, 70-72 (discussing the federal election laws discussed in the decision).

\textsuperscript{24} I recognize that equal protection, in an important sense, is not a substantive question. The clause commits government to provide no benefits or burdens, requiring simply that if the government dispenses a given benefit or burden, it must do so roughly equally. At the same time, equal protection cannot simply be considered a rule of procedure on par with, say, a statute of limitations. One might safely situate it in the middle of the substance/procedure continuum, and to that extent we may, for our purposes, consider it a relatively substantive issue, particularly as concerns this litigation.

\textsuperscript{25} It may be that even if I am right on the equal protection issue, the Court’s disposition of the case is ultimately indefensible. As the majority admits, “[t]he only disagreement is as to the remedy,” and its application of 3 U.S.C. § 5 seems barely plausible. \textit{Bush v. Gore}, 531 U.S. at 111. However, this complex issue is beyond the scope of this Article. My goal here is simply to advance the dialogue in one sphere of a national debate.
II. CRITIQUES OF THE EQUAL PROTECTION RULING

A. Bush v. Gore Has "No Basis in Precedent"

The majority and concurring opinions divide their work. While the concurrence focuses on Article II, Section 1 and 3 U.S.C. § 5,26 the majority opinion concentrates on equal protection.27 The majority opinion identifies the issue it must address as "whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."28 Citing four precedents that invalidated burdens on voting rights under equal protection, it concludes that the recount procedures were not.29 However, as Karlan writes, "A common thread [in the scholarship] has been that the Court's equal protection analysis 'had no basis in precedent.'"30 Since consistency with precedent is an important measure of a ruling's legitimacy, I will examine whether the scholars are right about this conclusion.

In Gray,31 Reynolds,32 and Moore,33 the Court invalidated state action that diluted the voting power of citizens in relatively populous districts or counties, thus offending the principle of "one person, one vote."34 In Reynolds, the Alabama legislature failed to reapportion state legislative districts despite great demographic shifts in the 60 years since the original apportionment.35 Chief Justice Warren wrote:

27. Id. at 103-11.
28. Id. at 105.
31. 372 U.S. at 381.
32. 377 U.S. at 586-87.
33. 394 U.S. at 819.
34. Gray, 372 U.S. at 381.
35. 377 U.S. at 540. As the Court summed up the problem in Gray, "Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties." 372 U.S. at 379. In Moore, Justice Douglas wrote the following for the majority:

Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

394 U.S. at 819.
[We have] repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted. . . .

[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. Almost a century ago . . . the Court referred to “the political franchise of voting” as “a fundamental political right, because preservative of all rights.”

. . . “To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . .”

. . . [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. . . . Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

. . .

Simply stated, an individual’s right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State. 36

Several related ideas emerge here, but perhaps key for our purposes is that voting is a fundamental right, an alleged burden that triggers strict scrutiny upon equal protection challenge. Yet the critics attack this proposition in several ways.

While some simply dismiss the ruling under the guise of lack of precedent, others provide forceful arguments for their claim.

As a matter of law, some assert that only state action involving a suspect classification, and not that burdening a fundamental right, triggers strict scrutiny upon an equal protection challenge. Since no suspect classification was shown in *Bush v. Gore*, the implication is that the facts simply yield no Fourteenth Amendment cause of action. In this connection, Epstein targets the majority’s citation to *Harper*, in which the Court struck down a small poll tax, even though the proceeds were to be used for virtually unassailable purposes like public education. Epstein writes:

> At root it looks as though *Harper* rests on the proposition that voting rights are so fundamental that they cannot be abridged on account of wealth. Be that as it may, *Harper* has scant relevance to the probity of Florida’s recount procedures. It is one thing to find a serious affront to equal protection from a wealth test that is uniform in its application but disparate in its impact. It is quite another to find an equal protection violation in a process that does

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37. Referencing both *Reynolds* and *Harper*, Sunstein claims:

The cases that the Court invoked on behalf of the equal protection holding... were entirely far afield. To be sure, the absence of precedential support is not decisive; perhaps the problem had simply never arisen. But manual recounts are far from uncommon, and no one had ever thought that the Constitution requires that they be administered under clear and specific standards.


Sunstein’s claims have at least two problems. First, this case involved a federal election, in fact a presidential election, the only one in which the whole country has a direct stake. The federal interest in a process consistent with the Constitution is thus at its apex, and so the degree of concern that may characterize other elections does not necessarily control. The fact that manual recounts are “far from uncommon” is thus not dispositive.

Second, that “no one had ever thought that the Constitution requires... clear and specific standards” for manual recounts simply does not establish that it must forever remain a constitutional nonissue. *Id.* The rulings in *Reed v. Reed*, 404 U.S. 71 (1971), *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) were also unprecedented, but that hardly makes them illegitimate. Courts have regularly checked state action burdening fundamental rights, particularly in the voting rights context, where the Court has tolerated relatively little imperfection. *See Karcher v. Daggett*, 462 U.S. 725, 740-44 (1983). If asked to review the use of punchcards in one county and optical scanners in another, with the corresponding gaps in margins of error, the Court might have invalidated them as well. Courts have often struck down established practices simply because a set of facts forcing their close constitutional examination finally invited the Court’s scrutiny. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 959 (1983) (holding that the congressional veto provision is unconstitutional).

38. *See infra* text accompanying note 42.

39. Thus, Issacharoff claims that “the fundamental rights line of cases from the 1960’s... essentially collapsed of its own weight decades ago... [Suspect classifications have become] the sole effective source of equal protection redress...” *Issacharoff, supra* note 21, at 68-69.

not take into account wealth (or for that matter, race) in deciding what counts as a valid vote. In a word, the Florida scheme is devoid of any suspect classification needed to trigger the equal protection analysis.41

Two responses are in order. First, Epstein fails to show that Harper is not on point. To be sure, the ruling seems to rest on both the fundamental right and suspect classification triggers of strict scrutiny.42 Yet the status of voting as a fundamental right was essential to Harper. In response to the argument that "a State may exact fees from citizens for many different kinds of licenses," the Court recognized voting's fundamental nature by distinguishing it from the acquisition of a driver's license.44 The Court noted that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications."45 In other words, had Harper simply involved a fee payment, i.e., a wealth classification, as a prerequisite for obtaining a license, the outcome would have been different.

Second, and more importantly, Epstein (and Issacharoff) appear to misstate the law. As Reynolds and later cases clarify, a suspect classification is not the sole trigger of heightened scrutiny upon an equal protection challenge.46 State action burdening a fundamental right will also suffice, and the critics cite not a single case announcing the Court's retreat from this pillar of Fourteenth Amendment jurisprudence. Yet this lack of Supreme Court authority is not surprising, for only as recently as 1986, the Court's liberal wing solidly reaffirmed that state action burdening a fundamental right is sufficient for strict scrutiny upon equal protection challenge.47

Attorney General of New York v. Soto-Lopez48 involved New York's denial of veterans' civil service preference to those who otherwise qualified but had not been residents of New York when they entered military service.49 The Court held that this denial unconstitutionally burdened the right of interstate travel, long recognized

41. Epstein, supra note 22, at 15-16 (emphasis added).
42. The Court concluded as follows in Harper:

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental, to be so burdened or conditioned.

383 U.S. at 670 (citations omitted).
43. Id. at 668.
44. Id.
45. Id.
47. See Soto-Lopez, 476 U.S. at 904.
49. Id. at 900.
as a fundamental right. What is a fundamental right?—a basic right, a constitutionally protected right. As Justice Brennan wrote for the Court, “[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.” Brennan then stated that “[w]henever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law.”

Three things are noteworthy here. First, though the Constitution does not explicitly grant the right to travel, Justice Brennan held that it implied this right. This conclusion seems correct. Indeed, the political and economic system enshrined by the Constitution is incoherent without the right to travel. This right is essential to the nation’s social and commercial well-being.

Second, though Soto-Lopez involved the right to travel, the right to vote is equally fundamental. While the Constitution does not grant the right expressly, it is clearly implied as is the right to travel. Madisonian Republicanism would be an utter sham in the absence of widely and equally diffused voting power. Thus, as the Bush majority wrote, “[T]he right to vote as the legislature has prescribed is fundamental . . . . 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.”

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50. Id. at 911; see also Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985) (holding that the New Mexico veterans tax exemption statute violates the Equal Protection Clause); Zobel v. Williams, 457 U.S. 55, 65 (1982) (holding that the Alaska dividend distribution plan violates the Equal Protection Clause); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (holding that a statutory provision denying welfare assistance to those who have not resided in the jurisdiction for one year is unconstitutional).

51. Soto-Lopez, 476 U.S. at 901 (alteration in original) (quoting Dunn v. Blumstein, 405 U.S. 330, 338 (1972)).

52. Id. at 904.

53. Id. at 902-03.

54. See Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (reaffirming that even the right to vote in a school district election is so fundamental as to require strict scrutiny of state action that burdens it). A fortiori, the same is true of the right to vote in a federal election, particularly for President. As John Hart Ely comments, “The right to vote in various federal elections is adverted to in several constitutional provisions, and whatever additional content Article IV’s Republican Form of Government Clause may have, at a bare minimum it means that states must hold popular elections.” JOHN HART ELY, DEMOCRACY AND DISTRUST 118 n. * (1980).

55. Bush v. Gore, 531 U.S. 98, 104-05 (2000). While this Article is essentially a response to the essays in The Vote, Justice Ginsberg’s comments on the equal protection issue merit a brief reply at this point. To support her claim that “petitioners have not presented a substantial equal protection violation,” Ginsberg quotes McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 807 (1969) for the proposition that “even in the context of the right to vote, the state is permitted to reform ‘one step at a time.’” (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)). Bush v. Gore, 531 U.S. at 143 (Ginsburg, J., dissenting). However, neither of these cases involved a burden on a fundamental right. McDonald involved the claimed right to receive an absentee ballot, which Chief Justice Warren expressly distinguished from the right to vote. McDonald, 394 U.S. at 803. Williamson involved the claimed right of opticians to refit old eyeglass lenses into new frames, hardly a fundamental right. Williamson, 348 U.S. at 485. Thus, the Court applied mere rational basis scrutiny in both cases. By definition, the standards of permissible legislative action or inaction under rational basis scrutiny do not apply where fundamental rights are burdened; rather strict scrutiny applies where fundamental rights...
Third, "intensified scrutiny" means strict, not intermediate, scrutiny. As Justice Brennan wrote, "once we find a burden on the right to migrate, the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest." 57

Therefore, the critics are mistaken that, absent a suspect classification, a burden on voting rights cannot trigger strict scrutiny. Thus, the Bush majority correctly applied strict scrutiny to the Florida court's order of manual recounts under the "intent of the voter" standard. 58 As Brennan noted, a compelling interest is required for state action to survive the ends prong of strict scrutiny. 59 Therefore, the immediate question is whether Florida had such an interest in this gap in its election code, which allows identical votes to be counted in one county but not in another. 60 The majority's answer is clear and not surprising, but the weakness of Florida's (and the critics') position is driven home by Justice Souter's view of the matter. As one of the swing votes, he has the credibility that comes from being in the center, and as he writes in his dissent, "I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary." 61 That a swing vote could not find even a permissible interest, nevermind the compelling interest required to satisfy strict scrutiny, underscores the difficulty in discrediting the equal protection ruling in Bush v. Gore. 62

Yet the critics question the authority flowing from the precedents in other ways. Referencing a passage from Reynolds that "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice," 63 Issacharoff asserts that "it remains unclear thirty-five years later what are the precise parameters of this claimed right." 64 Given the "amorphousness

are burdened.

57. Soto-Lopez, 476 U.S. at 904-05, n.4. In Bush v. Gore, the "[t]he law which burden[s] [the] right" is the Florida Supreme Court order that the recounts shall be conducted in accord with the "intent of the voter" standard. See 531 U.S. at 102.
58. Thus, McConnell sums up the law correctly when he observes that "[t]he right to vote has been recognized as a fundamental right, and strict scrutiny is applied to ensure that every citizen within the jurisdiction is treated precisely equally with regard to that right." McConnell, supra note 4, at 105.
59. Soto-Lopez, 476 U.S. at 904-05 n.4. As Ely adds, "[i]t is . . . incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one." Ely, supra note 54, at 120.
60. Justice Stevens' point that most states provide nothing more than the intent of the voter standard does not, of course, answer the objection. See Bush v. Gore, 531 U.S. at 125 n.2. For example, at one time, most states had no laws against racial discrimination.
61. Id. at 134 (Souter, J., dissenting).
62. Since the ends prong is not satisfied, it is unnecessary and indeed impossible to examine whether the means sufficiently advance the end. The recount order under the "intent of the voter" standard thus falls strict scrutiny and is invalid under the Fourteenth Amendment.
64. Issacharoff, supra note 21, at 69.
of the claimed fundamental right to vote,"65 his inference seems to be that the right to vote either does not exist or has not been violated in this case.

The fact that a right’s exact contours are not clear, of course, does not establish that it does not exist or is unenforceable in a given case. Constitutional rights, by nature, are forged over time, and many important rights have been protected even while still unavoidably amorphous.66 Although the rulings in Reynolds, Gray, and Ogilvie may be imperfect on this account, if the Court properly found equal protection violations in these cases (and the critics have not shown or even argued otherwise),67 then the same is true in Bush. The problem in Bush is not vote dilution, as in the earlier cases, yet that difference renders it a greater, not a lesser, Fourteenth Amendment violation. While the voting power of certain individuals was diminished in those earlier cases, many Florida citizens would have had their votes completely denied under the Florida Supreme Court’s “intent of the voter” standard.68 One whose vote is not counted loses all, not just part, of his political voice. Therefore, those who reject the Bush ruling without discrediting Reynolds and its progeny claim that only the lesser burden on the franchise violates equal protection. Such an inconsistency seems hard to justify.69

Yet the critics still attempt to distinguish the precedents on other grounds. Even if voting is a fundamental right, its burden is subject to strict scrutiny, and its amorphousness does not render it unenforceable,70 they note two things. First, we do not know exactly whose votes were being denied in Florida, and second, there was no proof of the state’s conscious intent to burden voting rights. As Ronald Dworkin writes, “[A] general standard for counting undervotes that may be applied differently in different districts puts no class of voters, in advance, at either an advantage or disadvantage.”71 Epstein elaborates on this issue:

>[T]he per curiam citation to Reynolds v. Sims . . . runs far afield. That case dealt with the refusal of state legislatures to reapportion themselves, in ways that perpetuated massive differences in the size of legislative districts. The obvious imbalance is that all

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65. Id. at 68.
66. The evolution of the constitutional rights to privacy, freedom of speech, and the right to counsel, to name a few, illustrate the point.
67. Indeed, even Elizabeth Garrett praises the Court’s action in the Reynolds decision. See Elizabeth Garrett, Leaving the Decision to Congress, in THE VOTE, supra note 19, at 38, 40.
68. As McConnell observes, “[T]o treat one voter’s ballot as a legal vote and another voter’s identical ballot as spoiled, in the same jurisdiction, for no conceivable public purpose, certainly states a plausible equal protection claim.” McConnell, supra note 4, at 116. This point is further underscored by Karcher v. Daggett, 462 U.S. 725, 734 (1983), which imposed strict equality in the legislative redistricting context, striking down even a minor variance in vote dilution.
69. As Ely writes, “Discussions of the meaning of ‘democracy,’ no matter how scrupulous they are about noting the existence of some variations in understanding, seem invariably to include political equality, or the principle that everyone’s vote is to count for the same, in their core definition.” ELY, supra note 54, at 122.
70. See Issacharoff, supra note 21, at 68-70.
individuals who reside in populous counties systematically have much less political influence than their peers who reside in less populous counties. *It is possible therefore to identify unambiguously the winners and losers from the state practice,* and to demand in principle at least some justification for imbalances consciously perpetuated by the refusal of the dominant legislative coalition to initiate electoral reforms that would necessarily cut into its own power.

That situation bears scant resemblance to the Bush versus Gore dispute... *No one in Florida practiced a conscious manipulation of the voting standard* that necessarily skews the outcome in favor of one region, or even one group.72

The first claim, that the burden falls on no identifiable group, is certainly true. Since voting is performed privately, a given Florida citizen could not know whether her vote in the 2000 election was going to be counted. However, given the counties’ ballot counting methods, we know with certainty that, as a result of a recount, identical ballots would have been treated differently depending on a citizen’s residence. As a twist on the problem above, the critics’ position is that mere vote dilution is impermissible if we know whose votes are burdened, but complete vote denial is permissible simply because the identities of those affected are unavoidably

72. Epstein, supra note 22, at 16 (emphasis added) (citations omitted). Similarly Sunstein notes that there is no “sign of discrimination against... members of any identifiable group.” Sunstein, supra note 37, at 213. Michelman adds:

So far as I am aware, in no case prior to *Bush v. Gore* has the Court recognized a claim to unequal protection of voting rights in which there was on the state’s part no implicit or explicit act of what the jargon calls “classification”—that is, ex ante division of a population of actual or would-be voters into groups... to whose members the state accords differentially advantageous treatment within the voting scheme... .

... [O]f exactly what maltreatment [could a voter] have complained? The bottom line answer is: the chance that her ballot, in the event it fell into a batch submitted to recount, would undergo appraisal by an intent-of-the-voter standard, honestly applied by whomever would be applying it. True, her ballot stands possibly to be rejected by the official who happens to be the one to pick it up, whereas it might have been accepted if another official had been the one to pick it up first, because of differing rules of thumb in use by the two, each of them reasonably and impartially adopted and applied. These are eventualities about which our voter will never know, and it is not clear why she has any reason to care about them, either, given that the anticipated vagaries of ballot appraisal are utterly random with respect to partisan voter interest... . No one’s equal dignity is impugned by this practice...

Frank I. Michelman, *Suspicion, or the New Prince, in The Vote,* supra note 19, at 123, 129, 135-36.
unknown. Though a fundamental right is at stake, only the lesser injustice violates equal protection. As stated above, this position seems hard to justify.\(^73\)

Secondly, the critics assert that the absence of conscious intent to manipulate voting rights renders the precedents inapplicable.\(^74\) The claim seems to be that only the vote’s deliberate dilution, and not its negligent denial (through the state legislature’s failure to have specified adequate standards for manual recounts), violates equal protection. Yet, why should these two situations be distinguished for equal protection purposes? Both situations involve fault by public officials that burdens the exercise of a fundamental right. Again, as Justice Brennan wrote in Soto-Lopez, “[W]henever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law.”\(^75\) “Infringes” encompasses careless foresight as well as conscious intent, which is appropriate where fundamental rights are completely denied. Under recent, well-established precedent, then, mere state inaction—be it the failure to reapportion or to specify adequate recount standards—can constitute an impermissible burden on the right to vote.\(^76\)

As a final attempt to discredit the majority’s equal protection ruling, Issacharoff alleges that the Court’s own behavior belies its knowledge that it is engaged in an indefensible extension of precedent.\(^77\) As the majority writes, “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”\(^78\) Observing that the “newly articulated equal protection doctrine is dramatically wide reaching,”\(^79\) Issacharoff claims that “[t]he difficulty in defining the scope of this new equal protection right is made all the worse by the Court’s disingenuous limiting instruction.”\(^80\)

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\(^73\) McConnell notes “in cases involving fundamental rights, such as the right to vote, the Court applies strict scrutiny to all disparities, [regardless of] whether the disparities reflect discrimination against any protected group. Minor and unsystematic variances from precise population equality for legislative districts injure no identifiable group, but nonetheless violate . . . Equal Protection.” McConnell, supra note 4, at 115-16 (citations omitted). McConnell further explains that “it could be said that the injured ‘group’ is residents of the larger districts. But that is analytically analogous to saying that voters with uncounted votes were the injured group in Bush v. Gore.” Id. at 116 n.80 (citing Karcher v. Daggett, 462 U.S. 725, 744 (1983)).

\(^74\) See Epstein, supra note 22, at 16-17; Sunstein, supra note 37, at 213; Michelman, supra note 72, at 135-37.

\(^75\) 476 U.S. at 904 (emphasis added).

\(^76\) See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964) (finding that the Alabama Legislature’s inaction in its failure to reapportion legislative districts unconstitutionally burdened the right to vote).

\(^77\) Issacharoff, supra note 21, at 68.


\(^79\) Issacharoff, supra note 21, at 70.

\(^80\) Id. David Strauss adds, “The Court’s attempt to limit its holding, with barely a fig leaf of principle, gives the game away.” David A. Strauss, Bush v. Gore: What Were They Thinking? in The Vote, supra note 19, at 185, 199. In Sunstein’s words, “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.” Sunstein, supra note 37, at 214.
While this limitation may seem suspicious, under the circumstances it was eminently defensible. Writing under a tight deadline, the Court could not articulate its judgment as thoroughly and carefully as it could have with more time. It quite rationally issued a "minimalist" ruling, so to allow itself the flexibility to develop the scope of the right, whether to expand or restrict it in future adjudications. Indeed, to do otherwise would have been irresponsible. I conclude that the critics fail to show that the majority's ruling on the merits of the equal protection claim is an illegitimate extension of the precedents on which it relies.

B. Bush v. Gore Has Basis in Precedent, and That's the Bad News

In contrast to the previous critics, Professors Garrett and Karlan concede that the majority's equal protection ruling is consistent with precedent. However, they claim that precedent is precisely the problem since the relevant precedents are illegitimate. In this connection, Garrett cites Buckley v. Valeo,81 Nixon v. Shrink Missouri Government PAC,82 and California Democratic Party v. Jones.83 She claims that the Court in these cases entered the "political thicket," lacking both adequate institutional resources and political understanding.84 Garrett's argument does not fail on the ground that Buckley, Nixon, and Jones are First Amendment cases, because the Court in those cases reviewed claims of burdens on fundamental rights, as in Bush. However, upon closer examination her critique is still unpersuasive.

Buckley, of course, is a notoriously troubling case. The Court reviewed provisions of the Federal Election Campaign Act (FECA), a comprehensive scheme regulating federal campaign finance in the wake of Watergate.85 Though the Court upheld FECA's limits on contributions to political campaigns for federal office, it struck down the ceilings FECA imposed on expenditures for such offices on the theory that spending one's own money is a form of political speech.86 In other words, the Court left the statute in tatters and Congress virtually powerless to enact comprehensive campaign finance reform.87 We shall return to Buckley, but let us observe for now that by contrast, Bush did not address an integral, well-considered component of a comprehensive regulatory scheme, but rather a gap in an election code that served only to burden a fundamental right.

82. 528 U.S. 377 (2000).
84. Garrett, supra note 67, at 40-43.
85. Buckley, 424 U.S. at 1-2.
86. Id. at 52-53.
87. Speech as money haunts us as much as ever. Even if the McCain-Feingold bill passes the House, it will be subject to immediate challenge on free speech grounds, based on the "speech is money" doctrine.
Garrett’s citation of Nixon is even harder to understand. This case involved limitations on contributions to campaigns for state office.88 While Nixon certainly relied on Buckley, it did so in order to uphold rather than to invalidate the state action.89 Bush is thus consistent with Nixon insofar as both decisions function to protect the integrity of the electoral process, whether by upholding contribution limits that guard against influence peddling,90 or by ensuring that the fundamental right to vote is not arbitrarily denied.91 Even more remarkably, Garrett praises Justice Kennedy’s dissent in Nixon, which articulates the “right wing” view that limitations on contributions are unconstitutional,92 and supports judicial intervention to invalidate the Missouri statute.93 For someone arguing that the Court should avoid the political thicket, she chooses a strange citation of support.

Finally, Jones involved a California state law that had replaced the state’s “closed” primary system, in which only a political party’s members can vote on its nominees, with a “blanket” primary system.94 Under the latter system, each voter’s ballot lists every candidate regardless of party affiliation, allowing the voter to choose freely among them.95 Like Buckley, the Court in Jones invalidated the law on First Amendment grounds.96 Yet Garrett concedes that well-informed people could disagree on the merits of such a case, and that “[t]he point . . . is not that the Court got the result wrong.”97 Rather, she claims that given the Court’s “unsophisticated view of political parties,” its “institutional limitations and its inability to resolve problems comprehensively,” it should have declined review.98

For the moment, two responses are in order. First, the ordinary solution for what Garrett dismisses as the Court’s unsophisticated political understanding is education on the issues by the parties and amici curiae. If there is a failure here, it may at least partly be those parties’

Second, Garrett’s position is undermined by her praise of Reynolds:

In some cases, notably the voting rights cases, [for example Baker v. Carr and Reynolds v. Sims] the judicial role can be defended as necessary to safeguard the equal access of every American to elected officials and institutions of governance. Even if the institutional limitations of the adjudicatory process decrease the possibility that courts can provide comprehensive solutions, on

88. Nixon, 528 U.S. at 381-82.
89. Id.
90. Id. at 397-98.
92. Garrett, supra note 67, at 41.
93. Nixon, 528 U.S. at 405-10.
94. 530 U.S. at 569-70.
95. Id. at 570.
96. Id. at 585-86.
97. Garrett, supra note 67, at 44.
98. Id. at 42, 44.
balance the good done by the judiciary in these cases of political
process failure outweighs the harm. 99

If Reynolds is valid, as Garrett admits, and on point, as we have seen it to be,
then the equal protection ruling in Bush is valid as well. 100 Garrett thus paints with
too broad a brush. Of the cases she cites, she can only show Buckley to have been
wrongly decided. And even so, we have seen that Bush is distinguishable from
Buckley. Therefore, Garrett fails to show that the Court wrongly intervened in Bush.

Unlike the other critics, Professor Karlan views Bush neither in the light of
Reynolds and its progeny nor of the campaign finance reform cases. Instead, she
situates Bush within a more recent line of cases, beginning with Shaw v. Reno, 101
which "recognized a claim 'analytically distinct' from a vote dilution claim." 102 In
Karlan's view, the Shaw cases involve a claim of "'metagovernance,' that is, a
claim about the rules by which the democratic political processes are structured." 103
Thus, she labels this claim as "structural" equal protection, in which the clause is
used "not to protect the rights of an individual or discrete group of
individuals... but rather to regulate the institutional arrangements within which
politics is conducted." 104 Karlan claims this approach is an illegitimate theory of
equal protection insofar as it is informed by:

[A] fear of too much democracy, of too robust and tumultuous a
political system... [T]he Court sees itself as the only institution
fully competent to resolve the difficult questions raised by the
role of race in American democracy... .

... .

[T]he Court's minimalist approach... in the Shaw cases conveys
a critical message: these cases "really aren't individual rights
lawsuits in the first place. Rather they concern the meaning of
'our system of representative democracy.'" Judicial endorsement
of a color-blind conception of democracy necessarily entails
judicial repudiation of the vision of democracy expressed by the
normal majoritarian political process... . The redistricting plans
that the Supreme Court has struck down were the product of a

99. Id. at 40 (footnotes omitted).
100. Ely singles out First Amendment and Equal Protection Clause issues as those on which the
Court is justified in departing from interpretivism and using a broader mode of constitutional
interpretation in the interest of ensuring that the channels of political change are not choked off. See
ELY, supra note 54, at 105-34.
Vera, 517 U.S. 952, 1004-05 (1996); Shaw v. Hunt, 517 U.S. 899, 905-08 (1996). These cases involve
equal protection challenges by white voters to the creation of "majority-minority" congressional
districts in the wake of the 1990 census, and under the "preclearance" supervision of the U.S. Justice
Department.
103. Karlan, supra note 20, at 79 (footnote omitted).
104. Id. at 78.
robust political process. They were enacted by fairly elected state legislatures and were approved by the executive branch of the federal government pursuant to the authority conferred by a congressionally enacted statute that rests on the consensus that the Fourteenth and Fifteenth Amendments are best enforced by taking race into account, rather than by claiming color-blindness. . . . The Voting Rights Act and the various political realities of contemporary redistricting define self-government in ways that take into account America’s racial and ethnic diversity, its history of exclusion, and current realities of racial polarization.

For those of us who spent much of the 1990's preoccupied with Shaw v. Reno and its progeny, Bush v. Gore had an aspect of déjà vu all over again.\textsuperscript{105}

I find problems here at two levels: (1) the narrow question of Bush’s consistency with precedent and (2) the broader issue of Karlan’s theory of judicial review.

On the question of precedent, even assuming the Equal Protection Clause protects group rights,\textsuperscript{106} Karlan’s central claim that the Shaw cases significantly depart from the Court’s equal protection jurisprudence is highly questionable. The claim depends on which facts we emphasize. The Shaw cases may be “analytically distinct” from the vote dilution cases, but three facts are noteworthy.\textsuperscript{107}

First, Reynolds\textsuperscript{108} itself plausibly involves a metagovernance claim. Though it began as an assertion of injury to the rights of a discrete group of individuals, the remedy imposed partook of metagovernance.\textsuperscript{109} Insofar as reapportionment redistributed voting power more equally, it exemplifies regulation of “the institutional arrangements within which politics is conducted.”\textsuperscript{110} Even if Shaw may be characterized this way, then, so can Reynolds. Therefore, the Shaw cases are not clearly illegitimate on this account.

Second, the underlying rationale for the approach in the Shaw cases was that the type of state action at issue, official segregation based on race, had long been

\textsuperscript{105} Id. at 78, 80-81 (footnotes omitted).

\textsuperscript{106} U.S. CONST. amend. XIV, § 1 explicitly grants full protection to “any person”, i.e., the individual human being, regardless of his racial group membership. Thus, the Court wrote in Miller, “At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens ‘as individuals, not as “simply components of a racial, religious, sexual or national class.”’” 515 U.S. at 911 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)); see also Martin D. Carcieri, The Wages of Taking Bakke Seriously: The Untenable Denial of the Primacy of the Individual, 67 TENN. L. REV. 949, 952 (2000) (noting debate among scholars as to whether equal protection clause provides rights to individuals rather than groups).

\textsuperscript{107} See Karlan, supra note 20, at 79 (quoting Shaw v. Reno, 509 U.S. at 652).

\textsuperscript{108} 377 U.S. 533 (1964).

\textsuperscript{109} Id. at 577-87.

\textsuperscript{110} Karlan, supra note 20, at 78.
a special concern of the Equal Protection Clause. Brown v. Board of Education recognized the presumptive illegitimacy of this practice, and the Court elaborated on the principle in Miller:

[T]he essence of the equal protection claim recognized in Shaw is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools so did we recognize in Shaw that it may not separate its citizens into different voting districts on the basis of race.

Third, the factual predicate justifying strict scrutiny in the Shaw cases is firmly grounded in landmark equal protection precedent. As the Court wrote in Bush v. Vera, “For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were ‘subordinated’ to race. By that, we mean that race must be ‘the predominant factor motivating the legislature’s [redistricting] decision.’” This allowance of race as one, but only one, factor in governmental decisionmaking parallels the Court’s allowance, in Regents of the University of California v. Bakke, of race or ethnicity as one of many permissible factors that selective public universities may use in deciding whom to admit. As Justice Powell wrote in his controlling opinion:

112. Id. at 495.
115. Id. at 959 (alteration in original) (citations omitted). See also Shaw v. Hunt, 517 U.S. 899, 905 (1996) (finding court’s standard of proving motive for districting was race and was compatible with Miller standard); Miller, 515 U.S. at 916-17 (stating plaintiff must prove race was basis for district restructuring); Shaw v. Reno, 509 U.S. 630, 645 (1993) (stating strict scrutiny standard used when districts alleged to be determined based upon race).

Karlan’s description of the 1965 Voting Rights Act as a “a congressionally enacted statute that rests on the consensus that the Fourteenth and Fifteenth Amendments are best enforced by taking race into account, rather than by claiming color-blindness,” thus simply blurs the well-established distinction between race as one of many factors and race as the predominant factor in governmental decisionmaking. Karlan, supra note 20, at 81. She also distorts what both Congress and the Court have done. As for the former, had there really been a consensus in Congress in the mid-1960s that “the Fourteenth and Fifteenth Amendments are best enforced by taking race into account,” then the express nondiscrimination language in the 1964 Civil Rights Act and the 1965 Voting Rights Act is hard to account for. As for the latter, the Court in Shaw and its progeny never declare color-blindness a fact of the world, but rather simply state that it is the express standard by which government is presumptively to operate. Shaw, 509 U.S. at 642-44.

117. Id. at 320. Writing for the Court, Justice Powell struck down the rigid set aside of 16 of every 100 seats in the Medical School of the University California at Davis entering class only for members of certain races and ethnicities, yet held that race and ethnicity may be used as one factor among many in the public university admissions process. Id. at 318-20.
Ethnic diversity...is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body... .

...[T]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single...element. .

...[R]ace or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.118

Just as Powell recognized the dangers posed by assuming that human diversity begins and ends with race, the Court explained in Shaw v. Reno that a reapportionment plan based primarily on race reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.119

Given these links between the Shaw cases and established Fourteenth Amendment jurisprudence, Karlan’s claim of its surface inconsistency is not persuasive. To the contrary, Shaw and its progeny are firmly grounded in equal protection precedent, and the majority’s ruling in Bush is not invalid for its consistency with Shaw.

As for the broader implications of Karlan’s argument, we saw that she speaks of the Court’s “fear of too much democracy” and the “judicial repudiation of the vision of democracy expressed by the normal majoritarian political process.”120 However, these words imply a distorted, one-dimensional view of the Constitution. To be sure, the presumptive legitimacy of majority rule is the irreducible minimum of democracy in any form.121 Yet American democracy is far from exhausted by

118. Id. at 314-15, 318.
119. 509 U.S. at 647; see also Miller, 515 U.S. at 911-12 (stating that the Constitution requires that Government treat persons as individuals, not as part of a racial group).
121. If this majoritarian consensus in favor of race-based decisionmaking by government truly exists, such that the Supreme Court has undemocratically struck down state action in which race is the predominant factor, then a constitutional amendment ridding federal statutory law and Fourteenth Amendment jurisprudence of the nondiscrimination standard should not be difficult to obtain. Yet
majority rule, even (perhaps especially) where elected representatives seek to impose race-based differential treatment by government. Judicial review is an integral component of our constitutional scheme and the debate over its abolition, the "counter-majoritarian difficulty" notwithstanding, is long over. Judicial review enabled the Court to intervene in Brown v. Board of Education, and as Chief Justice Warren wrote in Reynolds v. Sims, "We are cautioned about the dangers of entering into political thickets ... . Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."

Thus, the contemporary debate over judicial review concerns not its existence, but rather its scope; however, the critics' arguments as to scope are no better. Garrett's claim that the Court must decline review where it cannot "resolve problems comprehensively" is no more plausible than Karlan's claim that the "democratic" outcomes of the "majoritarian political process" should not be disturbed. Again, Brown is instructive: though the Court could hardly have expected to resolve comprehensively either public education or race relations, it properly intervened. To Karlan's point, one might simply reply that the majoritarian political process of mid-century Topeka produced the view that given the current realities of racial polarization, segregating white and black students is preferable. However, again the Court properly intervened, since by 1954 the Justices clearly saw that race is presumptively an illegitimate basis of state action, even if a majority thinks otherwise.

critics know that at least two problems exist here. First, polls consistently show that while most Americans are sympathetic to the goals of affirmative action, they disfavor race-based differential treatment by government to achieve them. Second, even assuming a majoritarian consensus in favor of race-based differential treatment by government, how would such an amendment even be worded—Congress shall be allowed to grant preferences to women and people of color in the allocation of public resources? The political will does not even exist to change the wording of Title VII to this effect, much less to amend the Constitution to this effect. Thus, the claim of majoritarian consensus favoring the official use of race as a major factor in governmental decisionmaking rings hollow.

122. See Alexander M. Bickel, The Least Dangerous Branch 16-23 (1962) (explaining that the judicial branch is a counter-majoritarian check on the legislative and executive branches).

123. 347 U.S. 483, 486-87 n.1, 488 (1954). This intervention, in turn, gave Congress the political cover to enact the 1964 Civil Rights Act and the 1965 Voting Rights Act.

124. 377 U.S. 533, 566 (1964); see also Miller, 515 U.S. at 922-23 (stating it is the responsibility of the judiciary, not a political branch, to enforce protections given under Constitution).

125. Garrett, supra note 67, at 44.

126. See Karlan, supra note 20, at 80.

127. Brown, 347 U.S. at 495. Karlan might claim that Brown is not on point here since the composition of any state or local legislature in the pre-Voting Rights Act South is suspect. While this claim has merit, let us ask why she claims the legislatures that produced the redistricting plans invalidated in Shaw and its progeny were "fairly elected"? Simply because they were elected following the Voting Rights Act? Fair enough, but that still does not establish Karlan's fundamental, underlying point that whatever they do is constitutional, and judicial review of their action is illegitimate. Even a "fairly elected" legislature can enact unconstitutional legislation.

Karlan's position is troubling in light of another landmark decision. She insists on judicial deference to the political branches where a policy "taking race into account, rather than ... claiming color-blindness" has been "approved by the executive branch of the federal government pursuant to the
I conclude that Professor Karlan has shown neither that Shaw and its progeny are illegitimate nor that Bush v. Gore is invalid for its consistency with them.128

III. CONCLUSION

The critics do not seriously discredit the Supreme Court’s equal protection ruling in Bush v. Gore. However, the ultimate question is that of remedy, the full treatment of which is well beyond the scope of this article. Even assuming that the Court’s remedial disposition of the case under 3 U.S.C. § 5129 is plausible, it may be that the principles underlying the decision are in conflict. Whereas the principle at the root of the equal protection ruling seems to be that all votes should count equally (the rule of the people), the principle underlying the application of 3 U.S.C. § 5 is the importance of finality and closure (the rule of law). While these are both fundamentally valid principles in our constitutional scheme, and while both may be fairly applicable within a given case, it just seems more legitimate when the Court consistently relies on one or the other within the same case. Where it does not, this conflict of principles cannot help but to raise the suspicion that the Court has engaged in result-oriented jurisprudence. Whether or not this suspicion is justified, the Court surely suffers as a result of the perception.

authority conferred by a congressionally enacted statute.” Karlan, supra note 20, at 81 (footnote omitted). However, these facts describe Korematsu v. U.S., 323 U.S. 214 (1944). In Korematsu, a constitutional challenge was brought against a civilian exclusion order under which all Americans of Japanese ancestry in certain West Coast military areas were to be removed to internment camps. Id. at 215-16. The government argued that since the country was at war with Japan and since it was certain that at least some Japanese Americans were engaged in espionage and sabotage, the exclusion order was justified under military necessity. Id. at 217. This order is one of the sad chapters of our history not only because U.S. military authorities issued the order (pursuant to an Executive Order and an Act of Congress), but also because the Supreme Court upheld that order against constitutional challenge. See id. at 223-24. Though it took forty years, the United States finally made reparations to the survivors of the internment camps. See WILLIAM COHEN & DAVID J. DANELSKI, CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 968 (4th ed. 1997); OTIS H. STEPHENS, JR. & JOHN M. SCHEIB, II, AMERICAN CONSTITUTIONAL LAW 199 (2d. ed. 1999). Like Dred Scott v. Sandford, 60 U.S. (1 How.) 393 (1857) and Plessy v. Ferguson, 163 U.S. 537 (1896), Korematsu is now generally regarded as one of the Court’s worst mistakes. See, e.g., Reggie Oh & Frank Wu, The Evolution of Race in the Law: The Supreme Court Moves From Applying Internment of Japanese Americans to Disapproving Affirmative Action for African Americans, 1 Mich. J. Of Race & L. 165, 165 (1996) (“[Korematsu] is one of the ‘justly infamous episode[s]’ in the history of the American judiciary,” quoting Laurence Tribe). I submit that a theory of judicial review inconsistent with Brown but consistent with Korematsu is on weak ground.

128. Some may object that I am being inconsistent insofar as I justify the fundamental rights strand of strict scrutiny in response to the earlier scholars, but now justify the legitimacy of the Shaw cases based on their continuity with precedent via race as a suspect classification. I respond that the equal protection ruling in Bush v. Gore is justified precisely because both of these are true: a burden on fundamental rights does trigger strict scrutiny, and Shaw and its progeny are legitimate extensions of precedent, such that Bush v. Gore is consistent with several lines of valid precedent.

129. 3 U.S.C. § 5 (1994). I do not mention U.S. CONST. art. II, § 1 since only the concurrence rested its decision in part on this provision.