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

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

Jason Belmont Conn\*

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\* A.B. 2003, *summa cum laude*, Cornell University; J.D. Candidate 2006, University of Michigan Law School. Mr. Conn is Executive Articles Editor of the *Michigan Journal of Race & Law*. Mr. Conn would like to thank Professor Ellen D. Katz at Michigan Law and Professor Walter Mebane at Cornell University for their helpful comments.

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The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.<sup>1</sup>

### *I. Introduction: Ambiguities without Answers*

On November 3, 2004,<sup>2</sup> Senator John Kerry conceded the presidential election to President George W. Bush,<sup>3</sup> and the nation exhaled a deep sigh of relief that this presidential election would not end in another lengthy and contentious legal battle like the one that cast a dark cloud over

<sup>1</sup> Gray v. Sanders, 372 U.S. 368, 381 (1963) (Chief Justice Earl Warren).

<sup>2</sup> See Tracy Grant, *Election Is Too Close to Call*, WASH. POST, Nov. 3, 2004, at C15 (noting that although the election was held on November 2, 2004, the election was still too close to call at the end of the day because of the close margins of victory in a number of key states).

<sup>3</sup> Adam Nagourney, *Bush Celebrates Victory*, N.Y. TIMES, Nov. 4, 2004, at A1.

the 2000 presidential election.<sup>4</sup> Although his decision to forgo litigation helped unify a politically divided nation in the wake of a contentious election cycle,<sup>5</sup> Kerry also closed the door on a judicial dissection of the balloting process and a potential opportunity for the Supreme Court to revisit many of the lingering questions from its controversial and tangled decision in *Bush v. Gore*.<sup>6</sup>

In this Note, I examine one of these lingering questions: Does *Bush v. Gore* and the relevant equal protection case law open the door for an equal protection challenge to a state's use of different voting machines/technologies and how do the racial disparities in error rates impact this analysis?<sup>7</sup> As we reflect on the fiftieth anniversary of *Brown v. Board of*

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<sup>4</sup> *Bush v. Gore*, 531 U.S. 98 (2000). In *Bush v. Gore*, the Court evaluated the Supreme Court of Florida's order for a manual recount "in all Florida counties where so-called 'undervotes' had not been subject to manual tabulation." *Id.* at 100. The Court found that the Florida Supreme Court's order for a manual recount of votes without establishing a standard for tabulation violated the Equal Protection Clause. *Id.* at 103. The Florida Court's directive to discern the intent of the voter from the questionable ballots rendered "unequal evaluation." *Id.* at 105–06. In addition, the certification of incomplete recounts was permissible under the Florida decision. *Id.* at 108. Since the ballots and the Florida voter's choice for President were not treated equally, the Florida Supreme Court decision was reversed and the mandatory recount was stopped. *Id.* at 111. See generally JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION* (2001); ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001).

<sup>5</sup> See Charles Hurt, *As Night Wore On, Glee Became Gloom*, WASH. TIMES, Nov. 4, 2004, at A11 (quoting Senator Kerry as stating: "In America, it is vital that every vote count . . . . But the outcome should be decided by voters, not a protracted legal fight.").

<sup>6</sup> *Id.* A group of prominent House Democrats strongly objected to and encouraged legal challenges of the counting of Ohio's electoral votes in the 2004 election.; see Amy Fagan, *Kerry Rebuffs Protest of Ohio Electors*, WASH. TIMES, Jan. 5, 2005, at A4 (discussing Kerry's decision to not join the protest of the Ohio Electoral votes).

<sup>7</sup> See Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U.L. REV. 469, 470 (2001) (discussing in a self-proclaimed "short essay" the "significance of the racial disparities reflected in machine-rejected ballots"). Given developments in the case law and political science data regarding these disparities since 2001, this issue deserves greater scrutiny.

*Education*<sup>8</sup> and the fortieth anniversary of the Voting Rights Act of 1965,<sup>9</sup> it seems particularly important to continue scrutinizing the electoral process to ensure that all Americans are given not only equal access to the ballot but also an opportunity to uniformly impact who is elected. Standardization of voting technologies at the state level is central to accomplishing this goal.<sup>10</sup>

Given the nation's current partisan political divide,<sup>11</sup> the documented closeness of recent elections at all governmental levels,<sup>12</sup> and the recognition that a single vote or a single jurisdiction's returns can impact national

<sup>8</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*] (finding that racially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment). In *Brown*, the Court considered together four cases brought by African-American public school students who were challenging the racial segregation of public schools. *Id.* at 487–88. The plaintiff's claimed that the separate schools were not equal and they thereby violated the Fourteenth Amendment. *Id.* at 488. The Court directly confronted the effect of the "separate but equal" doctrine on modern public education. *Id.* at 492–93. The Court found that separate facilities denoted the inferiority of African-Americans and expressly overruled such language in its prior *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896). *Id.* at 494–95. The Court concluded that "separate educational facilities are inherently unequal" based on the Equal Protection Clause and reversed the decision of the lower court that had denied the Plaintiff's request for relief. *Id.* at 495.; see also, e.g., Genna Rae McNeil, *Essay, Before Brown: Reflections On Historical Context and Vision*, 52 AM. U.L. REV. 1431 (2003) (discussing the background of and time period leading up to *Brown*); Honorable Robert M. Bell, C.J., Ct. of Apps. of MD, *Journey To Justice: Fiftieth Anniversary of Brown v. Board of Education*, 34 U. BALT. L. REV. 1 (2004) (recalling personal experiences in the Civil Rights movement post-*Brown*); Ronald S. Sullivan Jr., *Multiple Ironies: Brown at 50*, 47 HOW. L.J. 29 (2003) (addressing the problematic premises regarding race in *Brown* and arguing that *Plessy*'s language better advances the right of African-Americans).

<sup>9</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. 1973 (2000)) (enforcing the Fifteenth Amendment); see Karyn L. Bass, *Are We Really Over the Hill Yet? The Voting Rights Act at Forty Years: Actual and Constructive Disenfranchisement in the Wake of Election 2000 and Bush v. Gore*, 54 DEPAUL L. REV. 111, 114 (2004) (analyzing the success of litigation and legislation in achieving the goals of the Voting Rights Act of 1965).

<sup>10</sup> See Press Release, Elec. Data Serv. Inc., *New Study Shows 50 Million Voters Will Use Electronic Voting Systems, 32 Million Still with Punch Cards in 2004*, [http://www.electronicdataservices.com/EDSInc\\_VEStudy2004.pdf](http://www.electronicdataservices.com/EDSInc_VEStudy2004.pdf). ("Over the years, several states have moved to establish uniform voting systems. Oklahoma led the way by establishing a uniform optical scan voting system in the early 1990s. Delaware's three counties have used electronic systems since 1996. Hawaii and Rhode Island established uniform optical scan systems in 1998. Georgia established a uniform electronic voting system in 2002. Nevada will establish a uniform electronic voting system in 2004; Maryland, in 2006. Although Maryland's uniform system won't be fully implemented until 2006, all 24 election jurisdictions, including the city of Baltimore, are expected to use some type of electronic system in 2004.").

<sup>11</sup> Toobin, *supra* note 4, at 5–8. In 2000, the United States had the closest presidential election in the modern history of the Electoral College. *Id.* On election night, the national news media first declared Vice President Al Gore the winner, only to retract the prediction a few hours later. *Id.* Eventually, George W. Bush was declared the winner but only after five weeks of legal debates, recounts, and political mayhem. *Id.* The 2000 election was the first time in over 100 years that the candidate who won the Electoral College and thus the presidency was not the candidate that won the popular vote. *Id.* The 2000 and 2004 elections also demonstrated that there is currently no overwhelming mandate for either party's political platform.

<sup>12</sup> See Jason B. Conn, *Excerpts from the Partisan Politics of Ex-Felon Disenfranchisement Laws* 58 (Apr. 2003), <http://www.sentencingproject.org/pdfs/conn-fvr.pdf> (unpublished undergraduate honors thesis, Cornell University) (on file with author) (discussing closing gaps in elections at federal and state levels).

elections,<sup>13</sup> the Court should strictly apply "one person, one vote" to its jurisprudence regarding election machines. Whereas the courts have been willing to scrutinize reapportionment plans to ensure that electoral districts are unexceptionally even,<sup>14</sup> the courts have largely looked the other way when confronted with one of the largest threats to the ideal that every person's vote counts equally: Errors in voting machine technology which compromise one's vote do not strike evenly across types of voting machines, and the error rates within a state often correlate with race and socioeconomic status.

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

<sup>13</sup> See Tim Jones & Andrew Zajac, *Vote Ordeal for Ohio Begins, Ends in the Dark*, CHICAGO TRIBUNE, Nov. 3, 2004, at C12 (noting that one region in Ohio's vote count could ultimately decide the 2004 presidential election); see also Chris McGann, *Gregoire Sworn In Amid Legal Challenge*, SEATTLE POST-INTELLIGENCER, Jan. 13, 2005, available at [http://seattlepi.nwsourc.com/local/207695\\_governor\\_13.html](http://seattlepi.nwsourc.com/local/207695_governor_13.html) (discussing the closeness of the 2004 Washington State Governor's race).

<sup>14</sup> See Daniel R. Ortiz, *The Law of Democracy: Redistricting: Case Law and Consequences: Got Theory?*, 153 U. PA. L. REV. 459, 459-61 (2004) (analyzing the "got theory" argument in the Court's foray's into political redistricting).

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

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

<sup>17</sup> See Philip Elman, *Response*, 100 HARV. L. REV. 1949, 1951-52 (1987) (noting that the Court's lax implementation of the "deliberate speed" mandate was problematic); Michael A. Berch, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L.J. 493, 495-96 (2004) (observing that the "all deliberate speed" language in *Brown* enabled some cases regarding discriminatory practices to fall "off the radar screen" of the Courts).

"one person, one vote" and ensure voting equality among all races.

## II. Syllabus

Thus far, this Note has suggested that the quick resolution of the 2004 presidential election helped unify the nation and did not provide a forum in which the courts could review and clarify the Supreme Court's controversial and factionalized decision in *Bush v. Gore*.<sup>18</sup> Part III examines the current state of voting technology in the United States and argues that statewide variation in technology is problematic in a democracy. Part IV of this article explores, albeit briefly given the large amount of litigation in this area, the Supreme Court's "one person, one vote" standard's use as a template for reviewing election laws and disparate treatment at the ballot box, and argues that using voting machines with different error rates is a violation of this standard. Part V demonstrates that the worst machines in a state are often found in districts with a large proportion of racial minorities and in economically disadvantaged areas, suggesting that the racial impact of the variation should elevate the level of judicial scrutiny the use of these machines receives. Although this article is primarily concerned with the impact of *Bush v. Gore*, Part VI briefly examines the possibility of a Voting Rights Act challenge to voting machines. Part VII examines some of the key law suits that have been brought since *Bush v. Gore* challenging the use of disparate voting machines. Part VIII draws a connection between dicta in the majority opinion in *Bush v. Gore*<sup>19</sup> and the famous "all deliberate speed"<sup>20</sup> order after *Brown v. Board of Education*,<sup>21</sup> and suggests that despite the expense and logistical difficulty of standardizing voting machines within a state, the lesson of *Brown I* is that, when a judicial order goes to the core of equal protection values, the Court should not give any leeway to the states to take their time in changing policy. Part IX summarizes the arguments made in this article and concludes by making recommendations to the Court.

## III. The Problem: Variations in Voting Technology

In today's elections, voters' ability to impact elections varies

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<sup>18</sup> See *Bush*, 531 U.S. at 98 (2000) (resolving the 2000 presidential election by a 5-4 margin with one concurring and four dissenting opinions filed).

<sup>19</sup> *Id.*

<sup>20</sup> See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (holding that the District Courts should proceed with "with all deliberate speed" in their implementation of *Brown I*) [hereinafter *Brown II*]. *Brown II* remanded the cases that lay as the foundation of *Brown I* back to local courts in order to fashion remedies to ensure desegregation. *Id.* at 299. Such remedies would be equitable in nature, fashioned to local circumstances, and would be implemented with "all deliberate speed." *Id.* at 300.

<sup>21</sup> *Brown I*, 347 U.S. at 483.

depending on the type of voting machine used in their locality.<sup>22</sup> According to Election Data Services, which has monitored election administration for the last twenty years, there were six broad categories of machines used by counties in the United States during the 2004 election: punch card,<sup>23</sup> lever, paper ballots, optical scan, electronic and mixed equipment.<sup>24</sup> Political scientists and legislators have documented significant differences in error rates for each type of machine, but voters do not choose which type of machine they will use to vote.<sup>25</sup> The determining factor behind which type of machine is used within a locality is largely a combination of funding, politics, number of voters per polling place, and the standards set by state law.

There are a number of reasons why the intent of a voter entering a voting booth might not be reflected in what is eventually tallied by the election administrator and sent to state officials. Although some of these reasons might be attributed to election fraud or mistakes by the onsite administrator or poll workers, this article does not seek to address these problems.<sup>26</sup> State and federal law already deters, punishes, and seeks to rectify the fraud associated with these types of errors.<sup>27</sup> Rather, this article discusses two general categories of voting frustration caused or enhanced by voting technology: (1) errors when the voter votes, and (2) errors caused during the counting process.

First, the type of machine impacts one's ability to overvote,

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<sup>22</sup> For a discussion of the various problems associated with different types of voting machines, see *Amicus Curiae Brief of Electronic Frontier Foundation et al., Stewart v. Blackwell*, 356 F. Supp. 2d 796 (D. Ohio 2004), available at [http://www.eff.org/Activism/E-voting/20040805\\_Ohio\\_Amicus\\_Brief.pdf](http://www.eff.org/Activism/E-voting/20040805_Ohio_Amicus_Brief.pdf) (last visited Jan. 8, 2006).

<sup>23</sup> Kerry might have brought a legal action in Ohio based on the use of punch card balloting had the final vote count been slightly closer. George W. Bush received 2,859,768 votes to John F. Kerry's 2,741,167, a difference of 118,601 votes. Official Ohio 2004 Presidential Election Results, <http://www.sos.state.oh.us/sos/ElectionsVoter/results2004.aspx?Section=135>. Prof. Dan Tokaji found that: "Overall, there were a total of 94,488 residual votes in Ohio's November 2004 presidential election. Of those, the substantial majority (76,398) were cast using punch card equipment." The total residual votes, even if completely for Kerry, would not have turned Ohio "blue." Dan Tokaji, *How Did Ohio's Voting Equipment Fare in 2004?*, Feb. 8, 2005, <http://moritzlaw.osu.edu/electionlaw/comment0208.html>.

<sup>24</sup> Press Release, *supra* note 10.

<sup>25</sup> See generally Eric A. Fischer, CRS Report for Congress: RL30773: Voting Technologies in the United States: Overview and Issues for Congress, <http://ncseonline.org/NLE/CRSreports/Risk/rsk-55.cfm?&CFID=8946583&CFTOKEN=5583815> (last updated Mar. 21, 2001).

<sup>26</sup> For a discussion of voting fraud in recent elections, see Lori Minnite and David Callahan, Demos: A Network for Ideas and Action, *Securing the Vote: An Analysis of Election Fraud*, 2003, [http://www.demos-usa.org/pubs/EDR\\_-\\_Securing\\_the\\_Vote.pdf](http://www.demos-usa.org/pubs/EDR_-_Securing_the_Vote.pdf).

<sup>27</sup> See *Disputes and Questions Linger Three Weeks After Presidential Vote: Election 2004*, SEATTLE TIMES, Nov. 25, 2004, at A1 (noting that "state officials regulate elections and the Justice Department prosecutes voting-rights violations and election fraud").



undervote, or make an unintended choice,<sup>28</sup> for example:

Lever machines can prevent overvoting through the use of interlocking mechanisms that prevent a voter from pulling a lever for more than one candidate for a given office. Electronic systems can prevent overvoting through an electronic equivalent of such a mechanism. Some marksense systems can reduce overvoting by permitting a ballot to be checked by the tabulator (sometimes called a "smart ballot box") before submission and indicating if there is an overvote; the voter can then be given a new ballot.<sup>29</sup>

Although there are no machines that absolutely prevent undervoting, some machines indicate the races for which a voter has not selected a candidate, thus providing the voter with an opportunity to correct his "mistake." These machines, often electronic, force the voter to make a deliberate decision to leave a section of the ballot blank.<sup>30</sup>

Unintended choice was a large problem in the 2000 Presidential election in Florida which was publicized largely in connection with the infamous "Butterfly Ballot."<sup>31</sup> Although voting machines generally cannot warn voters about unintended choices, since these machines cannot possibly know voters' intention, voting technology that allows voters to review their selections prior to submission would help reduce the incidence of these errors. In all these ways, the type of voting technology that is used greatly

<sup>28</sup> See Fischer, *supra* note 25, at CRS-8 ("There are three basic kinds of error that a voter might make: overvote, undervote, and unintended choice. An overvote is a vote for more candidates for a particular office than is permitted, such as voting for two candidates for President, and is usually considered an error. An overvote on a ballot item invalidates the vote for that item. An undervote is a vote for fewer than permitted, such as voting for no candidate for President. An undervote may or may not be an error -- a voter might, on the one hand, have tried to vote for a candidate but was unsuccessful in marking the ballot unambiguously, or might, on the other hand, have chosen not to vote for any candidate. An unintended choice is inadvertently voting for a candidate other than the one intended.").

<sup>29</sup> *Id.*

<sup>30</sup> Walter Mebane, *The Wrong Man is President! Overvotes in the 2000 Presidential Election in Florida*, 2 PERSPECTIVES ON POLITICS 525, 525-28 (Sept. 2004). It is true, that even if the warn-and-correct technology is part of the machine's package, it is still subject to human error. In Florida during the 2000 election some election administrators did not understand the function or never turned it on.

<sup>31</sup> See generally *id.* (demonstrating that undoubtedly, the butterfly ballot used in Palm Beach caused many more voters to make mistakes there); see *Siegel v. LePore*, 234 F.3d 1163, 1201 (11th Cir. 2000) ("It was stated in the Palm Beach recount request that the particular configuration of the ballot in that county (the so-called 'butterfly ballot') had confused Palm Beach's voters, producing two bad results: a substantial number of votes were disregarded because more than one choice was punched in the presidential race; and some voters may have inadvertently voted for someone other than their true choice."); see generally Steven J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got it Wrong in the Butterfly Ballot Case*, 14 STAN. L. & POL'Y REV. 203 (2003).

impacts the accuracy of the manifestation of the voter's intention.<sup>32</sup>

The second broad category of error caused by machines is created by the counting mechanism associated with each machine. This category is arguably more problematic since the voter has often left the polling place before her vote is tallied and the error is often attributable to a machine/technological failure, not human error.<sup>33</sup>

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

Different tabulation error rates have been associated with different type of machines.<sup>34</sup> For example:

In the 2000 elections, 53.4 percent of California voters used punch-card machines, while the remainder used DRE or optical scan technologies. The punch-card machines suffered error rates

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<sup>32</sup> After the 2000 election debacle, I purchased a voting machine that had been used by a Florida polling site that utilized punch-card ballots, the ballots that caused the problems with "hanging chads." In fact, I found many chads littered around the machine's packaging. After having watched months of controversy and litigation regarding the standard that should be used to count these ballots, I was surprised to find clear instructions attached to the inside of the machine telling voters that they must fully punch through the card before submitting their ballot. Although there could have been additional safeguards to ensure that voters fully punched their ballots, the voters were not without instruction or warning if they failed to vote properly without leaving "hanging chads."

<sup>33</sup> See Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 393-94 (2002) ("The hanging chad became a running joke, a symbol of everything that was wrong with a process that had been badly bungled and was now running amok, and which was irretrievably corrupt. The skepticism that met the canvassing boards was ferocious. Indeed, to many around the country—whether in favor of or against recounting, whether Democrat or Republican—the pictures of individuals sitting at card tables in gymnasiums trying to decipher punch-card ballots were simply not consistent with their vision of American democracy at work."). *Id.* These two categories are largely intended as guideposts as this paper discusses types of errors. It is not clear which category some errors fall into. For example, consider the "hanging chad" in Florida. This system was problematic at the time of voting since the technology failed to allow the voter to make a clear selection and did not warn the voter of potential errors, but it was also problematic during counting since the counting technology did not count many ballots that would have been votes if counted by a human.

<sup>34</sup> See Fischer, *supra* note 25, at CRS-11 ("Reports on the accuracy of different systems vary. For example, some people have claimed that punch card readers can have an error rate as low as 1 vote out of each 10,000 counted under ideal test conditions. Error rates as high as 1 in 100 have been reported from prior elections, and some experts believe that votomatic punch card systems using pres-scored card may be the least accurate of the available technologies"); see generally The Caltech/MIT Voting Technology Project, *Residual Votes Attributable to Technology: An Assessment of the Reliability of Existing Voting Equipment* (Mar. 30, 2001), [http://www.hss.caltech.edu/~voting/CalTech\\_MIT\\_Report\\_Version2.pdf](http://www.hss.caltech.edu/~voting/CalTech_MIT_Report_Version2.pdf).

of 2.2 percent, more than twice that of the other technologies. Thus, for every 10,000 votes cast in a punch-card county, approximately 200 were discarded; in the other counties, fewer than 100 were lost to machine error.<sup>35</sup>

Furthermore, a state's decision to tabulate the votes at the precinct or county level further impacts the number of errors.<sup>36</sup> Indeed, given the closeness of today's elections, "the difference between the numbers of votes cast for the two leading candidates may be less than the error rates in the balloting and vote counting processes and machinery."<sup>37</sup> The wide variation in voting machines forces us to reassess what type of "equality" we want when it comes to the electoral process.

### A. Unstandardization

Currently there are six main types of voting technologies being utilized throughout the United States.<sup>38</sup> Each type of machine is associated with a certain error rate, and the error rates vary significantly. Certainly in law, we accept a certain level of error in our proceedings and standards. For example, in criminal cases, our standard of proof is "beyond a reasonable doubt." This is not absolute certainty, and we recognize that it is not a perfect system.<sup>39</sup> Indeed, rarely in law do we find ourselves facing absolute certainty about any standard that is applied.<sup>40</sup> However, we hope that our judicial standards are applied equally across race, socioeconomic factors, and jurisdiction.

In the case of voting machines and the error rates the court accepts, there is not standardization. Even across precincts within a locality, there may be very different machines and procedures when one arrives at the polls. Analytically, the very fact that voting machines vary significantly seems particularly troubling to our notion of equality and "one person, one vote." After all, equal access and the ability to impact an election is the very basis

<sup>35</sup> Marshall Camp, Note, *Bush v. Gore: Mandate for Electoral Reform*, 58 N.Y.U. ANN. SURV. AM. L. 409, 436 (2002).

<sup>36</sup> See Brian Kim, *Recent Development: Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 586 (2003) ("[P]recinct tabulation allows voters to correct the ballot if they have not completed it properly. Without precinct tabulation, voters do not know whether their ballots will be read by the scanner. By the time the ballot is transported to a central tabulation center, it is too late for voters to correct their ballots if they are rejected by the scanner."); Mebane, *supra* note 30, at 6.

<sup>37</sup> Joseph W. Little, *Essay: Election Disputes and the Constitutional Right to Vote*, 13 J. LAW & PUB. POL'Y 37 (2001).

<sup>38</sup> See Table 1, *infra* pp. 49–50 (outlining the six types of voting machines).

<sup>39</sup> Linda Greenhouse, *High Court Warns About Test for Reasonable Doubt*, N.Y. TIMES, Mar. 23, 1994, at B8.

<sup>40</sup> See generally Richard D. Friedman, EVIDENCE 39–42 (3d 2004).

of the Supreme Court's continuous review of election laws and voting procedures through the lens of the 14th Amendment's equal protection clause.<sup>41</sup>

### B. *Standing: Defining the Injury*

Thus far, this article has demonstrated that certain voters have a greater likelihood that their vote will not count as a result of the voting machines they use when they arrive at the polls. This article lays out a constitutional challenge to the variation in voting machines, and a challenge cannot go forward without establishing standing.<sup>42</sup> It is therefore important to more specifically define the injury.<sup>43</sup> As the Supreme Court has noted:

The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" —an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."<sup>44</sup>

No voter can know for sure whether or not his or her vote was counted; anonymity remains an essential part of the electoral process. Thus, after an election, no voter could argue that his or her individual vote had not

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<sup>41</sup> See *New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 693 (1989) (noting "[e]lectoral systems should strive to make each citizen's portion equal").

<sup>42</sup> For discussion of standing in voting rights litigation, see Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389 (1999); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996).

<sup>43</sup> See Heather K. Gerken, *Understanding The Right To An Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (discussing the tension in the caselaw between "the highly individualistic view of rights developed by the Rehnquist Court and the group-based conception of harm evident in many other areas of the law").

<sup>44</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

been counted as a result of a machine malfunction.<sup>45</sup> But if the standard was proving individual harm to a certainty, almost no vote dilution case could go forward: A voter in a precinct where the pollworkers threw away all but one ballot when the polls closed would have no redress in the courts under this narrow conception of standing. The courts have dealt directly with this issue:

Because the voting process is anonymous, it is impossible for any one voter to know with more certainty that their intended votes were not counted. If standing in cases like this one required more, then no one would have standing to challenge a system with, for example, a 20% or 30% or 60% residual vote rate, or a policy under which every tenth ballot was systematically discarded instead of counted. Such results would be contrary to both voting rights and standing law. Further, the injury here alleged, is not the State's failure to count any one person's vote, but the higher probability of that vote not being counted as a result of the voting systems used, *i.e.*, vote dilution. That injury is both provable and traceable. . . . Vote dilution as "directly related to voting, the most basic of political rights, is sufficiently concrete and specific (citation omitted)."<sup>46</sup>

Indeed, the probabilistic injury, which has been demonstrated throughout this part of the article, is enough to establish standing, as is consistent with court decisions in other areas of the law.<sup>47</sup>

This article repeatedly revisits and refines this description of the injury, but many courts have found the probabilistic injury sufficient for the purpose of establishing standing under Article III.<sup>48</sup> Of course, even with

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<sup>45</sup> Some defendants in cases challenging voting mechanisms have even suggested that the case should be dismissed on account of "mootness" because the case was either brought before an injury could be shown or after the injury had occurred and the election could not be undone. These arguments have been rejected. *See, e.g.*, *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 801–02 (N.D. Ohio 2004) (refusing to dismiss the case "on the issue of mootness"); *Toney v. White*, 488 F.2d 310, 314–15 (5th Cir. 1973) (finding that the claim was properly considered even though the litigation was filed one month after the election in question had occurred).

<sup>46</sup> *Black v. McGuffage*, 209 F. Supp. 2d 889, 895 (N.D. Ill. 2002) (citation omitted).

<sup>47</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 61 n.10 (1976) ("Clearly there is no difference for purposes of Art. III standing—personal interest sufficient for concrete adverseness—between a small but certain injury and a harm of a larger magnitude discounted by some probability of its nonoccurrence. If the probability of the more ultimate harm is so small as to make the claim clearly frivolous, the plaintiff can be hastened from the court by summary judgment."); *McGuffage*, 209 F. Supp. 2d at 895 (citing *Bryant v. Yellen*, 447 U.S. 352 (1980) and finding that voters had standing to bring a challenge to the use of different voting mechanisms based on a probabilistic injury).

<sup>48</sup> *See, e.g.*, *McGuffage*, 209 F. Supp. 2d at 895 ("[P]laintiffs have standing to raise the claims asserted."); *Stewart*, 356 F. Supp. 2d at 802 (acknowledging the strength of the defendant's argument, but declining "the invitation to dismiss the case on standing").

standardization, there would still be a chance a vote would not be counted, since no machine has a 0% error rate. However, the injury asserted here, in the equal protection sense, is really the relative probabilistic chance that one's vote will not count in comparison with other voters in the same state. This is a definable injury with a remedial solution, and because there is a definable injury and a remedial fix, the question that remains is whether the courts can mandate this fix using the Fourteenth Amendment or Voting Rights Act.

#### IV. "One Person, One Vote"

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

"[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.<sup>49</sup>

The "one person, one vote" standard is discussed throughout legal scholarship and has become a mainstream maxim when it comes to election policy.<sup>50</sup> However, the words "one person, one vote" do not appear in Article I, Section 2 of the Constitution,<sup>51</sup> the section the Supreme Court has relied upon in formulating its "one person, one vote" standard, and its strictness in application and scope are not always clear. The application of the "one person, one vote" standard has evolved, and a better understanding of its development will facilitate this article's discussion of how a legal challenge to variations in voting machines could fit into the "one person, one vote" jurisprudence.

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<sup>49</sup> Gray, 372 U.S. at 381 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

<sup>50</sup> Robin Wright, *President Hails Election As a Success and a Signal*, WASH. POST, Jan. 31, 2005, at A1. When American and Iraqi leaders recently developed election policy for Iraqi elections, many analysts and even Grand Ayatollah Ali Sistani argued that in order for the election to be fair, it must operate on a one person, one vote system. *Id.* This demonstrates how universally recognized the American "one person, one vote" principle has become.

<sup>51</sup> U.S. CONST. art. I, § 2.

### A. Entering the "Political Thicket"

Historically, the federal courts stayed away from issues they perceived as political in nature and were reluctant to review issues related to elections for fear of impeding on local autonomy.<sup>52</sup> However, the *laissez faire* period in the Court's elections law jurisprudence has long passed.<sup>53</sup> Today, the courts decide many issues related to the election and rarely shy away from reviewing the electoral process.<sup>54</sup> Using equal protection analysis, the Court has said that States cannot treat voters differently in three respects: (1) Right to cast a vote; (2) Right to an equally-weighted vote; (3) Right to have vote counted.<sup>55</sup> However, the Court is constantly refining and expanding the amorphous "right to vote,"<sup>56</sup> and "history has seen a continuing expansion of the scope of the right of suffrage in this country."<sup>57</sup> Recognizing that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," the Court seeks to attain greater equality in all aspects of the electoral process.<sup>58</sup>

### B. The Impossibility of "Absolute Equality" is not an Impediment

However, while striving to achieve greater equality in the electoral process, the courts have been reluctant to require "absolute equality" when conducting their equal protection analysis.<sup>59</sup> In the reapportionment line of equal protection cases, the Supreme Court recognized that despite even the most genuine efforts to create equality between electoral districts, other factors would create some level of inequality. For example, in *Karcher v. Daggett*,<sup>60</sup> the Court found that "[a]ny standard, including absolute equality,

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<sup>52</sup> See *Colegrove v. Green*, 328 U.S. 549 (1946) (providing a number of justifications for the judiciary staying out of political apportionment questions).

<sup>53</sup> See, e.g., *Bush*, 531 U.S. at 98 (providing an example of the Court's recent reviews of election law issues).

<sup>54</sup> See *Bush*, 531 U.S. at 111 (Breyer, J., dissenting) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

<sup>55</sup> *Camp*, *supra* note 35, at 418.

<sup>56</sup> *Id.*

<sup>57</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>58</sup> *Id.*

<sup>59</sup> See *Karcher v. Daggett*, 462 U.S. 725, 778 (1983) (J. White dissenting) (stating that "...by extending *Kirkpatrick* to deviations below even the 1% level, the redistricting plan in every State with more than a single Representative is rendered vulnerable to after-the-fact attack by anyone with a complaint and a calculator").

<sup>60</sup> See generally *id.* at 725. In *Karcher*, the Court considered the validity of New Jersey's plan to reapportion congressional districts based on the 1980 census data which reduced the representatives of the

involves a certain artificiality. . . . [E]ven the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed."<sup>61</sup> Applying this reasoning to voting machines, one might conclude that the Court would be willing to allow a certain level of inequality when it comes to error rates, and that we should just accept that there are a number of factors that are uncontrollable. However, as the Court recognized in *Karcher*, the distinction between apportionment inequality made by the legislature and imperfections in census data is that the latter "apply equally to any population-based standard we could choose."<sup>62</sup>

As one court recently noted:

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

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

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state from 15 to 14. *Id.* at 727. The plan adopted by New Jersey established districts with varying population sizes and the court found that these variations could have been minimized by good faith efforts to promote equality amongst the districts. *Id.* at 728–34. The Court found that New Jersey failed to establish that each variance was necessary to achieve a legitimate state objective. *Id.* at 740–42. The *Karcher* court held that New Jersey's plan to reapportion congressional districts violated 1, §2 of the federal Constitution, because New Jersey did not make a good faith effort to minimize population variances among the districts and could not justify each variance as necessary to achieve a legitimate state objective. *Id.* at 744.

<sup>61</sup> *Id.* at 732.

<sup>62</sup> *Id.*

<sup>63</sup> *McGuffage*, 209 F. Supp. 2d at 889, 891.



### C. Having One's Vote Count as a Fundamental Right

"The United States Supreme Court has clearly stated that the right to vote is a fundamental right protected by the Fourteenth Amendment."<sup>64</sup> If voting is a fundamental right, then it would seem that having one's vote count equally is a natural extension of this right, and thus triggers strict scrutiny. In *Gray v. Sanders*,<sup>65</sup> the Court used the 15th Amendment rather than the 14th Amendment<sup>66</sup> to specifically link the right to cast a vote with the right to have one's vote counted:

The Court has consistently recognized that all qualified voters have a constitutionally protected right to cast their ballots and have them counted at Congressional elections. Every voter's vote is entitled to be counted once. It must be correctly counted and reported. The right to have one's vote counted has the same dignity as the right to put a ballot in a box. It can be protected from the diluting effect of illegal ballots. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have.<sup>67</sup>

This linkage between the casting and counting of a vote is consistent with a long line of court decisions.<sup>68</sup>

*Bush v. Gore* also addressed this connection:

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

<sup>65</sup> See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (holding that the use of a county unit voting system in a statewide election violates the Equal Protection Clause of the Fourteenth Amendment). In *Gray*, the Court considered whether a state statute creating a county unit system whose practical effect was to make the vote of each citizen count for less and less as the population of his or her county increased was constitutional under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 376. The Court was unwilling to draw the parallels made by the district court between the Electoral College used for federal elections and the county unit system used in this statewide election. *Id.* at 378. States can specify the qualifications of voters as long as those qualification do not discriminate against one class or group, but the Equal Protection Clause does not allow the State to weigh one person's vote more than another. *Id.* at 379. Political equality, noted the Court, dictates that one person equals one vote. *Id.* at 381.

<sup>66</sup> See *id.* at 376 (noting that "this case . . . does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature").

<sup>67</sup> *Id.* at 380.

<sup>68</sup> See *United States v. Mosley*, 238 U.S. 383, 386 (1915) ("[T]he right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); see also *United States v. Classic*, 313 U.S. 299 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right to qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution.").

First, *Bush* establishes that state action regarding vote-counting is fully subject to the equality principles it perceives inherent in the right to vote. Second, *Bush* expands upon existing doctrine in defining those principles. The opinion finds an equal protection violation in unequal treatment despite the absence of any discrete and articulable voter "classification" (arguably the pith of the Court's voting rights doctrine prior to *Bush*), ignores whether uneven treatment is intentional in assessing whether the Equal Protection Clause is violated, and employs an elevated standard of review in assessing purported justifications for any uneven treatment. The extension of evolutionary equality norms to the context of vote-counting, combined with a heightened standard of inquiry into purported justifications, represents the essential equal protection "rule" of *Bush*.<sup>69</sup>

The fundamental right that must be protected according to *Bush v. Gore* is the right to an equal valuation of one's vote at all stages of the voting process: "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."<sup>70</sup>

One of the challenges made in *Bush v. Gore* was whether disparate manual counting methods without uniformity violated the Equal Protection Clause.<sup>71</sup> Similarly, a challenge to the variation of voting machines would hinge on whether machines with different counting methods without uniformity violate the Equal Protection Clause. If one equates human vote counters with voting machines, the legal challenges look basically identical. Although one might question whether the *Bush* rule "actually applies to the mechanics of vote-counting or whether it is limited to systemic concerns such as methods of election and districting . . . *Bush v. Gore* seems to invite this analogy."<sup>72</sup> Thus, it would appear from the language in *Bush* that the use of different voting machines may violate the Equal Protection Clause. Whether states can fashion a sufficiently compelling justification for continuing to use varied technologies is one of the "important questions of Equal Protection and the right to vote that *Bush v. Gore* now opens up."<sup>73</sup>

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<sup>69</sup> Camp, *supra* note 35, at 416–17.

<sup>70</sup> *Bush*, 531 U.S. at 104–05.

<sup>71</sup> See generally *Bush*, 531 U.S. at 98.

<sup>72</sup> See Mulroy, *supra* note 31, at 221–23 (discussing the statistical evidence that butterfly ballots were not counted properly in at least one Florida county and making the further claim that this possible mechanical error creates a reasonable doubt as to the veracity of victory).

<sup>73</sup> SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 306–07 (Robert C. Clark et al. eds., 2d ed. 2002).

*D. Bush v. Gore Applies to Machines*

Some scholars have suggested, quite persuasively, that *Bush v. Gore* applies only to the "expressive harm" caused by the public and poorly-managed recount in Florida.<sup>74</sup> Arguably, the expressive harm caused by perceptions of illegitimacy due to the widespread publication of stories about faulty machines, and the reality that when minorities go to the polls to vote they are more likely to see these faulty machines, is just as large as the "expressive harm" discussed in *Bush*. At the time of the holding, it is possible that the Court was less focused on the voting machinery than it was on the laughable manual recount process. However, most scholars and courts have argued that *Bush v. Gore* applies to vote counting processes more generally, and that even if it was not intended, the language of *Bush* is applicable generally to voting standards and technologies, not just the specific expressive harm caused by the Florida recounts:

[The Supreme Court] has asserted a new constitutional requirement: to avoid disparate and unfair treatment of voters. And this obligation obviously cannot be limited to the recount process alone. The court condemns the fact that 'standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county.' That criticism surely would apply to the variations in voting machines across Florida, and, for that matter, to similar variations in all other states. The court's new standard may create a more robust constitutional examination of voting practices.<sup>75</sup>

*Bush* was about vote counting procedures and inequality. The varied use of the *Bush* decision in the last four years demonstrates that there is no general consensus on the applicability of *Bush* to voting machines. But beyond its general limiting language, almost nothing in the opinion suggests that it cannot be extended to vote counting mechanisms generally.<sup>76</sup>

Only Justice Souter writing in dissent advances justifications for the distinction between recounting and balloting that seem, if not persuasive, at least arguable. Souter suggests that local variety in

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<sup>74</sup> See Gerken, *supra* note 43, at 1692 (using the redrawing of district lines to describe "expressive harm" as harm resulting from a district's actual shape after its borders have been redrawn as opposed to "representational" harm, which results from a representative's acts directed at the new population within the redrawn district).

<sup>75</sup> Samuel Issacharoff, *The Court's Legacy for Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39.

<sup>76</sup> SAMUEL ISSACHAROFF ET AL, *supra* note 73, at 309; see *infra* notes 165–207 and accompanying text (discussing the subsequent use of *Bush v. Gore* in the courts).

balloting technology is justified by "concerns about cost, the potential value of innovation, and so on," a claim that echoes the much less explicit reference by the majority to "local expertise."<sup>77</sup>

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

What is missing from the opinion is an explanation of why the situation in the case is distinctive, and hence to be treated differently from countless apparently similar situations involving equal protection problems. The effort to cabin the outcome, without a sense of the principle to justify the cabining, gives the opinion an unprincipled cast.<sup>78</sup>

This conclusion will be unpacked further in Part VII.

### *E. Bush's Limiting Language*

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

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<sup>77</sup> Camp, *supra* note 35, at 441.

<sup>78</sup> Cass R. Sunstein, *Bush v. Gore: Order Without Law*, 68 U. CHI. L. REV. 737, 765 (2001).

<sup>79</sup> *Bush*, 531 U.S. at 109; see generally William C. Smith, *Bush vs. Gore: Evermore: Plaintiffs Use High Court Voting Case in Other Lawsuits*, ABA JOURNAL, 87 A.B.A.J. 16 (May 2001), available at [http://www.pawalaw.com/assets/aba\\_journal\\_article.pdf](http://www.pawalaw.com/assets/aba_journal_article.pdf).

<sup>80</sup> *Bush*, 531 U.S. at 109; see Smith, *supra* note 79 (stating that "the High Court seemed to be expecting a one-hit wonder").

<sup>81</sup> See Elizabeth Garrett, *Democracy In The Wake of The California Recall*, 153 U. PA. L. REV. 239, 267 (2004) (arguing that "Justice Ruth Bader Ginsburg's prediction that *Bush v. Gore* was a 'one of a kind case' was premature (or perhaps wishful thinking)").

*Bush v. Gore* can, and should, be cited in this context.<sup>82</sup>

Bush stands as more than just a fact-specific result, more than a meaningless judicial coin-toss. Seven of nine Supreme Court Justices concurred on the equal protection holding, and if the Court insists on saying something is so, then it is so. What the majority said, precisely, was explained in a nearly 4,000 word, twelve-page per curiam opinion – an opinion by which it and all other courts ostensibly are now bound in interpreting the Constitution. Such a pronouncement by the United States Supreme Court can not flippantly be ignored. Moreover, widespread public approval of the Bush decision may do more to assure its long-term legitimacy than will the firmness of its doctrinal footing.<sup>83</sup>

#### *F. Level of Scrutiny: A Severe Infringement on the Right to Vote*

As is true in any Fourteenth Amendment challenge, the court must determine what level of scrutiny should be applied during review. For example, classifications based on race are subject to strict scrutiny,<sup>84</sup> classifications based on sex are subject to intermediate scrutiny,<sup>85</sup> and those classifications which affect fundamental rights are subject to strict scrutiny.<sup>86</sup> Although I will consider the impact that race may have on a potential

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<sup>82</sup> See *McGuffage*, 209 F. Supp. 2d at 898 ("Although the [*Bush v. Gore*] Court limited its decision to the then present circumstances, the rationale behind the decision provides much guidance to the situation in this case, which presents, as far as this Court can tell, a matter of first impression in this Circuit and, indeed, this country. That question is whether a state may allow the use of different types of voting equipment with substantially different levels of accuracy, or if such a system violates equal protection.") (internal citations omitted). *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 895 (9th Cir. 2003) (relying on *Bush v. Gore*), vacated by 344 F.3d 914 (9th Cir. 2003).

<sup>83</sup> *Camp*, *supra* note 35, at 411 (internal citations omitted).

<sup>84</sup> See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>85</sup> See generally *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>86</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (utilizing strict scrutiny in its analysis).

challenge later in this article, in the wake of *Washington v. Davis*,<sup>87</sup> disparate impact alone on racial minorities is not enough to trigger strict scrutiny without intent under the Fourteenth Amendment. Thus, any argument that strict scrutiny should apply would probably have to be grounded in a fundamental rights line of reasoning.

The Court has been somewhat ambiguous as to the level of scrutiny that should apply when examining potential violations of the fundamental right to vote. Certainly, *Bush* has confused many constitutional scholars and lower courts that have looked to see what level of scrutiny was applied by the Court. This is discussed further in Part VII.<sup>88</sup>

Although *Bush* appears to address the fundamentality of the right to have one's vote counted,<sup>89</sup> if the Court truly treated its opinion in *Bush* as unprecedented, then under the pre-*Bush* jurisprudence courts could still apply strict scrutiny. In *Burdick v. Takushi*, a 1992 case, the Court outlined the balancing of interests that it considered in determining whether to apply strict scrutiny in the election law context:

Under this standard [of weighing the character and magnitude of the asserted injury against the constitutional rights sought to be vindicated,] the rigorousness of the Court's inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, when those rights are subjected to "severe" restrictions, the regulation must be narrowly drawn to advance a "state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the state's important regulatory

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<sup>87</sup> See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (finding that a "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."). In *Washington*, a written personnel test for potential police officers which had disproportionate effects upon black applicants was challenged under the Fifth Amendment Due Process and Equal Protection clauses. *Id.* at 233. The Supreme Court held that the test did not violate either the Fifth Amendment or analogous sections of state and federal law, observing that the test in question was facially neutral and served the legitimate governmental purpose of ensuring a well-qualified police force. *Id.* at 246.; see also *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) ("Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race."). But see *Camp*, *supra* note 35, at 425 ("By ignoring the emergence of intent-based review, *Bush* wipes away another potential objection by clearly implying that intent is not a requirement for an equal protection violation in the vote-counting context.").

<sup>88</sup> See *infra* notes 165–207 and accompanying text (discussing the implications and use of *Bush v. Gore*).

<sup>89</sup> See *Bush*, 531 U.S. at 104 (referring to voting as a "fundamental right").

interests are generally sufficient to justify" the restrictions.<sup>90</sup>

This methodology suggests that if the restriction is not "severe" enough, heightened review, or the requirement of a "compelling importance," do not apply.<sup>91</sup> In the pre-*Bush* jurisprudence a challenge to disparities in voting machines would probably include a discussion of the severity of the harm caused by the variation.<sup>92</sup> However, any notion that the burden on the right to vote is not severe enough to warrant strict scrutiny is strongly rebutted by evidence demonstrating the large disparities that error rates and variation of technology have on individuals and communities with less accurate technology.<sup>93</sup>

### G. Fatal in this Case: Application of Strict Scrutiny

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

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<sup>90</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal citations omitted). In *Burdick*, the Court considered whether Hawaii's ban on write-in voting impermissibly violated an individual's rights of expression and association under the First and Fourteenth Amendments. *Id.* at 430. The Court refused to apply strict scrutiny because subjecting every voting regulation to such a high standard of review would "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* at 433. The Court described the three different mechanisms available to an individual who wished to appear on the election ballot and concluded that the system provided for adequate access to the ballot. *Id.* at 435-36. Because the burden the Hawaii law imposed upon voters was slight, the State did not have to show a compelling interest in order to prove the law's constitutionality. *Id.* at 439. The State's interest in running an efficient election that did not allow for "divisive sore-loser candidacies" was sufficient. *Id.* at 439. Consequently, the *Burdick* Court held that the State's legitimate interest in prohibiting write-ins outweighed the limited burden placed upon individual voters. *Id.* at 440.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* (applying a flexible standard that weighs severity of harm against State interests).

<sup>93</sup> *See id.* (stating that "when those rights are subjected to *severe* restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance") (emphasis added).

<sup>94</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (reminding the parties that "strict scrutiny is not strict in theory, but fatal in fact").

<sup>95</sup> *Johnson v. California*, 125 S. Ct. 1141, 1151 (2005).

<sup>96</sup> *See McGuffage*, 209 F. Supp. 2d at 900 (considering the main arguments that states make in support of upholding their statutes).

of a fixable infringement, the Court should apply heightened review and force compliance.<sup>97</sup>

#### H. The Counter-Arguments: Cost and Local Autonomy

Even though a fundamental right is implicated, the costs of instituting standardization would be unprecedented in elections administration and cannot be ignored in any considerations of standardization.<sup>98</sup> With the current budgetary problems facing state governments and the growing federal deficit, many political leaders would probably argue that American tax dollars could be spent better elsewhere.<sup>99</sup> Although this argument might suggest that the courts need to order standardization, since Congress and the legislatures will not, it is also a somewhat convincing justification for a gradual move to better, and more standardized, voting technology, rather than a complete overhaul prior to the next election cycle.<sup>100</sup> This may ultimately rest on a public policy consideration by the Court, but given that the election is the focal point of American democracy, "replacing voting systems that deprive individuals of the right to vote is clearly in the public interest."<sup>101</sup>

As was described above, election administration has traditionally been left to local autonomy.<sup>102</sup> Thus, if Congress or the courts entered the "thicket" of voting mechanisms, one might argue that they had overstepped the powers of the federal government.<sup>103</sup> However, this argument seems extremely unlikely. If there is one lesson from *Bush v. Gore*, it is that the federal courts will not hesitate to get involved in elections and any exit from

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<sup>97</sup> See *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1470 (M.D. Ala. 1988) (finding that in the face of a racial dilution constitutional violation "the selection of a plan with seven, rather than five, single-member districts reflects a conservative remedy limited to only those measures necessary to cure the violation.").

<sup>98</sup> Sunstein, *Bush v. Gore*, *supra* note 78, at 765.

<sup>99</sup> *Id.*

<sup>100</sup> See *infra* notes 208–34 and accompanying text (arguing that the Court's experiences in *Brown I* and *Brown II* indicate that any Court ordered plan for the vindication of a fundamental right should have an enforcement mechanism, rather than being left to individual states to implement at their own pace); see also Jason Belmont Conn, Note, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495 (2005) (discussing the differences in the approaches that state legislatures and courts take when addressing election law issues).

<sup>101</sup> *Common Cause v. Jones*, 213 F. Supp. 2d 1110, 1113 (C.D. Cal. 2002) [hereinafter *Common Cause II*] (finding that the only question was the feasibility of replacing the machines before the next election).

<sup>102</sup> Sunstein, *Bush v. Gore*, *supra* note 78, at 766 (considering the implications of *Bush v. Gore* on "longstanding rules of local autonomy") (stating only two techniques looked at by the Article hold out any hope of disentangling the Supreme Court from the political thicket).

<sup>103</sup> See generally *id.*



the "political thicket" would be difficult for the courts at this point.<sup>104</sup> Certainly, there is no reason to believe the courts would restrain from involvement in a challenge to voting machines, when they have become so deeply involved in the enforcement of equality in elections.<sup>105</sup>

In summation, using the "one person, one vote" standard and applying strict scrutiny, the courts should strike down any state law that does not require equal error rates in the voting machines it uses. The disparity in voting machines is altering the likelihood that a vote will be counted, thus violating that voter's fundamental right to vote without a compelling justification for doing so.<sup>106</sup> This is consistent with other cases implicating a fundamental right,<sup>107</sup> and with previous cases where voting was found to be a fundamental right.<sup>108</sup>

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

Even if the more lenient standard is ultimately applied by this Court, Plaintiff has alleged facts indicating that the Secretary of State's permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory.<sup>109</sup>

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

<sup>104</sup> See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B. U. L. REV. 667, 698 (2002) (stating that only two techniques looked at by the Article hold out any hope of disentangling the Supreme Court from the political thicket).

<sup>105</sup> See *supra* notes 52–58 and accompanying text (discussing the federal courts' entrance into the realm of politics, abandoning their *laissez faire* position).

<sup>106</sup> See *Bush*, 531 U.S. at 105, 109 (referring to voting as a "fundamental right").

<sup>107</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (stating that the right to marital privacy and to marry are of similar order and magnitude as the fundamental rights specifically protected by the Constitution).

<sup>108</sup> *Reynolds*, 377 U.S. at 561–62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) ("the political franchise of voting as a fundamental political right, because preservative of all rights"); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); see also *Duke v. Massey*, 87 F.3d 1226, 1232 (11th Cir. 1996) (finding that "when a state election law burdens a fundamental constitutional right severely, that law may survive only if it satisfies strict scrutiny"). But see *Common Cause I*, 213 F. Supp. 2d at 1108 ("The Supreme Court, however, has not clearly articulated the level of scrutiny which courts are to give to alleged infringements of the fundamental right to vote."). See also *Burdick*, 504 U.S. at 432 ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.").

<sup>109</sup> *Common Cause I*, 213 F. Supp. 2d at 1109.

insufficient.

*V. The Problem Revisited: Where the Worst Machines are Found and an Argument for Heightened Scrutiny*

Although it remains unclear whether the Court would accept a "mathematical equality,"<sup>110</sup> "one person, one vote," or fundamental rights argument as justification for requiring the standardization of voting technology, the addition of a race-based argument would significantly increase the pressure on the Court under the 14th Amendment.<sup>111</sup> After all, when a system has a "greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern."<sup>112</sup> There is significant evidence that the lack of standardized voting technology has a disparate impact on urban and minority communities.<sup>113</sup> This Part of the article demonstrates this impact and examines the effect it should have on a legal challenge.<sup>114</sup>

As new voting technology reaches the market, wealthy jurisdictions pride themselves on providing it to their voters,<sup>115</sup> but the poorer neighborhoods end up with the old, and less accurate, voting machines that

<sup>110</sup> See *Baker v. Carr*, 369 U.S. 186, 258 (1962) (stating that most, but not all, do not contend that mathematical equality among voters is required by the Equal Protection Clause). *But see Reynolds*, 377 U.S. at 566 ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.").

<sup>111</sup> See *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (searching for evidence that Blacks "had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice"); see also *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring) (finding "that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution").

<sup>112</sup> *McGuffage*, 209 F. Supp. 2d at 899.

<sup>113</sup> Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, 47 AM. J. POL. SCI. 1, 46 (2003); MINORITY STAFF OF SPECIAL INVESTIGATIONS DIV., COMM. ON GOV'T REFORM, 107TH CONG., INCOME AND RACIAL DISPARITIES IN THE UNDERCOUNT IN THE 2000 PRESIDENTIAL ELECTION (July 2001) [hereinafter SPECIAL INVESTIGATIONS]; John Mintz & Dan Keating, *A Racial Gap in Voided Vote: Precinct Analysis Finds Stark Inequity in Polling Problems*, WASH. POST, Dec. 27, 2000, at A1.

<sup>114</sup> It is interesting that efforts to introduce internet voting have met substantial resistance from civil rights activists who question the impact that internet voting will have on different communities, given the differences in access to the internet based on the economic, and thus racial, makeup of particular constituencies. However, these same concerns do not appear in the mainstream press regarding the differences in access to traditional voting technologies. See Kristen E. Larson, *Cast Your Ballot.com: Fulfill Your Civic Duty Over The Internet*, 27 WM. MITCHELL L. REV. 1797, 1804 (2001) (finding that some of the litigation in this area "arose from the idea that poor and minority voters do not have equal access to Internet voting systems, because they do not have computers or Internet access at home or work").

<sup>115</sup> See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435-36 (1994) (suggesting that the ratifiers of the Fourteenth Amendment "did believe that caste or class legislation was forbidden; but they did not fully unpack the category" and that they thought it was a "small subset of legislation, involving illegitimate grounds for differential treatment").

the wealthier neighborhoods pass down. As one journalist aptly noted, "votes don't spoil because they're left out of the fridge. It comes down to the machines. Just as poor people get the crap schools and crap hospitals, they get the crap voting machines."<sup>116</sup> Due to the fact that the worst machines and technologies are employed in poorer jurisdictions and inner cities where voting technology upgrades are not a high budgetary priority, the lack of an upgrade hinders, in a statistically significant way, the effectiveness of the urban, and thus minority, vote.<sup>117</sup> Classes of voters who should be "similarly situated" are not being treated similarly.<sup>118</sup>

### A. Congressional Findings

After the 2000 election, Rep. Roybal-Allard requested the first report at the national level to investigate race and income's connection to the number of undercounted and uncounted votes in the 2000 election.<sup>119</sup> The investigation examined forty congressional districts in twenty states; twenty of the districts had high poverty rates and a large minority population, twenty had low poverty rates and a small minority population.<sup>120</sup> The report made three significant findings: (1) Voters in low-income, high-minority districts were significantly more likely to have their votes discarded than voters in affluent, low-minority districts; (2) Better voting technology significantly reduced uncounted votes in low-income, high minority districts; and (3) Better voting technology significantly narrowed the disparity in uncounted votes between low-income, high-minority districts and affluent, low-minority districts.<sup>121</sup> Essentially, voters in low-income and high-minority districts had worse machines and these machines caused more minority votes to be discarded.<sup>122</sup>

The findings of the report are consistent with other studies of

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<sup>116</sup> Greg Palast, *An Election Spoiled Rotten*, BALT. CHRON. & SENTINEL, Nov. 1, 2004, <http://baltimechronicle.com/110204Palast.shtml>.

<sup>117</sup> *Income and Racial Disparities in the Undercount in the 2000 Presidential Election*, *supra* note 113; Mintz & Keating, *supra* note 113.

<sup>118</sup> *See generally*, Sunstein, *The Anticaste Principle*, *supra* note 115 (discussing the development of the equal protection doctrine to mean that "similarly situated" Americans must be treated "similarly" under the Fourteenth Amendment).

<sup>119</sup> SPECIAL INVESTIGATIONS, *supra* note 113, at 2.

<sup>120</sup> *See id.* at 3 (stating that in order to create the sample of congressional districts, "information was obtained from the Congressional Research Service" and the districts were selected based on the 1990 census data; districts were not selected if their boundaries had changed prior to the 2000 election).

<sup>121</sup> *Id.* at i.

<sup>122</sup> *See id.* at 9 (stating that districts with high poverty rates and a high minority population has significantly higher rates of uncounted ballots and that uncounted ballots were reduced by 85% when improved voting technology was used).

elections.<sup>123</sup> In a recent study of the racial gap in voting errors, Tomz and Van Houweling found that "the black-white gap in voided ballots depends crucially on the voting equipment that people use."<sup>124</sup> They found that the use of DRE and lever machines cut the gap in the voting errors by a factor of ten.<sup>125</sup> Although they found that the machines were not the only factor in differences in error rates, citing African-Americans' propensity to intentionally undervote at a higher rate than Whites, they found that when machines were standardized, the gap was between 0.3 and 0.7 percentage points,<sup>126</sup> suggesting that standardization would basically eliminate any racial differences. Thus, standardization would be one of the easiest fixes to a serious state-supported racial disparity in American history.

### *B. Fundamental Right + Race = Heightened Strict Scrutiny?*

The studies are enlightening and arguably unsurprising, but the current widespread consensus in political science that voting machines dilute the minority vote suggests a breach of the Fourteenth and Fifteenth Amendments. The racial impact of a system that uses a variety of machines is now certainly foreseeable.<sup>127</sup> Indeed, although it is unlikely that intent on the part of the legislatures could be shown,<sup>128</sup> the combination of a fundamental right and race suggests that an extremely high level of scrutiny should be applied.

The Court has historically separated its analysis of classifications and fundamental rights as two separate strands of equal protection.<sup>129</sup> When a fundamental right is implicated, however, a classification in effect, not

<sup>123</sup> See Mebane, *supra* note 30, at 526 (finding "[i]t is well established that throughout Florida voting problems disproportionately affected blacks and Democrats"); Stephen Knack & Martha Kropf, *Invalidated Ballots in the 1996 Presidential Election: A County-Level Analysis 2* (May 2001) <http://unofficial.umkc.edu/kropfm/invalidv.pdf> (finding "counties with more African Americans and Hispanics have higher rates of invalidated ballots" and discussing similar election studies); see also *McGuffage*, 209 F. Supp. 2d at 899 (finding the variation is "impacting African American and Hispanic groups disproportionately").

<sup>124</sup> Tomz & Van Houweling, *supra* note 113, at 58.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Cf. Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 511 n.17 (1979) ("To add the word 'foreseeable' does not change the analysis, because the police department in Davis would be hard pressed to say that the disparate impact of the examination was unforeseeable.").

<sup>128</sup> *Cf. Washington v. Davis*, 426 U.S. 229, 242 (1976) (finding that a "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations").

<sup>129</sup> See *Bolden*, 446 U.S. at 55 (finding that disproportionate effects alone are insufficient to establish a claim of unconstitutional racial vote dilution).

necessarily intent, could be enough to further heighten the level of review.<sup>130</sup> The use of the levels of scrutiny is formulaic, but in application, the levels are extremely abstract and open to interpretation as to how they should be applied. When considering race and voting laws the Court should be immediately suspect of any laws that have a large disparate impact on a "discrete and insular" group's ability to access the political process.<sup>131</sup>

### VI. A Potential Challenge Under the Voting Rights Act

Although this analysis of the constitutionality of the variation of voting machines focuses on the implications of *Bush v. Gore*, which does not focus on the Voting Rights Act,<sup>132</sup> any analysis of the intersection of elections and race would be incomplete without a discussion of the Voting Rights Act's impact on a constitutional challenge.<sup>133</sup> After all, the Voting Rights Act was enacted to "ensure that minority voters no longer will have to raise their voices against judicial tyranny,"<sup>134</sup> and was the most important legislation passed by Congress during the Civil Rights Era. President Lyndon Baines Johnson called the Act "one of the most monumental laws in the entire history of American freedom."<sup>135</sup> Despite lofty descriptions of the Voting Rights Act, the Act's applicability to the unintentional disparate impact on protected minorities created by a statewide variation of voting machines is not unequivocal, and may reach beyond the scope of Congress'

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<sup>130</sup> See *id.* at 113–14 (Marshall, J., dissenting) (arguing that "[u]nder the Equal Protection Clause, if a classification 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny' is required, regardless of whether the infringement was intentional. As I will explain, our cases recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution. Proof of discriminatory purpose is, therefore, not required to support a claim of vote dilution. The plurality's erroneous conclusion to the contrary is the result of a failure to recognize the central distinction between *White v. Regester* and *Washington v. Davis*: the former involved an infringement of a constitutionally protected right, while the latter dealt with a claim of racially discriminatory distribution of an interest to which no citizen has a constitutional entitlement.") (citations omitted).

<sup>131</sup> See *United States v. Carolene Prods Co.*, 304 U.S. 144, 152–53 n.4 (1938) (considering whether prejudice against discrete and insular minorities may be a special condition).

<sup>132</sup> See *Bush*, 531 U.S. at 103 (establishing up front that "[t]he petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses").

<sup>133</sup> See SAMUEL ISSACHAROFF ET AL., *supra* note 73, at 306–11 (asking "[i]s there also a role for courts in policing voting technologies, both before and after *Bush v. Gore*?").

<sup>134</sup> James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of The Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 611 (1999).

<sup>135</sup> Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 793 (2001–02) (quoting David J Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965*, at 132 (1978)).

enforcement powers.<sup>136</sup> However, as is argued in this Part, the Voting Rights Act should be "interpreted in a manner that provides the broadest possible scope" and should be used by the courts to standardize voting machines.<sup>137</sup>

*A. Scope of Congress' Enforcement Powers  
Under the Reconstruction Amendments*

The scope of Congress' enforcement powers under the Fourteenth and Fifteenth Amendments has been heavily litigated over the last decade with respect to the Voting Rights Act.<sup>138</sup> "[T]he Supreme Court has instructed . . . that statutes should not be construed to alter the constitutional balance between the states and the federal government unless Congress makes its intent to do so unmistakably clear."<sup>139</sup> Indeed, because there is no explicit standard for determining whether an application of the Voting Rights Act would extend beyond the scope of congressional power:

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

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<sup>136</sup> Essentially, the applicability of the Voting Rights Act to this type of challenge could be framed by asking the question: If Congress passed a bill to standardize voting technology at the state level, or even at the federal level, would this action be beyond the scope of Congress' powers?

<sup>137</sup> *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

<sup>138</sup> See *Muntaqim v. Coombe*, 366 F.3d 102, 104 (2d Cir. 2004) (finding that a number of recent Supreme Court decisions have looked at the scope of the enforcement powers under the Reconstruction Amendments); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) ("States have broad powers to determine the conditions under which the right of suffrage may be exercised. The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.").

<sup>139</sup> *Muntaqim*, 366 F.3d at 104.

one apparent from the text of the Amendment.<sup>140</sup>

The scope of the Voting Rights Act is often ambiguous. As a result, the Circuits have been divided in some important areas of election law.<sup>141</sup>

Congress originally enacted the Voting Rights Act, under its enforcement powers, to eliminate discriminatory practices based on race.<sup>142</sup> As the Supreme Court stated in *South Carolina v. Katzenbach*:<sup>143</sup>

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting.<sup>144</sup>

Due to the fact that many states continued to enact discriminatory practices under the auspices of neutrality with respect to race, "[i]n 1982, Congress amended § 2 of the Voting Rights Act to make clear that certain practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge."<sup>145</sup> Thus, the 1982 amendments relieved

<sup>140</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (stating that Congress' power to enforce is only preventive or remedial and that it cannot enforce a constitutional right by changing the nature of the right).

<sup>141</sup> See *Governor of Florida*, 405 F.3d at 1214 (finding that whether § 2 of the Voting Rights Act applies to felon disenfranchisement provisions has divided the Circuits); e.g., cf., *Muntaqim*, 366 F.3d at 102 (deciding that § 2 did not reach New York's felon disenfranchisement statute) with *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (deciding that § 2 applied to Washington's felon disenfranchisement law).

<sup>142</sup> *Katzenbach*, 383 U.S. at 308; see *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

<sup>143</sup> *Katzenbach*, 383 U.S. at 301. In *Katzenbach*, South Carolina challenged selected provisions of the Voting Rights Act as violations of the Federal Constitution. *Id.* at 307. The Supreme Court held that Congress, operating under the § 2 of the Fifteenth Amendment, may use any rational means it deems appropriate to ensure the prohibition of racial discrimination in voting. *Id.* at 324. These means include the prohibition of literacy tests and other voting tests, poll taxes, and Federal preclearance for voting regulations and political subdivisions. *Id.* at 315, 316.

<sup>144</sup> *Id.* at 308.

<sup>145</sup> *Chisom*, 501 U.S. at 383–84; see also 42 U.S.C. § 1973 (2000) (discussing denial or abridgement of the right to vote on account of race or color through voting qualifications or prerequisites).

"plaintiffs of the burden of proving discriminatory intent,"<sup>146</sup> even though a plurality of the Supreme Court had held in *City of Mobile v. Bolden* that the Voting Rights Act and Fifteenth Amendment had an intent/purpose requirement.<sup>147</sup> However, even as amended, "Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect,"<sup>148</sup> and just because intent does not need to be shown, does not mean that disparate impact alone is always enough.<sup>149</sup>

Today, it certainly appears that a "state practice could survive Equal Protection Clause scrutiny but fail Section 2 Voting Rights Act scrutiny."<sup>150</sup> Thus, it is an attractive platform for challenging the use of different machines should the equal protection argument fail.

### B. A Voting Rights Act Challenge: Why now?

As we approach the twenty-fifth anniversary of the 1982 amendments to the Voting Rights Act, the most obvious question raised by the possibility of a challenge to disparate voting machines is: Why now? The courts have been particularly skeptical as to whether a challenge falls outside the scope of congressional intent when the challenged practice was in place at the time of the Voting Rights Act's enactment, no specific mention of the practice was made at the time of enactment, and no challenge was brought immediately after the Act was passed.<sup>151</sup> After all, the use of different voting machines has been commonplace over the last century - if this practice was in violation of the Voting Rights Act, then why have not more challenges been brought? There are two answers to this question:

<sup>146</sup> *Chisom*, 501 U.S. at 403.

<sup>147</sup> *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Mobile* held city-wide elections for all city council positions and a group of minority citizens challenged this practice as a violation of the Voting Rights Act of 1965, the Fourteenth amendment, and the Fifteenth amendment, favoring election of a mayor by the entire city and of city council members on a district basis. *Id.* at 58. The Court interpreted the statutory claim as identical to the Fifteenth amendment challenge and found that the evidence failed to show intent to discriminate as required by the Court; likewise, the success of the Fourteenth amendment claim hinged on purposeful or intentional discrimination, also unsupported by the evidence. *Id.* at 61, 62-63, 65-66.

<sup>148</sup> *Governor of Florida*, 405 F.3d at 1228; see *Chisom*, 501 U.S. at 383 (stating that "certain practices and procedures that result in the denial or abridgment of the right to vote are forbidden").

<sup>149</sup> The vote dilution cases that used the *Zimmer* factors were not looking for outright intent, but they were looking for something more than just a disparate impact when looking at the *Zimmer* factors and the totality of the circumstances. This suggests that the Court's history indicates there might be a need to show something more than disparate impact. See *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (setting forth factors to be considered in determining whether a voter districting scheme is constitutional).

<sup>150</sup> *Governor of Florida*, 405 F.3d at 1234.

<sup>151</sup> *Id.* at 1229 (discussing the role that the Voting Rights Act should play in the court's review of felon disenfranchisement laws in Florida, since construing the Act to invalidate felon disenfranchisement laws might be "clearly contrary to Congressional intent").



First, the Voting Rights Act *has* been used before to challenge problems with voting technology, but the cases have usually garnered little attention and been focused on a small geographic area.<sup>152</sup> Second, many of the problems now associated with voting technology have come to light since the 2000 election and with advancements in technology.<sup>153</sup> Of course, these two answers are not unconnected; ironically, challenges to voting technology under the Voting Rights Act could not succeed on a large-scale until the technology and modeling were in place to properly review and understand the deficiencies of the system.<sup>154</sup> Now that the courts can "identify and remedy the burdens," a challenge under the Voting Rights Act is more likely to succeed.<sup>155</sup>

### *C. Anatomy of a Challenge To Disparate Voting Technology Under the Voting Rights Act*

"The essence of a [claim under § 2 of the Voting Rights Act of 1965, 42 U.S.C.S. § 1973] is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."<sup>156</sup> When scrutinizing a voting practice, courts generally look to the "non-exclusive list of factors relevant to a claim under § 2" which was codified in the Voting Rights Act:

[T]he history of official voting-related discrimination in the political subdivision; the extent to which voting is racially polarized; the extent to which the political subdivision has used

<sup>152</sup> See, e.g., *Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989) (using the Voting Rights Act to challenge problems with voting technology).

<sup>153</sup> See SAMUEL ISSACHAROFF, ET AL, *supra* note 73, at 311 (noting that previous litigation under the Voting Rights Act had focused on rules for aggregating votes, showing a general lack of awareness regarding problems with voting technology); see generally Part III: "The Problem: Variations In Voting Technology," *infra* pp. 6.

<sup>154</sup> Even though this conclusion may seem ironic, it is not unlike what has occurred in recent gerrymandering cases. As technology for finding inequality has emerged, the standards have gotten more stringent. See *Vieth*, 541 U.S. at 312–13 (Kennedy, J., concurring) ("Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.").

<sup>155</sup> See *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring) (noting that courts must have a standard to measure the burden imposed upon a claimant's representational rights in order to more effectively decide gerrymandering cases).

<sup>156</sup> *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); see *Wamser*, 679 F. Supp. at 1529 (looking at whether the punch card voting system denies blacks an equal opportunity for participation in St. Louis).

electoral practices that tend to enhance the opportunity for discrimination; whether minorities have been excluded from any candidate slating process; the extent to which minority groups bear the effects of discrimination in such areas as education, employment and health; the extent to which political campaigns have been characterized by overt or subtle racial appeals; the extent to which minority members have been elected to public office; whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of minority groups; whether the policy underlying the use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.<sup>157</sup>

A plaintiff must show that there is a disparate impact on minority voters, but a disparate impact alone, is not enough. In order to challenge a voting practice under "Section 2[,] plaintiffs must show a causal connection between the challenged voting practice and the prohibited discriminatory result."<sup>158</sup> In cases where the "causal connection" is glaring, the court does not need to pay as much attention to the codified factors, as is consistent with Congressional intent that "intent" not be a factor in Voting Rights Act inquiries.<sup>159</sup> The Senate Judiciary Committee Report

emphasized . . . that this list of factors was not a mandatory seven-pronged test; the list was only meant as a guide to illustrate some of the variables that should be considered by the court. As stated in the Report, 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'<sup>160</sup>

Thus, any suggestion that a challenge to disparate voting mechanisms does not fit perfectly into the Act's "factors" is rebutted by the strong "causal connection" that can be shown using the vast amount of data on the disparate impact.

As this article described above, political scientists have demonstrated that minorities are disproportionately affected by the disparities in voting machines, and that in any given election minority voters are having their

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<sup>157</sup> *Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 309-10 (3d Cir. 1994); see *Gingles*, 478 U.S. at 45 (noting that "this list of typical factors is neither comprehensive nor exclusive").

<sup>158</sup> *Ortiz*, 28 F.3d at 312; see *Farrakhan*, 359 F.3d at 1117-19 (Kozinski, J., dissenting) (citing *Ortiz* and discussing the different Circuits' treatment of this "causal connection" inquiry).

<sup>159</sup> See *Farrakhan*, 359 F.3d 1116 (denying petitioner's request for a rehearing *en banc*).

<sup>160</sup> *Gomez v. Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988).

votes discounted at a much higher rate than white voters.<sup>161</sup> Thus, a finding of disparate impact is certainly supported.<sup>162</sup> There is also a "causal connection" between the use of disparate voting technologies and the disproportionate discounting of minority votes. Minority voters have their votes discounted disproportionately because they disproportionately reside in precincts using the worst machinery;<sup>163</sup> were the machines standardized, the disparate impact would disappear.

No one could blame the machines for the geographical polarization that has led to the disparate impact in discounted votes. After all, geographic homogeneity is the result of centuries of discriminatory social, economic, governmental, private, and political practices that are deeply connected with the history of racial bigotry in the United States. But because the use of different machinery by geography "interacts with social and historical conditions to cause an inequality," the practice violates the Voting Rights Act.<sup>164</sup>

### VII. Subsequent Use of *Bush v. Gore* in the Courts

In the four years between *Bush v. Gore* and the 2004 election,<sup>165</sup> a number of suits challenging voting practices and the adequacy of voting machines were filed in state and federal courts.<sup>166</sup> Although many of these suits are quoted in this article and the arguments presented in this article reflect their contributions to the caselaw, a few of these decisions are more explicitly discussed in this section. As is true of many of the Court's

<sup>161</sup> Perhaps one of the advantages of bringing this claim under the Equal Protection Clause, as opposed to the Voting Rights Act, is that in more homogeneous states a claim under the Voting Rights Act might fail. Without a racial disparate impact, the Voting Rights Act claim would likely be dismissed on the pleadings.

<sup>162</sup> See "The Problem Revisited: Where the Worst Machines are Found and an Argument for Heightened Scrutiny," *infra* pp. 24–27 (discussing empirical studies that show racial disparities in different types of voting machines).

<sup>163</sup> There is also some very undeveloped political and social science data suggesting that certain machines even disproportionately impact Black voters when there is standardization because Blacks tend to undervote/overvote by accident at a slightly greater rate than Whites when the machinery is held constant. Although this paper has not sought to answer what possible changes should be made beyond standardization, and standardization would help remedy the overall discrepancy greatly, this area of research's applicability to a judicial challenge should be explored further in the future. See Michael Tomz & Robert P. Van Houweling, *supra* note 113 (suggesting that the choice of voting equipment has a potentially significant impact on the racial disparity reflected in voided ballots).

<sup>164</sup> Gingles, 478 U.S. at 47.

<sup>165</sup> 531 U.S. 98 (2000).

<sup>166</sup> *Stewart*, 356 F. Supp. 2d at 798 (finding that "[i]n the wake of the 2000 presidential election, several suits, including the present action, were filed challenging the use of punch card ballots as violative of § 2 of the Voting Rights Act, the Equal Protection Clause, and/or the Due Process Clause."). "Additionally, voters filed suits leading up to the 2004 presidential election challenging the adequacy of the voting systems that replaced the punch card ballots." *Id.*

decisions based on elections and voting rights law, the lower courts have struggled to apply *Bush v. Gore*'s amorphous language,<sup>167</sup> but as this Part demonstrates, their reliance on *Bush* in examining voting mechanisms is significant in itself.

### A. *Black v. McGuffage*

In *Black v. McGuffage*, the District Court for the Northern District of Ohio scrutinized a motion to dismiss, in a suit seeking an injunction challenging the use of punch card ballots and the variation of voting systems at the county level. The court examined "whether a state may allow the use of different types of voting equipment with substantially different levels of accuracy, or if such a system violates equal protection."<sup>168</sup> The plaintiffs, who were "Latino and African American voters in counties throughout Illinois," alleged that minorities were "disproportionately forced to use—and are disproportionately injured when they use—the challenged voting systems."<sup>169</sup> Although the litigation did not come to a conclusion in the courts because the suit was settled after the motion to dismiss failed, the District Court's discussion of the motion is revealing.<sup>170</sup>

The court denied the defendants' motion with respect to the claims under the Voting Rights Act, Equal Protection Clause, and the Due Process Clause, and only dismissed the count based on the privileges and immunities clause.<sup>171</sup> Quoting *Bush v. Gore*, and analogizing to the human ballot counting in Florida, the court found:

That people in different counties have significantly different

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<sup>167</sup> See, e.g., *Vieth*, 541 U.S. at 279 ("Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate.").

<sup>168</sup> *Black v. McGuffage*, 209 F. Supp. 2d 889, 898 (N.D. Ill. 2002). In *Black*, the District Court for the Northern District of Illinois considered the validity of the voting systems in Illinois to determine whether the use of different voting equipments would violate voters' equal protection rights. *Id.* at 898. The court reasoned that this case was similar to *Bush v. Gore* in that the lack of a rational basis for implementing a different system of vote counting resulted in vote dilution. *Id.* at 899. Therefore, the court concluded that plaintiffs had sufficiently stated a claim against the defendants for violation of equal protection. *Id.* Moreover, the court stated that defendants violated plaintiffs' substantive due process rights by allowing significantly inaccurate systems of vote counting to be imposed upon some portions of the electorate and not others without any rational basis. *Id.* at 901. Lastly, the court dismissed the claim of Eleventh Amendment's immunity, because the county clerks were not state officials and thus not protected by the Eleventh Amendment's immunity when engaged in the supervision of elections. *Id.* at 902.

<sup>169</sup> *Id.* at 891.

<sup>170</sup> *Stewart*, 356 F. Supp. 2d at 799–800 n.8 (noting that *Black v. McGuffage* "was subsequently settled by the parties").

<sup>171</sup> See *McGuffage*, 209 F. Supp. 2d at 889 (dismissing the privileges and immunities claim, but denying defendant's motions to dismiss the Voting Rights Act, Equal Protection Clause, and Due Process Clause claims).

probabilities of having their votes counted, solely because of the nature of the system used in their jurisdiction is the heart of the problem. Whether the counter is a human being looking for hanging chads in a recount, or a machine trying to read ballots in a first count, the lack of a uniform standard of voting results in voters being treated arbitrarily in the likelihood of their votes being counted. The State, through the selection and allowance of voting systems with greatly varying accuracy rates "value[s] one person's vote over that of another," even if it does not know the faces of those people whose votes get valued less. This system does not afford the "equal dignity owed to each voter." When the allegedly arbitrary system also results in a greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.<sup>172</sup>

Not only did the court treat *Bush v. Gore* as precedential, but it also found that the harm in *Bush* went beyond an expressive harm and directly implicated the use of varying voting technology that creates different probabilities that one's vote would be counted. The court explicitly found that by demonstrating a "disproportionate risk of having their votes not counted" the plaintiffs had established an injury and thus had standing.<sup>173</sup> Furthermore, the court found that because this probabilistic injury impacted traditionally protected groups, the injury was constitutionally problematic. Thus, *Black v. McGuffage* strongly suggests that *Bush* can be used to challenge the use of disparate voting technology under a number of constitutional provisions.

### B. *Common Cause Southern Christian Leadership Conf. v. Jones*

In *Common Cause v. Jones*, the court denied the state's motion for judgment on the pleadings after the plaintiffs challenged California's use of the less reliable punch card ballots under the Fourteenth Amendment and Voting Rights Act.<sup>174</sup> In looking at the Fourteenth Amendment challenge in *Jones*, the court looked at previous decisions by the Supreme Court to try to

<sup>172</sup> *Id.* at 899 (quoting *Bush v. Gore*, 431 U.S. at 104–05).

<sup>173</sup> *Id.* at 894 ("Probabilistic injury is enough injury in fact to confer standing in the undemanding U.S. CONST. art. III sense.")

<sup>174</sup> *Common Cause v. Jones*, 213 F. Supp.2d 1106 (C.D. Cal 2002). In *Common Cause*, the court considered whether the Secretary of State of California's approval of the use of unreliable punch-card systems in some counties infringed on the fundamental right to vote protected by the Fourteenth Amendment. *Id.* at 1107. The plaintiff's alleged that voters in counties with punch-card systems were substantially less likely to have their votes counted, and that the residents of these counties were more likely to be minorities. *Id.* at 1107–08. The court found that the plaintiff was not required to satisfy the three part test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as this test only applies to redistricting and vote dilution cases. *Id.* at 1110.

determine the correct level of scrutiny to apply. Ignoring the Court's instruction that *Bush* should not hold precedential weight, the District Court found significance in the Supreme Court's citation of *Harper* in *Bush* because that opinion adopted a "standard of at least intermediate, and possible, strict scrutiny."<sup>175</sup> In looking at *Bush*, the court was unsure which level of scrutiny the Court had applied and found "that perhaps the Court was using a heightened standard of scrutiny but also was finding the Florida recounts to be arbitrary and discriminatory."<sup>176</sup> Thus, based partially on *Bush*, the court found that the plaintiffs "alleged facts indicating that the Secretary of State's permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory."<sup>177</sup> The Fourteenth Amendment challenge was allowed to proceed.

With regard to the Voting Rights Act challenge, the state argued that because the claim did not fit the *Gingles* factors, it should be denied.<sup>178</sup> However, the court rejected this argument, finding that the *Gingles* factors "apply to redistricting and vote dilution cases" and that a challenge based on the disparate impact of voting machines is more analogous to a voting qualifications challenge and thus the test outlined in *Gingles* does not apply.<sup>179</sup> The court was convinced that the arguments under the Voting Rights Act and Fourteenth Amendment claims should proceed.

Unfortunately, "[t]he issues in this case were subsequently rendered moot because the Secretary decertified punch card ballots" for use in elections occurring after March 2004.<sup>180</sup> However, due to the campaign to recall Governor Gray Davis in the summer of 2003, the battle over California's voting mechanisms was anything but moot.

### C. *Southwest Voter Registration Education Project v. Shelley*

In *Southwest Voter Registration Education Project v. Shelley*, the Ninth Circuit, sitting en banc, would not allow a preliminary injunction based on the California's use of different voting mechanisms in the

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<sup>175</sup> *Common Cause I*, 213 F. Supp. 2d at 1109; *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

<sup>176</sup> *Common Cause I*, 213 F. Supp. 2d at 1109.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1110 ("[T]he three part test articulated in *Thornburg v. Gingles*: 1) the minority group is sufficiently large and geographically compact to constitute a majority in single-member district; 2) the minority group is politically cohesive; and 3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate").

<sup>179</sup> *Id.*

<sup>180</sup> *Stewart*, 356 F. Supp. 2d at 800 n.10.

upcoming gubernatorial recall election of 2003.<sup>181</sup> A circuit panel, relying heavily on *Bush*, had previously found that the election should be postponed because the "choice between holding a hurried, constitutionally infirm election and one held a short time later that assures voters that the rudimentary requirements of equal treatment and fundamental fairness are satisfied is clear."<sup>182</sup> The plaintiffs based their challenge on the equal protection clause and the Voting Rights Act, and a circuit panel noted that they were likely to succeed on the "merits of their equal protection claims."<sup>183</sup>

The Ninth Circuit quoted *Bush* and held that because the question in *Bush* did not implicate "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections," an injunction was not appropriate because the plaintiffs had not shown that there was a high likelihood of success that their challenge would ultimately succeed.<sup>184</sup> After all, in determining whether to impose an injunction, the standard of review requires that the court speculate as to the likelihood that the plaintiffs will ultimately succeed in their action.<sup>185</sup> However, the Ninth Circuit *did not* say that there was not a constitutional violation,<sup>186</sup> nor that

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<sup>181</sup> *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (*en banc*) (*per curiam*). In *Shelley*, the Ninth Circuit considered a challenge to California's "punch-card" voting procedures as constituted during the gubernatorial recall election resting on the Equal Protection Clause and the Voting Rights Act. *Id.* at 916–17. The Ninth Circuit heard and agreed with arguments presented en banc urging that it uphold the district court's denial of the injunction which would reverse the decision of the panel of the circuit, employing a test requiring a plaintiff to show "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiffs if relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the public interest (in certain cases)." *Id.* at 917–18 (quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)). The court held that the district court did not abuse its discretion when it denied the request for injunctive relief brought by voter organizations alleging that punch-card balloting machines violated their rights protected by the Equal Protection Clause and by the Voting Rights Act. *Id.* at 919–20.

<sup>182</sup> *Shelley*, 344 F.3d at 912.

<sup>183</sup> *Id.* at 907.

<sup>184</sup> *Id.* at 918 (citing *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

<sup>185</sup> See *id.* at 917–18 (finding that "[a] preliminary injunction is appropriate where plaintiff's demonstrate 'either: 1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in their favor. The district court must also consider whether the public interest favors issuance of the injunction. This alternative test for injunctive relief has also been formulated as follows: a plaintiff is required to establish: 1) a strong likelihood of success on the merits, 2) the possibility of irreparable injury to plaintiffs if preliminary relief is not granted, 3) a balance of hardships favoring the plaintiffs, and 4) advancement of the public interest (in certain cases). This analysis creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor'" (citing *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)) (internal citation omitted).

<sup>186</sup> *Id.* at 919 (finding "[t]here is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election. The decision to enjoin an impending election is so serious that the United States Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation" and citing *Ely v. Klahr*, 403 U.S. 108, 113, 115 (1971)); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (*per curiam*).

machinery was not implicated in *Bush*, but solely "that plaintiffs will suffer no hardship that outweighs the stake of the State of California and its citizens in having this election go forward as planned and as required by the California Constitution."<sup>187</sup> In other words, in the face of potential competing constitutional interests, the Ninth Circuit erred on the side of allowing the election to proceed.<sup>188</sup> The decision certainly did not foreclose future challenges to the use of disparate voting technologies; in fact, the court hints that if the evidence of disparate impact had been further developed at the time of litigation, a Voting Rights Act claim might have succeeded,<sup>189</sup> and that *Bush* leaves open the question of whether an equal protection challenge to the use of the machines would succeed.<sup>190</sup>

#### D. *Weber v. Shelley*

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

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the . . . Fourteenth Amendment [] that the plaintiff seeks to vindicate against the precise interests put forward by the

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<sup>187</sup> *Id.* at 920.

<sup>188</sup> *Id.* at 919 (stating that "[i]f the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election's proceeding on the announced date").

<sup>189</sup> *Id.* at 918–19 ("There is significant dispute in the record, however, as to the degree and significance of the disparity. Thus, although plaintiffs have shown a possibility of success on the merits, we cannot say that at this stage they have shown a strong likelihood.").

<sup>190</sup> *Id.* at 918.

<sup>191</sup> *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003). In *Weber*, the Ninth Circuit considered whether a computerized touchscreen voting system adopted by Riverside County, California, violated a voter's equal protection and due process claim under 42 U.S.C. § 1983, because of the lack of a voter-verified paper trail. *Id.* at 1102–03. The court affirmed the district court's ruling that excluded expert testimony, holding that it was not an abuse of discretion to exclude studies without a showing that experts normally rely upon them. *Id.* at 1105. In addition, the court found that the expert testimonies provided by Weber did not indicate that the touchscreen voting system was "inherently less accurate, or produces a vote count that is inherently less verifiable, than other systems." *Id.* The Ninth Circuit held that a touchscreen voting system that did not use paper does not create a severe restriction on the right to vote. *Id.*

<sup>192</sup> *Id.* at 1103.



State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Under this standard, the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens Fourteenth Amendment rights. Thus, as [the court has] recognized, when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the...Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.<sup>193</sup>

*Weber* can be distinguished from the type of challenge recommended in this article in two ways: First, no racial disparate impact was shown. The analysis in this article has suggested that when race is implicated the standard of review should be heightened and the protections under the Voting Rights Act can be triggered. Second, *Weber* was a challenge based on the possibility of fraud, not on the possibility that a vote would not be counted. As was discussed above, there are already laws in place to deal with and deter fraud, thus the justification for standardization in this case was much weaker than the race-based challenge developed in this article.

### *E. Stewart v. Blackwell*

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

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<sup>193</sup> *Id.* at 1106.

<sup>194</sup> *Stewart*, 356 F. Supp. 2d at 791.

<sup>195</sup> *Id.* at 795.

<sup>196</sup> *Id.* at 804-05 n.19.

reasons, and the decision reads like a long excuse.

First, the court denied the Voting Rights Act claim because the plaintiffs only asserted a "vote denial" claim and neglected to assert a "vote dilution" claim.<sup>197</sup> While implying that the vote dilution claim might have succeeded, the court dismisses any potential for success under the Voting Rights Act because the plaintiffs failed to define their challenge using the proper legal term.<sup>198</sup> The court quickly notes that there certainly is no vote denial because minorities have not been denied access to the polls.<sup>199</sup> This seems like an excuse so that the court did not have to consider what was obviously meant to be a vote dilution claim.

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

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

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<sup>197</sup> *Id.* at 807–08 (finding "[t]here are two separate and distinct theories under which a plaintiff can assert a claim under the Act, vote denial and vote dilution") (citing *Holder v. Hall*, 512 U.S. 874 (1994)).

<sup>198</sup> *Id.* at 809.

<sup>199</sup> *Id.* at 808.

<sup>200</sup> *Id.*

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

<sup>202</sup> *Id.* at 805.

<sup>203</sup> *But see Chisom*, 501 U.S. at 403 (finding Voting Rights Act should be "interpreted in a manner that provides 'the broadest possible scope'" (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969))).

*F. Conclusions Drawn from Litigation after Bush v. Gore*

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

The lasting significance of *Bush v. Gore* is likely to be the reinvigoration of the line of cases from the 1960s that deemed voting a fundamental right. The court's language has now opened the door for constitutional challenges of flawed election methods. The spotlight on Florida revealed just how infirm the operations of elections are. The legacy of this case could be a substantial jolt of justice into the voting arena.<sup>207</sup>

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

<sup>205</sup> See Garrett, *supra* note 80, at 265–73 (discussing the use of lawsuits as "political weapons").

<sup>206</sup> Smith, *supra* note 78.

<sup>207</sup> Samuel Issacharoff, *The Court's Legacy for Voting Rights*, *supra* note 75, at A39.

### VIII. *Bush, Brown and Lessons Learned from "All Deliberate Speed"*

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

#### A. *Background on Brown v. Board of Education*

In 1954, the Court handed down what scholars consider the most important civil rights decision in American history,<sup>210</sup> *Brown v. Board of Education*.<sup>211</sup> *Brown* decided a collection of challenges to school segregation based on race. Relying on strong social science data, the Court found that although the schools had similar buildings, curricula, qualifications, and teacher salaries, the doctrine of "separate but equal" had no place in the public school system:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater

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<sup>208</sup> In making the comparisons between voting rights and education, it is worth noting that some courts have been reluctant to "extend the education line of cases to other areas," especially when there is specific precedent in the area of law. See *Governor of Florida*, 405 F.3d at 1214 (discussing the Eleventh Circuit's reluctance to extend the standards in the education cases to felon disenfranchisement laws since "there is specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement").

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

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

<sup>211</sup> *Brown v. Bd. of Educ.* 347 U.S. 483 (1954).

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

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

### B. *Separate but Unequal*

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

Looking at the broad entitlement implicated in *Brown*, the states argued that there was an equal right to receiving an education. Furthermore, they were able to demonstrate that if the doctrine of "separate but equal" manifested itself in the educational system correctly, the tangible outcome of receiving a quality public school education would result. Similarly, in the case of voting, all voting technology provides an opportunity to cast one's vote in the broadest sense. One can cast a vote no matter what machine is used, and, if the machinery works perfectly, there is really no difference between machines. However, the problem is that separate is inherently unequal because the chance of failure, whether in an education system or voting machine, is not equal once there is a separation. This is the takeaway from *Brown*.

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

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<sup>212</sup> *Id.* at 494.

<sup>213</sup> *Id.* at 493 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

### C. Lessons from "All Deliberate Speed"<sup>214</sup>

In *Brown*, the Court overruled the "separate but equal" doctrine<sup>215</sup> which had buttressed segregated schools throughout the United States, and without providing a decree for immediate desegregation, left it to the lower courts and state government to implement the process.<sup>216</sup> However, the Southern states did little to implement the Court's changes, the courts refused to strengthen the decision without further guidance from the Supreme Court, and ultimately "stagnation resulted."<sup>217</sup> As a result, *Brown* returned to the Supreme Court in 1955 for the Court to decide how its first decision should be implemented. Faced with unwilling state governments and a divided nation, the Court wrote in *Brown II* that the States, through the enforcement of the District Courts, must desegregate with "all deliberate speed."<sup>218</sup>

A few years later, in *Cooper v. Aaron*,<sup>219</sup> after the Governor and the legislature of Arkansas defied the Supreme Court's decision in *Brown I*, the Court affirmed its authority, and forced Arkansas' schools to desegregate. However, the decision in *Cooper* and the subsequent history of school desegregation are testaments to the failure of the "all deliberate speed" "order" from the Court. Indeed, ten years after *Brown I*, "few schools were even marginally integrated."<sup>220</sup> It was not until *Green v. County School*

<sup>214</sup> *Brown II*, 349 U.S. at 301.

<sup>215</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (announcing the "separate but equal" doctrine).

<sup>216</sup> *Brown I*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

<sup>217</sup> Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968-1974*, 32 AKRON L. REV. 471, 471 (1999) (finding that "[s]outhern opposition to desegregation, combined with a lack of direction from the Supreme Court, had left the lower federal courts unwilling, or unable, to demand rapid action. Stagnation resulted.").

<sup>218</sup> See *Brown II*, 349 U.S. at 301 (ordering the district courts to "take such proceedings and enter such orders and decrees...as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties in these cases.").

<sup>219</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958). In *Cooper*, the Supreme Court considered the validity of a court-ordered stay of the Little Rock District School Board's desegregation program due to the staunch opposition that Arkansas state officials and the public presented. *Id.* at 4, 9. The Court reasoned that "law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights." *Id.* The School Board, as an agent of the State, could not postpone desegregation without violating black students' equal protection rights. *Id.* at 17. The State was prohibited from delaying integration by direct or indirect action. *Id.* The Court noted that its interpretation of the Federal Constitution in *Brown I* is the supreme law of the land, and cannot be evaded by the States. *Id.* at 18. Consequently, it affirmed the appellate court's decision requiring prompt desegregation and reinstated the district court's enforcement of the School Board's desegregation plan. *Id.* at 5.

<sup>220</sup> Zelden, *supra* note 218, at 471.

Board,<sup>221</sup> that the Court actually said that its decision in *Brown* required integration and had "teeth." It took two more decisions in 1969 and 1970, *Alexander v. Holmes County Board of Education*,<sup>222</sup> and *Carter v. West Feliciana Parish School Board*,<sup>223</sup> to make it clear to the States that the Court meant what it said when it came to desegregation and integration.<sup>224</sup>

Today, the *Brown II* "all deliberate speed" order is considered one of the greatest failures of the Court during the civil rights era: "Both at the time of the decision and in subsequent appraisals, *Brown II* was criticized for delegating too much authority to the district courts and relying unduly on state and local authorities."<sup>225</sup> In the face of a constitutional violation, the Court bowed to state governments that did not want to desegregate, and failed to create a timeframe that would counter the "massive resistance" to desegregation around the country.<sup>226</sup> After all, if segregation was unconstitutional, it did not follow that the Court would allow it to continue for any time period. The "all deliberate speed" order diminished the seriousness of the constitutional violation and allowed the state governments leeway in their remedial efforts.

The Court must have known that its "all deliberate speed" order would not force immediate state action. Politically, given the public opinion of desegregation at the time, without a strong order from the Court, state officials were savvy (and potentially motivated by animus) in their decision

<sup>221</sup> *Green v. County Sch. Bd.*, 391 U.S. 430 (1968). The Court held that the School Board's "freedom-of-choice" program implemented in response to a prior Supreme Court ruling did not adequately provide meaningful assurance of prompt and effective integration of its schools and, as such, violated the Fourteenth Amendment's guarantee of equal protection where the board had other more immediate methods of achieving the required ends, including rezoning. *Id.* The Court's analysis relied upon its rulings in prior school segregation cases addressing similar situations, leading it to conclude that New Kent County's school board could more effectively integrate its students to immediately remedy the disparities recognized as violating the guarantee of equal protection found in the Fourteenth Amendment and must adopt measures to immediately effectuate unitary status among its schools. *Id.* at 437-39, 442.

<sup>222</sup> *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969). In *Alexander*, the Court considered the validity of an appellate court's order permitting Mississippi schools to operate a racially segregated dual school system until it could transition to a unitary system. *Id.* at 20. The Court held that the order was invalid. *Id.* It asserted that operating segregated schools under "a standard allowing 'all deliberate speed' for desegregation" was no longer constitutional. *Id.* Desegregation, stated the Court, must be enforced immediately, the dual school system giving way to a unitary one because children must not be denied their fundamental rights. *Id.*

<sup>223</sup> *Carter v. West Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970). In *Carter*, the Court reversed the decision of the Court of Appeals which allowed school districts in Louisiana to defer pupil desegregation beyond February 1970. *Id.* at 291. The Court held that the Court of Appeals misconstrued the decision in *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) by allowing such a deferment. *Id.*

<sup>224</sup> Zelden, *supra* note 217, at 486.

<sup>225</sup> Judith A. Hagley, *Massive Resistance: The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 182 (1997).

<sup>226</sup> *Id.*

to delay desegregation as long as possible.<sup>227</sup> Additionally, given the large cost of desegregating, busing students, and revising the entire educational system of a state, the officials were constrained by considerations of practicality.

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

*D. "Likely . . . will examine ways"*<sup>228</sup>

This is a lesson the Court did not heed in its decision in *Bush v. Gore*.<sup>229</sup> In *Bush*, the Court identified the variation in voting machines and said that "[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting."<sup>230</sup> There is a strong parallel that can be made between this language and the "all deliberate speed" order in *Brown*. Both orders provide an ambiguous timeline for the States to cure a constitutional violation.

In *Bush*, the Court indicated, but did not hold, that the use of disparate voting machines is unconstitutional, and the Court did not immediately force the states to standardize.<sup>231</sup> The Court's decision argued that:

The right to vote is protected in more than the initial allocation of the franchise [to choose electors for the President of the United States.] Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another . . . . It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."<sup>232</sup>

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<sup>227</sup> *Id.* at 186 (finding that politicians were unwilling to support desegregation and whites formed groups in the South to actively oppose the process).

<sup>228</sup> *Bush v. Gore*, 531 U.S. 104, 104 (2000).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Part III: "The Problem: Variations in Voting Technology," *supra* pp. 6.

<sup>232</sup> *Bush*, 531 U.S. at 104–05 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).



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

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

Just as the decision in *Brown*, without a firm mandate, was a "shot over the bow" to the states to begin the desegregation process, the language implicating the voting machines in *Bush* indicated to the States that they needed to thoroughly examine their voting machines. Just as the changes after *Brown* were mired in state politics, funding issues, and left an impacted class without substantial political influence with nowhere to turn but back to the courts, changes to voting technology in the states have been slow, and the states, burdened with large deficits, have struggled to meet the standards recommended to them and those of HAVA.<sup>233</sup> If *Brown* is an indicator, the Court will likely be forced to revisit the issues discussed in this article soon, and in the face of a constitutional violation, the Court should not tell the

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<sup>233</sup> Camp, *supra* note 36, at 443 (finding that "many states have failed to undertake ballot reform efforts, and . . . some have done so in an incomplete fashion"); see Dan Tokaji, *What Voting Equipment Will Ohio's 10 Largest Counties Be Using?*, [http://moritzlaw.osu.edu/electionlaw/ebook/part4/equipment\\_machines03.html](http://moritzlaw.osu.edu/electionlaw/ebook/part4/equipment_machines03.html) (last visited Jan. 8, 2006) ("When the polls open on November 2, 2004, most Ohio voters will find the same voting equipment that they used four years ago.").

States to standardize machines with "all deliberate speed," rather it must provide an ultimatum, mandating change prior to the next election.<sup>234</sup>

### IX. Conclusion

John Hart Ely wrote, "[u]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage."<sup>235</sup> As technology advances, new voting technologies will be utilized in American elections. Although these new technologies provide for greater accuracy, faster voting, and quicker results, as long as voting machinery is not standardized across a given State, some voters will be left behind. There is significant evidence today that the voters being left behind are disproportionately minorities in socio-economically disadvantaged areas. When the right to vote is infringed, and especially when that infringement has racial implications, the courts must step in to protect the equal protection rights of those affected. Under the Equal Protection Clause, "we have seen the eradication of numerical malapportionment, the enfranchisement of minority voters, and the erosion of discriminatory electoral systems."<sup>236</sup> Nevertheless, although our electoral processes have improved and become more inclusive over the last fifty years, we can still do better. The closeness of the 2000 election and subsequent studies of voting technology have "brought into sharp focus a common, if heretofore unnoticed, phenomenon,"<sup>237</sup> resulting in an opportunity for the Court to shape the law and institute change using its equal protection jurisprudence. As we learned from *Brown*, in the face of a constitutional violation, the Court must step in and not idly wait for the legislatures to act. No matter what the cost, it is important that we commit the funds necessary to protect the democratic ideals that we purport to advance. If Congress and the legislatures will not, the Court must.

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<sup>234</sup> See Camp, *supra* note 36, at 443 (arguing that "the question of whether Bush itself mandates reform will remain significant").

<sup>235</sup> John Hart Ely, *DEMOCRACY AND DISTRUST* 117 (1980). Even though we do not necessarily want the Court getting involved in political issues, "[t]he party that controls the process has no incentive to change it," and sometimes it is important for the Courts to step in. *Vieth*, 541 U.S. at 327 (Breyer, J., dissenting).

<sup>236</sup> Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 U. ILL. L. REV. 683, 686 (1995).

<sup>237</sup> *Bush*, 531 U.S. at 103.

**TABLE 1: UNITED STATES VOTING TECHNOLOGIES<sup>238</sup>**

EQUIPMENT	DESCRIPTION
Paper Ballots	Candidates' names are printed next to boxes which voters mark, on large ballot forms that are counted manually. Because counting by hand is time intensive, these remain in use mostly in small counties with few contested offices.
Lever Machines	Each candidate name is assigned to a lever on a rectangular array of levers on the face of the machines. The voter pulls down selected levers to indicate choices. Interlocks in the machines prevent overvoting.
Punch Card	Information about the ballot choices is provided in a booklet attached to a mechanical holder and centered over a punch card, which is inserted by the voter. To cast a vote, a stylus or other punching device provided is used to punch holes at the appropriate locations on the card, forcing out the inside of a pre-scored area in the shape of a rectangle.
DataVote	In this variation on punch-card ballots, a stapler-like tool creates holes on the card with sufficient force that pre-scoring of ballot cards is unnecessary. Unlike standard punch card systems, information on candidates and ballot questions is printed directly on the DataVote card, so it is easier for voters to ascertain after completing their ballot whether they voted as intended.
Optical Scanning <sup>239</sup>	Large ballots similar to those of paper ballot systems are used, allowing information about candidates to be printed directly on the ballot. Voters mark their choices using a pen or pencil. Ballots are counted by a machine that uses light or infra-red as a sensor to discern which oval or

<sup>238</sup> Stephen Knack & Martha Kropf, Working Paper, *Invalidated Ballots in the 1996 Presidential Election: A County-Level Analysis* 8 (May 2001), <http://unofficial.umkc.edu/kropfm/invalidv.pdf>.

<sup>239</sup> A great deal of literature has discussed the differences between optical scan machines that tabulate at the precinct-level and those that tabulate at a central location. Mebane, *supra* note 30, at 532.

	rectangle the voter marked from a set of choices. Some precinct-based scanning machines are programmed to allow voters to check their ballots for overvotes.
Electronic Systems (DRE)	With electronic voting, voter choices directly enter electronic storage, using touch screens, push buttons or keyboards. Machines are typically programmed to prevent overvoting. The most common models are "full faced," showing all contests at once, like lever machines, and a flashing red light alerts voters to the contests in which they have not yet voted.

**TABLE 2: RELATIVE STRENGTHS AND WEAKNESSES OF VOTING TECHNOLOGIES<sup>240</sup>**

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

<sup>240</sup> Tomz & Van Houweling, *supra* note 113, at 48.

