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The History and Future of Bush v. Gore

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THE HISTORY AND FUTURE OF *BUSH V. GORE*

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I. INTRODUCTION

Bush v. Gore[1] presents us with something of a paradox. The U.S. Supreme Court frustrated the political processes by which we ordinarily choose our president by finding a constitutional violation that could not be remedied, according to that Court, in a manner consistent with Florida law.[2] At the same time, the constitutional violation the Court identified advanced the cause of voting rights. The U.S. Supreme Court found that the Florida Supreme Court denied some voters, whose ballots were "legal" under state law,[3] the right to have their votes counted equally with other votes.[4] To overstate the point somewhat: the U.S. Supreme Court denied the right of United States citizens to cast votes that were effective to ensure that everyone who voted could cast an effective vote. In one way, the Court's decision on the merits vindicated the right to vote. But in another way, the Court's termination of the recount *defeated* the right to vote.

This Article places *Bush v. Gore* in the context of the historical development of the right to vote, and speculates about the decision's doctrinal future by attempting to identify the underlying constitutional

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1. 531 U.S. 98 (2000).

2. *Id.* at 107-10. The "ordinary" political process includes the methods for resolving controversies over who actually won the presidential election prescribed in the Constitution and federal statutes. *See e.g.*, U.S. CONST. amend. XII; 3 U.S.C. § 5 (2000).

3. Gore v. Harris, 772 So. 2d 1243, 1254 (Fla. 2000).

4. Bush v. Gore, 531 U.S. at 107-08.

violation of Florida's provisions more carefully than the U.S. Supreme Court did.[5]

II. HISTORY OF THE RIGHT TO VOTE

Any enumeration of stages in the development of the right to vote is arbitrary.[6] For present purposes, we can begin with the establishment of a right to vote *per se*, that is, the transformation of government from one where power was exercised according to hereditary rights, to another where power is derived ultimately from the people. The first step in creating a right to vote was to have elections in which someone voted.

Nothing in such a system required that everyone be entitled to vote, however.[7] Conceptually, two grounds were available to justify limiting the franchise. First, some might be thought to be properly subject to control by others, either directly, as in slavery, or indirectly, as when the poor, despite their inability to vote, are subject to punishment for violating criminal laws enacted by elected legislatures. Second, those not entitled to vote might be considered represented by others through virtual representation.[8]

The Declaration of Independence challenged both grounds for denying the right to vote.[9] In asserting that "all men are created equal," the Declaration undermined any account that sought to justify personal subjection — despite the fact that the Declaration's authors knew that their society was shot through with personal subjection, especially the subjection of slaves to masters, and of women to men.[10] In addition, in claiming a right to be self-governing, the Declaration rejected the proposition that the colonists were virtually represented in Parliament.[11]

Of course, independence alone did not create a comprehensive right to vote. Generations of popular struggle went into vindicating a universal right to vote, even though such a right may have been implicit in the

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5. I do not fault the Court for incompletely defining the constitutional right, under the time pressures it imposed on itself.

6. For a recent historical treatment of the development of the right to vote in the United States, see ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

7. *Id.* at xvi.

8. Virtual representation refers to the belief that legislators not elected by some group might nonetheless take that group's interests into account when making policy.

9. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

10. *Id.* at para 2. For discussions of the implications of the Declaration's theory for systems of personal subjection, *see* THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA (1997) *and* ROBERT A. GOLDWIN, WHY BLACKS, WOMEN, AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION, AND OTHER UNORTHODOX VIEWS (1990).

11. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

theory underlying the Declaration of Independence. As historian Alexander Keyssar states, "The conflict over the franchise that erupted during the revolution involved — *as such conflicts always would* — both interests and ideas."[12] In this Article, an outline is provided of the popular struggles and ideas that animated them without pretending to offer a full account of those struggles and the political circumstances under which they succeeded or failed. Keyssar's list of factors that affected political outcomes suggests the scope that such an account must have: "grassroots pressure, ideological resonance, wartime mobilization, economic incentives, class interest, and partisan advantage."[13]

Through the nineteenth century, social movements sought to eliminate systems of personal subjection that placed the poor, slaves, and women under the control of others. Some of these movements focused on the right to vote directly, while others saw the right to vote as only one part of a comprehensive challenge to systems of personal subjection. The first movement to succeed involved the right to vote only. During the Jacksonian era, states abolished property qualifications for voting, creating universal manhood suffrage — the word *manhood* indicating that women were not yet thought entitled to vote, and the absence of the word *white* indicating that suffrage for African-Americans was not yet even on the agenda.[14]

The fight to abolish slavery initially took as its aim the institution of slavery alone. Many abolitionists, especially those who sought to abolish slavery because of its political effects on the national government, were unsure that abolition meant more than ensuring that African-Americans could own themselves, and thereby participate fully in the economy as autonomous actors. Abolition was, initially, a struggle for civil rights, as that term was understood in the 1850s and 1860s.[15] Civil rights arose from the fact that people lived in organized societies; there were basic human rights to which every person was entitled simply on account of being human that included the right to own property, enter into contracts, and testify in court so as to be able to defend in property and contract actions.[16] Civil rights emphatically did *not* include the right to vote, which was described as a political right, flowing not from the fact of humanity itself

12. KEYSSAR, *supra* note 6, at 8 (emphasis added).

13. *Id.* at 195.

14. *Id.* at 29, 101.

15. *See* Mark Tushnet, *Political Aspects of the Changing Meaning of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884 (1987) (discussing the distinction between civil and political rights).

16. *Id.*

but from the fact that people lived in particular societies each with its distinctive form of political organization.[17]

Events demonstrated that securing civil rights was inadequate, for both political and human reasons. The Thirteenth Amendment[18] abolished slavery and the Fourteenth Amendment[19] protected the civil rights of the freed slaves (and everyone else). However, a high degree of personal subjection remained in the South. Further, Republican proponents of the Thirteenth and Fourteenth Amendments understood that their political power was vulnerable as long as African-Americans could not vote in the South.[20] The Fifteenth Amendment,[21] providing that the right to vote could not be denied on the basis of race, was adopted to ensure that African-Americans could protect themselves politically in the South, and that Republicans could do the same by giving them an assured base of political power.[22]

The Fifteenth Amendment guaranteed the right to vote in a formal sense, but it proved inadequate in practice. By 1876, the nation's commitment to racial equality had weakened; Republicans were willing to sacrifice African-American interests in exchange for retaining the presidency after the contested 1876 election.[23] The Fifteenth Amendment remained on the books, but many African-Americans were deprived of the effective right to vote by legal and extra-legal means.

These exclusionary practices took two forms: terror and law. Through the early 1950s, African-Americans who sought to vote in the segregated South were routinely killed or beaten until federal prosecutions and, more important, public opinion began to limit what terrorists could do. Effective disfranchisement of African-Americans through law could be challenged as violation of the Fifteenth Amendment, and occasionally the U.S. Supreme Court invalidated statutes that it described as ingenious but disingenuous attempts to single out African-Americans for disfranchisement.[24] Generally, however, the U.S. Supreme Court found

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17. *Id.*

18. U.S. CONST. amend. XIII, § 1.

19. U.S. CONST. amend. XIV, § 2.

20. KEYSSAR, *supra* note 6, at 108.

21. U. S. CONST. amend. XV, § 1.

22. *See* LAWANDA COX & JOHN H. COX, POLITICS, PRINCIPLE, AND PREJUDICE 1865-1866: DILEMMA OF RECONSTRUCTION AMERICA (1963).

23. For the classic discussion, see C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951).

24. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915) (invalidating Oklahoma's "grandfather clause," which exempted from existing voter qualification requirements those whose ancestors had been qualified to vote before the Civil War); Lane v. Wilson, 307 U.S. 268, 275 (1939) ("The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.").

acceptable statutes that were neutral on their face in that the statutes did not explicitly refer to race, even though it was well-known that such statutes were implicitly aimed at disfranchising African-Americans.[25] The most celebrated example is the Court's 1959 decision upholding North Carolina's literacy test, when such tests were known to be used in the South to exclude African-Americans from the voting booths.[26]

With no response coming from the U.S. Supreme Court, reformers of voting rights turned to Congress. The Voting Rights Act of 1965[27] barred the use of literacy and other forms of voter qualification. More important, the Act required states with particularly bad records of voting exclusions to obtain the permission either of the Department of Justice or a federal court for changes in voting qualifications and practices.[28] With the effective enforcement of the Voting Rights Act, African-Americans finally secured their right to cast a vote.

The women's suffrage movement extended from before the Civil War through 1920, when the Nineteenth Amendment[29] took effect. The movement's founding document, the Seneca Falls Declaration (1848), was modeled after the Declaration of Independence.[30] The movement's leaders believed that the expansion of the franchise to include African-Americans would inevitably lead to a similar expansion to include women.[31] They were warned, however, that society could only take up "one question at a time," and they objected to the implicit endorsement of excluding women from the franchise in the Fourteenth Amendment's second section, which provided that a state's representation in Congress could be reduced if the state denied the right to vote "to any of the male inhabitants of such State."[32] Efforts to use the Fourteenth Amendment as the basis for women's suffrage failed in 1874,[33] and the women's suffrage movement began a long effort to gain the franchise state-by-state. Yet, by 1900, only four states provided for a general right to vote for women, all in the West.[34] The suffrage movement's successes accelerated after 1910, as ten more states enfranchised women, some already anticipating the Nineteenth Amendment's adoption.[35]

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25. KEYSSAR, *supra* note 6, at 115-16.

26. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

27. 42 U.S.C. § 1973(b)(c) (1965).

28. *Id.*

29. U.S. CONST. amend. XIX.

30. The SENECA FALLS DECLARATION (1848), *available at* http://www.ukans.edu/carrie/docs/texts/seneca.htm.

31. *See* KEYSSAR, *supra* note 6, at 177-78.

32. *Id.* at 177; U.S. CONST. amend. XIV § 2.

33. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

34. KEYSSAR, *supra* note 6, at 195.

35. *Id.* at 206.

With some qualifications, suffrage was nearly universal by the 1980s, in the sense that categorical exclusions from the franchise were rare and largely uncontroversial. As Alexander Keyssar's recent work shows, however, the story of suffrage is not one of unalloyed progress.[36] Even on the formal level, there was "backsliding and sideslipping."[37] Expansion of the categories of people eligible to vote was accompanied by, and often provoked, franchise restrictions through the development of administrative mechanisms. For example, voter registration schemes and residency requirements limited the number of people from the newly enfranchised categories who would actually vote.[38] Some of these restrictive devices, such as the poll tax and literacy tests, were designed precisely to restrict the franchise.[39] Others, like the secret ballot, had some restrictive effects by making it more difficult for political parties to mobilize their supporters.[40] Categorical exclusions from the franchise remain today, the most prominent being the exclusion in many states of persons convicted of felonies who have fully discharged their criminal sentences.[41] Some of these exclusions were designed to disfranchise African-Americans.[42]

These residual categorical exclusions aside, the expansion of voting rights continued with a change in focus. The transformation of the United States from a rural nation to an urban one meant that traditional apportionment of seats in legislatures resulted in urban voters having less political power than their numbers suggested, at least according to one theory of democracy. Discontent with malapportionment reached the U.S. Supreme Court in 1946, when the Court rejected a challenge to Illinois's apportionment system in *Colegrove v. Green*.[43] A divided U.S. Supreme Court found the case unsuitable for decision for a variety of reasons. Justice Felix Frankfurter pithily urged the Court to stay out of what he called the "political thicket" of apportionment.[44] Frankfurter was concerned that controversies over apportionment were intensely partisan, and thought that the Court would be damaged if it intervened in such

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36. *Id.* at 53-76.

37. *Id.* at 53 (chapter title).

38. *See, e.g., id.* at 28 (describing early administrative mechanisms), 127-29 (describing similar efforts between 1865 and 1920).

39. *See id.* at 111-12 (describing the initiation of such requirements in the late nineteenth century South).

40. *Id.* at 142-43 (describing the effects of the Australian, or secret, ballot).

41. For a critical overview, see George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999).

42. *See* Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating an Alabama felon-disfranchisement provision because it was intended to disfranchise African-Americans).

43. 328 U.S. 549 (1946).

44. *Id.* at 556 (Frankfurter, J., joined by Reed and Burton, J.J.).

controversies.[45] The Court eventually rejected Frankfurter's counsel in the 1960s,[46] and discovered that Frankfurter's political judgment was mistaken. The Warren Court's "one person, one vote" decisions, though initially upsetting to political office-holders, were among that Court's most popular.[47]

The theory underlying the Court's reapportionment decisions was more troublesome than the public might have initially realized. Chief Justice Earl Warren memorably wrote, "Legislators represent people, not trees or acres."[48] That described one, but not all, theories of democracy. Perhaps more important, malapportionment injured urban voters by diluting their votes. Voters were admitted to the voting booth, but when their votes were counted, each vote cast in a city had less political impact than a vote cast in a rural area.

When transferred to the context of race, vote dilution became controversial. The elimination of formal barriers to voting meant that everyone had the effective right to cast a ballot. The theory of vote dilution was that people who exercised that right should also have the right to a fully or equally effective vote. Yet, the effectiveness of a person's vote could be reduced not simply by giving it less weight than another person's, as with malapportionment. A voter's effectiveness could be reduced by making it more difficult for a person to vote for a winning candidate.[49]

In 1980, the U.S. Supreme Court held that this sort of vote dilution did not violate the Constitution unless the purpose of the statute that allowed the dilution was to reduce the effectiveness of votes cast by African-Americans.[50] However, Congress found this vote dilution sufficiently troubling to justify a legislative response. The Voting Rights Act of 1982[51] outlawed practices that restricted the ability of African-Americans to elect the representative they preferred.[52] Coupled with the "pre-clearance" requirements of the 1965 Voting Rights Act,[53] these provisions led to a

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45. *Id.*

46. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (finding apportionment challenges to be justiciable); Reynolds v. Sims, 377 U.S. 533 (1964) (adopting the "one person, one vote" standard).

47. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 255 (2000).

48. *Reynolds*, 377 U.S. at 562.

49. For a recent discussion of the development of the vote dilution doctrine and the controversies associated with that doctrine, *see* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

50. City of Mobile v. Bolden, 446 U.S. 55, 65-66 (1980).

51. 42 U.S.C. § 1973 (1982).

52. I believe that *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), cast serious doubt on the present constitutionality of this aspect of the Voting Rights Act of 1982.

53. 42 U.S.C. § 1973(c) (1965).

series of controversial cases involving what critics characterized as racial gerrymandering in the aftermath of the 1990 Census.[54]

III. THE FUTURE OF *BUSH V. GORE*

What light does this history cast on *Bush v. Gore*?[55] One common version is that the case represents a new stage in voting rights litigation: from concern over categorical exclusions, to concern over the effectiveness of votes cast by people with the right to vote, to concern over the mechanics of voting.[56] While not inaccurate, this description does not make the equal protection doctrine the Court articulated central to our understanding of the case.

When the Court's doctrine is taken seriously, *Bush v. Gore* is another case involving extension of the franchise in the context of vote dilution.[57] On first impression, the problem in *Bush v. Gore* is simple: some people walked into the voting booth and cast their votes, but after they left the booth the vote counters decided not to count their votes. Classic examples of voting fraud seem to take a similar form, as when boxes containing votes from one or more precincts are simply thrown into the river.[58] However, the first impression, and the analogy to classic vote fraud, is misleading. The Court's equal protection analysis is necessarily comparative and, as will be argued, its doctrine does not make anything turn on an intent to deny any identifiable group its vote.

The problem in *Bush v. Gore* was that some votes were counted and others were not. In contrast, in the vote fraud example the injury may be noncomparative; some had the appearance of a right to vote but not the

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54. *See* Hunt v. Cromartie, 532 U. S. 234 (2001); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

55. In what follows, I assume that the decision does create a binding precedent available for future use. No court can confine the implications of a decision in the manner the Court suggested when it wrote, "Our consideration is limited to the present circumstances," and defined the constitutional problem as one arising "in the special instance of a statewide recount under the authority of a single state judicial officer." 531 U.S. at 109.

56. *See, e.g.*, SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at ii (2001) (distinguishing between concern for "institutional arrangements" such as "structures of the political process, conceptions of representation, [and the like]," and concern for "the nuts-and-bolts of casting votes and having them counted"); Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, LOY. PUB. L. & LEGAL THEORY (2001), *available at* http://papers.ssrn.com/paper.taf?abstract_id-262030 (distinguishing between "big picture" and "nuts-and-bolts" issues, and identifying three "levels of equality" involving universal suffrage, "the right to an equally weighted vote," and "equality in the procedures and mechanisms used for voting").

57. So far the best analysis of which I am aware is Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 4 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

58. *See* ROBERT A. CARO, MEANS OF ASCENT 308-13, 318-21 (1990).

right itself. Perhaps more important, the injury is ordinarily intentionally inflicted on a group because of the concern of vote counters over who the group voted for.

In *Bush v. Gore*, the U.S. Supreme Court held that Florida law required that authorities count all votes, either in a first pass or in a later recount.[59] Suppose that two hundred legal votes were in fact cast in one precinct. The first pass through the machines captured 150 of those votes. A recount under the procedures authorized by the Florida Supreme Court would capture another twenty-five. A recount under different procedures would capture the remaining twenty-five votes as well. The procedures adopted by the Florida Supreme Court, then, harmed the twenty-five voters who cast legal votes but whose votes would not be captured in the recount.[60]

One could treat this harm in several ways. Seeing the case as presenting an ordinary vote-dilution scenario, one would ask whose votes were diluted? One obvious answer is that the Florida Supreme Court's procedures would dilute the votes for Governor Bush because these procedures were "gerrymandered." That is, on this view the Florida Supreme Court devised a recount system that gave a systematic advantage to Vice President Gore by making it likely that more votes would be added to the preliminary count from counties where Vice President Gore appeared to have an advantage than would be added from counties apparently favorable to Governor Bush. This advantage might violate equal protection, akin to stuffing ballot boxes or throwing boxes of ballots away. However, it is unclear that this claim could be sustained because of the uncertainty about the extent to which the uncounted votes would be distributed in the same proportion as were the votes initially counted.[61] Alternatively, the Florida Supreme Court may have intended to favor Vice President Gore even if the procedures it adopted were not well designed to do so. This intention also might have violated equal protection, although usually when intent is a component of equal protection analysis, one asks that there be actual harm as well as an intent to harm.

It is important to emphasize that these two lines of analysis, while arguably consistent with the facts underlying the U.S. Supreme Court's decision, were not ones that the Court pursued. The Court was primarily concerned that some votes, while "legal" under Florida law, would not be

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59. 531 U.S. at 104-05.

60. This analysis follows from the Court's concern that the procedure authorized by the Florida Supreme Court included vote totals based on a complete recount of part of Miami-Dade County's ballots, including both undervotes and overvotes, while the statewide recount the court ordered would have included only the undervotes.

61. The very fact that a person cast a ballot that was an undervote or an overvote indicates that that voter was different in some way from voters who cast ballots that were initially counted.

counted under procedures authorized by the Florida Supreme Court.[62] The harm was that the state counted some but not all legal votes, not that some group identified by a partisan — or any other — characteristic cast the uncounted legal votes.[63] Accordingly, the harm the Court recognized was what Professor Pamela Karlan calls "structural."[64] That is, affecting the structure of government without adversely affecting any individual.

The flaw in the Florida Supreme Court's decision was that it allowed the final vote total to include some, but not all, of the "legal votes," while there were other procedures available to include all votes in the final total. But, of course, no procedure can ever guarantee that all legal votes will be included in the final total.[65] The question then becomes, what can justify a refusal to include a legal vote in the final total?

According to standard equal protection doctrine, one assesses purported justifications by invoking either rational-basis review or strict scrutiny.[66] The U.S. Supreme Court waffled on the standard it applied. In one paragraph, it characterized the right to vote as "fundamental," which would imply that only the strongest justifications could be provided for disparate treatment.[67] Yet, in the next paragraph, the Court suggested that Florida's procedures were "arbitrary," a term associated with rational-basis review.[68] The Court's decision can be rationalized only if the standard requires that a state must have a reasoned basis, other than local control, for the procedures it uses to identify legal votes.

Professor Hasen has outlined one part of the argument.[69] Recall the hypothetical precinct in which 150 legal votes were counted initially, 25 were added in a recount, and 25 went uncounted. Suppose that, instead of ordering a recount, the state simply stood on the initial count. Now fifty voters who cast legal votes would suffer the structural harm, rather than

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62. Bush v. Gore, 531 U.S. at 107-08.

63. Decisions like *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (involving a racial gerrymander), and *Reynolds v. Sims*, 377 U.S. 533 (1964) (involving the dilution of voters in urban and suburban areas), involve discrimination against groups with identifiable characteristics, in a way that *Bush v. Gore* as decided by the U.S. Supreme Court does not.

64. Karlan, *supra* note 57. This characterization links *Bush v. Gore* to the history recounted earlier, for each prior expansion of the franchise altered the structure of governance as well.

65. Strictly speaking, we could define a *legal* vote as one that is identified as legal according to lawful procedures. *Bush v. Gore* appears to preclude that definition by overriding the Florida Supreme Court's determination of what procedures are legally sufficient to identify legal votes.

66. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 528-29 (1997).

67. Bush v. Gore, 531 U.S. at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

68. *Id.* at 104-05 ("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.").

69. Hasen, *supra* note 56.

only twenty-five. Could that harm be justified? According to the U.S. Supreme Court, yes. After all, that is precisely what the Court said Florida law required when a recount pursuant to constitutionally permissible standards could not be completed before December 12, 2000. According to the U.S. Supreme Court, the Florida legislature chose this deadline to ensure that its electoral votes would be conclusively valid.[70] Would the legislature's justification survive strict scrutiny? Professor Hasen argues persuasively that it would not. The Florida legislature would trade a violation of the fundamental right to vote for the chance that the electors would be rejected at the final stage of the selection process because they were not conclusively deemed validly chosen.[71] That trade-off would be insufficient under strict scrutiny because Florida still had a decent chance — not a certainty, to be sure — that its choice would be respected in the final stages anyway. It follows, if Professor Hasen is right, that the U.S. Supreme Court could not have applied strict scrutiny.

Rather, the Court must have applied a rational-basis review. However, the Court's review ruled out one important justification for the procedures authorized by the Florida Supreme Court: local control. The U.S. Supreme Court considered the lower court's procedures problematic because they granted too much power to local control, rather than to a single decision-maker that was in a better position to provide more guidance.[72] The Court stated that it was not to consider "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[73] It also stated that the instant case involved "a situation where a state court with the power to assure uniformity" has authorized a procedure that provided no assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[74] This does describe the situation; the question is whether there are any principled limitations implicit in that description.

There are two important components of the Court's description of Florida's situation: first, that there is a decision-maker with power to assure uniformity, and second, that this decision-maker is a court. One can understand why the first element is important: it guarantees that, as a matter of state law, there is a decision-maker who can set up a system that provides equal treatment. But, there is no principled reason for limiting that decision-maker to the courts. Specifically, a state legislature with the power under state law to adopt a uniform system of vote counting and recounting would seem required to do so by the Court's doctrine.

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70. Bush v. Gore, 531 U.S. at 110.
71. Hasen, *supra* note 56.
72. Bush v. Gore, 531 U.S. at 109.
73. *Id.*
74. *Id.*

Therefore, the Court's equal protection rule appears to be that a state may adopt any reasonable system for identifying legal votes, but may not justify a system that allows variations within the state by adverting to the interest of local control.[75] *Bush v. Gore*, then, appears to place some constraints on legislative decisions. The state legislature need not adopt a system that guarantees that officials will count every legal vote, but it cannot adopt procedures that allow officials to count legal votes in one county while officials fail to count equivalent legal votes in another.

More particularly, the U.S. Supreme Court found the abstract standard of clear intent of the voter[76] generally acceptable.[77] It seems to follow that state legislatures cannot adopt a system that identifies a voter's intent to vote for a candidate in County A, but fails to identify another voter's clear intent in County B when the sole justification is to preserve local control. This analysis has already generated challenges in several states with systems authorizing different methods of counting votes initially.[78]

But, as Professors Karlan and Hasen suggest,[79] structural claims can reach well beyond the context of electoral machinery. Here one can return to the history of the right to vote to inquire about the conditions under which expansive structural claims might have some purchase in the law. The U.S. Supreme Court played quite a secondary role in prior expansions of the franchise. Rather, mobilized social groups, such as the abolitionists, emancipated slaves, and the women's suffrage movements, played a more significant role in expanding voting rights. Sometimes, though not consistently, U.S. Supreme Court decisions assisted those groups in their larger social and political struggles.[80]

IV. CONCLUSION

In light of this history, *Bush v. Gore* presents an interesting picture. The post-Reagan Republican party and its supporters might well be an example of a mobilized social group analogous to those that pushed expansions of the franchise in the past. Yet, nothing in the Republican political program

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75. The obvious justification that remains available is cost, although most of the costs that have been referred to in post-*Bush v. Gore* discussions have been the costs associated with the transition from a system with local variations to a uniform statewide system, rather than the absolute cost of one rather than another system of counting legal votes.

76. Gore v. Harris, 772 So. 2d 1243, 1256 (Fla. 2000) (quoting FLA. STAT. § 101.5614 (5)-(6) (2000)).

77. Bush v. Gore, 531 U.S. at 105-06.

78. I think it worth emphasizing that, given the nature of the structural harm that underlies *Bush v. Gore*, these claims seem to have merit independent of whether variations among jurisdictions correlate with anything else, such as wealth, racial composition of the jurisdictions, or the expected political preferences of the jurisdictions.

79. Hasen, *supra* note 56; Karlan, *supra* note 57.

80. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

seems to have much to do with expansion of the franchise. In contrast, the Democratic party managed to mobilize its supporters, particularly African-Americans and some of the elderly, during the post-election events.[81] *Bush v. Gore* may prove to have larger implications than the five conservative justices who joined it might wish, but only if a social and political movement sustains pressure for revision of our election laws.

81. Despite the fact that the candidate they were supporting had not been a vigorous advocate of those groups' distinctive political agendas.