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Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore

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NOTHING PERSONAL: THE EVOLUTION OF THE NEWEST EQUAL PROTECTION FROM *SHAW V. RENO* TO *BUSH V. GORE*

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In this Essay, which is a response to Robinson Everett's Redistricting in North Carolina—A Personal Perspective, *I argue that the* Shaw *line of cases and the Supreme Court's recent decision in* Bush v. Gore *share some critical features. Each involves what I call "structural" equal protection. The Supreme Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through the operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted. The* Shaw *cases and* Bush v. Gore *raise quite similar issues of standing and remedies. Neither the* Shaw *cases nor* Bush v. Gore *fully answers the question of when, and why, courts should intervene in the deeply messy process of partisan politics. Instead, they manifest the Supreme Court's general disdain for the other branches and levels of government. Finally, each adopts a distressingly narrow perspective within which to measure equality, a perspective that shortcircuits the normal, albeit potentially contentious and messy, process of self-government, leaves in its wake weakened institutions, and re-enlists equal protection in the service of less, rather than greater, equality and democracy.*

* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. As with all my work in this field, I owe many of my insights to Sam Issacharoff, Rick Pildes, and Jim Blacksher. In addition, I thank Henry Weinstein and Viola Canales for virtually hours of conversations on the issues raised in this piece. Portions of this comment appear, in a different form, in Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in* THE VOTE: BUSH, GORE AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001). These passages appear here by permission of the University of Chicago press. Finally, in the interest of full disclosure, I have participated in many cases involving the issues raised by *Shaw v. Reno* and its progeny: *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (per curiam); *Meadows v. Moon*, 521 U.S. 1113 (1997), *aff'g*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); and *United States v. Hays*, 515 U.S. 737 (1995).

INTRODUCTION

During the week of November 27, 2000, the United States Supreme Court heard two cases involving judicial regulation of electoral politics. The first case was *Hunt v. Cromartie*:[1] the Court's fifth confrontation with North Carolina's post-1990 congressional reapportionment.[2] The second was *Bush v. Palm Beach County Canvassing Board*: the Court's first encounter with the disputed presidential election of 2000 and the counting of ballots in Florida.[3]

What do these two litigations have in common? A lot more than may be apparent to the casual reader. Both involve what I will call "structural" equal protection. The Court deploys the Equal Protection Clause[4] not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted. Neither fully answers the question of when, and why, courts should intervene in the very messy process of partisan politics. Further, each adopts a distressingly narrow perspective within which to measure equality.

Most of the commentary about *Bush v. Gore*,[5] at least so far, has been quite scathing.[6] A common thread has been that the Court's equal protection analysis "had no basis in precedent."[7] This Article

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1. 121 S.Ct. 1452 (2001).

2. The Court was hearing the second round of oral argument in *Easley v. Cromartie*. *See also* Hunt v. Cromartie, 526 U.S. 541 (1999) (remanding the case for a full trial on the merits). The Court had also issued two opinions in a prior challenge to the state's reapportionment as an unconstitutional racial gerrymander. Shaw v. Hunt, 517 U.S. 899 (1996); Shaw v. Reno, 509 U.S. 630 (1993). Even earlier, the Court had summarily affirmed the rejection of a challenge to the same apportionment as an unconstitutional political gerrymander. Pope v. Blue, 506 U.S. 801 (1992).

3. 531 U.S. 70 (2000).

4. U.S. CONST. amend XIV, § 1.

5. 531 U.S. 98 (2000).

6. For representative examples, see Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. (forthcoming Dec. 2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001); Mark V. Tushnet, *Renormalizing* Bush v. Gore, 90 GEO. L.J. (forthcomming Nov. 2001); Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18.

7. Sunstein, *supra* note 6; *see also, e.g.*, David G. Savage, *The Vote Case Fallout*, 87 A.B.A. J. 32 (2001) (quoting Professor A.E. Dick Howard as saying "This is a remarkable

takes a somewhat different tack. Rather than condemning *Bush v. Gore* as an aberration, it criticizes *Bush* as the latest manifestation of the "newest model of equal protection," the Court's *Shaw* jurisprudence.[8] *Bush v. Gore* turns out to have a lot in common with *Bush v. Vera*.[9]

As Richard Pildes perceptively notes, the "image of democracy" that has informed the contemporary Supreme Court's interventions into the political arena—in contexts as diverse as blanket primaries, ballot access, and candidate debates—is a fear of too much democracy, of too robust and tumultuous a political system.[10] That image underlies the Court's *Shaw* jurisprudence as well: the Court sees itself as the only institution capable of resolving the difficult questions raised by the role of race in American democracy. In the *Shaw* cases, as in *Bush v. Gore*, the Supreme Court has radically transformed not only the substantive rules that govern reapportionments and recounts, but also the vertical and horizontal relationships among the various institutional players involved in these intensely political activities. The former concern the connection between the federal government and state governments: for example, what is the extent of congressional power to regulate state elections? The latter concern the interaction among different branches of government: when can courts overturn the choices reached by other branches and when should courts resolve, or pretermit, conflicts among the other branches? And, as *Bush v. Gore* shows, the institutional questions may sometimes seem almost diagonal: what is the relationship between, for example, Article II, section 1 of the Constitution, which provides that "Each State shall appoint" its presidential electors "in such Manner as the Legislature thereof may direct,"[11] the federal Electoral Count Act, which confers special responsibilities on Congress,[12] and the powers of the Florida and federal courts?[13] The Supreme Court's newest equal protection

use of the equal protection clause. It is not consistent with anything they have done in the past 25 years.").

8. I use this phrase as a shorthand to describe the Court's race-conscious redistricting cases, which began with the decision in *Shaw v. Reno*, 509 U.S. 630 (1993).

9. 517 U.S. 952 (1996). *Bush v. Vera* is the *Shaw* case striking down three majority-nonwhite congressional districts in Texas. *Id.* at 956–57. George W. Bush was named as a defendant because he was the Governor of Texas.

10. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. (forthcoming summer 2001).

11. U.S. CONST. art. II, §1, cl. 2.

12. 3 U.S.C. §§ 1–18 (1994).

13. For a more extensive consideration of these issues, see generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO

manifests a striking mistrust of nearly every other actor in the reapportionment and recount processes. Forty years after the judiciary's first significant foray into the political thicket, we find ourselves ensnared in the political *Bushes*.

I. STANDING ON THIN AIR: THE "NEWEST EQUAL PROTECTION" IN THE WRONGFUL DISTRICTING CASES

There is a deep irony in the title of Robinson Everett's contribution to this Symposium.[14] Everett can offer a "personal perspective" on the North Carolina experience only because he was the lead counsel for the plaintiffs in both *Shaw* and *Cromartie*. Had he been simply a plaintiff, he would have virtually nothing "personal" to say and no distinctive "perspective" to offer; as a matter of law, the distinctive qualities and experiences of plaintiffs in the *Shaw* cases are entirely irrelevant.[15] All that matters is that the plaintiffs live in the district they challenge.[16] To be sure, the other named plaintiffs in *Shaw* and *Cromartie* make a brief appearance in the text or footnotes of Everett's article, but what do we learn about them? That Everett knew each of them for a long time.[17] That Ruth Shaw had been a plaintiff in one of the early one-person, one-vote lawsuits.[18] That Martin Cromartie lives in Tarboro and has known Everett for almost fifty years.[19] Was there anything that singled out these individuals from all their neighbors who were also allocated among the state's twelve congressional districts? Actually, we learn one other thing about this deracinated quintet: although each of them was white, this

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BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (rev. ed. 2001) [hereinafter BAD ELECTIONS].

14. Robinson O. Everett, *Redistricting in North Carolina—A Personal Perspective*, 79 N.C. L. REV. 1301 (2001).

15. The most pointed example of this fact arose in one of the Florida *Shaw* cases, *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996) (three-judge court). In that case, the plaintiffs successfully resisted being deposed by defendant-intervenors on the ground that the plaintiffs had no discoverable information about the lawsuit they had initiated. Email from Brenda Wright, attorney for Defendant-Intervenors, to Pamela S. Karlan, Professor of Law, Stanford University Law School (Feb. 5, 2001 10:10:19) (on file with author and the North Carolina Law Review).

16. For more extensive discussions of *Shaw* standing, see Sinkfield v. Kelley, 531 U.S. 28 (2000); United States v. Hays, 515 U.S. 737 (1995); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 289–99 (1996) [hereinafter *Still Hazy*].

17. Everett, supra note 14, at 1310 n.51.

18. *Id.*

19. *Id.* at 1322 n.96.

fact was omitted from the complaint because the plaintiffs "did not believe it to be relevant."[20] But their race *is* relevant—not necessarily to their legal claim, but rather in explaining how it is that people who had lived for decades in North Carolina could be more upset by the creation of the state's first majority-black congressional districts in the twentieth century than they had been by the preceding century's lily-white congressional delegations.[21] Why is Everett so distressed by the deliberate creation of two districts—in neither of which does he live—that enable black voters to elect the candidates of their choice? Why does he describe the districts drawn after *Shaw v. Hunt* as "fruit of the poisonous tree" designed to assure that persons with "dirty hands" would retain their "spoils,"[22] while using far more measured language to describe the maneuvering designed to protect white incumbent Harold Cooley in the 1960s?[23] The race of the *Shaw* plaintiffs is relevant as well to my broader point: that the newest equal protection, unlike its predecessor, is far more solicitous of the interests of individuals who are fully capable of protecting their interests within the broader political processes. Everett points to nothing that suggests that proponents of a color-blind interpretation of the Equal Protection Clause have been unable to promote their view within the normal reapportionment process. They simply lost out to a national consensus in favor of the Voting Rights Act's consciously multiracial image of American democracy and to political realities within the North Carolina General Assembly.[24]

In *United States v. Hays*,[25] the Supreme Court noted that "the irreducible constitutional minimum of standing" requires that "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical" and that "it must be likely, as opposed to merely speculative, that the injury will

20. *Id.* at 1311.

21. For a more extensive discussion of this ahistoricism, see Chandler Davidson, *Racial Gerrymandering Across the Centuries: A Reply to Professor Everett*, 79 N.C. L. REV. 1333 (2001).

22. Everett, *supra* note 14, at 1322.

23. *Id.* at 1305-06. It is also interesting to note that Everett's participation in the litigation surrounding the post-*Drum v. Seawell* redistricting was spurred by his friendship with a putative candidate.

24. Those realities led the U.S. Supreme Court ultimately to uphold North Carolina's 1997 redistricting against a renewed *Shaw* challenge because the Court held that politics, not race, was the predominant factor explaining the configuration of the Twelfth District. *See* Easley v. Cromartie, 121 S. Ct. 1452, 1458–66 (2001).

25. 515 U.S. 737 (1995).

be redressed by a favorable decision."[26] Attempting to categorize the *Shaw* plaintiffs' injury in fact, Everett writes that the plaintiffs "felt disenfranchised by the legislature's creation of the Twelfth [Congressional] District."[27]

Certainly, disenfranchisement is an injury in fact; however there is no pre-existing definition of "disenfranchisement" that describes the *Shaw* plaintiffs' situation. *Feeling* disenfranchised is not the same thing as *being* disenfranchised. Each of the *Shaw* and *Cromartie* plaintiffs was able to go to the polls and to cast a ballot for the candidate of his or her choice.[28] So they weren't "disenfranchised" *de jure* in the way that citizens who could not pass North Carolina's literacy test had been.[29] The two *Shaw* plaintiffs who lived within the original Twelfth District in fact voted in the general election for the winning candidate.[30] So they were not "disenfranchised" *de facto* in the way that voters whose preferred candidates are consistently defeated at the polls by racial bloc voting[31] have been.

In fact, despite the invocation of images of disenfranchisement, the real character of the *Shaw* cases is not a claim about voting rights at all. As I have explained elsewhere, the right to vote embodies a nested constellation of concepts: participation (the entitlement to cast a ballot and have that ballot counted); aggregation (the choice among rules for tallying votes to determine election winners); and governance (the ability to have one's policy preferences enacted into law within the process of representative decisionmaking).[32] The *Shaw*

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26. *Id.* at 742–43 (internal citations omitted).

27. Everett, *supra* note 14, at 1310.

28. *Cf.* City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (plurality opinion) (announcing that African-American voters could not state a claim under the Fifteenth Amendment because they were able to "register and vote without hindrance").

29. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53–54 (1959) (upholding North Carolina's literacy test against constitutional attack). In *Gaston County v. United States*, 395 U.S. 285, 291 (1969), the Supreme Court noted that North Carolina's history of relegating black citizens to inferior segregated schools "deprived them of an equal chance to pass the literacy test."

30. Issacharoff & Karlan, *supra* note 16, at 2278 n.16.

31. *See* Thornburg v. Gingles, 478 U.S. 30, 48–51 (1986) (explaining how racial bloc voting denies minority voters an equal opportunity to elect representatives of their choice). For extensive discussions of the history of racial discrimination in North Carolina's political process, see WILLIAM R. KEECH & MICHAEL P. SISTROM, *North Carolina in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965–1990, at 155–90 (Chandler Davidson & Bernard Grofman eds., 1994); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 243–76 (1999).

32. Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707–08 (1993).

plaintiffs were not advancing a claim under any of these concepts.[33] Rather, they were pressing a claim involving what we might call "meta-governance," that is, a claim about the rules by which the democratic political processes are structured.[34] It was a claim that the very use of race in the process of redistricting was divisive and harmful.[35]

Notice, however, that this claim does not distinguish the *Shaw* plaintiffs from all other citizens of North Carolina, or, indeed, of the United States. The claim that race played too great a role in the redistricting process is a paradigmatic example of "a generally available grievance about government—claiming only harm to ... every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [the plaintiffs] than it does the public at large."[36] The *Shaw* plaintiffs are advancing a shared, individuated "right to a Government that obeys the Constitution."[37]

Normally, this sort of interest does not confer Article III standing. Rather, it "gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process" rather than to the judiciary.[38] With the notable exception of claims under the Establishment Clause,[39] the Court's general response is that when everyone has been affected equally by a

33. At a couple of points in his article, Everett suggests that one *could* have made a hybrid aggregation-governance claim regarding North Carolina's plan: the ultimate effect of drawing majority-black districts in his view is "to polarize Congress by making it more difficult for moderate white Democrats to be elected." Everett, *supra* note 14, at 1311 That issue is one to which Chandler Davidson's contribution responds in part. Davidson, *supra* note 21, at 1333–34; *see also* Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997) (discussing the "bleaching" hypothesis). Everett disclaims such an intent regarding the motivation for the *Shaw* and *Cromartie* lawsuits—that is, he denies that these lawsuits are partisan political litigation dressed up as race-discrimination claims—and I take him at his word.

34. *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 286.

35. *See* Everett, *supra* note 14, at 1312–13.

36. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).

37. Allen v. Wright, 468 U.S. 737, 754 (1984).

38. United States v. Richardson, 418 U.S. 166, 179 (1974). *Richardson* denied standing to a plaintiff who claimed that the budget secrecy statute he challenged prevented him from "properly fulfill[ing] his obligations as a member of the electorate in voting for candidates seeking national office." *Id.* at 176. The Court rejected the idea that the "Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the [challenged process] by means of lawsuits in federal courts." *Id.* at 179. According to the Court, a "citizen who is not satisfied with the 'ground rules' established by the Congress" still has "the right to assert his views in the political forum or at the polls." *Id.*

39. U.S. CONST. amend. I.

governmental decision, no one has standing: these are precisely the cases in which the political process can be trusted to handle individuals' claims.

As I have explained before, the Court's minimalist approach to standing in the *Shaw* cases conveys the critical message that these cases "really aren't individual rights lawsuits in the first place. Rather they concern the meaning of 'our system of representative democracy.' "[40] The *Shaw* cases are about our vision of democracy: what is the role of colorblindness as opposed to the role of full and equal participation of racial minorities in pluralist politics? When should courts step in because race has played too great a role? What deference ought the Supreme Court accord the judgments of Congress in enacting and amending the Voting Rights Act of 1965 and the executive branch in implementing the preclearance process?

> For all their equal protection rhetoric, the wrongful districting cases are instead really addressed to what Justice Thomas has termed the "political landscape of the Nation." The Court has smuggled into the equal protection clause a decision that really speaks to what constitutes a republican form of government in multiracial twentieth-century America.[41]

Now consider the final "irreducible" element of standing—that the plaintiffs' injury "will be redressed by a favorable decision."[42] How, precisely, are the *Cromartie* plaintiffs injured by the Supreme Court's decision to uphold the redrawn Twelfth District? Everett's own account does not provide a very clear answer. The complaint he originally filed in *Shaw* claimed that the use of race in the redistricting process violated a constitutional right to "a color-blind electoral process."[43] The Supreme Court decisively rejected the existence of such a right: race-conscious redistricting is permissible, either when it comports with traditional districting principles,[44] or when it is necessary to comply with the Voting Rights Act of 1965, itself a race-

40. *Still Hazy*, *supra* note 16, at 296–97 (quoting *Shaw v. Reno*, 509 U.S. 630, 650 (1993))).

41. *Id.* at 297–98 (quoting Holder v. Hall, 512 U.S. 874, 894 (1994) (Thomas, J., concurring)).

42. *United States v. Hays*, 515 U.S. 737, 742–43 (internal citations omitted).

43. *Shaw v. Reno*, 509 U.S. at 641–42 (quoting complaint paragraph 29).

44. If a district's configuration reflects traditional districting principles—and query what precisely those are—then strict scrutiny is not even triggered in the first place. *See* Easley v. Cromartie, 121 S. Ct. 1452 (2001); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 592 (1998) [hereinafter LAW OF DEMOCRACY].

conscious statute.[45] Thus, in *Cromartie*, the district court upheld the First Congressional District, despite the overt race-consciousness that went into its creation.[46] Moreover, the Supreme Court has acknowledged that districting will never be "race-neutral" in the way Everett desires: "[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."[47] At most, what the *Shaw* litigation has achieved is more regularly shaped districts, and Everett provides no independent justification for why pleasingly shaped districts are superior.

Compactness is one often useful criterion for assessing districts, but there are many other values as well. Everett offers no reason why compactness is more important than other values. The *Shaw* litigation achieves esthetic regularity at significant cost. Judicial endorsement of the *Shaw* plaintiffs' conception of democracy necessarily entails judicial repudiation of the vision of democracy expressed by the normal majoritarian political process. To paraphrase now-Chief Justice Rehnquist's youthful observation regarding the *White Primary Cases*:

> [t]o the extent that this decision advances the frontier of ... 'social gain,' it pushes back the frontier of freedom of association and majority rule.... [I]t does not do to push blindly through towards one constitutional goal without paying attention to other equally desirable values that are being trampled on in the process.[48]

The redistricting plan that the *Shaw* Court struck down was supported by North Carolinians, black and white, who thought it was important for the state to create congressional districts that gave black citizens an equal opportunity to elect the representatives of their choice; was enacted by a majority in a fairly elected state legislature; and was approved by the executive branch of the federal government pursuant to the authority conferred by a congresionally enacted statute that rests on the consensus that the Fourteenth and

45. *See Shaw v. Reno*, 509 U.S. at 642; Bush v. Vera, 517 U.S. 952, 976 (1996).

46. The district court's opinion, which is unreported, is excerpted in SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 136, 145–47 (Supp. 2001).

47. *Shaw v. Reno*, 509 U.S. at 646.

48. Memorandum from William H. Rehnquist to Justice Robert Jackson regarding *Terry v. Adams*, 345 U.S. 461 (1953), *reprinted in* LAW OF DEMOCRACY, *supra* note 44, at 92–93.

Fifteenth Amendments are best enforced by taking race into account, rather than by color-blindness.[49] "Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well"; thus, judicial involvement in redistricting "may interfere with those aspects of democratic self-government that are most essential to it."[50] The Voting Rights Act and the various political realities of contemporary redistricting define self-government in ways that take into account America's racial and ethnic diversity, its history of exclusion, and current realities of racial polarization. The approach taken by Everett and his colleagues rejects self-government in favor of judicial imposition of one, very contestable, vision of what equality means.

While I think that the Supreme Court finally got it right when it upheld the redrawn Twelfth District in *Hunt v. Cromartie II*, its decade-long intervention in North Carolina's redistricting process was nonetheless harmful. In the short run, the Supreme Court's expressed skepticism about the bona fides of the Department of Justice and the various state legislators who participated in redistricting may undermine the public's sense of confidence in the integrity of other governmental actors. In the long run, the roadblocks the Court has thrown in the way of achieving effective desegregation of political office risk undermining the legitimacy of a monoracial government for a multiracial society. Contemporary redistricting under the Voting Rights Act may well be "a device for regulating, rationing, and apportioning political power among racial ... groups."[51] Any multi-ethnic nation, however, in which political cleavages often break along racial lines must have *some* such device. One might think, from all their invocation of "balkanization,"[52] that the Justices might have noticed that two generations of communist suppression of ethnic and religious tension in Yugoslavia did little to ensure stability, tolerance, or integration. It is worth remembering the question Langston Hughes asked a half-century ago: "What happens to a dream deferred?"[53] The Voting Rights Act, and the self-

49. For example, section 2 of the Voting Rights Act expressly states that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered" in deciding whether the political processes are equally open to minority voters." 42 U.S.C. § 1973(b) (1994).

50. Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982).

51. Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment).

52. Miller v. Johnson, 515 U.S. 900, 912 (1995); Johnson v. DeGrandy, 512 U.S. 997, 1030 (1994) (Kennedy, J., concurring); *Holder*, 512 U.S. at 905 (Thomas, J., concurring in the judgment); *Shaw v. Reno*, 509 U.S. at 657.

53. Langston Hughes, *Harlem (Montage of a Dream Deferred)*, *in* THE COLLECTED

conscious and deliberate racial integration of American politics it has produced, began finally to redeem the promise of the Fifteenth Amendment. The Act has been, as Lyndon Johnson predicted, "one of the most monumental laws in the entire history of American freedom."[54] I don't think it is an exaggeration to say that the Act helped to prevent America from exploding in the kind of ethnic violence that has characterized so many other contemporary nations.

Seventy years ago, the great Legal Realist Jerome Frank warned that we tend to view the world too much through our personal experiences:

> Every man is likely to overemphasize and treat as fundamental those aspects of life which are his peculiar daily concern. To most dentists, you and I are, basically, but teeth surrounded by bodies. To most undertakers we are incipient corpses; to most actors, parts of a potential audience; to most policemen, possible criminals; to most taxi drivers, fares. "The Ethiopians," wrote Xenophon, "say that their gods are snub-nosed and black-skinned, and the Thracians that theirs are blue-eyed and red-haired. If only oxen and horses had hands and wanted to draw with their hands or to make the works of art that men make, then horses would draw the figures of gods like horses and oxen like oxen, and would make their bodies on models of their own." Spinoza suggested that if triangles had a god it would be a triangle. We make life in the image of our own activities.[55]

Although there is nothing "personal" about being a plaintiff in a wrongful-districting case, something about Everett's analysis is profoundly personal. Its focus on the sentiments of individual voters and its assumption that the building blocks of the American political order are abstract, universalized individuals, rather than the diverse, distinctive, and yet overlapping groups into which we organize ourselves reflects a partial, in both senses of the word, perspective. From my admittedly different perspective, the problem with Everett's account is what he would trumpet as its virtue: precisely that it *is* color-blind. Everett sees that stance as a refusal to employ an irrelevant and illegitimate factor. I see it as a failure to acknowledge

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POEMS OF LANGSTON HUGHES 426 (Arnold Rampersad & David Roessel eds., 1995) (1951) ("What happens to a dream deferred?//Does it dry up/like a raisin in the sun?/Or fester like a sore/And then run?/Does it stink like rotten meat?/Or crust and sugar over/like a syrupy sweet? /Maybe it just sags/like a heavy load.*//Or does it explode?*").

54. DAVID GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 132 (1978) (quoting Lyndon B. Johnson).

55. Jerome N. Frank, *Accounting for Investors, The Fundamental Importance of Corporate Earning Power*, 68 J. ACCT. 295, 295–96 (1939).

a complex and inescapable reality. In my view, race has played, and continues to play, a variety of critical roles in American politics.

II. SKATING ON THIN ICE: THE "NEWEST EQUAL PROTECTION" IN *BUSH V. GORE*

For those of us who spent much of the 1990s preoccupied with *Shaw v. Reno* and its progeny, *Bush v. Gore* had an aspect of deja vu all over again. It raised quite similar issues of standing, remedies, judicial respect for the states and the political branches, and the framework within which to assess equal protection claims.

The central question in *Bush v. Gore* was the constitutionality of a Florida Supreme Court decision ordering a manual recount of certain ballots in the agonizingly close presidential election.[56] The Florida Supreme Court directed: (1) that the state's popular vote total be adjusted to add additional votes for Al Gore identified in a full manual recount in Palm Beach County and a partial manual recount in Miami-Dade County;[57] (2) that the trial court conduct a recount of approximately 9,000 as-yet unreviewed "undercount" ballots from Miami-Dade County;[58] and (3) that the trial court order the county canvassing boards in all other counties that had not yet conducted a manual recount of their undervotes to do so as well.[59] In conducting these recounts, the Florida Supreme Court directed the counters to use the standard "established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.' "[60]

The U.S. Supreme Court reversed, holding that "Florida's basic command ... to consider the 'intent of the voter' "[61] was "standardless"[62] and a violation of the Equal Protection Clause "in the absence of specific standards to ensure its equal application."[63] The Court rested its holding in part on an acknowledgment that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from

56. For a fuller account of the various events, see Bush v. Gore, 121 S. Ct. 525 (2000); Gore v. Harris, 772 So.2d 1243 (Fla. 2000); 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS *passim* (Douglas Brinkley ed., 2001).

57. *Gore v. Harris*, 772 So. 2d at 1248.

58. *Id.* at 1262.

59. *Id.*

60. *Id.* (quoting FLA. STAT. § 101.5614(5) (2000)).

61. Bush v. Gore, 121 S. Ct. at 530.

62. *Id.* at 529.

63. *Id.* at 530.

one recount team to another."[64] Thus, *who* examined a ballot might determine whether that ballot was counted.[65]

In addition, the Court found an equal protection violation in the different treatment accorded to "undervotes" (ballots on which machine tabulation had failed to detect a vote for President) and "overvotes" (ballots which the tabulating machines rejected because there was more than one vote cast for a presidential candidate):

> As a result [of this different treatment], the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot.[66]

Given these problems, which rendered the recount as ordered unconstitutional, and its view that the problems could not be cured within the available time,[67] the Supreme Court "reverse[d] the judgment of the Supreme Court of Florida ordering a recount to proceed,"[68] effectively ending the election.[69]

Just as in the *Shaw* cases, it is worth asking what the precise constitutional injury was, and who suffered it. With respect to the problem of different standards for deciding a previously-uncounted ballot's validity, there are two easily understandable potential injuries in fact. First, a voter whose ballot was not counted in the initial

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64. *Id.* at 531.

65. The Court gave a concrete example of this problem: "Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties." *Id.*

66. *Id.*

67. The question of the precise time available is beyond the scope of this commentary. Suffice it to say, the question whether the recount had to be completed by December 12, 2000—the date mentioned in the Supreme Court's opinion—or whether there was in fact more time is among the many controversial aspects of the Supreme Court's decision.

68. *Bush v. Gore,* 121 S. Ct. at 533.

69. While George W. Bush was clearly the winner, given that he was ahead in the count when time was called, his margin of victory was not entirely clear. While the U.S. Supreme Court seemed to see equal protection problems with respect to the already completed full recounts in Broward and Palm Beach counties, *see id.*, it did not explicitly require that votes added through those processes be excluded.

machine count, but whose ballot would be recovered under the "liberal" standard applied by, for example, Broward County, or by an "inclusionary" counting team, might claim an injury if her ballot were to be rejected because she lived in a county like Palm Beach County that employed a more stringent standard or had her ballot examined by a counting team with a more "exclusionary" approach. This allegation has the structure of a classic equal protection claim.[70] Second, a voter whose preferred candidate received disproportionate support in "stringent" counties might claim that she had less of an ability to elect the candidate she preferred than would a voter whose candidate's support was concentrated in "liberal" counties, because liberal-county-preferred candidates are more able to recapture votes through a manual recount. For example, suppose the counties with a liberal standard were disproportionately Democratic while the counties with a stringent standard were disproportionately Republican. A Republican voter anywhere in the state might then suffer an injury in fact because his preferred candidate's supporters would be less likely to have their ballots counted. In either event, assuming for the sake of argument that the recaptured votes were legally cast in the first instance,[71] the equal protection claim *with respect to the recount standards*[72] inheres in voters who claim that their votes, or the votes of the bloc of which they are members, are less likely to be captured manually than other citizens' votes.

A somewhat different set of potential injuries in fact flows from the Florida Supreme Court's directive to recount undervotes, but not to recount overvotes. First, the citizen who cast an overvote but whose intent was clear is injured. Her overvote will not be re-examined in the manual recount process.[73] As a result, she is denied the opportunity to have her vote recovered that is accorded to citizens who cast undervotes. If overvoters and undervoters whose

70. I leave aside here the question whether such different treatment would ultimately occur, given unified judicial review of the county-conducted manual recounts.

71. Thus, I set aside the claims of some Republicans that Democratic-controlled canvassing boards were either treating ballots differently if the potentially recoverable vote was for Gore than if it was for Bush and of other Republicans that the recovered votes were not legal votes as a matter of Florida law.

72. I highlight this phrase because it will turn out that there is another important potential equal protection claim ignored by the Supreme Court's decision. *See infra* notes 90–95 and accompanying text.

73. This category turns out to have a significant, perhaps decisively significant, number of voters. *See* Mickey Kaus, *Election 2000: The Race Tightens Up*, SLATE, Jan. 28, 2001, *available at* http://slate.msn.com/code/KausFiles/KausFiles.asp?Show=1/28/2001&idMessage=6962 (last visited Mar. 22, 2001) (on file with the North Carolina Law Review).

intentions are equally clearly discernible are similarly situated, and I have no reason to doubt that they are, they have been treated unequally. Second, if it could be shown that the supporters of a particular candidate were more likely than other voters to cast recoverable overvotes, then supporters of that candidate might suffer a cognizable injury since their candidate's relative inability to recover votes in the recount process would make it less likely that their voting bloc would succeed. These two claims, of course, resemble the claims available to voters challenging the different standards for recapturing undervotes. But according to the Supreme Court, there is a third potential problem with the failure to re-examine overvotes: this might allow invalid votes to be counted, since "the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot."[74]

This third category is problematic and distinctive. It is problematic, because it does not in fact exist. The problem identified by the Supreme Court arises from a failure to re-examine *all* ballots and not from a failure to re-examine overvotes. By hypothesis, after all, these ballots are unidentifiable as overvotes: they were counted, improperly as it turned out, in the mechanical process. No amount of re-examining overvotes would identify this category.

More significantly, this injury is distinctive, because it concerns the only category of ballots identified by the Supreme Court as to which other voters are necessarily injured by their *inclusion* in the official count. The injury-in-fact occurs because voters who cast valid ballots have the value of their votes diluted by the inclusion of these invalid ballots.[75] With respect to each of the other injuries, by contrast, the injury is produced by the *exclusion* of valid votes.

One striking thing about the Supreme Court's opinion in *Bush v. Gore* is that it doesn't distinguish these analytically different injuries. But its general tone seems to focus largely on the claims of individual excluded voters, rather than on voters whose preferred candidate was potentially disadvantaged by the recount the Florida Supreme Court ordered. Perhaps this was a tactical decision by the majority, which sought to avoid having its decision appear partisan: to say that the injury was suffered only by Republican voters whose overall voting strength was diluted by the recount standard would have made

74. Bush v. Gore, 121 S. Ct. at 531.

75. *See* Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) (identifying the inclusion of illegally cast ballots as a cognizable injury); BAD ELECTIONS, *supra* note 13, at 17.

explicit that this was a case about partisan outcomes rather than abstract principles. But if the injuries the Supreme Court sees are the exclusion of valid undervotes by stringent counties and exclusionary counting teams and the exclusion of valid overvotes by an incomplete recount process, who has standing to raise these claims?

George W. Bush? Why? He is not an excluded voter himself. So unless he has third-party standing, he is not a proper champion of the excluded voters' claims. Moreover, unless and until the Supreme Court is prepared to say that his supporters are disproportionately likely not to have their votes recovered under the prescribed process, he is an especially unlikely candidate for third party standing. It is hard to see George W. Bush as the champion of a claim by undervoters in overwhelmingly Democratic Palm Beach County that they are being denied equal protection because their votes would have been included under the more liberal Broward County standard. Indeed, Bush's third-party complaint in *Gore v. Harris*—the source of his intervention in the case which the Supreme Court decided as *Bush v. Gore*—alleged, among other things, that the standard used in Broward County was partisan, inconsistent, and unfair. The relief he sought was a declaration that "the illegal votes counted in Broward County under the new rules established after the election should be excluded under the Due Process Clause and 3 U.S.C. § 5."[76] Nothing in that proposed remedy vindicates the rights of excluded voters in Palm Beach County or elsewhere except in the brute realist sense that they might be content to have their votes excluded if that means that a disproportionate number of votes by the other candidate's supporters gets excluded as well.

I examined the pleadings filed by the other parties in *Gore v. Harris* to see what they claimed their injuries to be.[77] There were three groups of voters who intervened. Stephen Cruce, Teresa Cruce, Terry Kelly, and Jeanette K. Seymour were registered voters who lived in West Florida.[78] The Cruces voted by absentee ballot, and

76. Third-Party Complaint of Defendants George W. Bush and Dick Cheney, Gore v. Harris ¶ 40 (filed Dec. 2, 2000), *available at* http://election2000.stanford.edu/cv-00-2802bs.pdf (last visited Oct. 1, 2001) (on file with the North Carolina Law Review).

77. Intervenor John E. Thrasher sought to participate in his capacity as an elector pledged to George W. Bush. His argument centered on the questions whether Gore had standing to contest the election in the first place and whether the Florida Supreme Court's recount order violated Art. II, § 1 of the Constitution. *See* Presidential Elector John E. Thrasher's Motion to Intervene (filed Dec. 2, 2000), *available at* http://election2000.stanford.edu/cv-00-2808be.pdf under *Gore v. Harris* (last visited Oct 1, 2001) (on file with the North Carolina Law Review). Thus, I do not discuss his arguments in the text.

78. Motion to Intervene in Election Contest by Stephen Cruce, Teresa Cruce, Terry Kelly, and Jeanette K. Seymour (filed Nov. 27, 2000), *available at*

Kelly and Seymour did not cast ballots at all, ostensibly because, on the way to the polls, they heard media reports that Gore had carried Florida, and "became convinced that [their] vote[s] would be meaningless."[79] They alleged a host of misconduct by election officials in various counties, ranging from the improper exclusion of military absentee ballots or votes cast for Bush to the illegal inclusion of ballots that did not manifest a voter's clear intent. In addition, they alleged that felons had been illegally permitted to vote, and that premature media reports of Gore's victory—released while the polls were still open in the Florida Panhandle (which is on Central, rather than Eastern, Standard Time)—unreasonably interfered with Panhandle residents' right to vote and debased and diluted the overall voting strength of the Panhandle.[80] Leaving aside the claims based on the media's effect on voter turnout, as to which I cannot even begin to identify a legally cognizable injury, the nature of the intervenors' arguments was somewhat opaque.[81] In any event, however, they distinguished themselves from the candidate-parties (Bush, Gore, Cheney, and Lieberman) in the following terms: "[Our] view of the 2000 presidential election in Florida comes from a statewide perspective, and [our] concerns lean toward the legitimacy and constitutionality of the election process, more than to [our] own preference of who ought to win."[82]

Put this way, their injury looks exactly like the real objection advanced by the *Shaw* plaintiffs: a "shared individuated right to a Government" that obeys the Constitution.[83] Nothing about their situation distinguishes them from any other voter in Florida. They are not raising participation-based or aggregation-centered interests.[84]

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http://election2000.stanford.edu/gore-v-harris_112700.pdf. (last visited Oct. 1, 2001) (on file with the North Carolina Law Review).

79. *Id.* at ¶¶ 5–6.

80. *Id.* at ¶ 8.

81. By the time the case reached the U.S. Supreme Court, the Cruce intervenors' key claim seemed to be that the problem with the recount ordered by the Florida Supreme Court was that it potentially denied voters who chose not to cast a vote in the presidential election their right against compelled speech. *See* Brief for Respondent/Intervenors Stephen Cruce, Teresa Cruce, Terry Kelly, and Jeannette K. Seymour in Support of Petitioners in *Bush v. Gore*, Bush v. Gore Section, at 10–13 (filed Dec. 10, 2000), *available at* http://election2000.stanford.edu/crucein.pdf (last visited Oct. 1, 2001) (on file with the North Carolina Law Review). But none of the Cruce intervenors was denied that right: two of them did not vote at all, and claimed that the *denial* of their right to vote was the injury they had suffered, *see supra* note 78 and accompanying text, and the other two just as clearly chose not to exercise that right, since they did cast votes for president.

82. *Id.* at 3.

83. Allen v. Wright, 468 U.S. 737, 754 (1984) (internal quote omitted).

84. In their motion to intervene, the Cruce intervenors did allege that "Due to the

They are not claiming that the actual outcome of the election process fails to reflect their choice among the candidates. Rather, they are raising meta-governance claims.

The other intervenors did raise more individuated claims. Matt Butler, a voter in Collier County, voted for George W. Bush. He intervened because, as a voter in a punchcard community whose votes were not being manually recounted, he had "no way of knowing for sure whether or not his vote was in fact counted by the machine. . . ." Butler alleged that:

> the Presidential votes in a few Florida counties specifically selected by Gore are being given special treatment, by being manually examined for "voter intent" as to the vote (if any) for a Presidential candidate (and thereafter being counted for a candidate), as opposed to those ballots otherwise not tallied as to any Presidential vote by a machine count because no clear evidence of any Presidential vote was machine-detected. This results in a subjective process to which no ballots in Collier County, or in any other of the approximately sixty-three counties not selected by Gore, were or are being treated.[85]

In a similar vein, voters Glenda Carr, Lonnette Harrell, Terry Richardson, Gary Shuler, Keith Temple, and Mark Thomas intervened to seek a declaratory judgment striking down those portions of the Florida election code that allowed a candidate to pick the counties in which he would seek a manual recount. They claimed that this selection device would allow a candidate to seek recounts in only those counties where he would be likely to pick up votes. This ability to pick and choose, "without consideration of other counties which have discredited or 'undervoted' ballots" violated the rights of voters in those counties whose returns were not re-examined.[86]

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news media's unreasonable interference with Florida's election, those citizens . . . who cast their votes in Central Time Zone counties suffered a debasement and dilution of their votes because, at that time, they reasonably expected their individual votes would be supported and strengthened by votes from their fellow voters of similar political views from those same counties. Instead, the strength of the vote from Panhandle counties for a particular candidate was diluted and debased." Motion to Intervene ¶ 8(d). But there is no conceivable remedy for such an injury—even if the First Amendment does not bar liability altogether. They alleged no aggregation-based injury with regard to ballots actually cast.

85. Intervenor Matt Butler's Response to Plaintiffs' Memorandum in Opposition to Motions to Intervene at 2–3 (filed Dec. 1, 2000), *available at* http://election2000.stanford.edu/cv-oo-02802bi.pdf (last visited Mar. 22, 2001) (on file with the North Carolina Law Review).

86. *See* Emergency Petition for Declaratory Judgment that the Florida Statutory Scheme for a Manual Recount is Unconstitutional and Motion to Dismiss the Complaint

Butler and the Carr intervenors raise a plausible injury-in-fact that sounds in equal protection. But what is the appropriate remedy for their claims? The most sensible remedy obviously is to re-examine ballots in the counties where they voted as well. The equal protection right of individual voters to participate can really be vindicated only by *expanding* the scope of the prescribed recount. The only equal protection right that can be vindicated by abolishing recounts altogether is a group-based aggregation interest[87] that depends on the partisan composition of the unrecovered pool, precisely the issue the Supreme Court seemed to want to avoid by couching its discussion in individualistic, atomistic terms. As I have pointed out elsewhere, equal protection rights generally are expansive, rather than restrictive:

> The general assumption in contemporary equal protection law, which seems to play out most of the time, is that faced with a finding of unconstitutionality, the state will remedy the inequality by providing the benefit to the previously excluded group (that is, by "levelling up") rather than by depriving the previously included group ("levelling down"). The few examples in ordinary equal protection of levelling down—the closing of the schools in Prince Edward County, Virginia, or the swimming pools in Jackson, Mississippi—stand out precisely because of their rarity.[88]

The Supreme Court, however, did not order a conventional equal protection remedy. Instead *Bush v. Gore*

> is essentially a leveling down case: since Florida could not conduct a manual recount that comported with the Supreme Court's definition of equal protection within the constricted time period, the Court held essentially that *none* of the as-yet uncounted votes should be included. From the tactical perspective of candidate Bush, this was of course an acceptable solution. But which *voters* had cognizable interests that were vindicated by the Court's decision? Is

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to Contest Election at 3–4 (filed Nov. 29, 2000), *available at* http://election2000.stanford.edu/cv-00-2808w.pdf (last visited Oct. 1, 2001) (on file with the North Carolina Law Review); *see also* Motion for Order Allowing Intervention ¶ 4 (filed Nov. 30, 2000) (alleging that having manual recounts "in the counties unfairly selected by the Gore-Lieberman candidacy destroys their right to due process and equal protection of the law," and further claiming that "the statutory scheme for manual recounting allows the losing candidates to intentionally and unfairly skew the election results thereby diminishing the weight of Petitioners'/Intervenors' right to vote").

87. *See supra* text accompanying notes 32–34 (discussing the distinction between participation and aggregation interests).

88. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication,* 96 MICH. L. REV. 2001, 2027 (1998).

> there any voter who is better off than she was before in a sense that the legal system can or should recognize?[89]

My answer to that rhetorical question from our casebook on the election is basically "no." Whatever interest the Supreme Court's decision vindicated, it was *not* the interest of an identifiable individual voter. Rather it was a perceived systemic interest in having recounts conducted according to a uniform standard or not at all. It was structural equal protection, just as the *Shaw* cases have been.

The second substantial similarity between *Shaw* and *Bush v. Gore* has to do with the excessively narrow frame within which the Supreme Court assesses equality. In the *Shaw* cases, the Court focuses on the claims of individual voters to the exclusion of claims about race-conscious districting's contributions to the achievement of effective political equality for minority communities.[90] In *Bush v. Gore*, the problem lies in the Court's myopic focus on potential unequal treatment in the manual recount process. The per curiam opinion acknowledged that one purpose of the manual recount process was to vindicate a right to vote that might not be adequately protected by the machine count,[91] but it never really confronted the magnitude of the inequalities produced in the first instance by Florida's use of different voting technologies in different parts of the state. The Broward County recount discerned votes on about twenty percent of the undervoted ballots, while the Palm Beach County recount, using a more stringent standard, recovered votes on about ten percent of the undervoted ballots.[92] But as noted political scientist Henry Brady points out, while the disparity between the Broward and Palm Beach standards is troubling:

> it pales in comparison with the difference in the undervotes from using the Accuvote optical scanning devices versus the older punch card systems. The Accuvote devices (used in 16 Florida counties) have an undervote rate of about three per thousand which amounts to 18,000 undervotes statewide if Accuvote were used everywhere. The punch card systems (used in 24 counties) have an undervote rate of about fifteen per thousand which amounts to about 90,000 undervotes if applied statewide. The difference is 72,000 votes—more than ten times the difference between the [number of votes potentially recoverable under the] Broward and Palm Beach County standards.

89. BAD ELECTIONS, *supra* note 13, at 169–70.
90. *See supra* notes 50–53 and accompanying text.
91. Bush v. Gore, 121 S. Ct. 525, 530 (2000) (per curiam).
92. Henry E. Brady, Equal Protection for Votes (Dec. 11, 2000) (on file with author).

> But that is not all. Different voting machines lead to different numbers of total overvotes (those ballots where the tabulating machine detects two or more votes for the same office). The overvote rate for the Accuvote devices is about three to four per thousand which amounts to 21,000 votes if applied statewide. The overvote rate for the punch card machines is about twenty-five per thousand which amounts to 150,000. The difference between these two vote recording systems would be 129,000 votes—more than twenty times the difference between the Broward and Palm Beach County standards.
>
> By any reckoning, the machine variability in undervotes and overvotes exceeds the variability due to different standards by factors of ten to twenty. Far more mischief, it seems, can be created by poor methods of recording and tabulating votes than by manual recounts.[93]

In light of these huge disparities, it simply will not suffice for the Supreme Court to ignore the larger equal protection problem. That is why the most outrageous passage in *Bush v. Gore* is the following:

> The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.
>
> The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.[94]

A Court that believes that the real problem in Florida was the disparities in the manual recount standards, rather than the disparities in a voter's overall chance of casting a ballot that is actually counted for the candidate for whom he intended to vote, has strained at a gnat only to swallow an elephant.

Moreover, it has done so in a way that will continue to disadvantage the already disadvantaged. There is credible evidence

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93. *Id.*

94. Bush v. Gore, 121 S. Ct. at 532.

that systems that disproportionately reject votes both have a racially disparate impact[95] and are more often used in the populous jurisdictions in which minority voters are concentrated.[96] Thus, the newest equal protection once again vindicates the interests of middle-class, politically potent voters, while ignoring the interests of the clause's original beneficiaries.

Finally, *Bush v. Gore*, like the *Shaw* cases, manifests the U.S. Supreme Court's general disdain for the other branches and levels of government. It is hard to see the U.S. Supreme Court's opinions as anything other than contemptuous and suspicious of the Florida Supreme Court. Moreover, the Supreme Court also seemed not to think that either the Florida Legislature, using its powers under Article II of the federal Constitution, or the United States Congress, using its powers under the Electoral Count Act,[97] was capable of policing the Florida election process. Once again, as it did in the *Shaw* cases, the Court intervened to short circuit the normal, albeit potentially contentious and messy, process of self-government. The Court's decision left in its wake weakened institutions. The newest equal protection turns out to complete the reconception of equal protection begun by the Reapportionment Revolution of the 1960s. But as Robert Frost once remarked, "the trouble with a total revolution . . . [i]s that it brings the same class up on top."[98] Both the *Shaw* cases and *Bush v. Gore* re-enlist equal protection in the service of less, rather than greater, equality and democracy.

95. *See* Roberts v. Wamser, 679 F. Supp. 1513 (E.D. Mo. 1987) (finding a disproportionate racial impact in St. Louis's punchcard voting system), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989) (holding that the plaintiff did not have standing under the Voting Rights Act).

96. *See* Brady, *supra* note 92.

97. 3 U.S.C. §§ 1–18 (1994).

98. ROBERT FROST, *A Semi-Revolution*, *in* THE POETRY OF ROBERT FROST 363 (Edward Connery Lathen ed., 1971).