Are We Really over the Hill Yet? The Voting Rights Act at Forty Years: Actual and Constructive Disenfranchisement in the Wake of Election 2000 and Bush v. Gore

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ARE WE REALLY OVER THE HILL YET? THE VOTING RIGHTS ACT AT FORTY YEARS: ACTUAL AND CONSTRUCTIVE DISENFRANCHISEMENT IN THE WAKE OF ELECTION 2000 AND BUSH V. GORE

INTRODUCTION

Throngs of people stood in a steady drizzle on the night of November 7, 2000, staring intensely at the thirty-foot screens lining downtown Nashville’s War Memorial Plaza. Network anchors volleyed conflicting election results while the Democratic Party faithful cheered, sighed, and after a roaring speech by Gore Campaign Chair William Daley, wrapped up the hours of hopeful waiting at 3:05 A.M. as the Presidency hung in the balance.¹ As the confused crowds shuffled off, their uncertain mumbles reverberated throughout the city.²

In the days that followed the 2000 presidential election, (Election 2000) reports of hanging chads,³ pregnant chads,⁴ dimpled chads,⁵ and


2. As Press Secretary and Communications Director for Jeff Clark, Tennessee’s Democratic U.S. Senate candidate, the author of this Comment had a front-row seat at the 2000 presidential election (Election 2000) chaos. While I was an obviously invested actor in the election and the Democratic Party’s organization both statewide and nationally, I hope to answer with this Comment the broader question of how close America is to reaching the voter equality envisioned by the Voting Rights Act of 1965, 42 U.S.C. §§ 1971–1975e (2000). Election 2000 presents a striking illustration of the powers and passions roused by the right to vote for and elect our nation’s leader. Some may view Election 2000 as an absolute aberration. Yet others, this author included, see the actual and constructive disenfranchisement in Election 2000 as finally bringing to light the miscounting of votes along racial, economic, and political lines.

3. A hanging chad can result from voting on a Votomatic machine. On Votomatic computer ballot cards, perforated squares, called “chads,” mark the box for different candidates. See 2000 Florida Ballots Project: Votomatic Ballot Images at http://www.umich.edu/~nes/florida2000/ballot/votomatic.htm (last visited Sept. 9, 2004) [hereinafter 2000 Florida Ballots Project]. If a voter fails to punch the perforated square completely, the chad will hang on the card. Id. To allow the computer to read the cards, election workers must, and routinely do, remove the hanging chad to count the vote. Id.

4. A pregnant chad is also the result of a Votomatic machine. Id. If a voter does not punch through the ballot card forcefully enough to break the perforated square, then the chad will appear to be expanded or “pregnant.” Id. In the aftermath of Election 2000, much discussion ensued as to whether a pregnant chad was actually a vote. Id.

5. A dimpled chad also occurs as the result of a Votomatic machine. See 2000 Florida Ballots Project, supra note 3. If a voter punches the perforated box enough to create a point or a “dimple” in the chad, then it is considered dimpled. Id. As with the pregnant chad, there was great disagreement following Election 2000 as to whether a dimpled chad was indeed a vote. Id.
out-dated mechanical voting machines flooded headlines. Questions also surfaced regarding butterfly ballots and thousands of military absentee ballots—ballots that Republican Party officials single-handedly waded through to correct and then count.\(^6\)

Meanwhile, buried on page two of papers nationwide were stories of civil rights leader Jesse Jackson holding rallies and relating the experiences of hundreds, possibly thousands, of African-American voters who were physically intimidated away from polling places, required to show picture identification, and denied the right to vote, while white voters were free to vote without identification.\(^7\) Aside from anecdotes of literal roadblocks,\(^8\) the statistical analysis of which votes were counted and which votes were discarded is telling:

In the 2000 presidential election, African-Americans made up only 16 percent of the voting population in Florida but cast 54 percent of the ballots rejected in automatic machine counts. Across the state, automatic machines rejected 14.4 percent of the ballots cast by African-Americans, but only 1.6 percent of the ballots cast by others. Racial disparities appeared even when the same voting technology was used. For example, counting machines rejected punch card ballots in predominantly African-American precincts in Miami-Dade County at twice the rate they rejected ballots in predominantly Latino precincts, and four times the rate they rejected ballots in predominantly white precincts.\(^9\)

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7. Wyman, supra note 6, at 1A. Derek Rose, Reno Must Probe Florida, Says Jackson, N.Y. DAILY NEWS, Nov. 30, 2000, at 40.

8. Peter Slevin & Serge F. Kovaleski, Outside Palm Beach, Complaints Growing; Democratic Hot Line Collects 6,000 Reports of Problems Voting in Florida, WASH. POST, Nov. 11, 2000, at A12. In the days following the election, the NAACP and several other African-American organizations said they had received hundreds of complaints from blacks who were reportedly turned away at the polls even though they were properly registered. Id. Some complained that they were harassed by law enforcement authorities at checkpoints set up in largely black areas as they proceeded to polling places. Id. First-time Haitian voters were denied assistance in understanding or translating the ballots in violation of the Voting Rights Act. Id. The NAACP filed complaints with the Justice Department. Id. “We are hearing complaints about roadblocks in Tallahassee, for example, in predominantly black communities to discourage blacks from voting. And we are hearing here in Miami about Haitians and Cubans being accosted and people with proper identification and registration who were denied the right to vote,” reported Bishop Victor T. Curry, president of the Miami-Dade branch of the NAACP. Id.

9. Spencer Overton, The Law of Presidential Elections: Issues in the Wake of Florida 2000: A Place at the Table: Bush v. Gore Through the Lens of Race, 29 FLA. ST. U. L. REV. 469–70 (2001) (citations omitted). Professor Overton borrows his title from a line in Langston Hughes’s famous poem, I, Too. Its poignant lines appear to be just as important today, although papered over in more nuanced subtleties. Professor Overton begins his article with a telling homage to Hughes: “I am the darker brother. They send me to eat in the kitchen when company comes . . . . Tomorrow, I’ll be at the table when company comes. Nobody’ll dare say to me, ‘Eat in the
In the midst of this fracas, a cacophony of chants and sound bytes, clamoring to “count every vote,”10 “don’t steal the election,”11 and that “some are determined to change the legitimate result,”12 filled nightly news stories, headlines, and eventually, legal briefs to the United States Supreme Court.13 Aside from bruised, but burly partisan forces stirring up the messiest election in over 124 years,14 the real issue on the table concerned the voting rights of United States citizens. Election 2000 was a time of chaos and confusion while political leaders and voters alike tried to figure out what went wrong—and what was right.15

As we pause at the cusp of the first presidential election after Bush v. Gore,16 sandwiched between the Civil Rights anniversaries of Dr. Martin Luther King, Jr.’s “I Have a Dream” speech17 and the Voting kitchen,” then ... I, too, am America.” Id. at 469 n.11 (quoting Langston Hughes, I, Too, in THE NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE 1258 (Henry Louis Gates, Jr. & Nellie Y. McKay eds., 1997)).

10. “How can we teach our children that every vote counts if we are not willing to make a good-faith effort to count every vote?” Sen. Joseph I. Lieberman’s Statement, WASH. POST, Nov. 27, 2000, at A11 (remarks of Senator Joseph Lieberman, Vice President Al Gore’s running mate, after Florida certified the state for George W. Bush).


15. Political leaders and voters were not the only parties keenly watching Election 2000. While “most of the scholarship and federal case law involving the political process prior to the 2000 election focused more on institutional arrangements than on the nuts-and-bolts of casting votes and having them counted,” after Election 2000, scholarship, analysis, and litigation soared as injured parties, baffled scholars, and incredulous partisans tried to understand the chaos of chads, undervotes, overvotes, and all the other mechanisms contributing to the disenfranchisement. Samuel Issacharoff et al., When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000, at ii (2001).


17. Dr. King’s “I Have a Dream” speech is perhaps the most well-known and oft-quoted address he ever delivered. He gave this speech at the Lincoln Memorial on August 28, 1963 as the “keynote address of the March on Washington, D.C. for Civil Rights.” See A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217 (James M. Washington ed., 1991). The fortieth anniversary of Dr. King’s famous speech was August 28, 2003.
Rights Act, the anticipation is palpable. Election 2000 poses a pivotal question: Are we really over the hill yet with regard to voting rights or are there still mountains to climb?

In light of claims of actual and constructive disenfranchisement, did Bush v. Gore correctly answer the voting rights outcry surrounding Election 2000? Does it extend or at least carry on the rights of insular minorities who make up the class of citizens the Voting Rights Act was meant to protect?

On the eve of the fortieth anniversary of the 1965 Voting Rights Act, this Comment seeks to determine if voting rights litigation and legislation have accomplished the goal of the Voting Rights Act, or if many challenges still lay in its path toward the goal of universal franchise. Part II of this Comment will give a brief historical overview of voting rights in the United States, the enactment and impact of the Voting Rights Act and its subsequent litigation, and a summary of Election 2000 and the circumstances that led the Supreme Court to decide Bush v. Gore. While this Comment focuses primarily on section 2 of the Voting Rights Act, specifically its remedial nature, an explanation of the historical backdrop leading to its enactment and the subsequent amendments are necessary to understand the full implications and purpose of the legislation.


19. In the title of this Comment, “Over the Hill” has dual meanings. Much like adults reaching the age of forty, the Voting Rights Act faces a possible midlife crisis. By contrast, the parallel meaning resting in the title also evokes images of reaching the end of a journey and finally making it over the hardest stretch.

20. See infra notes 230–272 and accompanying text.

21. The cornerstone of modern due process and equal protection analysis is the now-famous phrase “discrete and insular minorities,” used by Justice Harlan Fiske Stone to delineate those groups needing particular judicial protection. See United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

22. Id. See also infra notes 24, 33–75 and accompanying text.

23. See infra notes 110–170 and accompanying text.

24. The statutory basis for a voting rights claim is § 2 of the Voting Rights Act, which simply provides that:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner that results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.


25. See infra notes 33–109 and accompanying text.
Part III will analyze what *Bush v. Gore* has done for voting rights jurisprudence. Further, Part III will compare the evolving thread of Voting Rights Act litigation with the new path that activists may follow for the legislation in a post-*Bush v. Gore* era. Thus, the fundamental right to vote reestablished by the Court begins to revive significant voting rights jurisprudence. However, to create a full revival, a reframing of the Voting Rights Act litigation thread is necessary.

Finally, Part IV will proffer insight into the impact of both *Bush v. Gore* and Election 2000 on future voting rights litigation. It also will discuss whether the snapshot of Election 2000 is indicative of a consistent rate of voter disenfranchisement, or if it demonstrates deeper fractures within the United States electoral system. However, there may be different challenges as voting rights supporters work to reframe and re-choreograph strategies for making every citizen's vote count, regardless of a county's investment, or lack of investment, in voting technology. This Comment posits that the Voting Rights Act, as it nears its fortieth birthday, has been successful in many of its initial battles with actual disenfranchisement, but there are still many miles to travel to achieve the goal of universal franchise.

II. BACKGROUND: A BRIEF SUMMARY OF THE VOTING RIGHTS ACT AND ELECTION 2000

The voting rights struggle for African-Americans and other disenfranchised minorities consists of a long and turbulent history. The Election 2000 crisis provides a vivid illustration of the realization of voting rights just shy of the Voting Rights Act's fortieth birthday. This section details some of the key historical developments in voting rights as well as a brief summary of the remarkable events following Election 2000.

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26. See infra notes 230–271 and accompanying text.
27. See infra notes 272–279 and accompanying text.
28. See infra notes 160–162 and accompanying text.
29. See infra notes 280–294 and accompanying text.
30. The election crisis that Florida painted for the country illustrated and “exposed what has long been the dark secret of the entire electoral process: significant inaccuracies and mistakes infect the actual process of recording and tabulating votes.” ISSACHAROFF ET AL., supra note 15, at ii.
31. See infra notes 280–294 and accompanying text.
32. See infra notes 298–303 and accompanying text.
A. Historical Overview of the Voting Rights Act of 1965

The right of United States citizens to vote, regardless of race, was constitutionally established in 1870 with the Fifteenth Amendment. However, it was not until almost a full century later that national and universal suffrage became a reality and the actual law of the land.

In direct response to the post-Civil War amendments, the South enacted a number of "legal and extralegal" reforms to limit the political power of freed black men and to enable the Southern caste system to continue. Strategic tools were employed by segregationists to keep the franchise away from African-Americans. Such methods of discrimination included: district gerrymandering, purposeful closing of black polling places, poll taxes, literacy tests, grandfather clauses, and above all else, waves of Ku Klux Klan terrorism in the form of lynchings and vigilante violence against blacks and white civil rights activists in the South. The segregationists' efforts ensured that the right to vote was a promise on paper rather than an actualization of civil rights. Such extralegal maneuvers to rid southern society and its electorate of equal racial representation became an acceptable and effective way to continue the South's racist caste system.

Obviously, given the southern segregationists' effort in disenfranchising African-Americans, a vast disconnect existed between the voting rights laws on the books and the actual ability of African-Americans to vote. In the South, Jim Crow laws effectively kept African-Americans from exercising their newly-derived constitutional

33. The Fifteenth Amendment to the United States Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV.


35. See U.S. Const. amends. XIII, XIV, XV. The Thirteenth Amendment prohibits slavery and gives Congress the power to enact appropriate legislation to enforce the prohibition. U.S. Const. amend. XIII. The Fourteenth Amendment provides for the privileges and immunities to extend to all citizens of the United States regardless of the state of residence, guarantees due process, and equal protection of the law. U.S. Const. amend. XIV. The Fourteenth Amendment also provides for apportionment for federal representation based on the male population of a state. Id. The Fifteenth Amendment gives male citizens the right to vote regardless of race, color, or previous servitude. U.S. Const. amend. XV.

36. See Keyssar, supra note 34, at 105.


right to vote for nearly ninety years.\textsuperscript{39} Finally in the 1950's, partly due to organizations such as the NAACP, labor unions, and the Southern Christian Leadership Conference, African-American citizens engaged in peaceful protests,\textsuperscript{40} bus boycotts, petitions, and lawsuits to challenge the law and culture of Jim Crow, which had flourished in the Southern states.\textsuperscript{41}

The momentum for social and political change intensified after \textit{Brown v. Board of Education},\textsuperscript{42} where the Supreme Court decided that racially separate schools were inherently unequal.\textsuperscript{43} The next battle for national and community civil rights activists was to effectuate the integration of schools and institutes of higher education.\textsuperscript{44} Yet, key leaders were convinced that "the franchise was an important right in itself and the key to securing other civil rights, [thus] hundreds of thousands of African-Americans, acting alone and in organized registration drives, attempted to enter their names on registry lists and participate in elections."\textsuperscript{45} Many believed that once blacks were able to vote in large numbers, the Jim Crow power structure, so ingrained in Southern culture, would dissipate.\textsuperscript{46}

Jim Crow did not disappear over night and social changes were not easily implemented. The next ten years, 1955–1965, proved to be turbulent and deadly for many activists and supporters of the civil rights movement who worked to eradicate the deeply rooted caste system.\textsuperscript{47} Further, the Court was not always a friend to universal enfranchisement. In \textit{Lassiter v. Northampton County Board of Elections},\textsuperscript{48} for example, the Court upheld a thinly veiled disenfranchising tool when

\begin{itemize}
\item \textsuperscript{39} See Keyssar, \textit{supra} note 34, at 258. Shortly after the Civil War and Reconstruction, Jim Crow laws were imposed in the South to enforce racial segregation in public places, educational institutions, employment, housing, and transportation. \textit{Id}. The laws lasted until the Civil Rights Movement of the 1960s. \textit{Id}.
\item \textsuperscript{40} It must be noted that while the civil rights movement began based on the tenets and teachings of peaceful protest and civil disobedience, many protests indeed turned violent. See Keyssar, \textit{supra} note 34, at 258. The actions of bystanders, counter-protesters, and even law enforcement often caused what began as peaceful protests by civil rights activists to turn into violent incidents. \textit{Id}. For a detailed account of the civil rights movement, see \textit{John Lewis, Walking with the Wind: A Memoir of the Movement} (1998).
\item \textsuperscript{41} See Keyssar, \textit{supra} note 34, at 258.
\item \textsuperscript{42} 347 U.S. 483 (1954).
\item \textsuperscript{43} See generally \textit{Id}.
\item \textsuperscript{44} See \textit{Juan Williams, Thurgood Marshall: American Revolutionary} 228–52 (1998). See also \textit{Jack Bass, Unlikely Heroes} (1981).
\item \textsuperscript{45} Keyssar, \textit{supra} note 34, at 256.
\item \textsuperscript{46} \textit{Id}.
\item \textsuperscript{47} For a detailed discussion of the long road to enfranchisement for African-Americans, see Keyssar, \textit{supra} note 34, at 256–315.
\item \textsuperscript{48} 360 U.S. 45 (1959). See also \textit{McDonald v. Bd. of Election Comm'r's}, 394 U.S. 802 (1969) (holding that persons in jail awaiting trial had no right to an absentee ballot).
\end{itemize}
it ruled North Carolina's use of literacy tests was facially neutral, even though such tests were widely known throughout the South as methods to keep African-Americans away from voting booths.49

Finally, by 1965, several appalling acts of terror50 served as a sharp message to Washington that strong legislative steps were needed. The trigger for President Johnson and Congressional leaders may have been the murders of civil rights activists Michael Schwerner, Andrew Goodman, and James Chaney in Philadelphia, Mississippi on June 16, 1964 by a white lynch mob,51 or the attack on peaceful protestors by state troopers in Selma, Alabama on March 7, 1965.52 The disturbing scenes erupting throughout the South persuaded President Johnson to overcome the strong resistance by southern legislators against effective voting rights legislation.53 President Johnson called for strong voting rights laws,54 and shortly thereafter, hearings commenced on the Voting Rights Act of 1965.55

49. See Tushnet, supra note 38, at 26.
50. On June 16, 1964, civil rights activists Michael Schwerner, Andrew Goodman, and James Chaney were murdered in Philadelphia, Mississippi. See generally FLORENCE MARS, WITNESS IN PHILADELPHIA (1977). Many other disturbing and violent scenes erupted throughout the South including attacks by Alabama state troopers on peaceful protesters in Selma. See BASS, supra note 37, at 236–59.
51. See MARS, supra note 50, at 258.
52. See BASS, supra note 37, at 236–59. In many ways, Selma was the clearest illustration of the intense and violent obstacles to political equality in the South. Id. at 236. Notwithstanding litigation by the Justice Department and activism by civil rights groups, Dallas County and its seat of government in Selma had become symbols of entrenched opposition and brutal reaction . . . . Fewer than 400 of the 15,115 blacks of voting age were registered to vote, and in the three previous months, registrars had accepted only 48 of 221 blacks who had applied . . . . "We are going to bring a voting bill into being in the streets of Selma," Martin Luther King, Jr., declared. Id. at 236–37.
54. President Lyndon B. Johnson noted with prescience, upon signing the Voting Rights Act, that he was delivering the South to the Republican Party. See JACK BASS & WALTER DE VRIES, THE TRANSFORMATION OF SOUTHERN POLITICS: SOCIAL CHANGE AND POLITICAL CONSEQUENCE SINCE 1945 (1976). See also Charlie Rose: Conversation with Gary Wills (PBS television broadcast, Aug. 8, 2002).
55. See DORIS KEARNS GOODWIN, LYNDON JOHNSON AND THE AMERICAN DREAM 229 (1991) (quoting President Lyndon B. Johnson, Speech at the Presentation of the Voting Rights Act of 1965 (Mar. 5, 1965)): I speak tonight for the dignity of man and the destiny of democracy . . . . At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom . . . . So it was a century ago at Appomattox. So it was last week in Selma, Alabama . . . . There is no constitutional issue here. The command of the Constitution is plain. There is no moral issue. It is wrong . . . . to deny any of your fellow Americans the right to vote . . . . This time, on this issue, there must be no delay, no hesitation, and no compromise with our purpose . . . . What happened in Selma is
Congressional hearings determined that the anti-discrimination laws, as of 1965, were not adequately addressing the intense opposition by certain states to enforce the Fifteenth Amendment.\(^5\) Further, the case-by-case litigation approach employed by many civil rights groups like the NAACP proved to be slow and unsuccessful.\(^5\) Each time one discriminatory practice was declared "unconstitutional and enjoined, a new one would fill its place and litigation would have to commence anew."\(^5\)

part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too. Because it is not just Negroes, but really it is all of us who must overcome the crippling legacy of bigotry and injustice . . . . And . . . we . . . shall . . . overcome.

\textit{Id.} at 229.

\(^{56}\) See U.S. Dep't of Justice, \textit{supra} note 53.

\(^{57}\) See \textit{infra} note 58.

\(^{58}\) \textit{Id.} See also Chief Justice Warren's historical account of the slow progress surrounding black enfranchisement in the South in\textit{South Carolina v. Katzenbach}, 383 U.S. 301 (1966). Chief Justice Warren stated:

The Fifteenth Amendment . . . was ratified in 1870. Promptly thereafter Congress passed the Enforcement Act of 1870, which made it a crime for public officers and private persons to obstruct exercise of the right to vote . . . . \[E\]nforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894 . . . .

Meanwhile, beginning in 1890, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification . . . . These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote . . . .

According to the evidence in recent Justice Department voting suits, . . . [discriminatory enforcement of voting qualifications] is now the principal method used to bar Negroes from the polls . . . . White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers. Negroes, on the other hand, have typically been required to pass difficult versions of all the tests . . . . The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials . . . .

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960 permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in
The Voting Rights Act was signed into law on August 6, 1965, by President Johnson. The chief provisions for remedial action were contained in section 2 and section 5. Section 2 of the Voting Rights Act enacted a nationwide prohibition of any denial or abridgment of the right to vote based on race or color. The legislation suspended literacy tests and "provided for the appointment of federal examiners (with the power to register qualified citizens to vote), in those jurisdictions that were 'covered.'"

Meanwhile, section 5 sought to ameliorate and monitor states (or areas within certain states) that had a substantial history of racial discrimination. The requirements of section 5 obliged covered jurisdictions to obtain "preclearance" for the implementation of new voting procedures. Covered jurisdictions included states and areas of states that historically discriminated in voting on the basis of race and/or had areas of systematic discrimination. Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

... [This] legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare. Litigation has been exceedingly slow. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests. Alternatively, certain local officials have defined and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

Id. at 310–14 (citations omitted).

59. U.S. Dep't of Justice, supra note 53.
62. Id.
63. U.S. Dep't of Justice, supra note 53.
64. The 'covered' jurisdictions included six Southern states (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) and in many counties of North Carolina, where voter registration or turnout in the 1964 presidential election was less than 50 percent of the voting-age population. Under the terms of Section 5 of the Act, no voting changes were legally enforceable in these 'covered' jurisdictions until approved either by a three-judge court in the District of Columbia or by the Attorney General of the United States.

Id.

racist practices in local codes and laws leading to disenfranchisement of African-American voters. Either the District Court for the District of Columbia or the United States Attorney General would approve the new voting practices for the covered jurisdictions. The purpose of section 5 was to prevent a covered jurisdiction from continuing the practice of substituting new methods of discriminatory voting practices for the previous laws that courts have invalidated as unconstitutional.

When the Voting Rights Act was first adopted, only one-third of voting age African-Americans were registered in the "covered" states compared to two-thirds of voting age whites. As the Supreme Court aptly stated in *Katzenbach v. South Carolina*, while upholding the constitutionality of the Voting Rights Act:

Congress had found that case-by-case litigation was inadequate to combat wide-spread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

The Voting Rights Act, considered by some to be the most influential legislation passed by Congress in the twentieth century, is still progressing toward the goal of equality and enfranchisement through true universal suffrage. What necessarily follows, however, is the

66. *Id.*


69. It should be noted, however, that a statistical discrepancy exists because the Twenty-Sixth Amendment, in 1971, changed the voting age from twenty-one to eighteen years of age. U.S. CONST. amend. XXVI.

70. See U.S. Dep't of Justice, *supra* note 53.

71. 383 U.S. 301 (1966).

72. *Id.* at 327–28. See also U.S. Dep't of Justice, *supra* note 53.


stirring reminder that political realities are often disconnected from the lofty theories that spur such goals.  

B. Weathering the Storm: Significant Challenges and Subsequent Amendments to the Voting Rights Act of 1965

The Voting Rights Act survived challenges attempting to sidetrack its effectiveness. While the Voting Rights Act did not include a provision barring poll taxes, it implicitly encouraged the Attorney General to challenge their use. In *Harper v. Virginia State Board of Elections*, the Supreme Court held that Virginia’s poll tax was unconstitutional under the Fourteenth Amendment. With *Harper*, the Court held that definitions of who can participate in what elections, on what terms, are subject to equal protection and due process review. Further, after the Voting Rights Act passed, the Supreme Court issued several key decisions upholding the constitutionality of section 5 and affirmed the broad scale of voting practices requiring preclearance. In 1970, Congress extended section 5 of the Voting Rights Act for another five years. In 1975, Congress again extended the preclearance requirements of section 5 for seven years. The extensions by Congress in many ways endorsed the Supreme Court’s expan-

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75. Illustrating the disconnect between the political reality of enfranchisement and its theoretical goals, Election 2000 was a needed wake-up call for political leaders and voters. With blatant race-based exclusion to the ballot box as a relic of the past, many people assumed that the right to vote was universal. The aftermath of Election 2000 certainly shattered such optimistic notions. See generally A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY (Ronald Dworkin ed., 2002) [hereinafter A BADLY FLAWED ELECTION].

76. The Legislative Findings section of the Voting Rights Act expressly cited poll taxes as a significant hurdle to the franchise that bore little reasonable relationship to any legitimate state interest in the conduct of elections. See 42 U.S.C. § 1973h (2000). However, the statute reads:

If in a proceeding instituted by the Attorney General . . . under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, . . . it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary . . . .


78. Id.


80. See U.S. Dep’t of Justice, supra note 53. See also Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (holding that gerrymandered districts and at-large elections could be used as techniques to dilute minority voting strength).


82. See U.S. Dep’t of Justice, supra note 53.

83. Id.
sive interpretation of the preclearance requirements of section 5. The legislative hearings on the extension of section 5 illustrated the many ways voting populations were manipulated through gerrymandering, annexations, adoption of at-large elections, and other structural changes to prevent newly-registered black voters from effectively using the ballot. "New" forms of discrimination were also moving into the political and legal landscape as Congress heard extensive testimony from other groups subject to voting discrimination. Hispanic, Asian, and Native-American citizens also fell victim to "new" as well as traditional voter disenfranchisement. Thus, the 1975 amendments included voting safeguards for "minority-language citizens."

In 1973, the Court recognized the effect of certain legislative multimember districts. The Court held in White v. Regester that multimember legislative districts were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because they systematically diluted the voting power of minority citizens. The decision served as a guide for litigation throughout the 1970s as minority groups fought against at-large voting schemes and gerrymandered redistricting plans. However, in 1980, the Court placed a roadblock in front of the progressive line of voting rights jurisprudence. In Mobile v. Bolden, a sharply divided Court changed directions and required that constitutional claims under the White holding of minority vote dilution contain proof of a racially discriminatory purpose. This newly-heightened requirement was widely seen as severely increasing the plaintiff's burden.

84. Id.  
85. Id.  
86. The author places the word "new" in quotations to recognize that other racial minorities and ethnic groups have also experienced franchise discrimination for many years as well. However, Congress first legally recognized this phenomenon in the amendments to the Voting Rights Act in 1975. 42 U.S.C. § 1973(a) (2000).  
87. Id.  
88. Id.  
89. In multimember district elections, a number of candidates are elected from a large district, often causing the dilution of a block of voters. See generally Lani Guinier, The Representation of Minority Interests: The Question of Single-Member Districts, 14 CARDOZO L. REV. 1135 (1993).  
91. Id.  
92. See U.S. Dep’t of Justice, supra note 53.  
95. Id. at 66–68. Bolden garnered only a plurality of votes. Id.  
96. For a further discussion, see Bolden, 446 U.S. at 103 (1980) (Marshall, J., dissenting).
in the Court’s view of equal protection claims,\textsuperscript{97} Congress legislatively removed the discriminatory purpose obstacle by quickly amending section 2 of the Voting Rights Act to allow a cognizable claim under the Act with only a showing of discriminatory impact.\textsuperscript{98}

After extensive hearings on the practice and harm of minority vote dilution, Congress amended section 2 of the Voting Rights Act in 1982 and determined that the purpose of the Act was to remove barriers to voting.\textsuperscript{99} Congress felt a response to the splintered vote in \textit{Bolden} was necessary.\textsuperscript{100} Congress understood that a certain practice, while neutral on its face, may have the result of denying minorities equal access to the political process, regardless of the intent or motivation behind the practice.\textsuperscript{101} As a result, to legislatively overcome \textit{Bolden},\textsuperscript{102} Congress amended section 2.\textsuperscript{103} The 1982 amendments thus allowed \textit{Bolden}-like claims, which included factual findings of minority vote dilution through such multi-member, at-large elections and other such discriminatory districting techniques to stand based on a finding of discriminatory impact on minority voters.\textsuperscript{104}

In the 1982 Amendments, Congress extended section 5 for another twenty-five years.\textsuperscript{105} Congress also approved a new measure which in 1985 provided covered jurisdictions a way to terminate (or “bail out from”) coverage under the special provisions of sections 4 and 5.\textsuperscript{106}

\textsuperscript{97} See, e.g., \textit{Washington v. Davis}, 426 U.S. 229 (1976) (holding, in a suit alleging race discrimination in police hiring, that a statute neutral on its face must be shown as invidiously discriminating on the basis of race to be unconstitutional); \textit{Arlington Heights v. Metro. Hous. Dev. Corp.}, 429 U.S. 252 (1977) (pointing out that respondents failed to prove that discriminatory purpose was the motivating factor in zoning denial); \textit{Pers. Adm'r. v. Feeney}, 442 U.S. 256 (1979) (representing the newly-carved requisite burden of proof, which relies on the basic principle that only if there is purposeful, intended discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment).

\textsuperscript{98} \textit{Voting Rights Act}, 42 U.S.C. §§ 1973-1975e (1982). It is interesting to note, however, that two years after \textit{Bolden}, the Court decided \textit{Rogers v. Lodge}, 458 U.S. 613 (1982), which held that the county’s at-large system of elections violated the Equal Protection Clause even without a finding of explicit discriminatory intent. Meanwhile, \textit{Rogers} hardly addressed or distinguished \textit{Bolden}, much to the dismay of its dissenter. \textit{Id.} at 628 (Powell, J., dissenting).


\textsuperscript{100} 446 U.S. 55 (1980).


\textsuperscript{102} \textit{Bolden}, 446 U.S. at 66-68.


\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}
The vast majority of Voting Rights Act litigation has centered around three areas: redistricting to increase minority representation in legislatures (with challenges to racial gerrymandering in favor of the historically discriminated minority dominating modern arguments);\textsuperscript{107} battling minority vote dilution;\textsuperscript{108} and jurisdictional challenges to the preclearance requirements under section 5 of the Act for states with a discriminatory history in voting.\textsuperscript{109} Breaking from the typical claims—possibly because the situation at hand was far from typical—were the \textit{Bush v. Gore} voting rights challenges. While staged on many fronts, including political, public relations and, of course, legal, the strategies employed for securing the franchise in the aftermath of Election 2000 had a blitzkrieg quality to them. Neither candidate knew exactly where any argument might get him—but they tried every angle and the foreshadowing for voting rights was of an oxymoronic quality; who could have imagined that the disenfranchise-ment of thousands of voters might lead to greater franchise and even a renaissance-of sorts for the Voting Rights Act?

\textbf{C. Brief Summary of Election 2000 and Its Aftermath}

While many tomes have been written about the myriad of issues involved in Election 2000 and the subsequent litigation, the following section will give only a brief synopsis of Election 2000 and its aftermath.

\textsuperscript{107} See, e.g., Shaw v. Reno, 509 U.S. 630 (1993) (holding that legislative redistricting plans based “predominantly on race” will be subjected to strict judicial scrutiny); Miller v. Johnson, 515 U.S. 900 (1995) (holding that the redistricting was so bizarre on its face that it was inexplicable on grounds other than race and therefore could not be upheld unless it was narrowly tailored to achieve a compelling state interest); Shaw v. Hunt, 517 U.S. 899 (1996) (holding that under section 5 of the Voting Rights Act, the Department of Justice lacked statutory authority to require creation of majority-minority districts whenever possible; holding that even assuming compliance with the Voting Rights Act was a compelling governmental interest, the redistricting plan did not survive strict scrutiny because it was not narrowly tailored); Bush v. Vera, 517 U.S. 952 (1996) (declaring the congressional districts unconstitutional because race was the predominant factor in drawing each of the districts).

\textsuperscript{108} Rogers v. Lodge, 458 U.S. 613 (1982) (holding that the county’s at-large system of elections violated the constitutional rights of its African-American citizens by diluting appellees’ voting power and excluding them from the political process). It is interesting to note that Rogers, decided between \textit{Bolden} and the 1982 Amendments to the Voting Rights Act, affirmed the lower court’s holding of a racially invidious purpose without overruling \textit{Bolden}. See generally \textit{id}.

\textsuperscript{109} For a comprehensive discussion of these “three generations” of Voting Rights Act cases, see Pamela S. Karlan, \textit{All Over the Map: The Supreme Court’s Voting Rights Trilogy}, 1993 Sup. Ct. REV. 245.
1. Allegations of Actual and Constructive Disenfranchisement

The aftermath of Election 2000 was a time of political chaos and disorder as the nation’s eyes turned to Florida to determine which candidate received more votes in the electoral college, and thus, won the Presidency.\(^\text{110}\) Since the election in Florida was so close, with less than one half of one percent separating the candidates,\(^\text{111}\) Florida election law mandated an automatic recount.\(^\text{112}\) The recount revealed across-the-board voting irregularities.\(^\text{113}\) Indeed, stark racial disparities emerged as well, in terms of whose votes were more likely not to be counted.\(^\text{114}\)

In such a perplexing and extraordinary time, with Texas Governor George Bush leading the popular vote in Florida with 2,909,135 votes, and Vice President Al Gore less than 2,000 votes behind at 2,907,351, both campaigns struggled to craft the best strategy to reach the requisite number of popular votes to then capture Florida’s twenty-five electoral votes.\(^\text{115}\) Further obstacles lay in the path, however, as more and more claims of disenfranchisement and illegal maneuvers during Florida’s election came to the surface.\(^\text{116}\)

For example, Palm Beach County employed a butterfly ballot as its voting mechanism of choice.\(^\text{117}\) However, the butterfly ballot had a number of design flaws causing many scholars and observers to conclude that thousands of votes had been miscast.\(^\text{118}\) A community known for a heavily Jewish population, with a significant number of Holocaust survivors among its residents,\(^\text{119}\) Palm Beach had a final

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111. See Bush, 531 U.S. at 100–01.
112. The automatic recount was conducted pursuant to Florida election code § 102.141(4). See Bush, 531 U.S. at 101. While such a proposition sounds relatively simple, irregularities between counties happen quite regularly as each municipality has the freedom to design the electoral mechanisms as the municipality sees fit. See Fla. Stat. ch. 102.141(4) (2003).
113. See Bush, 531 U.S. at 103.
114. See Overton, supra note 9, at 170.
115. See Bush, 531 U.S. at 100–01.
116. As noted earlier, many claims of disenfranchisement fell along racial and economic lines. See supra notes 8–9. The NAACP and other civil rights organizations received thousands of phone calls detailing actual disenfranchisement in voting. Id.
118. Id. at 139.
119. As the author of this Comment has noted elsewhere, Jewish-Americans have overwhelmingly voted Democratic in every Presidential election since the 1940s. See Karyn L. Bass, Beyond Dollars and Sense: The Partisanship of White Blue-Collar Workers and Jewish-Americans, (2000) (unpublished senior honors thesis, Northwestern University) (on file with the author, Northwestern University library, and Northwestern University Department of Political Science).
tally for Pat Buchanan higher than any other county in the state. In fact, twenty percent of Buchanan’s statewide total came from Palm Beach County. Further perplexing the situation was that many Palm Beach voters saw Pat Buchanan, the right-wing third party candidate, as an anti-Semite.

Upon returning home to watch the election coverage on the news, many Palm Beach voters realized they had mistakenly voted for Pat Buchanan instead of Vice President Al Gore. Buchanan had his strongest showing in Palm Beach in the precincts where Gore also had his strongest showing, adding to the contentions that Gore voters mistakenly voted for Buchanan. Indeed, one statistician argued that the chances the data would converge in this matter by accident or chance are less than one in one trillion. From the conflicting signs of voter intent and the apparent voter and systemic error, it is “hard to avoid the conclusion that the confusing butterfly ballot caused at least a few thousand Palm Beach voters who wanted to vote for Gore to vote instead for Buchanan by mistake. The number is certainly higher than 537, which is the margin by which Bush eventually won Florida.”

Complicating the election fiasco even further in Palm Beach was the presence of 19,120 double-punched ballots. The overvote rate in Palm Beach was much higher than other counties: “4.1 percent of all Palm Beach ballots were overvotes for the presidential race, compared with 2.7 percent in Miami-Dade County and 1.7 percent in Broward County.” A few days after the election, voters in Palm Beach County brought suit to demand a new county-wide vote for President because confusing butterfly ballots resulted in mistaken votes for Buchanan. While the arguments were strong for declaring the butterfly ballot illegal, the trial court felt it could not “unring the

120. See Greene, supra note 117, at 139.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. (citing CNN Live Event/Special, David S. Lee, University of California/Berkeley (transcript 11/10/00)).
126. Greene, supra note 117, at 139.
127. Double-punched ballots, also known as overvotes, are ballots on which a voter punched holes for two presidential candidates. Id.
128. Id. (footnotes omitted).
129. Id.
Consequently, the Palm Beach lawsuits did little to vindicate the voters’ rights to cast a valid vote in Election 2000.131

Closely following the revelations in Palm Beach were allegations of constructive disenfranchisement due to certain voting technology used in various counties. The impact of the different voting mechanisms was along racial lines.132

Aside from the constructive disenfranchisement in the concentration of voting irregularities and throw-away votes along racial lines, actual disenfranchisement of African-Americans occurred in the form of road blocks,133 refusal to verify voting registration,134 and denial of the franchise to individuals whose names matched or were similar to the names of ex-felons,135 who in fact were not ex-felons.136 The actual disenfranchisement claims in Florida were reminiscent of the Jim Crow era.137 Some citizens were barred from voting at the polling places for discrepancies in their registration.138 Election officials at central offices were nowhere to be found, and affidavits, typically needed by voters to prove residency or registration, were in short supply.139 Further examples of such problems included citizens with “voter registration cards being turned away because their names were not on the voter lists, polling places being moved without notice, votes
being cast incorrectly because of ballot problems, and non-American citizens [somehow] allowed to vote.”

Meanwhile, constructive disenfranchisement of non-minority voters amplified the election crisis as reports of as many as 6,686 valid ballots in Broward County alone were discarded and not read by the voting machine because voters failed to completely punch the hole next to their candidate choices. As a result, these ballots were left with a tiny piece of paper covering the hole, known as a chad, still clinging to the ballot. The machine could not read that a vote was cast. In other cases, ballots were discarded by machines because the sides of the ballots were mangled or unable to be inserted into voting machines properly. Thus, with only 327 votes at that time separating the two presidential candidates in their race to Florida’s twenty-five electoral votes, every vote truly did matter.

The ensuing five weeks after election day included a whirlwind of partisan battles to begin ballot recounting, lawsuits to stop the recounting, appeals to the Florida Supreme Court to interpret the “Byzantine” Florida election laws and eventual appeals to the United States Supreme Court to sort through the mess. Bush’s post-elec-

140. Id.
141. Id.
143. Some machines could not adequately process thousands of ballots because of “overvotes” and “undervotes.” Sack & Bruni, supra note 1, at A1. Overvoting occurs when a voter mistakenly punches through the ballot for more than one candidate per office. Id. Undervoting occurs when a voter either purposely or mistakenly does not punch through the ballot for a particular office. Id. The election machinery in many of Florida’s counties could not adequately compensate for these abnormalities in the ballots and therefore effectively threw out thousands of votes in the initial election night count. Id. The situation of machine error led to the now-infamous pictures of Florida election officials holding ballots up to the light to ascertain the voters intent. Id.
144. David Firestone, Counting the Vote: The Democrats’ Tactics; Democrats’ Eyes on Recounts and Courts, N.Y. Times, Nov. 11, 2000, at A1.
145. Id.
146. Id. As reported, the numbers for the “National Popular Vote” were: Al Gore: 49,244,746; George W. Bush: 49,026,305; Gore’s Lead: 218,441. Id. In the Florida recount, the numbers were George W. Bush: 2,910,198; Al Gore: 2,909,871, Bush’s Lead: 327. Id.
147. The actual breakdown of the final electoral college vote was: Bush 271, Gore 266. The Court Cases, supra note 13, at xiv.
148. For the sake of brevity and focus, the author has decided not to include a complete chronology of the myriad of legal filings and posturing during the post-election fracas. For a collection of chronological briefs, court opinions, and commentary surrounding the aftermath of Election 2000, see The Court Cases, supra note 13.
149. See Firestone, supra note 144, at A1.
tion campaign lawyer, former Secretary of State James Baker, pro-
fessed, "[i]t is a sad day for America and the Constitution when a
court decides the outcome of an election." Indeed, for the first time
in United States history, the Supreme Court decided the presidential
election.152

2. On to the Supreme Court

As the presidency hung in the balance, the Supreme Court granted
certiorari to answer questions of law regarding the constitutional is-
ues raised by the Florida election crisis.153 This section offers a brief
discussion of why the Court's decision was widely criticized as being
both incongruent with equal protection jurisprudence and politically
motivated.154 Indeed, even scholars who support the Court's decision
in Bush v. Gore do not embrace the entirety of its analytical underpin-
nings.155 Finally, this section will briefly summarize how Bush v. Gore
has been applied by lower courts to voting rights cases in its wake.156

151. ALAN DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION
152. For the first time in history, the United States Supreme Court cast the final vote for the
Presidency. See ISSACHAROFF ET AL., supra note 15, at 54.
153. The petition for certiorari raised the following Constitutional questions: "whether the
Florida Supreme Court established new standards for resolving Presidential election contests,
therby violating Art. II, § 1, of the United States Constitution and failing to comply with 3
U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection
and Due Process Clauses." Bush, 531 U.S. at 103. Some scholars, however, feel that the Su-
preme Court in agreeing to hear Bush v. Gore caused even more constitutional issues to arise.
See Erwin Chemerinsky, Bush v. Gore Was Not Justiciable, 76 NOTRE DAME L. REV. 1093
(2001). See also Bush, 531 U.S. 153–58 (Breyer, J., dissenting) (arguing that the Court had no
business deciding the case and should have left the resolution to Congress pursuant to the Elec-
toral Count Act of 1887, 3 U.S.C §§ 5, 6, and 15, which state that Congress is the primary body
authorized to resolve remaining disputes).
154. See Pamela S. Karlan, The Newest Equal Protection: Regressive Doctrine on a Changeable
Court, in The Vote: Bush, Gore & The Supreme Court 77 (Cass R. Sunstein & Richard A.
Epstein eds., 2001) [hereinafter The Vote] (explaining that the "newest equal protection," un-
like its forbearer, is far more attentive to the interests of individuals capable of protecting their
interests within the larger political process); Laurence H. Tribe, Freeing eroG v. hsuB From its
Hall of Mirrors, in A BADLY FLAWED ELECTION, supra note 75 (discussing, among other issues,
how the Court's decision was politically-motivated). Tribe, however, was Vice President Gore's
attorney before the Supreme Court.
155. See Richard Epstein, "In Such Manner as the Legislature Thereof May Direct": The Out-
Gore: Prolegomenon to an Assessment, in The Vote, supra note 154, at 165; RICHARD A. Pos-
156. See Steven Mulroy, Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a
When the Supreme Court granted certiorari to the Florida election-turned legal battle, in *Gore v. Harris*,157 which the Court decided in *Bush v. Gore*, it certified two questions for judicial clarification: “Whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.”158

The Court held that the standardless manual recounts constituted a violation of the Equal Protection Clause.159 The majority *per curiam* opinion ruled that the recount procedures enacted by the Florida Supreme Court were inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the instance of a statewide recount.160 By viewing the rights implicated in *Bush v. Gore* as not only highly fundamental, but proclaiming that such violations raised the controversy to constitutional levels, the Court treaded into new territory.161 In fact, many believe the Court possibly opened a Pandora’s box of new voting rights jurisprudence.162

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159. *Id.* The Court was particularly concerned about the differences in recount standards among the Florida counties. *Id.* at 101–03.

160. *Id.* at 105.

161. In fact, it is well-established and important to remember that every election irregularity does not give rise to a sufficient federal interest or constitutional violation. *See, e.g.*, Isacharoff et al., * supra* note 15, at 3–5 (citing Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980)) (holding that no equal protection violation occurred in a local school board election with several technical mishaps because unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the Equal Protection Clause). *See also* Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975) (holding that because the business of conducting elections is often dependent on volunteers and recruits, conditions, errors, and irregularities vary widely and no constitutional guarantee exists to remedy them, thus state election laws must be relied upon to provide the proper remedy); Pettengill v. Putnam County Sch. Dist., 472 F.2d 121 (8th Cir. 1973) (holding that federal courts are not the “arbiter of disputes” that arise in elections and absent aggravating factors such as denial of the vote on grounds of race or fraudulent interference with a free election, no federal violation exists with an alleged improper counting of ballots).

162. *See* Cass Sunstein, *Order Without Law*, in *The Vote*, supra note 154, at 205. Sunstein explains that while the equal protection holding is appealing, it had no basis in precedent or history. *Id.* at 207. Sunstein argues that coming from the notoriously minimalist Rehnquist Court, a Court that derives its minimalist views from its conception of a limited role of the federal judiciary, the *Bush* majority is astounding. *Id.* at 205. In a sense, the Pandora’s box of voting rights jurisprudence which the Rehnquist Court has opened in *Bush* could lead the way for a flood of equal protection arguments based on inequitable voting mechanisms which vary by locale. What is interesting, however, is that in recent years with *Shaw* and its progeny, the Court
The problem with the Court’s holding, however, was that while it theoretically opened the door to greater franchise by attempting to equalize the techniques used for counting ballots in close elections, it foreclosed any real opportunity to redress the disenfranchisement that occurred during Election 2000 because of its strict adherence to the Electoral College deadline. As one scholar stated: “[T]he U.S. Supreme Court denied the right of . . . citizens to cast votes that were effective to ensure that everyone who voted could cast an effective vote . . . . [t]he decision on the merits vindicated the right to vote. But . . . the Court’s termination of the recount defeated the right to vote.”163

The Court was widely criticized for its dubious change of heart as well as for its political motivations. Many scholars,164 commentators,165 and jaded voters166 contend that the Court’s opinion was na-

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163. See Tushnet, supra note 38, at 23.

164. Professor Jack Balkin’s comments on Bush illustrate much of the acerbic reaction surrounding the decision: “[d]uring the last five years or so, I have been consistently wrong about what the Court was willing to do to promote its conservative agenda. Repeatedly . . . I have thought to myself: ‘They can’t possibly do that. That would be crazy. And each time I have been proven wrong.’” Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 YALE L.J. 1407, 1446 (2001), cited in TUSHNET, supra note 73, at 7. See also A BADLY FLAWED ELECTION, supra note 75, at 8–10.


166. Dean E. Murphy, The 43rd President: The Voters—New York; Some Americans Seem Ready to Move on, but Others Aren’t So Sure, N.Y. TIMES, Dec. 14, 2000, at A31. Maurice De Witt, a registered Democrat from the Upper West Side who seasonally works as Santa Claus had some interesting observations of the holiday-time election decision, as noted in a New York Times article:

This is the case of the Grinch who stole the election, he said. I know as Santa Claus I am supposed to be apolitical, but I also know a Grinch when I see one . . . . He said he felt cheated by the Supreme Court decision, which, he said, blocked a fair tally of ballots, many cast by blacks like himself and members of other minority groups. As an African-American, Mr. De Witt said, he has grown accustomed to discrimination. But this time, he said, they did it legally, through the Supreme Court. That is what hurts the most.

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has not viewed voting rights as an aggregate issue yielding protection of certain classes, but through the lens of individual rights. See generally Pamela S. Karlan, The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in THE VOTE, supra note 154. Thus, majoritarian groups have co-opted the Court’s legal analysis to bring claims of injuries. Id. Given the fact that George W. Bush, as a party to this case, was far from a protected class, the majority’s view may simply be an extension of its recent voting rights jurisprudence. The lingering question that remains, however, is what the Court will do if presented with a case factually similar to Bush, with arbitrary standards for manual recounts in a state-wide recount. In such a question the Court’s legitimacy may lie.
ARE WE REALLY OVER THE HILL YET?

kedly motivated by political considerations, as evidenced by Justices quickly converting to views they had adamantly opposed on the record. The Justices known as champions of states' rights suddenly lauded the Equal Protection Clause while Justices better known for their love of the Equal Protection Clause than state's rights defended Florida's right and ability to decide its own election procedures in the vein of state's rights language. The Court's opinion, despite the consequences and careful case-specific factual framing for Election 2000, stands as precedent that the lower courts will follow when presiding over future voting rights cases, including claims brought under the Equal Protection Clause or the Voting Rights Act.

D. The Fundamental Right to Vote

The right to vote is a relatively recent sacrosanct right. This section explores the history of this constitutional right and discusses the level of scrutiny that the Supreme Court applies to voting cases.

1. Level of Scrutiny

The right to vote, while not explicitly stated in the Constitution, was deemed a fundamental right by the Supreme Court in Reynolds v. Sims and Harper v. Virginia State Board of Elections. In both cases the Warren Court articulated for the first time the fundamental nature of franchise. The Court analyzed the right to vote as fundamental, and under the Fourteenth Amendment’s Equal Protection

Id.


168. See Sunstein, supra note 162, at 213-14 n.39. Professor Sunstein points out that: One of the real oddities of the majority opinion is that it was joined by two Justices—Scalia and Thomas—who have insisted in their commitment to "originalism" as a method of constitutional interpretation. There is no reason to think that by adopting the Equal Protection Clause, the nation thought that it was requiring clear and specific standards in the context of manual recounts in statewide elections. In fact it is controversial to say that the Fourteenth Amendment applies to voting at all. The failure of Justices Scalia and Thomas to suggest the relevance of originalism, their preferred method, raises many puzzles.

Id.


170. See DERSHOWITZ, supra note 151, at 186.


Clause, applied strict scrutiny to the fundamental rights implicated in both claims.174

In Reynolds, the Court struck down the apportionment system in the Alabama legislature, holding for the first time that the right to vote was a fundamental interest, in part because it is preservative of all other rights.175 Alabama’s legislative districts were still based on a census from 1900, a time when most of the State was rurally-based.176 Yet, by 1964 when Reynolds came before the Supreme Court, the State’s population had migrated to urban centers.177 What the Court took issue with was the “historic practice of basing political representation in legislative bodies on units of political geography—such as counties, towns and the like—even if those units had vastly differing populations.”178

The Court firmly held that Alabama’s system, and its reliance on a sixty-year-old census, effectively diluted a citizen’s right to vote based on where the citizen lived, thus amounting to a violation of the Equal Protection Clause of the Fourteenth Amendment.179 In a sweeping decision, the Court held that the Equal Protection Clause of the Fourteenth Amendment required that seats in both houses of a bicameral system be apportioned on a population basis such that representation was based on “one person, one vote.”180

In Harper, the Court struck down a Virginia poll tax in which the eligibility to vote in state elections depended on one’s ability to pay a fee.181 Since the Court had recently pronounced the right to vote as fundamental in Reynolds just two years before, any burden on franchise was then to be judged under the strictest scrutiny.182 Accordingly, the Court held Virginia’s poll tax, regardless of its long-standing history under state law, constituted invidious discrimination.183 The Court held that wealth, affluence or ability to pay a fee does not provide a compelling state interest so as to distinguish be-

175. See generally Reynolds, 377 U.S. 533. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court first declared that the right of suffrage is “a fundamental political right, because [it is] preservative of all rights.” Id. at 370. It was not until Reynolds that the aspirational nature of the Yick Wo language became a legal reality. Reynolds, 377 U.S. at 562.
176. See Reynolds, 377 U.S. at 542 n.7, 545.
177. Id.
179. Reynolds, 377 U.S. at 583–84.
180. Id. at 558.
between voters when a fundamental right is at stake.\textsuperscript{184} In a broad declaration of the crucial nature of the right to vote, the Court emphasized that franchise must be closely guarded because the right to vote protects all other rights.\textsuperscript{185}

In both \textit{Reynolds} and \textit{Harper} the Court did not inquire into the intent of the legislation restricting enfranchisement.\textsuperscript{186} Rather, the tests were effects-based, analyzing the cases such that “regardless of the intent with which the enacting body created a representative institution that departed from equally weighted votes, that departure would be unconstitutional.”\textsuperscript{187} Notable in this area of jurisprudence is the Court’s “growing awareness of political equality as a legitimating foundation for our form of government.”\textsuperscript{188} Regardless of whether individuals “win in the electoral process, it is possible to accept the outcome if one has an equal voice in the process.”\textsuperscript{189} In fact, beginning with \textit{Reynolds} and continuing in \textit{Harper}, the Court has applied its most exacting strict scrutiny in equal protection challenges to effectuate the principle of “one person, one vote.”\textsuperscript{190} These pivotal cases have engendered a relatively recent and significant body of constitutional law adhering to the basic principles of the fundamental right to vote.\textsuperscript{191}

Since the Voting Rights Act was enacted in 1965, litigation surrounding this newly recognized constitutional right has mostly evolved

\begin{itemize}
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} Quoting \textit{Reynolds}, the Court stated,

  Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. \textit{Id.} at 667 (quoting \textit{Reynolds}, 377 U.S. 533, 561–62 (1964)).

  \item \textsuperscript{186} \textit{See generally Reynolds}, 377 U.S. 533; \textit{Harper}, 383 U.S. 663.

  \item \textsuperscript{187} \textit{Issacharoff et al.}, supra note 15, at 87 (emphasis added).

  \item \textsuperscript{188} \textit{Laurence H. Tribe, Constitutional Choices} 192 (1985).

  \item \textsuperscript{189} \textit{Id.} Tribe notes the influence of social contract theory, a primary foundation for our Constitution. He explains, “it is said, the rational individual will consent to government only if guaranteed an equal voice in its deliberations.” \textit{Id.} at 394 n.44. Tribe suggests to see \textit{John Locke, Two Treatises of Government} (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); \textit{John Rawls, A Theory of Justice} 221–34 (1971); \textit{John Hart Ely, Democracy and Distrust: A Theory of Judicial Review} 73–104 (1980) for further information.

  \item \textsuperscript{190} \textit{Reynolds}, 377 U.S. at 558. Creating an even more compelling level of intrigue to the Court’s exacting scrutiny in voting rights is the relatively recent holding that the franchise is a fundamental right. \textit{See Tribe, supra note 188, at 394 n.45. Although the franchise has been revered as fundamental since \textit{Reynolds}, prior to 1964 the Court had little to do with disenfranchisement claims, which clearly ran rampant through the Jim Crow South. \textit{Id.} Furthermore, “it took a separate constitutional amendment to extend the franchise to women.” \textit{Id. See also U.S. Const. amend. XIX.}

  \item \textsuperscript{191} \textit{See Laurence H. Tribe, American Constitutional Law} 1062–84, 1436–60 (2d ed. 1988).
\end{itemize}
from either section 2 or section 5 of the Act. While this Comment seeks to analyze the legal landscape of the Voting Rights Act forty years after its enactment, the area of focus necessarily falls upon the jurisprudence rooted in the actual and constructive disenfranchisement of African-Americans and other minorities denied the franchise. The Voting Rights Act grew out of the civil rights movement, fighting for the racial equality of African-Americans. Thus, its purpose has developed to encompass all racial and even insular minorities such as citizens whose first language is not English. Unfortunately, however, categorical exclusion to the ballot box still exists in legal forms. In many states, ex-felons who have served their sentence are denied access to vote. Indeed, some exclusions were aimed at disenfranchising African-Americans.

The voting rights litigation in the forty years since the Voting Rights Act was enacted has taken an often meandering path towards franchise. The "first generation" of claims, characterized by actual disenfranchisement in the form of physical intimidation and blatant techniques of disenfranchisement, were almost entirely extinguished by the 1980s. The "second generation" of cases, which broadened and augmented the reach of voting rights jurisprudence, focused on political equality and the dilution of a citizen's vote. While this course of litigation has created a renewed focus on the underlying ob-

197. First generation voting rights claims address the issue of access to the ballot box, specifically, "the conditions under which the right to vote is legislatively meted out." See Issacharoff et al., supra note 15, at 86.
198. The second generation of voting rights claims focus on the point when "even after access to the ballot box is nearly universal, the Equal Protection Clause can impose limits on the ways in which those votes are aggregated to produce the actual electoral outcome." See Issacharoff et al., supra note 15, at 86. See also Reynolds, 377 U.S. at 555 (1964) (stating that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").
stacles against full minority political participation,\textsuperscript{199} and thus effective disenfranchisement through vote dilution,\textsuperscript{200} much of the litigation in this area has been stymied by the Rehnquist Court's view of voting rights jurisprudence.\textsuperscript{201}

Indeed, some scholars and voting rights activists posit that the Voting Rights Act has lost its remedial abilities as it has become a force for white activists as well. In the "third generation" of Voting Rights Act cases, litigation focuses on vote dilution and redistricting of minority districts.\textsuperscript{202} While this would likely be an effective strategy to boost minority representation in legislatures, the Supreme Court repeatedly has aligned itself with a "color-blind" approach to voting rights litigation as seen in the Shaw line of cases.\textsuperscript{203} As a result, white voters used the Voting Rights Act to assert their own injuries of an ineffective vote from the allegedly diluted vote.\textsuperscript{204}

The level of scrutiny applicable to Voting Rights Act claims, in light of Bush v. Gore, focuses on the remedial avenues available to citizens whose right to franchise has been abridged.\textsuperscript{205} The expansive view of voting in Bush has opened a window of possibility. The Court opened the opportunity by applying a novel equal protection analysis, with no legal precedent, to the fairness in a state's mechanisms and procedures of the fundamental right to vote.\textsuperscript{206} Yet, by reaffirming the fundamental nature of the right to vote as recognized and established by Reyn-


\textsuperscript{201} Karlan, supra note 162, at 77.


\textsuperscript{203} See Shaw v. Reno, 509 U.S. 630 (1993) (political gerrymandering to create an African-American majority district still raises an equal protection claim even though its purpose is to help a historically disadvantaged minority); Bush v. Vera, 517 U.S. 952 (1996) (Texas legislature's redistricting scheme creating two majority African-American districts and one majority Hispanic district declared unconstitutional because race was the predominant factor in drawing the districts); Hunt v. Cromartie, 526 U.S. 541 (1999) (remanded because issue of fact remained as to whether the redistricting was influenced by voter concentrations of political party membership); Easley v. Cromartie, 532 U.S. 234 (2001) (The fact that racial identification is highly correlated to political affiliation does not raise an equal protection claim, thus the State did not violate the Equal Protection Clause by redistricting to create a majority-Democratic district.).

\textsuperscript{204} See Shaw, 509 U.S. 630. In Shaw, white voters asserted their own case under the Voting Rights Act through the dilution of their votes. Id. at 638. The white voters no longer had a majority in their district after it had been redrawn to allow for a majority African-American legislative district in North Carolina. Id. at 633–39.


\textsuperscript{206} See A Badly Flawed Election, supra note 75, at 7–55.
olds and Harper, the Bush v. Gore Court reached broadly to the disenfranchised masses, evoking images of a fundamental and sacrosanct interest embodied by the franchise. But in the same broad stroke, the Court disenfranchised those voters, as the majority opinion foreclosed any real possibility of renewed ballot counting with uniform standards in Election 2000.

Arguably, the level of scrutiny in federal voting rights cases should be strict because of the fundamental interest involved. However, with the current Supreme Court ever-watchful of federalism, it has waffled on the scrutiny applied to more nuanced voting rights cases, thus making it difficult to draw a line between when strict scrutiny is triggered and when some lesser level of scrutiny is sufficient.

The proper level of scrutiny in light of Bush v. Gore is decidedly muddled. The language of the opinion, relying heavily on the compelling state interest for a specific route of ballot-counting in light of the fundamental right at stake, seems to hint at a strict scrutiny standard. In dissent, however, Justice Souter attempted to carefully cabin the decision by giving deference to the many alternatives a municipality can choose in enacting its election procedures.

2. Voting Rights Litigation in the Aftermath of Bush v. Gore

Some key cases raising legal questions of voter disenfranchisement, equal protection, and due process were brought in the Bush v. Gore aftermath. The litigation focused primarily on the actual disen-

207. Bush, 531 U.S. at 104-05.
208. The Court stopped all chance for the Florida Supreme Court to consider the proper standards in the state-wide recount on December 12, as the majority felt bound by the “Safe Harbor” Provision of 3 U.S.C. § 5, which requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. Bush, 531 U.S. at 111. Since the Court decided the case on December 12 and the Florida Supreme Court did not have a chance to review and determine what a constitutionally acceptable standard would be, the Supreme Court ordered that all recounts be halted. Id.
209. See Tribe, supra note 191, at 1062-84, 1436-60.
210. For an excellent discussion of the meandering voting rights jurisprudence, see Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663 (2001). Given the current Court’s proclivities to reshape and redefine remedial forms of race-based classifications, the intersection of a protected class, gerrymandered districts, attempts at undiluted votes, and fundamental rights creates quite a quandary for the Court’s leanings. Professor Gerken provides insight into how best to reconcile these competing interests and dueling doctrines. Id. at 1663. It would be interesting to see how her article would have addressed Bush v. Gore had her piece still been in progress just six months later. See also Shaw v. Hunt, 517 U.S. 899, 916-17 (1996).
211. 531 U.S. 98 (2000).
212. Id. at 105.
213. Id. at 134 (Souter, J., dissenting).
214. See Mulroy, supra note 156, at 358 (describing the focus of post-Bush v. Gore litigation).
franchisement experienced by numerous voters due to shoddy ballot equipment used during Election 2000.\textsuperscript{215} Lower courts have been challenged to make sense of the Supreme Court’s decision as it relates to the long line of voting rights jurisprudence under both the Equal Protection Clause and the Voting Rights Act.

Suits were brought in Cook County, Illinois and Los Angeles, California challenging the use of punch-card ballot machines in some precincts.\textsuperscript{216} The precincts which used the punch-card ballot machinery had much higher rates of discarded ballots, and thus higher rates of disenfranchised voters.\textsuperscript{217} The complaints alleged that disenfranchisement was exponentially higher in precincts that were more likely to be poor and have a concentration of minorities than it was in wealthier precincts.\textsuperscript{218} Meanwhile, in wealthier districts with a concentration of mostly white, upper-middle class voters, ballot technology was more advanced and as a result, the likelihood of disenfranchisement was reduced by half.\textsuperscript{219} These claims were brought under section 2 of the Voting Rights Act of 1965, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment.\textsuperscript{220}

The lower courts that applied Bush v. Gore relied on the Court’s sweep of the fundamental right to vote in another arena—the ballot box. While the Bush v. Gore majority tried to carefully narrow its decision to the specific facts of the Florida recount, courts dealing with similar issues of discarded, but valid votes arising from the same election, decided not to distinguish the two cases; rather, lower courts chose to view the cases as an extension of the issues before the Court in December 2000.

In Black v. McGuffage,\textsuperscript{221} the ACLU brought a suit against Cook County, Illinois on behalf of “Latino and African American voters in counties throughout Illinois” to enjoin the county from using punch card ballot voting technology, as a violation of the Equal Protection Clause, Due Process Clause, and the Voting Rights Act.\textsuperscript{222} The court

\textsuperscript{215} Id.
\textsuperscript{217} See Mulroy, supra note 156, at 358.
\textsuperscript{218} Id. at 358–59.
\textsuperscript{219} Id.
\textsuperscript{220} See Mulroy, supra note 156, at 358, (discussing Black v. McGuffage, 209 F. Supp. 2d 889, 896–900 (N.D. Ill. 2002)).
\textsuperscript{221} Black, 209 F. Supp. 2d at 896–900.
\textsuperscript{222} Black, 209 F. Supp. 2d at 891.
in Black found startling disparities of ballot success rates depending on where a voter lived.

Voting error rates (the rates at which votes expressed by the voter were not picked up by the machines) varied from less than 1% in “optiscan counties” using “error notification” technology (which notifies the voter of an error in the precinct so as to give the voter an opportunity to correct her ballot) to more than 4% in “punchcard counties” without error notification. Error rates varied dramatically even among jurisdictions using the same equipment system. In some wards using the punchcard without error notification the rate rose as high as 12%; in one precinct, it rose as high as 37%. Plaintiffs alleged these varying error rates had a disparate impact on Hispanic and African-American voters. As a result of these differences, the “probability of an uncounted vote” was 22 times greater in [racially diverse] Chicago than in [ninety-four percent white] McHenry County.223

The defendants have since settled the case and have agreed to update and implement new voting technology for the 2004 presidential elections.224

In Common Cause Southern Christian Leadership Conference v. Jones,225 the plaintiffs contend that “while only 53.4% of the voters in California use punchcard machines, these voters accounted for 74.8% of the votes rejected due to ballot error.”226 The court denied various defendant motions and held that the plaintiffs did not have to allege racially discriminatory intent.227 The defendants agreed to implement new voting technology by the 2005 elections, but the plaintiffs pushed further and received a court order for the implementation to be complete by the 2004 presidential elections.228

In light of recent success in voting rights litigation since Bush v. Gore, the real question becomes what framework will set the Voting

224. See Mulroy, supra note 156, at 358.
226. Mulroy, supra note 156, at 359. It is also important to note here how this same argument and factual contention played out for voters during the California recall election of Governor Gray Davis in October 2003. See Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003). The Ninth Circuit Court of Appeals, sitting en banc, affirmed the district court's holding that plaintiffs had not established a clear probability of an equal protection violation and Voting Rights Act claim in the upcoming California Recall Election, only a possibility of such a claim. Id. at 918. Plaintiffs filed the lawsuit to delay the election so it could be conducted without the error-riddled punch-card system. Id. at 917.
228. Id.
Rights Act back on its path to universal franchise. Has Bush v. Gore infused new life into the Voting Rights Act and voting rights litigation, whose legacy was becoming mired and arguably ineffective with meandering paths to franchise vindication? Additionally, will race matter less in the voting rights arena now that the fundamental right to franchise has once again focused a strict scrutiny lens on the same language of individual rights bestowed upon it in Harper and Reynolds?

III. **Analysis: Is the Voting Rights Act Over the Hill Yet or Are There Still Mountains to Climb?**

In its forty year history the Voting Rights Act has expanded and changed to meet the evolving challenges of disenfranchisement. However, through its evolution the Voting Rights Act may have lost some of its strength. This analysis seeks to answer whether the Voting Rights Act is over the hill yet or if there are still mountains to climb.

**A. The Use of Voting Rights Legislation in Litigation**

The Voting Rights Act as a tool for litigation has evolved enormously in strategy and style over its forty years. Immediately following its passage, the Voting Rights Act primarily served as the first defense against actual, physical disenfranchisement of African-Americans. Also known as the “first generation” challenges to overt black disenfranchisement, the Voting Rights Act became part and parcel of the civil rights movement. As poll taxes, property requirements, and grandfather clauses became relics of the past, new forms of subtle discrimination replaced overtly racist methods of disenfranchisement and ushered in the next generation of voting rights claims, which concentrated on vote dilution and the concomitant right to an undiluted vote.

Voting Rights Act litigation since the 1980s has primarily become a tool for equalizing the range of voter effectiveness—or ineffective-

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232. See Keyssar, supra note 34, at 256–58. See also supra Part II.
233. See Guinier, supra note 231, at 1093.
ness, given the nature of the voter dilution claims— in legislative elections. While courts have rarely acknowledged the group-related aspects of dilution claims, the dilution doctrine has reflected the aggregate nature of these second generation voting rights claims to a remarkable extent. Indeed, even while the Court has lacked, until recently, a fully articulated conceptual framework for dealing with dilution claims, the Court has slowly moved towards treating individual voting rights through a group lens, even when that approach is at odds with a conventional view of individual rights. A noteworthy element of earlier dilution doctrine is that dilution claims depended entirely on the treatment of the group as a whole. The Court is

Voting Rights claims based on dilution doctrine reflect the second generation of voting rights cases, which involve the right of an individual to cast an undiluted vote. See generally Guinier, supra note 231. Essentially, the claim arises when minority citizens cannot effectively elect their candidate of choice in political elections because their votes are diluted by a larger concentration of white voters in their district. Id.

See cases cited supra note 203.

See Guinier, supra note 231, at 1094–1101.

Shaw v. Hunt, 517 U.S. 899, 905 (1996). Since Shaw v. Hunt was the second time the Court had presided over the issues in this case it is commonly referred to as Shaw II. In Shaw II, despite previous aversion to viewing individual rights as a group, the Court nonetheless instinctively moved toward an aggregate rights approach. See generally Shaw II, 517 U.S. 899.

See Gerken, supra note 210, at 1665–66.

Professor Gerken explains:

In De Grandy, for example, the plaintiffs tried to establish liability by pointing to a number of places in the state where minority voters were “fractured”—that is, placed in majority-white districts where whites would always outvote them. The De Grandy Court, however, rejected fracturing as a basis for liability. It held that if the group as a whole enjoys rough proportionality, a dilution claim will fail regardless of how the state treats individual group members. Thus, even those who have suffered what appears to be a concrete “harm”—the inability to elect their candidate of choice—cannot claim dilution if the group as a whole is treated fairly.

In Shaw II, the Supreme Court broke with this longstanding tradition. Having recognized a cause of action for challenging race-based districting, the Court was forced to confront the differences between its highly individualistic view of rights and the aggregative aspects of dilution. North Carolina, accused of a racial gerrymander, defended the challenged districts as an appropriate remedy to avoid a § 2 violation. As a result, the Court had to decide how to apply strict scrutiny, a doctrine developed within the context of conventional individual rights, to districts drawn to avoid dilution, an aggregate harm. Thus, these disparate strains of equal protection doctrine came into direct contact in Shaw II, and strict scrutiny became the framework for mediating the differences between them.

Faced with this doctrinal puzzle, the Supreme Court not only applied a self-consciously individualist approach to dilution remedies, but also explicitly rejected some of the basic tenets of an aggregate rights approach as signaling the existence of a “group” right. Shaw II thus provides an excellent example of how the conceptual differences between conventional individual rights and dilution claims (described in Part I) actually play out in practice.

Id. at 1690–91 (footnotes omitted).
beginning to grasp the nuanced group-nature of dilution claims as they relate to the individual right to vote.\textsuperscript{241}  

From some vantage points, it appears that the Court's view of the newest class of Voting Rights Act claims under dilution doctrine is similar to its more recent approach in addressing other remedial race claims, such as affirmative action requiring strict scrutiny for classifications based on race \textit{even if} the race-based classification is for a remedial purpose.\textsuperscript{242} Many scholars view the Court's shift towards this "newest form of equal protection" as significant but predictable given the philosophical tendencies of the current majority.\textsuperscript{243} By employing so-called "color-blind" justice,\textsuperscript{244} the Court today views the use of the Voting Rights Act and the Equal Protection Clause more as a protection for any individual whose vote may be diluted rather than the express purpose of the Voting Rights Act—to redress the disenfranchisement of minority voters.\textsuperscript{245}  

In analyzing the predictability of the Court's recent evolution, and thus the inevitable outcome in \textit{Bush v. Gore},\textsuperscript{246} Professor Pamela Karlan posits the view that the unfolding equal protection doctrine employed in \textit{Bush v. Gore} is just another step on a continuum towards decreasing the Equal Protection Clause's remedial measures.\textsuperscript{247} Indeed, in 1993, the Supreme Court acknowledged a third equal protection argument to the two well developed voting rights claims of disenfranchisement and dilution.\textsuperscript{248} Some have labeled the newest equal protection claim as one of metagovernance, or a "claim about the rules by which the democratic political processes are structured. It is a claim that the very use of race in the process of redistricting is

\textsuperscript{241} Id.  
\textsuperscript{242} Adarand v. Pena, 515 U.S. 200 (1995) (holding that under equal protection claims with governmental race classifications involved, the classification must serve a compelling governmental interest and be narrowly tailored to meet that interest).  
\textsuperscript{243} Karlan, supra note 162 at 77–78; see also Gerken, supra note 210, at 1670.  
\textsuperscript{244} Karlan, The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in \textit{The Vote}, supra note 154, at 77.  
\textsuperscript{245} See generally cases cited supra note 203. How ironic it must be for civil rights veterans to see their greatest weapons, the Voting Rights Act and the Equal Protection Clause, used to protect white voters in minority districts. See \textit{Race, Law and Justice: The Rehnquist Court and the American Dilemma}, 45 Am. U. L. Rev. 567, 641 (1996).  
\textsuperscript{247} Professor Karlan notes that "[u]nfortunately for equal protection law, \textit{Bush v. Gore} is not an aberration. Rather, it is yet another manifestation of the newest model of equal protection, a model laid out in the Court's decisions regarding race-conscious redistricting and Congress's power to enforce the Fourteenth Amendment." (footnotes omitted). Karlan, supra note 162, at 77–78.  
\textsuperscript{248} See cases cited supra note 203.
illegitimate." As a result, much of the Court's new equal protection doctrine protects white voters in minority districts to effectuate color-blind justice, regardless of the continuing inequality in minority electoral power.

Similarly, given the framework of equal protection jurisprudence as a guardian of "discrete and insular minorities," the Rehnquist Court's shift towards the superior nature of individual rights, greater than any redress for historical wrongs, sets an appropriate stage for the Bush v. Gore majority to view voters as individuals rather than looking at the aggregate nature of the harm, even with evidence of a significant harm falling on protected classes. The strong stance of the Rehnquist Court towards individual rights has turned the Supreme Court's jurisprudence away from the Warren Court's view of certain areas of law as inherently rooted in group rights, especially in the area of redress for historical wrongs.

Finally, the 1982 amendments gave voting rights activists a crucial leap with the articulation of discrimination based on impact, rather

249. Karlan, The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in The Vote, supra note 154, at 77–78. Professor Karlan clearly frames the Court's at-times confusing voting rights jurisprudence:

Disenfranchisement involved outright denial of the ability to cast a ballot. Dilution, by contrast, occurred when the votes of some identifiable group counted for less than the votes of other voters. Shaw [v. Reno] added a third type of equal protection claim:

[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

Plaintiffs in Shaw cases need not prove either that they were denied the right to vote or that their votes were diluted. In fact, despite the Court's reliance on prior vote dilution and disenfranchisement decisions, the real character of a Shaw case is not a claim about voting rights at all . . . . 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 decision-making. Shaw plaintiffs are not advancing a claim under any of these concepts. Rather, they are pressing a claim involving what we might call "metagovernance," that is, a claim about the rules by which the democratic political processes are structured. It is a claim that the very use of race in the process of redistricting is illegitimate.

Id. at 79 (footnotes omitted).

250. Id.


252. See supra note 9 and accompanying text.


254. Id.
than discriminatory intent.\textsuperscript{255} The leap must be emphasized as it spawned a strong front-line defense against many of the more subtle and nuanced forms of minority disenfranchisement.\textsuperscript{256} In 1986, the Supreme Court opened the door to discriminatory impact cases, affirming the constitutionality of the 1982 Amendments in the process.\textsuperscript{257} In fact, in Thornburg \textit{v.} Gingles,\textsuperscript{258} the Court addressed a challenge to multi-member election districts and their impact on minority electoral prospects.\textsuperscript{259} The new articulation of what franchise truly means, the ability to elect representatives who can indeed represent a voter's interests, trickled down to its constitutional foundation.\textsuperscript{260} The Court dismissed the "multidimensional statutory 'totality of the circumstances' inquiry . . . [and] adopted a simplified test to determine whether white voters as a group had frustrated the electoral aspirations of a cohesive set of minority voters and, if so, whether

\textsuperscript{255} See \textit{supra} notes 89–109 and accompanying text.

\textsuperscript{256} See, e.g., Mobile \textit{v.} Bolden, 446 U.S. 55, 67–68 (1980). The \textit{Mobile} Court required proof of discriminatory intent or purpose in order to show a violation of the Equal Protection Clause. \textit{Id.} In fact, the institutional discrimination (which often replaced the facially unconstitutional racist procedures in many parts of the country) seemed to be ignored in \textit{Bolden}, especially since it was decided during a period of the Court pulling back its Equal Protection Clause jurisprudence. See \textit{Washington v. Davis}, 426 U.S. 229 (1976); \textit{Arlington Heights v. Metro. Hous. Dev. Corp.}, 429 U.S. 252 (1977); \textit{Pers. Adm'r of Mass. v. Feeney}, 442 U.S. 256 (1979) (all holding that the requisite burden of proof relies on the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment). See also \textit{supra} note 97 and accompanying text.

\textsuperscript{257} Thornburg \textit{v.} Gingles, 478 U.S. 30, 50–51 (1986). See also Issacharoff, \textit{supra} note 199, at 1833. Indeed, Professor Issacharoff's question in 1992, similar to this Comment's inquiry twelve years later, asked why voting rights litigation was not yet obsolete.

\textsuperscript{258} See generally Thornburg, 478 U.S. 30.

\textsuperscript{259} \textit{Id.} It was the first case requiring the Court to construe section 2 of the Voting Rights Act as amended in 1982. \textit{Id.} at 42. The Court held that the redistricting plan proposed by the North Carolina General Assembly violated section 2(a) of the Voting Rights Act because it resulted in the dilution of black citizens' ability to elect representatives of their choice in all of the disputed districts. \textit{Id.} at 52.

\textsuperscript{260} The Court carefully scrutinized the purpose and gravity of the 1982 Amendments in light of the circumstances surrounding the legal reality of political elections in North Carolina, less than twenty years after the demise of Jim Crow laws. \textit{Id.} at 61. Noting the magnitude of discrimination that was still vibrant in various spheres of North Carolina daily life, the Court upheld the District Court's finding of constitutional violations:

The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion.

\textit{Id.} at 80 (emphasis added).
an alteration of electoral practices could relieve the diminution of minority electoral opportunity.\textsuperscript{261} The expansive view of the Voting Rights Act set the stage for new claims. However, as already discussed, with the Court’s shifting majority, the framework of such cases quickly turned away from minority voting rights activists and carved a channel for majoritarian voting rights claims.\textsuperscript{262}

A strategy for furthering minority rights, however, remains in the Court’s own language of individual rights.\textsuperscript{263} What talented litigants may be able to successfully argue in future voting rights cases is an entirely new framework dressed in the language of \textit{Bush v. Gore}. Applying the discriminatory impact of Election 2000,\textsuperscript{264} such a complaint can be framed within the 1982 Amendments to the Voting Rights Act.\textsuperscript{265} In essence, by illustrating the disparate impact along racial lines, the fundamental right to vote and the Equal Protection Clause would be triggered by the actual and constructive disenfranchisement evident in Election 2000. With a revived sense of the fundamental nature of the right to vote in the Court’s \textit{Bush v. Gore} opinion, meaningful challenges through the Voting Rights Act and the Equal Protection Clause may indeed evolve out of the Court’s careful yet clear language.

\textbf{B. Voting Rights as Seen Through the Lens of Bush v. Gore}

In light of the ever-winding path of voting rights litigation and its recent and rather odd judicial stepchild, \textit{Bush v. Gore}, students and scholars of constitutional law cannot help but ask what the quagmire means for voting rights in the wake of the most controversial Supreme Court decision in recent years. Undoubtedly voting rights and absolute enfranchisement still have a long way to go. While the days of blatant and institutionalized disenfranchisement may be relics of the Jim Crow era, remnants still remain.\textsuperscript{266} It was not until the United States had such a closely contested election that the public became fully aware of how many votes were “lost” every election,\textsuperscript{267} meaning that hundreds of thousands of voters have been unknowingly disenfranchised each election cycle.

\begin{itemize}
\item \textsuperscript{261} Issacharoff, \textit{supra} note 199, at 1834–35.
\item \textsuperscript{262} See cases cited \textit{supra} note 203.
\item \textsuperscript{263} Bush v. Gore, 531 U.S. 98, 101 (2000).
\item \textsuperscript{264} See \textit{supra} note 9 and accompanying text.
\item \textsuperscript{265} 42 U.S.C. § 1973 (2000).
\item \textsuperscript{266} See \textit{supra} notes 7–8 and accompanying text.
\item \textsuperscript{267} “Lost” votes in the sense that thousands of undervotes, overvotes, and discarded ballots were not counted. \textit{See generally} Posner, \textit{supra} note 155, at 165.
\end{itemize}
Viewing voting rights jurisprudence and the Voting Rights Act through the tinted lens of *Bush v. Gore* triggers much pause in the cacophony that critics and supporters have made in trying to make sense of the situation. Critics such as constitutional law professors Samuel Issacharoff and Cass Sunstein contend that no explanation of the Court's decision can be truly understood without an overt discussion of the underlying political consequences enveloped in the case.268

Regardless of the arguably partisan decision in *Bush v. Gore*, voting rights jurisprudence as framed by the Court's *Bush v. Gore* language has clearly taken a turn in its path to greater or even universal enfranchisement.269 Some scholars argue, along with the carefully couched majority opinion, that *Bush v. Gore* sets no real, tangible precedent as it simply was an immediate judicial answer to an explosive national crisis, a situation that needed an answer quickly to prevent political chaos.270

On the other hand, the Supreme Court currently faces an enormous vicious circle. In essence, this dilemma presents the Court with two options, both of which threaten the Court's legitimacy in the eyes of many citizens. First, the Court can continue to hold tantamount, as it did in *Bush v. Gore*, the fundamental right to vote and the concurrent right to equal protection through uniform voting systems. This option, however, opens the door to numerous valid claims of disenfranchised voters based on the out-dated and shoddy equipment a given county or municipality uses. In the background of such claims is the Court's dilemma: States' rights proponents will stridently argue the tenets of federalism and that each jurisdiction should be able to formulate its voting mechanisms as it sees fit. However, the very same arguments—set forth by the Gore legal team—were quickly dismissed under the guise of the Equal Protection Clause in *Bush v. Gore*. Therefore, for the Court to follow suit and not appear partisan in the future, such voting rights claims will probably have a strong chance of success.

268. Indeed, Sunstein insists that *Bush v. Gore* thrusts to the fore the undeniable intertwining of politics and law, as articulated in large part by the legal realist movements of the 1930s, further shoring up the contention that the line between political and legal judgments is rather hazy. See Sunstein, Order Without Law, in *The Vote*, supra note 154, at 205.

269. Id. at 101. See generally Mulroy, supra note 156. Interestingly, the *Bush v. Gore* opinion was per curiam and thus unsigned.

Quite plainly, access to efficient and successful ballot-boxes needs much improvement, as Election 2000 exposed "new" voting rights injuries and illustrated the grave fractures in the United States' electoral system that coincidentally fell on economic, geographic, and in some cases along racial lines. It seems that the Bush Court's reliance on the fundamental rights strand of franchise jurisprudence under Harper and Reynolds, as key doctrinal support will open the door to systematic legal challenges. By reviving the first generation Voting Rights Act cases, which revolved around claims of physical and actual disenfranchisement, the Supreme Court may have paved the way for numerous other disenfranchisement claims to follow in Bush v. Gore's wake.

C. Making Sense of Voting Rights in Light of Bush v. Gore: A Fact-Specific Case or Solid Precedent for Future Voting Rights Cases?

The arena of voting rights jurisprudence may either receive a large boost from the Supreme Court after Bush v. Gore and the tenets it claims to hold to, or it may continue in a somewhat stagnant condition as it has since Shaw and its progeny. However, given the difficulties encountered in post-Shaw franchise claims, Bush v. Gore may stand as the harbinger of greater voting rights litigation and serve to refresh the Voting Rights Act.

Although the conflicting decision danced around the bigger claims of enfranchisement and effectively disenfranchised thousands of voters in the actual moment of Election 2000, it does raise the inevitable question of what kind of solid precedent such a nebulous decision can make. Does Bush v. Gore inadvertently get the Voting Rights Act and voting rights litigation back on track with strong language regarding the importance of each person's vote, or will it be discarded as a Supreme Court aberration plaguing its legitimacy? As we come upon the fortieth anniversary of the Voting Rights Act of 1965, in what shape is its legacy and are we really over the hill yet?

The Voting Rights Act and the principles it was meant to uphold are as necessary today as they were during the fervor of the civil rights
movement.\textsuperscript{273} While disenfranchisement obviously occurs in different shapes and sizes today (and in Election 2000), it is not simply a relic of America’s past.\textsuperscript{274} Rather, disenfranchisement still plagues the United States.\textsuperscript{275} Modern disenfranchisement, similar to current and historical inequalities in education, housing, and health care,\textsuperscript{276} occur in subtle, yet narrowly proscribed forms. When the geographic region where citizens live (even within the very same county) can have enormous impact on the ability to have one’s vote actually counted, strong equal protection questions should be triggered. If each citizen, as posited in \textit{Bush v. Gore}, has a right to an equally counted vote based on pre-determined state mechanisms, African-Americans living in poor urban areas should have voting rights equal to their wealthier white counterparts in other areas of a city.\textsuperscript{277}

Leading scholars in voting rights jurisprudence disagree on the strength of future claims based on the language of the \textit{Bush v. Gore} majority.\textsuperscript{278} However, as illustrated by the Court’s Catch-22 as it stares at its judicial legitimacy, such claims are certainly worth a valiant and well-crafted try. In the three years since Election 2000, lower courts have interpreted the \textit{Bush} majority language without contentious appeals.\textsuperscript{279} Partly because the injuries to voting rights in subsequent cases have been glaring, many lower courts see the \textit{Bush} precedent as a welcome path to vindicate the injured classes before

\textsuperscript{273} See supra notes 40–262 and accompanying text.
\textsuperscript{274} See supra notes 1–15 and accompanying text.
\textsuperscript{275} \textit{Id.}
\textsuperscript{276} The notion that certain interests were fundamental, even if not explicitly protected by the Constitution, was promulgated by many civil and welfare rights organizations in the 1960s and 1970s. \textit{See generally} \textit{Tribe, supra} note 191. Wealth became a new quasi-suspect classification in the 1960s. \textit{Id.} Cases such as \textit{Harper v. Virginia State Board of Elections}, 383 U.S. 663 (1966), and \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969), illustrated the Court’s concern for structures that predicated wealth as a requirement for obtaining fundamental interests. However, the Court decisively turned away from the implications of the wealth-discrimination cases in \textit{San Antonio Independent School District v. Rodriguez}, 411 U.S. 1 (1973). As one commentator noted: \textit{[t]he case challenged the widespread use . . . of property taxes to finance public education by arguing that education was a fundamental interest and that property tax financing treated rich districts differently from poor ones. Justice Lewis Powell’s [majority] opinion for the Court held that the only truly fundamental interests were those protected explicitly or implicitly by the Constitution.} \textit{Tushnet, supra} note 73, at 72.

\textsuperscript{277} In fact, the \textit{Bush} majority states, in reference to the statewide remedy, that “there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” 531 U.S. at 109.

\textsuperscript{278} 531 U.S. 98 (2000). For a positive view of future voting rights claims in light of \textit{Bush v. Gore}, see Mulroy, \textit{supra} note 156. For a contrasting view that \textit{Bush v. Gore} stands on its own as a fact-specific holding and lacks the necessary doctrinal moxy to withstand piggyback claims fashioned as catalysts for voting rights progress, see Strauss, \textit{supra} note 270.

\textsuperscript{279} See generally Mulroy, \textit{supra} note 156.
them. Even if such voting rights successes remain at the lower court levels, the injured parties and disillusioned masses after Election 2000 can use this path under the language of *Bush v. Gore* to achieve greater enfranchisement.

IV. IMPACT

As the Voting Rights Act enters its fortieth year, in light of *Bush v. Gore* it is necessary to analyze whether Election 2000 was a deviation or the norm of current franchise.

A. Was Election 2000 a Deviation or Norm of the Franchise?

Looking back at Election 2000 three-and-a-half years later, the question still remains: was the actual and constructive disenfranchisement of voters in Election 2000 a deviation from the norm of universal franchise or merely another strike on a disappointing record of the on-the-ground impact of civil rights laws? While litigation necessarily focuses on the failures of voting systems, it does not necessarily represent the spectrum of failures as a whole.

Given the drastic outcry and shock regarding the actual and constructive disenfranchisement of voters in Election 2000, numerous reforms have been introduced in state legislatures and Congress to remedy the failings of our current election systems. Millions of dollars have poured into many jurisdictions, especially Florida, to update voting technology. Part of the goal of such reform has been to remedy the rampant disenfranchisement in Election 2000. Yet, some posit that the reformers' motivation is to ensure that election decisions return to the citizens rather than remain in the hands of nine individual vote-casters.

It may be too soon to ascertain whether Election 2000 was an aberration or a norm in the progression of voting rights history. The 2004 elections, replete with legislative reform and millions of dollars poured into such efforts, may serve as the indicative sign of our nation's progress or how far we still must travel to reach the dream of

281. Id.
282. The Court's decision in *Bush* may have been the strongest realization of dilution doctrine yet. See Karlan, supra note 272, at 1345.
283. See ELECTION REFORM 2004, supra note 280, for a chronology of the election reform efforts leading up to Election 2004.
complete enfranchisement.\textsuperscript{284} In fact, for some voters, the 2004 election has turned into a battle of legitimacy; Democrats are pining to take back the White House they believe was wrongfully stolen from them and Republicans are striving to put an end to the lingering questions of President George W. Bush's validity.\textsuperscript{285}

As the Supreme Court aptly pointed out, the disenfranchisement of thousands of voters has apparently been happening for years.\textsuperscript{286} Yet, disenfranchisement only seems to make headlines and lawsuits when elections are too close to call.

Simply by considering the statistics of who is likely to be disenfranchised, gnawing questions of racially discriminatory impact in voting clearly implicate the Voting Rights Act and the Equal Protection Clause. With numerous factors such as felon disenfranchisement, the geographic areas with the most outdated voting equipment—often the most economically depressed municipalities as well, and who lives in these geographic areas, these voting rights issues surely must be significant in more than just the "close" elections. Every election should raise the inquiry to levels of constitutional magnitude.\textsuperscript{287} If discriminatory impact in the actual mechanics of voting is so glaring from Election 2000, and probably many other unscrutinized elections, how can litigation correct these clear violations? Will the Court rethink its "judicially manageable" framing of the 1982 Amendments to the Voting Rights Act, when it articulated in \textit{Thornburg} the right to minority electoral success as the barometer of equality in the political and voting process?\textsuperscript{288}

Noteworthy are the vast investments in voting technology spurred by Election 2000. In addition to Florida, numerous other states across the country have invested in improving the franchise for all citizens.\textsuperscript{289} Electronic ballots are quickly replacing the irregular punchcard ballots.\textsuperscript{290} The days of the butterfly ballot are waning and currently, local


\textsuperscript{286} \textit{Bush}, 531 U.S at 103-04.

\textsuperscript{287} \textit{See supra} notes 18, 24, 33-34 and accompanying text.

\textsuperscript{288} \textit{Thornburg} v. Gingles, 478 U.S. 30 (1986). \textit{See also} Guinier, \textit{supra} note 231, at 1093.

\textsuperscript{289} For a comprehensive explanation and in-depth analysis of election reforms enacted since Election 2000 and reforms still needed, see Election Reform Information Project, \textit{Election.org}, at \textit{www.electionline.org} (modified daily).

\textsuperscript{290} \textit{Id.}
Election boards across the nation are scrutinizing their election procedures to avoid any incidents resembling those experienced in 2000.291

Aside from voting mechanism improvements, the Election 2000 crisis led to renewed discussions proffering ways to increase enfranchisement and turnout.292 The proposals include initiatives such as on-site same day voter registration, electronic voting, online voting, extended voting hours, voting holidays, and voting by mail.293 While Election 2000 provided a strong and stark impetus for change, in reality many of the wide-eyed and optimistic initiatives for electoral reform are un-

   Ever since Florida’s 2000 election, issues surrounding voting machines have taken center stage. HAVA [Help America Vote Act] paid particular attention to the subject, requiring states to mandate several significant improvements to their voting systems. As of January 1, 2006, every state must allow voters to verify their selections on the ballot, notify them of over-votes and give voters the opportunity to correct or change errors before casting their ballot. However, a voter education program training voters how to examine their own ballots for errors can suffice, the law states. Machines must produce a paper record to allow for a manual audit and all states must provide individuals with disabilities, including the blind and visually impaired, equal access to cast an independent and secret ballot through the use of at least one direct-recording (DRE) machine or other voting system at each polling place. Persons for whom English is a second language must have access to alternative language ballots and all systems must comply with the error-rate standard established by HAVA.

Under HAVA, individual states could take part in the $325 million optional buyout program to replace or upgrade antiquated punch-card and lever machines, but participation was not mandatory. States that opted to forgo machine replacement were required to create a voter education program.

States that decided to participate in the buyout program were given the option to apply for a waiver giving them until January 1, 2006 to make the replacements. Of those 30 states, 24 applied for waivers.

Voting machine usage varies from state to state and county to county. Currently, voters in most states cast ballots on a variety of machines including DRE, optical scan, lever, paper and punch-card – however, 19 states plan to implement uniform systems by 2006.

Id. at 10, 12.

292. Many policy suggestions for increasing voter turnout were made, including mandatory voting, rewarding voting with tax breaks or money, voting holidays, and closing bars, malls, and movie theaters on election day. William Safire, For Turnout Turnabout, N.Y. Times, Nov. 4, 2002, at A23. Other states have opted for on-line voting and mail-in voting to add to the citizens’ alternatives for casting a ballot. Online Voting Approved for Michigan Democrats, N.Y. Times, Nov. 24, 2003, at A17.

293. See Miles Rapoport & Jason Tarricone, Election Reform's Next Phase: A Broad Democracy Agenda and the Need for A Movement, 9 Geo. J. on Poverty L. & Pol'y 379 (2002) (arguing that what is needed is a broad agenda of reforms implemented at the state level to lower barriers to voting at every step, specifically: implementation of election day voter registration, restoration of voting rights to former felons, and development of comprehensive campaign finance reform, including public financing of elections). See also Eben Moglen & Pamela S. Karlan, The Soul of the New Political Machine: The Online, The Color Line and Electronic Democracy, 34 Loy. L.A. L. Rev. 1089 (2001) (discussing the strengths and disadvantages of online voting as to its potential impact on minority voting, political identity and participation, and the dangers of pure majoritarianism that online voting presents).
derfunded and have been trumped by other pressing national concerns such as the war on terror and national security.294

B. Momentum for Change

With the dust of the Election 2000 debacle gradually fading from the headlines, scholars and activists have moved onto other pressing national concerns, such as attacks on civil liberties in the wake of September 11th, international and domestic terrorism, war in Iraq, and other looming domestic crises, such as the economy, health care costs, and education.295 However, thoughtful review of the Court’s decision in Bush v. Gore points to a window for change. While the Court tried to narrowly couch its opinion in Bush v. Gore to the bizarre context of the Supreme Court deciding a presidential election, its words have already been applied by lower courts presiding over similar ballot box disenfranchisement cases.296

If new life can be infused into the Voting Rights Act as it nears its fortieth anniversary, then its noble goal of universal enfranchisement may be realized. Of course Voting Rights Act litigation must be re-

294. Edward Walsh, Enthusiasm Wanes for Election Changes; Bush, Hill Slow on Funds, Commission, Wash. Post, Sept. 16, 2003, at A9. The Bush Administration has been slow to provide the funding promised for election reform. Id. While not surprising to some skeptical observers, the states have fulfilled their obligation for updating voting machines and election technology while the federal government has been dragging its feet. Id. “‘The states are really walking alone on the road to reform,’ said Doug Chapin, director of the Election Reform Information Project, which tracks developments in the field. ‘The states have really moved forward on their end of the bargain, but the federal government has yet to do that.’” Id. Congress enacted reform legislation, the “Help America Vote Act” (HAVA), 42 U.S.C. § 15301 (2002) in response to the Election 2000 debacle. In passing the legislation, Congress immediately allocated $650 million to the states, most of which was going to replace punch-card and other arcane voting equipment with modern electronic machines. Id. While HAVA authorizes $1 billion for election reform, both the House and Senate versions of their appropriations bills included only $500 million for election reform. Id. For a full and bipartisan examination of electoral reform since Election 2000, see Election Reform 2004, supra note 280.

295. In the years since the Election 2000 chaos, numerous other pressing concerns have filled our headlines. Beginning with the terrorist strikes on American soil on September 11, 2001, the United States entered into the war on terror. During the ensuing months, President George W. Bush enjoyed unheard of approval ratings and served as a Commander-in-Chief with a mandate. See Richard L. Berke & Janet Elder, A Nation Challenged: The Poll, Survey Shows Doubts Stirring on Terror War, N.Y. Times, Oct. 30, 2001, at A1. The only problem is that he did not win Election 2000 with a mandate, thus his decisions have led numerous commentators, scholars and citizens to wonder how a president elected with a minority of the vote can so drastically effectuate sweeping and destructive changes in foreign policy, domestic affairs, civil liberties, and economic programs. See, e.g., Susan Sontag, Real Battles and Empty Metaphors, N.Y. Times, Sept. 10, 2002, at A25; Elisabeth Bumiller & David E. Sanger, A Nation Challenged: Dealing with the Crisis; Taking Command in Crisis, Bush Wields New, Y.N. Times, Jan. 1, 2002, at A1. See also Congresswoman Jan Schakowsky, Remarks at the Third Annual Ultimate Women’s Power Lunch (Apr. 30, 2004) (transcript on file with DePaul Law Review and author).

296. See supra notes 156, 221, 225 and accompanying text.
framed in order to accomplish such aspirations.\textsuperscript{297} Thus, strategies for litigation must draw on the analysis of the Court both in its \textit{Bush v. Gore} decision and in its constitutional underpinnings. However, the widely challenged logic and analysis of the Court's opinion poses a quandary for the Court's \textit{Bush v. Gore} majority, the scholars who defend it, and the activists who hope to capitalize on it.

The only roadblock to such an extension of jurisprudence could be the Court's ability to declare \textit{Bush v. Gore} an abberation of fact-specific judicial reasoning. In essence, if the Rehnquist Court follows its \textit{Bush v. Gore} analysis to future voting rights cases deriving from Election 2000, or facts compellingly on all fours with the voting discrepancies in \textit{Bush}, the Rehnquist Court will reluctantly expand the group rights of minority citizens. If, on the other hand, the Rehnquist Court retreats to its much-proffered jurisprudence of trumping group or minority rights with individual rights in future voting rights cases, then it will vindicate itself to the states' rights proponents, yet severely damage its own legitimacy.

Since the Court and its defenders swear that the opinion was not dependant upon outcome determinative reasoning, it seems they would fully embrace the tenets of equal protection to the fundamental right to vote as applied to the ballot box. If the Court is faced with an appeal of such a decision and necessarily holds that \textit{Bush v. Gore} does not apply because it was so fact-specific, then the dilemma the Court would face would indeed be the illegitimacy that haunted the Court in the aftermath of its decision in \textit{Bush v. Gore}.

V. Conclusion: There Are Still Many Mountains to Climb

In some circles, the Voting Rights Act has been rendered a time-piece,\textsuperscript{298} a remedy for past injuries, and an illustration of bandages seeking to repair America's ugly voting history. Given the trend of Voting Rights Act litigation towards creating racially representative districts,\textsuperscript{299} and the litigation's steady decline of success before the current individual rights-based Supreme Court, it is no wonder the effectiveness of the Voting Rights Act has been marginalized.\textsuperscript{300}

However unwittingly, the Supreme Court has added new life into the fatigued legislation in the form of its \textit{Bush v. Gore} decision. While

\textsuperscript{297} See supra Part III.
\textsuperscript{300} See supra note 107 and accompanying text.
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cautiously drafted to fit the unique circumstances of the presidential election fracas, the Court's reasoning has already echoed in the lower courts interpreting the decision. With lower courts interpreting Bush v. Gore to apply to the claims of unequally counted votes within local municipalities, the Supreme Court soon may need to address its Bush v. Gore decision and its lack of grounding in precedent.

With strategic analysis and careful advocacy, civil rights advocates can turn what appeared to be a significant blow to voting rights (in that thousand of voters were actually disenfranchised by the Court's opinion) into an incredible catalyst for mobilization and greater enfranchisement. Simply by applying the Court's rationale under a fundamental rights strand, triggering strict scrutiny under the Equal Protection Clause, individuals can demand equal access and equal counting of their right to vote. The parallel claim vindicates not only the fundamental rights of each voter as an individual, but also of racial minorities, the group that the Voting Rights Act was meant to protect. Such analysis also provides a revival of sorts for section 2, a clause that has been monopolized by redistricting and recently unsuccessful voter dilution cases.

Currently, great variations in voting technology exist along geographic lines depending on the arbitrary decision of the local election board in procuring its voting mechanisms. Meanwhile, it seems there are no compelling state interests for allowing wide discrepancies in voting equipment with such grave differences in voting success. The Court's requirement of a compelling state interest for the variance in voting procedures makes it increasingly possible that voters can challenge the voting systems in their municipality if the chosen system has a higher error rate than a nearby town.

In an interesting celebration for the fortieth anniversary of the Voting Rights Act, it seems that Bush v. Gore ironically breathes new life into the civil rights era legislation. By unwittingly giving the Voting Rights Act a fourth generation strategy of litigation in Bush v. Gore, the Supreme Court has proven that the Voting Rights Act, while far from being over the hill, is also far from dead.

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302. See supra notes 110–270.

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