Wyoming Law Review

Volume 2 | Number 2 Article 4

January 2002

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WYOMING LAW REVIEW

VOLUME 2 *2002* NUMBER 2

WHAT *BUSH v. GORE* MEANS FOR ELECTIONS IN THE 21ST CENTURY

Helen Norton[*]

So much has happened since the Supreme Court's decision in *Bush v. Gore*[1] that we may well find it tempting to move on to more immediate crises. But that would be a mistake. The controversy over Election 2000 revealed a wide range of failures in American elections that demand our attention and action. While these flaws are neither new nor limited to Florida, Election 2000 brought them to the public eye for the first time.

Part I of this essay identifies some of the shortcomings in our elections' integrity and accuracy. Part II describes how *Bush v. Gore* departs from and expands upon the Court's earlier election administration decisions, while Part III then examines how the Court's analysis creates important new opportunities for addressing flawed voting practices. Part IV concludes by exploring legislative efforts as a complement to litigation-driven election reform.

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1. 531 U.S. 98 (2001).

I. THE LESSONS OF ELECTION 2000

The most prominent of the failures exposed by the 2000 elections involves the startling number of voters who went to the polls on Election Day, only to be stymied in their efforts to cast valid ballots. For example, researchers at Caltech and MIT found that 4,000,000 to 6,000,000 votes were lost in the 2000 election[2]—a significant number in a presidential election where 105,500,000 votes were tabulated altogether and where only about 500,000 votes separated the top two candidates nationwide.[3] More specifically, the study found that faulty voting equipment (like the infamous punch card machine) and/or confusing ballot design (like the infamous butterfly ballot) caused the spoilage and loss of 1,500,000 to 2,000,000 votes.[4] The study further estimated that state registration errors denied an additional 1,500,000 to 3,000,000 eligible voters the ability to cast a ballot,[5] while poor polling place operations (including long lines and inconvenient hours and locations) led to the loss of another million votes.[6]

In particular, the problems in Florida highlighted various technological difficulties that undermined accurate vote counts. For example, punchcard machines often result in discarded ballots due to "undervotes" because the chad (the paper ballot piece perforated by the voter) fails to detach completely. In contrast, other types of voting equipment, such as optical scan machines, carry significantly lower error rates.[7] Because various counties within the same state—and sometimes precincts within the same county—often use different equipment from one another, many polling places across the nation employ technology several times less accurate than that available to voters in the precinct or county next door.[8]

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2. CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS, WHAT COULD BE 8 (July 1, 2001), *available at* http://web.mit.edu/newsoffice/nr/2001/VTP_-report1.pdf (last visited April 6, 2002) [hereinafter CALTECH/MIT]. This was but one of several studies to conclude that our elections remain far too error-prone. A General Accounting Office survey, for example, found that 57% of jurisdictions reported that they encountered "major problems" during the 2000 election. GENERAL ACCOUNTING OFFICE, ELECTIONS: PERSPECTIVES ON ACTIVITIES AND CHALLENGES ACROSS THE NATION 8 (2001), *available at* http://www.gao.gov/new.items/d023.pdf (last visited April 6, 2002) [hereinafter GENERAL ACCOUNTING OFFICE].

3. *See* FEDERAL ELECTION COMMISSION, VOTER REGISTRATION AND TURNOUT 2000 (2000), *available at* http://fecweb1.gov/pubrec/2000presgeresults.htm (last visited April 6, 2002).

4. CALTECH/MIT, *supra* note 2, at 8-9.

5. *Id.*

6. *Id.* at 32.

7. *Id.* at 18-21.

8. *See, e.g.*, Bush v. Gore, 531 U.S. at 126 n.4 (Stevens, J., dissenting) ("The per-

Flawed voting technology, however, did not pose the only barrier to effective election administration. While many voters had their ballots discarded due to equipment errors or faulty ballot design, others were wrongly purged from registration rolls and thus denied the chance to cast their ballots altogether. Florida, for example, ordered the purging of ex-felons and other ineligible voters from the rolls prior to the election, only to have many qualified voters erroneously dropped during this process. A disproportionate number were African-American voters.[9]

The failure to provide for "provisional" balloting exacerbates the harms of inaccurate purging and other registration errors. In most states, a voter has no opportunity to cast a provisional ballot (one that is later counted if the voter's eligibility checks out) if she finds, on Election Day, that she has been wrongly dropped from the rolls.[10] As the Caltech/MIT study showed, millions of eligible voters were erroneously turned away from the polls in 2000 without the opportunity to vote at all.[11]

Wyoming is actually a happy exception to the trend against provisional ballots. Because the state offers same-day registration, any

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centage of nonvotes in this election in counties using a punchcard system was 3.92%; in contrast, the rate of error under the more modern optical scan system was only 1.43%") (citations omitted).

9. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA L. REV. 1045, 1048 n.3 (2001). More specifically, Florida sought to delete all felons from its voting lists. To do so, however, the state used a computer match program that purged any voter whose name matched the first four letters and/or eighty percent of the letters of a felon's name when the voter and the felon were of the same race. So, for example, when attempting to drop a black felon named Bob Jones, the program would likely purge all black Bob Joneses on the rolls—felons or not—while the white Bob Joneses would remain undisturbed. Researchers estimate that "at least 15% of the thousands of voters purged from Florida's rolls were purged in error – and that half of those purged were African American voters." *Id.; see also* Dan Keating & John Mintz, *Study: Black Votes Affected Most*, WASHINGTON POST, Nov. 13, 2001 at A3 ("An examination of 175,010 Florida ballots that were not counted in the 2000 Presidential election provided further evidence that the ballots of voters in the state's black neighborhoods were most likely to go uncounted last November.").

10. *See* COMMON CAUSE, AN ELECTION REFORM REPORT CARD *(2001), available at* www.commoncause.org/publications/ereform/appe.htm (last visited April 6, 2002).

11. CALTECH/MIT, *supra* note 2; *see also* DEMOCRATIC INVESTIGATIVE STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, HOW TO MAKE ONE MILLION VOTES DISAPPEAR: ELECTORAL SLEIGHT OF HAND IN THE 2000 ELECTION 4 *(2001), available at* http://election2000.stanford.edu/electionreporthouse.pdf (last visited April 6, 2002) [hereinafter DEMOCRATIC INVESTIGATIVE STAFF] ("Eligible voters in at least 25 states went to polls and found their names were illegally purged from the rolls or were not timely added.").

Wyoming voter who arrives at the polls to find that her name is not on the rolls can immediately re-register and cast a ballot.[12]

Many voting methods remain inaccessible to persons with disabilities, highlighting another failure in our election systems. The General Accounting Office found that 28% of polling places reviewed had one or more potential impairments to voters with mobility-related disabilities yet failed to offer curbside voting.[13] In one major jurisdiction, only a quarter of its more than 1600 polling places were accessible to voters with disabilities.[14] Another study found that "[d]isabled voters in at least 18 states reported inaccessible polling stations and confusing ballots."[15]

These and other[16] barriers to successful voting threaten our republic's health in several ways. First, they limit our ability to identify the people's choices accurately. Second, they effectively disenfranchise too many eligible voters. And third, they fuel perceptions that at least some voters are not fully welcome to participate in our nation's democratic institutions. Unless folks are persuaded that voting is worth the effort and that their vote counts, the United States is unlikely to cultivate an engaged, informed electorate. A nation that prides itself on being the world's leading democracy can and should do better in running its elections.

II. THE COURT'S ANALYSIS IN CONTEXT

The Supreme Court's decision in *Bush v. Gore* may offer solutions to at least some of the problems revealed by the tumult of Election 2000. As you no doubt recall, *Bush v. Gore* involved a constitutional

12. WYO. STAT. ANN. § 22-3-102(LexisNexis 2001); *see also* COMMON CAUSE, *supra* note 10, at Appendix E, *available at* www.commoncause.org/publications/-ereform/wyoming.pdf (last visited April 6, 2002).

13. GENERAL ACCOUNTING OFFICE, *supra* note 2, at 165-66.

14. *Id.* at 167.

15. DEMOCRATIC INVESTIGATIVE STAFF, *supra* note 11, at 4. Wyoming is apparently one of only a few states without any specific state law provisions addressing accessibility issues for voters with disabilities. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, TABLE 10: POLLING PLACE ACCESSIBILITY AND VOTER ASSISTANCE (2001), *available at* www.electionline.org/site/docs/html/polling_place_-accessibility_and_voter_assistance.htm (April 6, 2002).

16. Other concerns include failures to address the voting needs of language minorities, difficulties in recruiting and training qualified pollworkers, and military and overseas voters' problems obtaining and casting absentee ballots. *See, e.g.*, GENERAL ACCOUNTING OFFICE, *supra* note 2, at 7-9.

challenge to Florida's recount procedures.[17] Those procedures required election officials to examine disputed ballots to determine the voter's intent, but provided no specific guidance as to how that intent was to be determined.[18] Left to their own devices, different counties—and sometimes different precincts within the same county—used varying standards for making this assessment.[19] For example, a "dimpled" chad (one that is partially, but not completely, detached from the ballot card) might count as a validly-cast ballot in one precinct, only to be rejected in the next.

The Court held that Florida's standardless recount procedures violated the state's constitutional "obligation to avoid arbitrary and disparate treatment of the members of its electorate."[20] The Court's willingness to find a constitutional violation based on flaws in the nuts and bolts of tallying votes—absent any evidence of an intentional effort to disadvantage identifiable groups of voters—significantly expands upon its past jurisprudence in this area.

Some background may be helpful here. As the Court reminded us in *Bush v. Gore*, it has long held that citizens have no federal constitutional right to vote for Presidential electors "*unless and until* the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."[21] But once a state provides for such appointment by statewide elections (as all states now do),[22] that decision creates a fundamental right for each voter to have "equal weight accorded to each vote," with "equal dignity owed to each voter."[23]

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17. 531 U.S. at 103.

18. *See id.* at 106-07.

19. *See id.*

20. *Id.* at 105.

21. *Id.* at 104 (emphasis added); *see also* Williams v. Rhodes, 393 U.S. 23, 29 (1968); McPherson v. Blacker, 146 U.S. 1, 35 (1892).

22. *See* Bush v. Gore, 531 U.S. at 104.

23. *Id.* at 104-05. This is sometimes called an "equal protection fundamental right," *i.e.*, a right that government need not provide at all, but once provided must be made available on equal terms across the board. Rigorous judicial scrutiny is applied to infringement of these rights "because they bear on what the Court finds fundamental rights or interests. Such interests are not rooted in any individual source of protection elsewhere in the text of the Constitution; if they were, there would be no need for litigants to resort to equal protection." KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 794 (14th edition 2001). The Court's short list of equal protection fundamental rights includes, for example, the right to equal access to counsel when appealing state court convictions. Douglas v. California, 372 U.S. 353 (1963) (although there is no fundamental right to appeal state court convictions, a state that chooses to make such appeals available must provide them on an equal basis to all regardless of

Similarly, nothing in the federal Constitution requires public elections for selecting state and local officeholders, but the Court has long held that states and/or localities that choose to hold such elections must respect voters' fundamental right to participate on an equal basis.[24] This equal protection fundamental right thus extends to voting in elections at all levels—federal, state, or local.

But before *Bush v. Gore*, the Court had recognized only a few specific violations of this right—and only then in situations involving deliberate efforts to suppress political participation by certain voters. For example, what have been called "first generation"[25] election administration claims addressed government restrictions that blocked certain citizens from the ballot altogether.

This first generation began with *Harper v. Virginia State Board of Elections*, where the Court ended its longstanding deference to states' choices in determining voter qualifications[26] and held that Virginia's poll tax triggered "careful" judicial scrutiny.[27] The Court further concluded that Virginia could not survive this scrutiny because a voter's ability to pay the tax was unrelated to his qualifications to vote.[28] Instead, this income-based restriction systemically distorted the right to vote: Those who had money (and thus political power) sought to deprive those who did not of the power to change the status quo. In the years to follow, the Court similarly invalidated other state or local requirements that conditioned voter eligibility on property ownership or related limitations.[29]

The Court's "second generation" cases took a step further, addressing voting practices that diluted[30] certain ballots' strength so that

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income and are thus required to provide appellate counsel to indigent defendants).

24. *E.g.*, Harper v. Virginia State Board of Elections, 383 U.S. 663, 665-66 (1964).

25. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 86-88 (2001) [hereinafter ISSACHAROFF, KARLAN, & PILDES] (discussing Court's "first" and "second" generation claims).

26. *See, e.g.*, Breedlove v. Suttles, 302 U.S. 277 (1937) (upholding Georgia's poll tax in administering state elections); Butler v. Thompson, 341 U.S. 937 (1951) (upholding Virginia's poll tax).

27. 383 U.S. 663, 667 (1966).

28. *Id.* at 666, 668-69.

29. *E.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (striking down New York state law limiting voting rights in school districts to owners/lessees of taxable real property and parents/guardians of children in public schools); Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (striking down Arizona law restricting nonproperty owners from voting in bond elections); Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down Tennessee law that imposed one-year state residency requirement as precondition to voting).

30. Unconstitutional vote dilution in this context raises somewhat different issues

some individuals' votes mattered more than others. Ushered in by *Reynolds v. Sims*,[31] the second generation cases dramatically transformed American elections by establishing the "one-person, one-vote" standard. *Reynolds* involved a challenge to several state apportionment systems, where rural voters in Alabama and other states elected many times more legislators than their urban counterparts.[32] The Court reasoned that the weight of a citizen's vote should not depend on where she lives within a state, and concluded that the apportionment schemes thus infringed upon the fundamental right to vote.[33] The Court went on to require that seats in both houses of a state legislature be apportioned on a population basis.[34] Since *Reynolds*, the Court has allowed relatively few deviations from the one-person, one-vote standard for federal, state, and local elections.[35]

Before *Bush v. Gore*, lower federal courts declined to extend these principles to new factual situations, consistently holding that various election irregularities did not constitute federal constitutional violations absent evidence of intentional efforts to deny or dilute a specific group's voting power. For example, the United States Court of Appeals for the Fifth Circuit rejected the notion that a state's inaccurate vote count due to machine and human error raised a federal constitutional issue.[36] The panel distinguished the first and second generation cases as involving activities that "systematically deny equality in voting," as opposed to "episodic events that, despite nondiscriminatory laws, may result in the dilution of an individual's vote. Unlike systematically dis-

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than statutory vote dilution claims under section 2 of the Voting Rights Act, which prohibits election systems that weaken minority voters' votes compared to those cast by nonminority voters. 42 U.S.C. § 1973. Practices that may impermissibly dilute minority voting strength in violation of the Act include racially gerrymandered districts, certain at-large elections, or unfair run-off systems.

31. 377 U.S. 533 (1964).

32. *Id.* at 545-47.

33. More specifically, the Court held 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." *Id.* at 555.

34. *Id.* at 568.

35. *See, e.g.*, Avery v. Midland County, 390 U.S. 474 (1968) (extending *Reynolds* to local government units); Hadley v. Junior College District, 397 U.S. 50 (1970) (striking down election scheme where one district with 60% of population elected only 50% of district trustees); Karcher v. Daggett, 462 U.S. 725 (1983) (holding that states must "come as nearly as practical to population equality" in drawing congressional districts); Brown v. Thompson, 462 U.S. 835 (1983) (holding that Wyoming's apportionment plan for state legislative districts with maximum population deviation of under ten percent was only a minor deviation and thus did not raise constitutional violation).

36. Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980).

criminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause."[37]

In the Fifth Circuit court's view, constitutional law does "not authorize federal courts to be state election monitors."[38] Other lower courts similarly declined to find constitutional violations in election cases absent discrimination against identifiable classes of voters (such as poor or urban voters).[39]

These lower court decisions seem motivated in great part by the recognition that episodic irregularities are an inevitable outgrowth of our very decentralized election system. Under this framework, states are themselves free to employ—as well as delegate to local governments the power to adopt—diverse approaches to voting technology, ballot design, etc. For this reason, one might well see a butterfly ballot in one county that looks very different from the ballots used in neighboring counties. For decades, this variation had been seen as the price of local control of election administration.

The Court's decision in *Bush v. Gore* has apparently ushered in the "third generation" of cases in this area by raising disparities in the mechanics of casting and counting ballots to the level of constitutional violations. In contrast to the practices rejected by the Court's first- and second-generation decisions, Florida's recount process had neither the purpose nor the effect of denying or diluting any particular group's vote.[40] Neither side claimed, for example, that local election officials manipulated the standards for assessing voter intent on the theory that Republicans were more likely to generate chads of the hanging persuasion, Democrats the dimpled variety.

The Court instead offered a new characterization of voting as an equal protection fundamental right: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate

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37. *Id.* at 454.

38. *Id.*

39. *E.g.*, Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975) (malfunctioning voting equipment and other irregularities did not establish constitutional deprivation without evidence of intentional or systematic bias); Pettengill v. Putnam County Sch. Dist. of Metropolitan Kansas City, Mo., 472 F.2d 121 (8th Cir. 1973) (election irregularities insufficient to establish federal constitutional violation absent deliberate action); *but see* Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) (post-election change in the standard for validating absentee ballots dilutes the votes of those who voted in accordance with prior interpretation and thus violates fundamental fairness and due process).

40. *See, e.g.*, ISSACHAROFF, KARLAN, & PILDES, *supra* note 25, at 88.

treatment, value one person's vote over that of another."[41] This breaks important new ground by introducing the notion that making every vote count is not just a policy aspiration, but also—at least in certain circumstances—a constitutional command.

III. NEW POSSIBILITIES FOR REFORM?

The Court's holding carries a certain intuitive appeal. For example, the prospect that dimpled chads would be counted as a vote in one precinct, only to be discarded as an "undervote" in the next, feels deeply unsettling. Indeed, recall that seven Justices shared this discomfort, agreeing that the Equal Protection Clause required Florida to employ uniform standards in assessing its voters' intent[42] (although Justices Souter and Breyer peeled off to join Justices Stevens and Ginsburg in protesting the majority's decision to stop the recount without remedying the constitutional violation).[43] Moreover, given voting's importance in preserving other civil and political rights, election administration seems an especially appropriate venue for searching judicial scrutiny.

But as we have seen, standardless recount procedures are by no means the only "arbitrary and disparate" obstacle to fair and accurate elections. The Court's analysis thus offers important new opportunities for challenging—and changing—many flawed practices that up until now had been assumed to pose no constitutional difficulties.[44]

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41. 531 U.S. at 104-05.

42. *Id.* at 111.

43. *Id.* at 133-34 (Souter, J., dissenting), 145-46 (Breyer, J., dissenting).

44. Note that the majority opinion might be seen to attempt to limit its holding to the narrow facts of this exceptional case:

> The recent process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in the election process generally presents many complexities.

531 U.S. at 110. Yet this language may also be seen as an unremarkable statement that the Court was presented at the time with one specific factual situation; certainly no principled decision could be interpreted so narrowly as to support only the delivery of a particular election to a particular candidate. As discussed *infra*, notes 45-52 and accompanying text, the majority's insistence on a state's obligation to avoid "by later arbitrary and disparate treatment, valu[ing] one person's vote over that of another" and its recognition of a fundamental right to have "equal weight accorded to each vote" with "equal dignity owed to each voter" have clear implications for other election "complexities." *See id.* at 104-05.

Even on the relatively narrow issue of recounts,[45] the Court's holding has ramifications far beyond Florida. Indeed, more than thirty states share Florida's failure to provide specific guidance for consistently assessing voter intent when examining disputed ballots and are thus now vulnerable to constitutional challenge unless they amend their election laws.[46]

Note that Wyoming appears to fall in this category. Wyoming's state election law provides that disputed ballots that are not clearly marked should be disregarded except where "the intent of the voter is obvious to the counting board.[47] This "obviousness" standard provides little assurance of uniformity in assessing voter intent and may well be open to challenge.

Moving beyond the specific recount procedures at issue in *Bush v. Gore*, the Court's analysis can easily extend to other error-ridden election practices as well. For example, using different voting equipment with significantly different error rates may well violate a state's obligation to avoid arbitrary and disparate treatment of its electorate.[48] Employing variably inaccurate technology within a state seems quite analogous to using inconsistent standards for assessing voter intent: In both cases, voters have no assurance that their ballots will be counted on the same basis as those in neighboring counties or precincts. *Bush v. Gore*'s expansion of vote dilution principles to include the mechanics of casting and counting ballots means that voters unlucky enough to live in precincts with less accurate technology may successfully argue that their votes have been impermissibly diluted.[49]

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45. *See* 531 U.S. at 105 ("[Florida's] recount mechanisms . . . do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.").

46. *See* DEMOCRATIC INVESTIGATIVE STAFF, *supra* note 11, at 5.

47. WYO. STAT. ANN. § 22-14-104 (LexisNexis 2001).

48. Several lawsuits have raised this claim to date. *See, e.g.*, ISSACHAROFF, KARLAN, & PILDES, *supra* note 25, at 91 (discussing pending litigation in California, Florida, Georgia, and Illinois).

49. As the Court earlier noted, "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state." *Reynolds*, 377 U.S. at 555. Justice Stevens' dissent in *Bush v. Gore* supports a reading of the majority opinion that would apply this principle to discrepancies in voting technology:

> Florida's decision to leave to each county the determination of which balloting system to employ – despite enormous differences in accuracy – might run afoul of equal protection. So, too might similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems.

Bush v. Gore provides similar support for constitutional challenges to a state's decision to allow each county to choose its own ballot design, when certain ballot designs prove especially confusing and thus lead to disproportionate error and spoilage rates.[50] Again, the Court's refusal to countenance inconsistent standards for assessing voter intent appears readily applicable to variations in ballot design that produce significantly different error rates. Tolerating this variation within a state's boundaries—where a voter in one county is significantly less likely to have his ballot counted accurately than his counterpart in a county with a more understandable ballot—might well violate the obligation to avoid "arbitrary and disparate" vote dilution.

Playing out these arguments even further, flawed election practices that turn eligible voters away from the polls may now run afoul of constitutional protections as defined by *Bush v. Gore*. These practices, which include error-prone purging and other registration errors, inflict arguably even graver injuries since they altogether deny voters the opportunity to cast a ballot and take their chances that it will be counted

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531 U.S. at 126 (Stevens, J., dissenting). Justice Breyer spied similar implications for the majority's analysis:

> Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair.

Id. at 146 (Breyer, J., dissenting).

On the other hand, Justice Souter distinguished variations in technological accuracy from the problems presented by Florida's recount procedures:

> It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction even though different machines will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.

Id. at 134 (Souter, J., dissenting). Recall, though, that infringement of the right to vote triggers especially searching judicial scrutiny. *E.g., Harper*, 383 U.S. at 667 ("[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). Governmental assertions of a need for increased convenience and/or efficiency have rarely satisfied higher levels of review. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688-89 (1973) (administrative convenience held to be an insufficiently strong government interest to satisfy heightened scrutiny).

50. *See, e.g.*, Dan Keating & Dan Balz, *Florida Recount Would Have Favored Bush, But Study Finds Gore Might Have Won Statewide Tally of All Uncounted Ballots*, WASHINGTON POST, Nov. 12, 2001 at A1 ("Many voters using the [butterfly] ballot became confused by the listing of presidential candidates on two facing pages and punched Gore's name and one of the candidates next to him, nullifying their vote.").

accurately. As the Court earlier noted in *Reynolds*, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." [51] Blocking voters' ability to cast a ballot for reasons unrelated to their qualifications—such as their names' similarity to that of felons, or other registration errors[52]—erects "arbitrary and disparate" obstacles to ballot access.

IV. LEGISLATIVE REFORM AS A PARALLEL PATH

While *Bush v. Gore* offers new opportunities for litigation-driven reform of unacceptably flawed election practices, lawsuits are neither the only, nor necessarily the best, approach for achieving change. Litigation's success is far from assured, and even successful litigation takes time. Legislative strategies present another possibility.[53]

Legislative action has come slowly at both the state and federal levels so far. Florida, not surprisingly, was among the few states to take real steps toward reform. In the summer of 2000, it enacted legislation that eliminated punch card voting machines, allocated $24,000,000 for new voting machines, and established uniform ballot design and vote-counting procedures.[54]

Few other states have followed suit. A nationwide survey by the nonprofit organization Common Cause concluded that, a year after the 2000 elections, "[m]ost states made no improvements. A few even regressed."[55] The Constitution Project similarly found that Florida was joined only by Maryland and Georgia in enacting "significant reform" by November 2001.[56]

Wyoming is apparently one of the many states that could benefit from reform measures. First, despite its relatively small population,

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51. 377 U.S. at 568.

52. *See supra* note 12 and accompanying text.

53. Litigation and legislation are, of course, not mutually exclusive pursuits. Litigation, for example, may be needed to push the legislative process, since enacting election reform requires significant change from elected officials for whom the status quo has worked wonderfully. Litigation may also fill in gaps left by political compromises forged in the legislative process.

54. Edward Walsh & Dan Balz, *One Year Later, Election Reform Remains Elusive*, WASHINGTON POST, Nov. 13, 2001 at A3.

55. COMMON CAUSE, *supra* note 13.

56. THE CONSTITUTION PROJECT, ELECTION REFORM PROGRESS REPORT 2 (2001), *available at* www.constitutionproject.org/eri/electionreformfactsheet.doc (last visited April 6, 2002).

Wyoming's election practices are surprisingly decentralized. For example, various Wyoming polling places use punch card, lever, optical scan, and touch screen machines, all with different error rates.[57] Second, as mentioned earlier, Wyoming apparently has no uniform rule for determining what is and is not a valid vote.[58] In contrast, other states with similarly-sized populations, such as Delaware and Alaska, employ uniform voting equipment statewide as well as uniform rules for counting ballots.[59] On the positive side, as discussed earlier, Wyoming is one of relatively few states to employ a same-day registration process that protects voters' ability to cast their ballots from registration errors—a model that other states should follow.[60]

Many states' apparent reluctance to take action strongly suggests the need for federal leadership.[61] Federal legislation should, at a minimum, address those election practices now vulnerable to constitutional challenge under *Bush v. Gore*.[62] This legislation would thus ensure that each state:

- has its own uniform standards to determine voter intent and valid ballot markings;

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57. DEMOCRATIC INVESTIGATIVE STAFF, *supra* note 11, at 116.

58. *See supra* note 47 and accompanying text.

59. COMMON CAUSE, *supra* note 10, at Appendix E, *available at* www.commoncause.org/publications/ereform/alaska.pdf (last visited April 6, 2002); www.commoncause.org/publications/ereform/delaware.pdf (last visited April 6, 2002).

60. *See supra* note 12 and accompanying text.

61. This apparently simple statement is not without its controversy. To date, congressional action has stalled in part because of disputes over what, if any, role the federal government should now play in an area that had been traditionally left to local control. *See, e.g.*, Edward Walsh, *Election System Changes are Few, Report Says: Lack of Funding, Consensus Block Reform Efforts*, WASHINGTON POST, Oct. 23, 2001 at A2.

62. The Elections Clause gives states the power to regulate elections as an initial matter, but empowers Congress to override states when it sees fit: "The Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators." U.S. CONST. Art. I, § 4, cl. 1.

Note that federal action could take several forms, including: imposing a single nationwide standard governing voting equipment, ballot design, and related processes; ensuring that each state establish its own internally consistent standards while allowing practices to continue to vary from state to state; releasing federal funds for upgraded election technology only to those states that meet or establish uniform standards; or issuing no-string-attached block grant funding to states for election reform purposes generally. *See, e.g.*, THE CONSTITUTION PROJECT, BUILDING CONSENSUS ON ELECTION REFORM (2001), *available at* www.constitutionproject.org/eri/report_text-.doc (last visited April 6, 2002).

- use the same election technology statewide to prevent variations in error rate from county to county or precinct to precinct;
- employs consistent ballot design across the state; and
- provides same-day registration, provisional balloting, and/or other safeguards that preserve eligible voters' ballot access.[63]

This is by no means all that can and should be done. While election reform is on the table, legislative changes in addition to those constitutionally compelled by *Bush v. Gore* are worth considering. For example:

- Registering to vote should be simple and easy. Current registration procedures too often discourage, rather than support, voting. Providing for same-day registration, as Wyoming does, would dramatically improve these processes.
- Voting itself should be simple and easy. Voters should be made aware of their rights to request assistance and correct their ballots if they believe they have made a mistake. We should also consider changes to ease long lines at polling places and other time pressures that inhibit voting. Ideas currently in play include making Election Day a federal holiday, ensuring that anyone in line at closing time is allowed to vote, and extending voting hours.[64]
- Uniform standards for absentee ballots should be developed to facilitate use by military and other overseas voters.

63. Note that curing constitutional infirmities in this context does not require that all states adopt a single nationwide standard for their voting practices. Each state's maintenance of its own internally consistent standards is sufficient, since local, state, and congressional elections only involve comparisons of votes cast within a state (or smaller political subdivision). Similarly, the Electoral College system means that votes in presidential elections are only meaningfully tallied on a state-by-state, rather than nationwide, basis.

64. *See generally* NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, FINAL REPORT (2001), *available at* http://election2000.Stanford.edu/full.report.8-.2001.pdf (April 6, 2002).

- Finally, all polling places and voting methods should at long last be made accessible to voters with disabilities.

V. CONCLUSION

Error-riddled voting practices require a timely and meaningful response from a nation committed to maintaining a thriving democracy. *Bush v. Gore* creates important new litigation opportunities for addressing such flaws by expanding upon the Court's prior decisions in this area. While earlier findings of constitutional violations had been limited to situations where certain groups' voting rights had been systematically disadvantaged, *Bush v. Gore* required no such evidence and instead focused on the harm posed by "arbitrary and disparate treatment" of individual voters. These new avenues for litigation are, at least for now, coupled with a window of political possibility generated by the ruckus in Florida and the attendant public outcry.

That window, however, may not long remain open as priorities shift and memories fade. Time is short. The 2004 election cycle may be our last best chance for change. If we fail to act, we will have sadly squandered the opportunity to rejuvenate those processes at the heart of our democracy.