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BUSH v. GORE: EQUAL PROTECTION TURNED ON ITS HEAD, PERHAPS FOR A GOOD THOUGH UNINTENDED REASON

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* Markenzy Lapointe recently served as a law clerk to the Hon. Justice Harry Lee Anstead, Supreme Court of Florida; however, the views and conclusions expressed herein are solely the author's and not necessarily the Florida Supreme Court nor any of its members. The author dedicates this article to the memory of his grand-aunt, Anne-Marie Demosthenes, who passed away in August of 2001. The author would also like to thank Professor Nat Stern, Florida State University College of Law, for reading the first draft of the article and for his helpful comments.

I. INTRODUCTION

Since the formation of this country more than two hundred years ago, Americans of various generations have witnessed some of the most dramatic political events in modern history. From the Boston Tea Party to the civil rights protests of the 1960s to the more recent impeachment proceedings against President Bill Clinton, a long line of events have shaped the social and political landscapes of this country in fundamental ways. Few, at least in recent history, have been more dramatic, more polarizing, and perhaps more pivotal than events surrounding the recent 2000 presidential election.

Given the role of the judicial branch in our system of government, the courts have taken center stage in some of these events. This latest political drama of the presidential election was certainly no different, as the dispute was ultimately and squarely decided, for better or worse, by the United States Supreme Court. In light of the polarizing nature of the dispute and the practical import of its resolution, the justices who authored the 5-4 opinion in *Bush v. Gore*[1] came under severe criticism on various grounds. At the outset, this article deals solely with the legal grounds upon which the decision was predicated.

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

The theme of this article is that the U.S. Supreme Court drastically departed from its own equal protection framework in arriving at the results reached in *Bush v. Gore*. To begin, Part II of this article provides the procedural history of the case, its holding and the reasoning provided by the Supreme Court. Part III delineates the equal protection paradigm developed by the Court. This section discusses the equal protection jurisprudence that has evolved more or less over the last forty years. The strict scrutiny standard applied in the voting rights cases is discussed, as well as the requirement of intentional discrimination that has governed the claims of equal protection in the non-voting rights context. Part IV submits that the strict scrutiny standard traditionally applied in the voting rights cases was improperly extended to the circumstances of *Bush v. Gore*. Specifically, this section argues that the heightened scrutiny in *Bush v. Gore* was unwarranted to the extent that it had traditionally been applied in the context of the history of racial discrimination in voting. Simply, the circumstances of *Bush v. Gore*, imperfect though they were, did not give rise to the constitutional violation associated with the voting rights cases.

Finally, Part V concludes *Bush v. Gore*, though inconsistent with recent application of the equal protection doctrine, is potentially redeemable. The potential redemption lies in the fact that certain claims of voting rights violations formerly rejected by the Court may now legitimately be raised, even as the Court attempted to limit its holding of the case to its facts. Also, the heightened scrutiny applied in *Bush v. Gore* may well be applied to some non-voting rights claims—racial profiling, selective prosecution, and disproportionate death sentencing—inasmuch as these claims share some of the same history of racial discrimination as the voting rights cases. Indeed, the integrity of the Court will be greatly affected by how it reconciles *Bush v. Gore* equal protection jurisprudence with post-*Bush v. Gore* equal protection claims.

II. PROCEDURAL BACKGROUND AND HISTORY OF THE CASE

It is not necessary to delve into every peripheral fact and litigation associated with the election case. There were many of them even for a case of this magnitude. It is, however, important to lay out the relevant factual and procedural background of the case leading to one of the most important decisions ever issued by the Supreme Court.

As done every four years, and in every state in the country, on November 7, 2000, Florida residents cast their votes for their preferred presidential candidates among other state and federal candidates. What ensued on that night of November 7, now distant enough and fairly mi-

nor in comparison to the days and nights which would follow, was the kind of drama perhaps seen only in closely contested athletic games. The news networks were going back and forth between then-Governor George Bush ("Governor Bush"), the Republican presidential candidate, and then-Vice President Albert Gore ("Vice President Gore"), the Democratic candidate, in announcing the winner of the State of Florida, and thus the winner of the presidential election. Finally, on November 8, the Florida Division of Elections ("Division") reported Governor Bush as the winner with 2,909,135 votes over Vice President Gore's 2,907,351 votes, a difference of a mere 1,784 votes.[2]

Florida law requires an automatic machine recount when election results are so close.[3] An automatic recount was thus conducted, resulting in an even closer vote differential between the two candidates. Because of that closeness, the Florida Democratic Executive Committee exercised its right to request that manual recounts be performed in selected counties.[4] In response to the request, the canvassing boards of each county conducted sample recounts which showed respective increases for Vice President Gore, prompting some of the counties to begin conducting countywide manual recounts, which Governor Bush fervently opposed.

The Florida statutory scheme requires that election returns be certified by 5 p.m. on the seventh day after an election.[5] Realizing that it would not be able to complete the countywide recount, the Palm Beach

2. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1230-31 (Fla. 2000) [hereinafter Harris]. A brief description of the relevant players in the conduction of election in Florida as explained by the Florida Supreme Court is in order. The Florida Secretary of State is the chief election officer and in charge of the election system. Each county, however, elects its own Supervisor of Election who then appoints two election boards for each precinct prior to an election. The election board, made up of inspectors and clerks, is responsible for conducting the actual voting in the election, counting the votes, and certifying the results to the Supervisor the day after the election. The County Canvassing Board, the members of which are the Supervisor, a county court judge, and the chairperson of the board of county commissioners, canvasses the return countywide and reports them to the Florida Department of State by 5:00 p.m. on the seventh day after the election. At the state level, the Canvassing Commission, the members of which are the Governor, the Secretary of state, and the Director of the Division of Elections, canvasses the returns and declares the winner for each office. As to the particular points at which a candidate can challenge the result of an election, there are two specific available challenges. One is a protest action, which must be filed with the relevant county canvassing board; and the other is a contest action, which must be filed in circuit court after the county boards certify results with the Department of State. *See id.* at 1231.

3. FLA. STAT. ANN. § 102.141(4) (2002).

4. FLA. STAT. ANN.§ 102.166(4) (2002).

5. *See Harris*, 772 So.2d at 1230-31.

County Canvassing Board requested an advisory opinion from the Division as to whether returns could be turned in past the deadline. The Division responded, fairly unequivocally, that the deadlines were firm and that it would ignore returns not turned in by the deadline. Not long thereafter, the Florida Attorney General issued a contrary opinion, leaving the county elections officials guessing as to which direction to follow.

The conflicting directives from the Division and the Florida Attorney General gave rise to the first relevant lawsuit. The Volusia County Canvassing Board immediately sought declaratory and injunctive relief in circuit court,[6] an action in which Palm Beach County and the candidates, among others, were allowed to intervene. Basically, the Volusia Board wanted the circuit court to find that the it was not bound by the deadline and that the Secretary of State could not ignore the results submitted after the deadline. The circuit court ruled against the Volusia Board inasmuch as it found *inter alia* that while nothing prevented county canvassing boards from filing amended returns after the deadline, the Secretary of State had the discretion to count or ignore the amended returns.[7]

Interpreting the circuit court's decision as a carte blanche to ignore amended returns, the Secretary of State decided she would not count any amended returns past the deadline. Vice President Gore and the Florida Democratic Party filed a motion in the circuit court, attempting to compel the Secretary to count the amended returns. Upon a denial of the motion by the circuit court, Vice President Gore appealed to the First District Court of Appeals, which certified the case to the Florida Supreme Court.[8]

A. The Florida Supreme Court's First Opinion

As urged by the parties, the Florida Supreme Court resolved the following two issues on appeal: Whether and the circumstances under which a board could authorize a countywide manual recount and whether the Secretary of State and Commission could deny such recounts when they were certified and submitted by the county board after the seven-

6. In Florida, the circuit court is the trial court. FLA. CONST. Art. V, § 5. A decision from the circuit court may be appealed to the appropriate District Court of Appeals, which may then be appealed to the Florida Supreme Court. FLA. CONST. Art. V, § 4(b) (district court of appeal jurisdiction) and § 3(b) (supreme court jurisdiction).

7. McDermott v. Harris, 2000 WL 1693713 (Fla. Cir. Ct. 2000) (No. 00-2700).

8. FLA. CONST. Art. V, § 3.

day deadline set forth by Florida law?[9] Vice President Gore wanted a yes to the first question and a no to the second while Governor Bush argued for a no and a yes respectively.

In a 7-0 decision, the Florida Supreme Court ruled in favor of Vice President Gore. The court's opinion rested heavily on the right to vote, as guaranteed by Florida's constitution, and the principle that all votes be counted to the extent possible. The Court emphasized from the outset that "the will of the people, not a hyper-technical reliance upon statutory provisions, should be [the] guiding principles in election cases[.]"[10] The Court then went on to construe Florida's election code according to statutory construction principles.

Related to the first issue, the court found that under Florida's statutory scheme, the county board had the discretion to conduct manual recounts if deemed necessary.[11] According to the court, section 102.166, Florida Statutes (2000), unambiguously gave a canvassing board the authority to conduct a countywide manual recount where the sample recount shows "an error in the vote tabulation which could affect the outcome of the election."[12] Given the closeness of the election, the court concluded, as ostensibly did the canvassing boards, there was an error in the vote tabulation warranting a countywide manual recount. In so doing, the court rejected the Division's narrow interpretation of "error in the vote tabulation" as being limited solely to a counting error resulting from an incorrect election parameter or one in the vote tabulating software.[13] As the court saw it, inasmuch as different vote counts reflected different numbers, there was an error in the vote tabulation, a reading the court felt to have been supported not only by the statutory language, but also by common sense.[14]

As to issue two, the court seemed to have read it, as earlier noted, simply as to what extent could the voting rights of the citizens of Florida be obviated by an overly narrow reading of the election code. From a reading of the opinion, the court seemed to have come to the conclusion that the statutory scheme was inadequate and mired in ambiguity in key parts.[15] The inadequacy of the statutory scheme, however,

9. *Harris*, 772 So. 2d at 1228.
10. *Id.* at 1227.
11. *Id.* at 1229-30.
12. *Id.* at 1228.
13. *Id.* at 1229.
14. *Id.*
15. *Id.* at 1231.

would not be allowed to obstruct the will of the people of Florida, the court advanced.[16]

The fatal conflict, according to the court, inhered in the situation in which the time allowed for a candidate to ask for and get a manual recount would in many instances run into the deadline by which returns had to be turned in by the county canvassing boards to the Division.[17] In that vein, the court reasoned that to the extent that a manual recount, as provided by the statutory scheme, was required under the circumstances—a close election in which different counts brought different results—the statutory deadline had to be extended to allow the manual count to proceed.[18] The court concluded that the Secretary of State could not simply reject a board's amended return unless such returns were so late that it would (1) prevent a candidate from contesting the final certification by the Secretary of State or (2) prevent Florida voters from participating in the federal electoral process. Accordingly, the court extended the deadline until November 26, 2000.[19]

B. *The U. S. Supreme Court's First Opinion:* Bush v. Palm Beach County Canvassing Bd.

Governor Bush filed a successful certiorari petition with the U.S. Supreme Court. As framed by the U.S. Supreme Court, the two issues on appeal were: "Whether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause or 3 U.S.C. § 5, and whether the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, §1, cl. 2 of the United States Constitution."[20] In a short per curiam opinion, the U.S. Supreme Court decided not to decide, judging apparently that the federal issues were not ripe. Accordingly, the Court remanded the case to the Florida Supreme Court so that it could clarify the grounds upon which it extended the deadline; specifically, the extent to which the deadline

16. *Id.* at 1236-37.

17. *Id.* at 1232-33 ("Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which a manual recount must be completed, logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days."). *Id.* ?

18. *Id.* at 1239-40.

19. *Id.*

20. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 73 (2000).

could be extended without running afoul of the above federal provisions.[21]

C. *The Florida Supreme Court's Second Opinion*

Subsequent to *Palm Beach County Canvassing Bd.*, matters escalated to even more urgent proportions. With the December 12, 2000, deadline for the federal certification fast approaching, the various lawsuits generated by the election showed no signs of stopping. As earlier noted, Florida law provided two opportunities to challenge the results of an election, the protest stage, which precedes certification by county officials to the state officials, and the contest stage, which succeeds certification by the state officials.[22] Subsequent to *Palm Beach County Canvassing Bd.*, the Division proceeded to certify the results, without the completion of the manual recounts initially sought by Vice President Gore.

Having had little success at getting manual recounts completed during the protest stage, Vice President Gore, on November 27, filed a contest action in the circuit alleging that the results certified by the Canvassing Commission included "a number of illegal votes" and failed to include "a number of legal votes sufficient to change or place in doubt the result of the election." Specifically, Vice President Gore sought to: (1) include 215 net votes for him identified in a manual count by the Palm Beach County Board; (2) include 3300 votes rejected by the Palm Beach County Board, but noted as Gore votes by Democratic observers; (3) include 168 net votes for him identified in a partial recount conducted by the Miami-Dade County Canvassing Board; (4) compel Miami-Dade to count 9000 ballots identified as undervotes; and (5) have the Court reject fifty-one votes that were received and certified after Thanksgiving of the election night results from Nassau County.

After a two-day evidentiary hearing, the circuit court denied all relief to Vice President Gore, giving Governor Bush a complete victory.[23] As expected, Gore immediately appealed to the First District Court of Appeals, which again certified the case to the Florida Supreme Court.

On appeal, the Florida Supreme Court found the circuit court's order to have been wholly inadequate and thus reversed in all but one

21. *Bush*, 531 U.S. at 78.
22. *Harris*, 772 So. 2d at 1230-31.
23. Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. 2000).

respect.[24] To begin, the court found that the circuit court applied all the wrong standards, first by confusing a contest proceeding for an appellate review of a protest action;[25] and second by assigning a higher burden of proof on Vice President Gore, that of a "preponderance of a reasonable probability" that the election result would have been different (to even contest an election), as opposed to the standard enunciated in the contest provision, " the receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change *or place in doubt* the result of the election."[26]

According to the Florida Supreme Court, as to the first error, the circuit court erred by simply finding, in effect, whatever the county canvassing boards did in the protest action was pretty much irreversible. In other words, the decision by the boards to count or stop counting after beginning a count was well within their discretion and no judge, in a contest action, could alter that.[27] As to the second error, the circuit court erred by confusing the remedy with the process. That is, the circuit court, by failing to examine even one ballot (the evidence), denied Vice President Gore that which would have led to a determination of whether a remedy was necessary or even feasible.[28]

> Unsatisfied with the circuit court's order, and still apparently concerned with having all the votes manually counted, the Florida Supreme Court remanded the case to be resolved as follows. First, the court directed the circuit court to add any legal votes that had been determined up to that point (i.e., 215 votes from Palm Beach County[29] and 168 from Dade County's partial recount for Vice President Gore and the 51 votes for Governor Bush from Nassau County).[30] The court then ordered that the 9000 votes that had not been manually counted from Miami-Dade county to be counted by the circuit court. The court, however, ordered, as urged by Governor Bush, that every county which had undervotes

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

25. *Id.* at 1252.

26. *Id.* at 1255 (emphasis in original).

27. *Id.* at 1252-53. The error, as apparently seen by the Florida Supreme Court, was that the circuit interpreted the "discretion" granted a county canvassing board in a protest action as requiring an "abuse of discretion" standard applied for appellate purposes. In short, the circuit court missed the mark in not distinguishing a protest from a contest.

28. *Id.* at 1259.

29. *Id.* at 1248 n.1. This number was disputed by Gov. Bush to be 176; therefore, the Florida high court ordered that the circuit court determine the right number.

30. *Id.* at 1260-61.

count them immediately, with only three days left before the federal meeting of electors.[31] The Court then provided the statutory "clear indication of the intent of the voter" as the standard by which the counties would determine a legal vote for either Vice President Gore or Governor Bush.[32]

D. The U. S. Supreme Court's Final Opinion: Bush v. Gore

Governor Bush immediately applied for a stay of the state proceedings at the U.S. Supreme Court, which was granted and treated as a certiorari petition. Effectively, the grant of the stay stopped the ongoing recount that had started pursuant to the Florida Supreme Court's decision. In what has now become one of the most controversial decisions in modern times, the Supreme Court reversed the Florida Supreme Court on equal protection grounds.

As framed by the U.S. Supreme Court, the issue was: "Whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."[33] At issue essentially was the scheme by which a voter's intent was determined in a manual recount in Florida. The interplay of two key Florida provisions spoke to this mechanism. First, section 102.166(7), Florida Statutes (2000), required, in a manual recount, the county canvassing board to appoint as many counting teams of at least two electors to do the recount. Counting teams had to be made up of members from the conflicting political parties.[34] Where a counting team was unable to determine the voter's intent (from looking at the ballot to see if a vote had been unsuccessfully attempted), the ballot was to be presented to the county canvassing board for determination.[35] As stated in the Florida Supreme Court opinion, however, the other provision that defined a legal vote merely stated that it be a "clear indication of the intent of the voter."[36]

In a 5-4 decision, the U.S. Supreme Court concluded that these

31. *Id.*

32. *Id.* at 1262.

33. Bush v. Gore, 531 U.S. 98, 105 (2000). The other question initially presented by the parties was "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." *Id. at* 103. However, the case was disposed of on the equal protection grounds.

34. FLA. STAT. ANN. § 102.166(7)(a) (2002).

35. *Id.* § 102.166(7)(b).

36. Gore, 772 So. 2d at 1256 (citing FLA. STAT. ANN. § 101.5614, (2002)).

circumstances lacked the requisite guarantees of equal treatment.[37] In other words, the fact of different counties potentially having different standards of determining what was a legal vote, and, sometimes different counting teams having different standards, was "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter . . . ."[38] Simply, a legal vote in the eyes of a counting team in Palm Beach County should be the same in the eyes of a Broward County counting team.[39] Accordingly, the Supreme Court ordered any manual recount stopped because the procedures ordered by the Florida Supreme Court could not be carried out with the requisite safeguards of due process in sufficient time to meet the December 12, 2000, federal deadline.

As will be shown in the following discussion, this application of the equal protection standard itself is wholly irreconcilable with the high court's more recent application of the equal protection doctrine. As a general matter, of course, no one can argue with the reasonableness inherent in the requirement that every vote in every part of the state of Florida, indeed the country, be judged and treated in like manner. Both of the opinions of the Florida Supreme Court themselves seemed to strongly espouse that view. However, up until *Bush v. Gore*, the equal protection doctrine has been applied differently. In non-voting rights cases, the Court has required the establishment of intentional discrimination to obtain relief. As to voting rights cases, the strict scrutiny standard, while not attached to a requirement of a showing of discriminatory intent, has been applied in a genre of cases much different from *Bush v. Gore*.

III. THE EQUAL PROTECTION DOCTRINE AS EVOLVED

Section 1 of the Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[40] Much like a substantial number of doctrines and concepts in American constitutional law, the

37. *See Bush*, 531 U.S. at 105-06.

38. *Id.* at 109.

39. The U.S. Supreme Court intimated that it did not really have a problem with that process, but rather with the failure of the Florida high court to, in effect, inject the adequate medicine to remedy it. ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."). *Id.* at 109.

40. U.S. CONST. amend. XIV, § 1.

Equal Protection Clause was deeply rooted in this country's profound entanglement with slavery.[41] The Fourteenth Amendment was part of the first major civil rights initiative by the federal government, which included the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments (the Civil Rights Amendments) to provide equality and protection to the newly emancipated slaves after the civil war.[42] This initiative also brought about the passage of the first Civil Rights Acts of 1866, 1871, and 1875 during the brief period referred to as the Reconstruction era.[43]

The Equal Protection Clause, however, has lived an unstable, if not often unfulfilled, life since its inception. The substantial erosion of the Equal Protection Clause was officially marked, ironically enough, by the events of the election of 1877.[44] It is firmly agreed that Rutherford B. Hayes literally stole that election through an electoral commission formed to resolve disputed southern votes in the electoral college at that time.[45] In exchange for the ratification of his election through the House of Representatives, Hayes, a Republican, guaranteed southern Democrats that he would not enforce Reconstruction-era legislation to protect Blacks.[46]

The erosion of the purpose of the Equal Protection Clause and civil rights laws would be felt for the better part of a century by those they were intended to protect. Starting with the *Civil Rights Cases*[47] and culminating in *Plessy v. Ferguson*[48] and beyond, the Equal Protection

41. *See generally* Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2001).

42. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) ("[I]ts design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it.").

43. *See* JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 103 (Random House 1st ed. 1992).

44. See Kevin G. Beckham, *Constitutional Law—Equal Protection—Race Shall not Be the Predominant Factor in Congressional District Drawing.* Miller v. Johnson, 115 S.Ct. 245 (1995), 19 U. ARK. LITTLE ROCK L.J. 109, 113 (1996).

45. LIEBERMAN, *supra* note 43.

46. *Id.*

47. 109 U.S. 3 (1883). The Civil Rights Cases involved the consolidation of one federal criminal prosecution and four federal civil prosecutions brought under the first two sections of the 1875 Act outlawing discrimination in the use and enjoyment of public accommodations. The Supreme Court declared the 1875 Act unconstitutional. *Id.* at 4-5.

48. 163 U.S. 537 (1896). The Court upheld a Louisiana statute that required railroads to provide equal but separate accommodations for Whites and Blacks. Two key points made by the Court are worth mentioning. One, the Court asserted that inferiority arose only because a race chose to perceive the laws in such way. In other words, Blacks simply lacked the proper perspectives in dealing with the various legal, judicial, and

Clause could not be applied in greater derogation of both its plain meaning and the legislative intent behind it. As shown by *Brown v. Board of Education*,[49] however, the equal protection doctrine has evolved and has thus been from one end of the jurisprudential pendulum to the other. The current focus is the application of the equal protection doctrine and the accompanying standards that have emerged recently. Naturally, a good part of the analysis invariably entails issues of race and how the Court has resolved them, as they have often been at the heart of the matter.

A. Three-Tiered Scrutiny and Suspect Classification

Issues of equal protection come up in instances where a governmental entity treats one group or individual differently from another. The government generally behaves in such a fashion in the pursuit of either social or economic goals, but in far too many instances on purely arbitrary grounds and for invidious purposes. The Supreme Court has developed a set of standards, a three-tiered system, to determine the propriety of governmental action with respect to violations of equal protection. The three standards are strict scrutiny, rational basis scrutiny, and intermediate scrutiny. These three standards are applied in relation to a traditional "suspect classification" encompassing race, gender and national origin, among others.

1. Strict Scrutiny

Strict scrutiny is the highest and toughest standard applied to a governmental action. This standard applies to a statute which uses race, national origin, or other so-called "suspect" classifications to effect a government policy.[50] In order for a governmental action applying such classifications to survive, the governmental interest must be compelling and the means used to further the interest must be narrowly tailored.[51] This standard has in fact been referred to as "fatal" scrutiny for a couple of reasons. First, no deference is given to the government's manner of accomplishing its goals, and as such, a court will strike down the statute or policy if there is any other feasible alternative to using such a classifi-

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social inequities they were facing at that time. This aspect of the case is interesting inasmuch as it demonstrates the importance of diversity in public (and private) institutions. Additionally, the Court was of the view that laws could not affect the established norms and cultural conditioning of a society. *Id.* at 551.

49. 347 U.S. 483 (1954). Directly contrasting *Plessy*, the Court held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprived the children of the minority group of equal educational opportunities. *Id.* at 493.

50. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

51. *Id.*

cation. Second, virtually all government actions reviewed under this standard, particularly affirmative actions undertaken by various governmental entities, have generally been found to have been inadequately devised.[52]

The voting rights area itself provides a fitting example of how the Court has applied the strict scrutiny standard. Recognizing the right to vote as a fundamental right, the Court has reviewed governmental restrictions upon the franchise under heightened scrutiny. In the seminal case of *Reynolds v. Sims*,[53] the Court stated the following in finding unconstitutional Alabama's legislative apportionment scheme:

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. Almost a century ago, in *Yick Wo v. Hopkins*, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights."[54]

The Court has thereafter applied heightened scrutiny in a host of cases in which violations of equal protection had been alleged with respect to regulation of the franchise. In *Kramer v. Union Free School District No. 15*,[55] for instance, the Court was presented with a New York statute which limited the franchise in certain school districts only to owners or lessees of taxable real property, or to parents of children enrolled in the local public schools. As a result of the restriction, individuals who were qualified both as to their age and citizenship could not vote in school board elections. Citing *Reynolds*, the Court invalidated the statute and stated that statutes that "may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court."[56] Accordingly, the Court held, "if a challenged statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."[57]

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52. *See id.*; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267, 283 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

53. 377 U.S. 533 (1964).

54. 118 U.S. 356, 370 (1886).

55. 395 U.S. 621 (1969).

56. *Id.* at 626.

57. *Id.* at 627.

More recently, the Court has routinely applied the strict scrutiny standard to invalidate various state apportionment plans. *Shaw v. Reno*[58] is illustrative of how the Court has applied the standard, as it has provided the standard for redistricting cases decided at the turn of the century. *Shaw* involved a submission of a congressional reapportionment plan by the state of North Carolina to the United States Attorney General, pursuant to § 5 of the Voting Rights Act of 1965. The Attorney General rejected the plan because it had only one majority Black district when, according the Attorney General, it could have had a second one to fortify minority voting in certain areas of the state. In response to the Attorney General's objection, the state redrew its plan and came up with a second majority Black district. Five North Carolina residents challenged the new plan in United States District Court, alleging that the two districts were drawn along racial lines, in violation of equal protection. The district court dismissed the claims on the ground that favoring Black voters did not run afoul of the Constitution nor did the plan result in proportional underrepresentation of White voters.

The Supreme Court reversed on the ground that the state's plan constituted impermissible racial gerrymandering. The unusual shape of the two districts was dispositive to the Court. As explained by the Court, the first of the two majority Black districts was "somewhat hooked shaped," with "finger-like extensions."[59] The second district "wind[ed] in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobble[d] up in enough enclaves of Black neighborhoods.'"[60] In rejecting these two districts, the Court stated that, when it comes reapportionment, appearance matters a great deal.[61] Thus, a reapportionment plan may be of such an unusual appearance that an inference of intent to arrange on the basis of race is necessarily drawn.[62]

Shaw was important in many respects. For current purposes, however, *Shaw* provided a reaffirmance of the principle of being able to establish an equal protection violation claim, even though the statute was facially race-neutral and remedial of past discrimination. It should be noted that the dissenters forcefully objected to this application of the equal protection doctrine in reapportionment cases. At bottom, the dissenters viewed race as an inseparable element from the realm of reapportionment.[63] As such, Justice White submitted that those who challenged

58. 509 U.S. 630 (1993).
59. *Id.* at 635.
60. *Id.* at 635-36.
61. *Id.* at 647.
62. *Id.* at 646-47.
63. *Id.* at 661 (White, J., dissenting, joined by Blackmun, Stevens, JJ.).

such state action must show that the latter have both "the intent and effect of unduly diminishing their influence on the political process."[64] Justice White thought these two elements were absent under the circumstances. The majority was, however, not persuaded, as it applied "fatal" scrutiny in its review of the plan.[65]

2. Rational Basis Scrutiny

Rational basis, unlike strict scrutiny, is the most relaxed and deferential standard by which a court reviews a governmental action. Under this standard, the statute is presumptively valid and will be sustained if the classification drawn by the statute is "rationally related to a legitimate state interest."[66] As stated by the Court, "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[67]

For quite some time, the mere invocation of the rational basis analysis would almost always result in upholding the state action.[68] However, recently the Court has somewhat departed from that line and has invalidated some statutes that were analyzed under the rational basis standard.[69] This departure by the Court has prompted some commentators to characterize this less-relaxed application of the rational basis standard as "rational basis with teeth."[70] Nonetheless, with or without teeth, this standard of review remains the most deferential of the three.[71]

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64. *Id.* at 660 (White, J., dissenting).

65. It should be noted that the *Shaw* litigation had been visited by the Court on three additional occasions. *See* Shaw v. Hunt, 517 U.S. 899 (1996); Hunt v. Cromartie, 526 U.S. 541 (1999); Easley v. Cromartie, 532 U.S. 234 (2001). On each occasion, the Court reaffirmed the threshold requirements be race neutral. *See also* Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

66. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (Marshall, J., dissenting).

67. *Id.*

68. *See, e.g.*, Williamson v. Lee Optical Co. of Oklahoma, 348 U.S. 483 (1955) (upholding statute disallowing opticians to fit lenses without a prescription from an ophthalmologist or optometrist).

69. In *City of Cleburne* itself, the Court invalidated the state statute even as it articulated the rational basis standard. *City of Cleburne*, 473 U.S. at 440.

70. Kevin G. Walsh, *Throwing Stones: Rational Basis Review Triumphs over Homophobia*, 27 SETON HALL L. REV. 1064, 1079 (1997).

71. For the Court's rare use of the rational basis standard in the voting rights context, *see infra* Part IV.

3. Intermediate Scrutiny

The Court has enunciated yet a third level of scrutiny, intermediate scrutiny, for a genre of cases that fit neither in the strictest nor the most relaxed category. Like strict scrutiny, the Court requires the government to establish the constitutionality of its action; however, the government's burden is less than that of a compelling interest. In this instance, the classification must be substantially related to an important governmental objective.[72] For the most part, this standard is applied when determining the propriety of classification based on gender;[73] it has also been used to invalidate classifications based on illegitimacy of childbirth.[74]

Commentators and members of the Court alike have criticized this tiered system of review by the Court. The criticism basically asserts that such a tiered system does not and cannot encompass the variety and complexity of the circumstances that are presented to the Court. Justice Thurgood Marshall himself stated, "I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'"[75] Justice Scalia has also expressed dissatisfaction with this three-tiered system.[76] Nonetheless, the Court has firmly adhered to this system.

B. Standard of Proof in Non-Voting Rights Context: From Disparate Impact to Intentional Discrimination

While the three-tiered system has dominated equal protection jurisprudence over the last thirty years, the heart of the action has been in the standard of proof required to get relief in the various non-voting rights cases alleging discrimination. In the civil area, subsequent to the enactment of the Civil Rights Act of 1964, the disparate impact standard was established in the landmark case of *Griggs v. Duke Power Co.*[77] As further discussed below, the disparate impact standard was made sub-

72. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

73. *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (applying *Craig v. Boren* in invalidating university practice of restricting attendance to nursing school to females only).

74. *See* Picket v. Brown, 462 U.S. 1, 7-8 (1983).

75. *City of Cleburne*, 473 U.S. at 460 (Marshall, J. dissenting).

76. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

77. 401 U.S. 424 (1971).

stantially more rigid, and that standard is what has governed equal protection litigation to this day in both the civil and criminal arenas.

1. The Civil Standard

In the midst of widespread civil protests in the mid 1960s, Congress enacted the Civil Rights Act of 1964. Title VII of the Civil Rights Act prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. In 1971, in *Griggs*, the Court decided what, at the time, was the groundbreaking case in employment discrimination law. The issue before the Court was whether the Civil Rights Act prohibited an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than White applicants, and (c) the jobs in question formerly had been filled only by White employees as part of a long-standing practice of giving preference to Whites."[78] The facts of the case revealed that Duke Power Co. had a long-established practice of hiring Blacks in this all-Black labor division where the highest paying job paid less than the lowest paying job in all the other four all-White divisions at the company.[79] Coincidentally, on July 2, 1965, the effective date of Title VII, the company suddenly initiated these educational requirements for jobs in the all-White divisions and for transfer into jobs in these divisions.[80]

At trial, the district court ruled in favor of the company by holding that earlier practices were beyond the reach of Title VII and the new requirements were not intentionally discriminatory, which was affirmed by the court of appeals. Reversing the court of appeals' decision, the Supreme Court ruled in favor of the Black plaintiffs and enunciated what became known as the disparate impact doctrine. The Court concluded that the Act prohibits not only overt discrimination but also practices that are fair in form, but discriminatory in operation.[81] In other words, the Court held that intent or discriminatory purpose would not determine whether there had been discrimination; rather the result or consequences of a particular policy upon a particular group of persons would govern, however neutral in intent that policy may be.[82] Additionally, the Court

78. *Id.* at 425-26.
79. *Id.* at 427-28.
80. *Id.* at 427.
81. *Id.* at 430.
82. *Id.* at 430-32; *see also* Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972) ("Once a prima facie case of invidious discrimination is established, the burden of proof

also held that in such cases the burden was on the employer to establish that any disparate impact occasioned by his policies was justified by business necessity.[83]

Just a few years later, however, in *Washington v. Davis*,[84] the Court significantly altered the standard enunciated in *Griggs*. *Davis* involved a suit by Black police officers and unsuccessful applicants against the District of Columbia's Metropolitan Police Department.[85] The suit alleged racial discrimination and violation of the due process clause of the Fifth Amendment because of the use of a written test by the police department, with the effect that a disproportionate number of Black applicants failed the test (four times as many as Whites). The district court granted a summary judgment motion in favor of the police department. The court of appeals, applying *Griggs*, found *inter alia* that the test had a disparate impact upon Blacks and reversed the district court's ruling.

The Supreme Court reversed the court of appeals' decision. First, the Court found that the appellate court had erroneously applied the standard developed for Title VII, because the standard was not extended to the Fifth and the Fourteenth Amendments.[86] The Court then went on to state that as a predicate for a finding of racial discrimination, an intent or purpose to discriminate had to be present, not merely a disparate impact.[87] The Court cited a line of precedents in which such an intent to discriminate had been required for a finding of unconstitutional discrimination. The Court, however, opined that there were times in which discriminatory intent could be inferred based on the totality of the circumstances, including disparate impact.[88] The Court did not set forth a precise manner of determining when discriminatory intent could be inferred from disparate impact resulting from a facially neutral policy or statute.

While *Griggs* was certainly not overruled by *Davis*, *Davis* decisively carried the day from that point on, as shown by the two cases decided thereafter, *Arlington Heights v. Metropolitan Housing Dev.*

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shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.").

83. *Griggs*, 401 U.S. at 431.
84. 426 U.S. 229 (1976).
85. *Id.* at 232-34.
86. *See id.* at 239.
87. *Id.* at 239-42.
88. *Id.*

Corp.,[89] and *Personnel Adm'r of Massachusetts v. Feeney*.[90] *Arlington Heights* involved an attempt by a non-profit developer, Metropolitan Housing Department (MHDC), to build racially integrated low- and moderate-income housing in the Chicago suburb of Arlington Heights.[91] MHDC filed a rezoning petition with the village board of trustees in order to be allowed to build; the petition was denied. Subsequently, MHDC filed for injunctive and declaratory relief, alleging that the board's refusal to change the tract from a single-family to a multi-family classification was racially discriminatory in violation of equal protection.[92]

The district court ruled in favor of the village, finding no discrimination. Ultimately, the Supreme Court had to determine once again whether the zoning decision which effectively denied MHDC the ability to build the integrated housing was unconstitutional. Applying *Davis*, the Court rejected the showing of disproportionate impact as proof of a violation of the Equal Protection Clause.[93] Once again, the Court simply held that the predicate of intent or purpose to discriminate was absent, thereby fatally handicapping MHDC's claim.

As to *Feeney*, the claim there involved a Massachusetts statute that provided a lifetime preference to veterans in public employment.[94] A lawsuit was filed by a female civil servant alleging a violation of equal protection on the grounds that she had consistently attained higher scores on civil service examinations than male veterans, yet was consistently passed over for employment and promotion for these male veterans. On appeal, the Supreme Court maintained the *Davis/Arlington Heights* line. The Court recognized that indeed 98 percent of the veterans in the state were males, that the veterans policy applied to some 60 percent of the public employment in the state, thereby severely impacting public opportunities for women. Nonetheless, reiterating *Davis*, the Court stated that a showing of discriminatory intent, not simply disproportionate impact from the policy was required.[95] Even more restrictive was the Court's statement that even if discriminatory results were foreseeable, inasmuch as the State knew that the veterans were mainly males, an equal protection violation would not be found unless policymakers acted because of

89. 426 U.S. 252 (1977).
90. 442 U.S. 256 (1979).
91. *See Arlington Heights*, 429 U.S. at 254-56.
92. *Id.* at 254-59.
93. *Id.* at 255-56.
94. *See Feeney*, 442 U.S. at 259-60.
95. *Id.* at 270-75.

the foreseeably discriminatory results, rather than in spite of the results.[96]

2. The Criminal Law Standard

Of course, no equal protection analysis could be complete without a look at its application in the criminal justice system. Particularly, Black defendants have had virtually no success challenging practices by various governmental authorities in the criminal justice system that have negatively affected them in a disproportionate manner. The Court has systematically applied the rigid standard of *Davis* and *Arlington Heights* in resolving these claims. As explained below, there are three specific areas, policing, prosecution, and sentencing, in which Blacks consistently maintained to have been mistreated by the authorities. Invariably in each area, the Supreme Court has flatly rejected the equal protection claims presented by the affected Blacks. In this respect, the Court has imposed stringent particularity requirements in order to establish a violation of equal protection.

a. Discriminatory Policing

The problem of crime in the United States and how to properly resolve it have always been a source of controversy. The controversy inheres in the actions allowed to be taken by the authorities and the extent to which such actions unfairly or unconstitutionally impact the rights and lives of members of the communities to be policed. Particularly, members of minority communities have had very little success in curtailing policing actions that have disproportionately affected them.

Nothing illustrates this point more than what has become known as racial profiling. A racial profile identifies with certain crimes members of certain racial groups, based on a genuine belief in actual statistical differences in crime rates or patterns of criminal involvement among groups.[97] Racial profiling refers to, for instance, the practice by law enforcement of stopping a disproportionate number of minority motorists who are acting no differently than White motorists who are not pulled over.[98] This phenomenon has been referred to among Blacks as Driving While Black (DWB).[99] Testimonials from a considerable number of

96. *Id.* at 278-79; *see also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

97. *See* Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1081 (2001).

98. *See* Pamela S. Karlan, *Race Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005 (1998).

99. *Id.*

Blacks from all socioeconomic backgrounds reflect their frustration being routinely stopped, and sometimes manhandled and humiliated, for no apparent reason.[100]

While testimonials and anecdotal accounts only go so far, some empirical evidence has demonstrated the overarching role of race in many traffic stops. Statistics developed from cases filed in New Jersey and Maryland, for instance, showed that more than 70 percent of the 437 motorists stopped and searched along a northeastern stretch of Interstate 95 in the first nine months of 1995 were Black.[101] One hundred and forty-eight hours of videotaped traffic stops in Florida similarly showed that seventy percent of the 1,048 motorists stopped along Interstate 95 were Black or Hispanic, even though Blacks and Hispanics made up only five percent of the drivers on that stretch of the highway.[102] Even more remarkable is the fact that only five percent of the stops resulted in arrest and less than one percent of the drivers received traffic citations.[103]

Equally telling is evidence from an *Orlando Sentinel* investigation.[104] For starters, the selective policing in this case was being executed by a group with the remarkable name of "Selective Enforcement Team" of the Volusia County, Florida, sheriff's office. The result of the investigation showed that although the vast majority of drivers on Interstate 95 in Volusia County were White, close to 70% of the motorists stopped were Black or Hispanic. Much like in the Maryland finding, a

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100. *See, e.g.*, Jack Kearney, *Racial Profiling: A Disgrace at the Intersection of Race and the Criminal Justice System*, 36 ARK. LAW. 20 (Spring 2001). In this article, the author describes an episode in which his sister, Janice, and her husband, were driving their new car from a dinner party when, for no apparent reason, they were stopped by numerous police units. With bright lights blinding them and weapons pointing at them from all directions, somewhat like in a movie, their frightt was intense. As she was forced to sit in the car, Janice had to watch her husband being thrown to the ground at gunpoint. All this ended with the police simply telling the couple that her husband fit the description of a suspect involved in a car theft. It turned out that all Janice's husband had in common with the suspect was that he was a Black male; as to the stolen car, all it had in common was that it was a relatively new SUV, even though of a different color, make, and model. Of course, some would believe this only happened to poor Blacks living in Black neighborhoods; in this instance, it actually happened to Janice Kearney, and her husband, former White House Personnel Director Bob Nash. *Id.* This perhaps represents the humiliating effect and widespread nature of racial profiling; *see also* Regina Waynes Joseph, *Testimony Before the New Jersey Senate Judiciary Committee Special Investigation into Racial Profiling*, 209 N.J. LAW. 44 (June 2001).

101. Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997).

102. *Id.* at 432.

103. *Id.*

104. *See* Karlan, *supra* note 97 at 2005-06.

mere fifty-five out of more than 1000 stops resulted in arrests for some other offense, and a mere nine were given traffic tickets; additionally, only 15.1% of the drivers convicted of traffic offenses in Florida were Black. Based on these numbers, many have concluded that these stops were pretextual in two ways. First, the police were stopping Black and Latino drivers to investigate non-traffic related crimes. And second, these stops were being made strictly because these drivers were members of minority groups.[105]

Given the strong inference of racial bias in this selective policing, and given the implication of the equal protection violation presented by these circumstances, it was only a matter of time before a case would make its way to the U.S. Supreme Court with a petitioner raising an equal protection violation. *Whren v. United States*[106] was that case. The facts in *Whren* reveal that plainclothes members of the Washington, D.C. Metropolitan Police Department were, on a summer evening of 1993, patrolling a so-called high drug area in an unmarked car. As they patrolled the subject area, they noticed a Pathfinder truck with temporary license plates and what appeared to be two youthful occupants. Observing that the truck stayed at a stop sign for a long time (twenty seconds), the officers made a U-turn, at which time they saw the truck make a sudden right turn without signaling and drive off at an "unreasonable" speed. Eventually, the officers caught up with the truck. As one of the officers approached the driver's side of the truck, he noticed what appeared to be two large plastic bags of crack cocaine in the hand of passenger Whren. Both occupants were arrested and charged with violations of federal drug laws.[107]

The defendants filed a pretrial motion to suppress, arguing the absence of probable cause or even reasonable suspicion that they were involved in illegal drug-dealing activity, rendering the stop illegal in violation of their Fourth Amendment rights. Simply, their argument went, the officer's ground for stopping them was pretextual because he was not concerned with any traffic violations. The trial court denied the motion and the subsequent convictions were affirmed by the court of appeals, holding that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation."[108]

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105. *Id.* at 2006.
106. 517 U.S. 806 (1996).
107. *Id.* at 808-809.
108. *Id.* at 809.

The Supreme Court granted a petition for certiorari and affirmed. As framed by the Court, the issue was "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws."[109] The Court answered with a resounding no. Citing a long line of cases, the Court, first, noted that claims of Fourth Amendment violations could not be sustained on the basis of the officer's actual motivations.[110] The Court then rejected the petitioners' urging to apply an objective standard in determining the impropriety of an officer's act of stopping.[111]

The most notable aspect of the case, however, was the minimal treatment given to equal protection concerns. In the briefest fashion, the Court agreed that selective enforcement of the laws based on considerations such as race would undoubtedly be violative of equal protection guarantees.[112] But, the Court advanced, such concern could be raised only through an equal protection claim. The Court did not even provide a real-life example in which a claimant could succeed with an equal protection claim. Here lies the potentially fatal nature of *Whren* for victims of racial profiling. To the extent that the Court concludes the Fourth Amendment allows an officer to stop a motorist purely on pretextual grounds, a defendant will have serious difficulty in establishing an equal protection violation.[113]

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109. *Id.* at 808.

110. *Id.* at 811-14.

111. *Id.* at 813-15.

112. *Id.* at 813.

113. Of course, racial profiling has always existed in one form or another. *See e.g.*, EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 216-17 (1998). The author explained the then-too-common phenomenon of the 1940 case of *Chambers v. Florida*, 309 U.S. 227 (1940). Following the robbery and murder of an elderly White man near Fort Lauderdale, the police arrested between twenty-five to forty Black men and held them in complete isolation for almost a week during which they were threatened and abused. This happened without the police ever procuring a warrant. Ultimately, the police released all but four "ignorant young colored tenant farmers" who confessed to the crime after an additional fifteen straight hours of interrogation. The Supreme Court reversed their convictions (and death sentences) as, for the first time, it applied the Constitution's prohibition against coerced confessions to the states. *Id.* at 217.

In many respects, that phenomenon still exists today when law enforcement personnel, under pressure to solve a particular crime, submits every "Black" person in their path to these treatments. A recent documentary illustrates this unfortunate situation. *See Murder on a Sunday Morning*, (HBO television broadcast, Mar. 31, 2002). The documentary followed the trial of a fifteen-year-old Black teenager, Brenton Butler,

who was accused of killing an older white woman in the Jacksonville area. Based on the racial description by a witness, the husband of the victim, the police picked up the first Black teenager they could find. Brenton was arrested, handcuffed, and put in the back of the police car; the witness, under these very suggestive circumstances, confirmed that Brenton was the killer. At trial, two detectives testified that Brenton voluntarily confessed to the muder. Brenton, on the other hand continually maintained that he was at his home at the time; he never confessed to the murder to these detectives; and he was brutalized during a fruitless search for the murder weapon.

Fortunately, Brenton had very competent and dedicated lawyers. The lawyers believed him from the very beginning and realized that the detectives in the case were total liars. As noted by one of the lawyers, the prosecution and the detectives were never concerned about finding out who the true killer was, but were instead concerned about protecting themselves. From their position, it was better to convict an innocent individual than to admit they had made a mistake. At the end, a racially mixed jury acquitted Brenton. Four months later, in an amazing turn of events, the true killer was arrested when he was caught bragging about the killing. Ultimately, no charges were brought against the officers for their unethical and illegal behavior in the case. *See also Frontline: Requiem for Frank Lee Smith* (PBS Television documentary, Apr. 11, 2002) (depicting similar railroading by Broward County, Fla., law enforcement and prosecutorial team, resulting in rape and first degree conviction and death sentence of Black man who was ultimately and positively cleared through DNA evidence, but not before he died under painful and deplorable conditions in a Florida prison.).

Equally serious is the tragic incidence of police shootings that plagues Black communities throughout the country and the societal acceptance of this problem. *See, e.g.* Robert Steinback, *Concern Grows Over Police Abuse*, THE MIAMI HERALD, March 3, 2002, at B1 ("The collective reluctance to question the behavior of police officers toward young black suspects—against whom aberrant tendencies might be most likely to surface—surely has encouraged continued abuses."). Almost in every major city, members of Black communities have to deal with questionable shootings of Black males, adults and youngsters alike, by police officers. *See* Mel Reeves, *Congressional Hearing Highlights Police Problems*, THE MIAMI TIMES, March 19, 2002, at A1. As is apparent from these circumstances, racial profiling has serious, and sometimes fatal, consequences for innocent members of minority communities.

It should, nonetheless, be noted that racial profiling is engaged in by minorities and many who have traditionally championed human rights as well, albeit with far less tragic consequences. As a result of the September 11, 2001, terrorist attack, men of middle eastern descent have now been the targets of racial profiling because of fear of other catastrophic acts. It is interesting, however, how some minorities have joined those engaged in this practice. *See, e.g.*, Sam Howe Verhovek, *A Nation Challenged: Civil Liberties; Americans Give into Race Profiling*, The New York Times on the Web, *available at* http://query.nytimes.com/search/abstract?res=F30D1FFD3C5E0C708-EDDA00894D9404482 (last visited April 20, 2002). This article depicts how, while torn about their own feelings, some minorities admit they would have second thoughts about sharing a flight with Arab-looking men. This is a feeling shared by most of the country, as an Arab-American member of President Bush's security detail was recently not allowed aboard an American Airlines flight because of his middle eastern appearance. *See A Nation Challenged: Airport Security; Guard for Bush Isn't Allowed Aboard Flight*, The New York Times on the Web, *available at* ttp://query.nytimes.com/search/abstract?res=F30F11FD3B550C78EDDAB0994D94044-82 (last visited Dec. 27, 2001).

As shown by the foregoing and countless other examples, the trail of the few

b. Selective Prosecution

Much as the wide discretion afforded law enforcement creates disparate treatment for certain members of the community, prosecutorial discretion has also created its own set of problems. Blacks have on numerous occasions brought claims of racially discriminatory prosecutions as a violation of equal protection. However, courts almost automatically reject such claims because of the defendants' failure to demonstrate that prosecutors intended to discriminate in their practices.[114]

Of course, any discourse concerning crime or the crime rate in America inevitably leads to a discussion about the drug trade and America's efforts to combat its prevalence. The most blatant disparity in punishment results from the federally mandated minimum sentencing for possession or use of cocaine in powder or crack (smokable) form.[115] Five grams worth of crack will send a defendant to prison for the same length of time as one who used or possessed one hundred times that amount in powder form.[116] Being generally a low-income inner-city addiction, the prosecution for crack possession and use has flooded federal prisons with Blacks and Hispanics.[117] On the other hand, powder cocaine, being the choice of wealthier, often White drug users, has not resulted in a similar number of convictions and Whites in prison; although recent evidence indicates that Whites use crack more than Blacks.[118] Though the rationale behind this policy is tied to the government's effort since the mid-1980s to eradicate the violence associated with the drug trade in the

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"bad guys" is littered with the bodies—their dignity at least—of innocent and law-abiding citizens who happen to have certain racial characteristics. Ultimately, the racial profiling of men of middle eastern descent will depend on how the war on terrorism is resolved and events to come in the future. *See* Korematsu v. United States, 323 U.S. 314 (1944), for an example of the Court's approval of geographical restrictions imposed upon Japanese Americans during wartime. Incidentally, *Korematsu* has now been viewed as one of the worst U.S. Supreme Court decisions by Justice Scalia himself. *See* Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (asserting that partial birth abortion ruling will one day find its rightful place in history along the side of *Korematsu* and *Dred Scott*).

114. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

115. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287-88 (1995).

116. *Id.*

117. *Id.* at 1289.

118. *See* Pamela G. Alexander, *Inequality in Sentencing: Is Race a Factor in The Criminal Justice System?*, 17 LAW & INEQ. 233, 235 (1999). "According to the statistics at that time, he greatest number of crack cocaine users were White, approximately 2.4 million or 64.4%, compared with 1 million Blacks or 26.6% and 400,000 Hispanics or 9.2%." *Id.*

streets,[119] some evidence suggests that the government specifically targets minority communities.[120]

Certainly, the inequity and racially discriminatory nature of this policy is patent and the criticism thereof has been equally strong, including from some who have done the prosecuting in these cases.[121] Much as in racial profiling, where a case was bound to make it to the Supreme Court because of the prevalence and disparate impact of selective enforcement on a distinct part of the community, the Supreme Court eventually granted certiorari in the case of *United States v. Armstrong*[122] to address this issue of disparate prosecution.

The defendants in *Armstrong* were indicted on charges of *inter alia* conspiring to possess with intent to distribute more than fifty grams of crack cocaine. Subsequent to their indictments, they filed a motion for discovery or dismissal on the grounds that they were prosecuted because they were Black.[123] They submitted statistics showing that every one of twenty-four federal crack cocaine cases defended by the local federal defenders office involved Black defendants, and affidavits asserting that White defendants were prosecuted in state courts, which issue much lighter sentences.[124] The discovery motion was granted by the district court, and the government refused to comply, resulting in dismissal of the cases. An en banc United States Court of Appeals for the Ninth Circuit affirmed, holding that the proof requirements for a selective-prosecution claim do not compel a defendant to demonstrate that the government has failed to prosecute others who are similarly situated.[125]

The Supreme Court reversed, holding that in order to be entitled to discovery on a selective prosecution claim, a defendant must, at a minimum, show that the government declined to prosecute similarly situated suspects of other races.[126] The Court based its decision on a narrow construction of Rule 16 of the Federal Rules of Criminal Procedure, which provides, in part, for the discovery of material evidence that is within the possession of the government.[127] The Court concluded that Rule 16(a)(1)(C) can be used as a "shield only," but not as a "sword"

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119. *See* Sklansky, *supra* note 114 at 1290.

120. *See* Alexander, *supra* note 117 at 235.

121. *Id.* at 233. The author had been a federal prosecutor in the Office of the United States Attorney for the Central District of California from 1987-1994.

122. 517 U.S. 456 (1996).

123. *Id.* at 459.

124. *Id.*

125. *Id.* at 459, 461.

126. *Id.* at 465.

127. *Id.* at 462-63.

against the government's case. In addition, the Court noted Rule 16(a)(2) allows the prosecution to withhold work-product evidence.[128]

Justice Stevens' dissent and Justice Breyer's concurrence suggested that requiring a defendant to show the government declined to prosecute similarly situated suspects of other races was improper, noting it was almost impossible to meet in light of the Court's restrictive application of Rule 16. Justice Stevens was of the view that the district court judge did not abuse her discretion in granting the discovery motion and the Court stepped into the judge's shoes to decide for her in this instance.[129] The district judge, Justice Stevens noted, having presided over these proceedings both as a state and federal judge, was in the perfect position to request an explanation from the government relative to its prosecution patterns. Even if in fact the evidence might have not ultimately supported a claim of selective prosecution, it was, in Stevens' view, perfectly permissible for the trial judge to allow the defense to proceed.[130]

One of Justice Breyer's points must be considered in light of the Court's equal protection analysis. The Court indeed recognized the evil and unconstitutionality of selective prosecution. However, it simply emphasized the nearly insurmountable standard that the "claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'"[131] That standard, as advanced by the Court, was not met under these circumstances. But how can that standard ever be met if the claimant is not allowed access to the government's records? As pointed out by Justice Breyer, claims founded upon the Constitution, like *Brady*[132] claims, trump court-made rules of procedure.[133] Given the equal protection implications here, an exception could certainly be made to the work-product limitation invoked by the majority, much as when there is reason to believe the government withholds exculpatory evidence, in violation of *Brady*, in a criminal prosecution. The Court held otherwise.

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128. *Id.*

129. *Id.* at 477 (Stevens, J., dissenting).

130. *See id.* This point is worth noting to the extent it shows that the Court seems to violate even the most basic rules, here the application of deference to a trial court's bird's eye view of certain facts, to disallow claims it disfavors.

131. *Id.* at 465.

132. *See* Brady v. Maryland, 373 U.S. 83 (1963) (?parenthetical).

133. *See Armstrong*, 517 U.S. at 475 (Breyer, J., concurring in part and concurring in the judgment).

c. Disparate Sentencing

While racial profiling and selective prosecution in the drug enforcement area have received considerable coverage recently, disparity in sentencing has been part of the discourse for quite some time. It has also received a great deal of coverage lately, as advances in DNA technology have cleared many individuals who had either been on death row or serving long sentences for life felonies.[134] Though disparity in sentencing resulting in non-capital punishment has been and continues to be a serious concern,[135] the more pressing matter has been with that which results in death sentences. A brief background is in order for a proper perspective on this issue as it relates to equal protection.

Capital punishment and its relationship with race has been a troubling feature of the criminal justice system since as far back as the beginning of this country.[136] During slavery, some crimes automatically carried a death sentence for Blacks while Whites were subjected to lesser punishment for the same crime.[137] Likewise, for decades after the Civil War, Blacks were consistently executed for crimes of significantly lesser gravity than those committed by Whites, and at a younger age than Whites.[138] The crime of rape, and often the mere accusation of it, carried an automatic death sentence for Blacks.[139] Part of the problem at the time was the fact that jurors were all Whites and males and the various states went through great lengths to prevent Blacks from sitting on juries. This was done by imposing poll taxes and exacting, arbitrary voter registration requirements.[140]

This state of affairs continued through Reconstruction and well into the 20th century. Ultimately, in 1972, the Supreme Court in *Furman v. Georgia* decided that the imposition of the death sentence through various state statutes at the time was unconstitutional because the arbitrariness in its imposition violated the Eighth Amendment's prohibition

134. *See generally* JIM DWYER, ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001).

135. *See, e.g.*, Harvard Law Review Association, *Developments in the Law—Race and the Criminal Process IX. Race and Noncapital Sentencing*, 101 HARV. L. REV. 1626 (1998).

136. *See* William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

137. *Id.* at 175.

138. *Id.*

139. *Id.*

140. *See infra* Part IV.B.

141. 408 U.S. 238, 239 (1972).

against "cruel and unusual punishment."[141] Following *Furman*, the states reformulated their statutes, presumably to remove the arbitrariness rejected in *Furman*.[142] Despite this reformulation by the states, however, racial disparities have remained. The existence of such disparities has been debated and documented extensively.

To the extent that *Furman* represented a turning point in death penalty jurisprudence, providing Blacks with a helping hand against arbitrariness, the case of *McClesky v. Kemp*[143] shut the door for equal protection claims regarding disparate imposition of the death sentence after *Furman*. In *McClesky*, the Court was presented with what appeared to be an empirically backed claim of racial disparity in the imposition of the death sentence and rejected it outright.

In 1978, McClesky was convicted for the killing of a White police officer during a store robbery. Pursuant to Georgia law and following a jury recommendation of death, the trial court sentenced him to death, which was affirmed by the Georgia Supreme Court. Upon exhausting the state post-conviction process, he filed a motion for habeas corpus relief in federal district court asserting that the state capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments. He presented a sophisticated statistical study done by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study) which examined more than 2000 cases in 1970s.[144]

The findings of the Baldus study, as set forth in the Court's opinion, indeed revealed certain disparities. Chief among them was disparity in the imposition of the sentence relative to the race of the victims. Among the findings, the study noted that the death penalty was imposed in 22% of the cases involving Black defendants and White victims; 8% of the cases involving White defendants and White victims; 1% of the cases involving Black defendants and Black victims; and 3% of the cases involving White defendants and Black victims. The study also found that prosecutors sought the death penalty in 70% of the cases involving Black defendants and White victims; 32% of the cases involving White defendants and White victims; 15% of the cases involving Black defendants

142. *See, e.g.*, Greg v. Georgia, 428 U.S. 153, 206-07 (1976) (finding Georgia's post-*Furman* death statute to have sufficiently removed arbitrariness); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976).

143. 481 U.S. 279 (1987).

144. *Id.* at 284-86.

and Black victims; and 19% of the cases involving White defendants and Black victims. In addition, after taking account of numerous variables that could have explained the disparities on nonracial grounds, disparities still remained as related to the greater likelihood of the imposition of the death penalty upon Black defendants who killed White victims.[145]

The district court rejected both McClesky's Eighth and Fourteenth Amendment claims. The district court rejected the findings of the Baldus study, concluding that it failed to establish that death was imposed because McClesky was Black or because of the race of the victim; the district court was also not convinced of the trustworthiness of the study. On appeal, an en banc United States Court of Appeals for the Eleventh Circuit affirmed. The Eleventh Circuit found, even as it assumed the validity of the study, that the statistics did not adequately substantiate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, nor did it show impermissible arbitrariness and capriciousness in the Eighth Amendment context.[146]

The Supreme Court granted certiorari and affirmed. The Court used the familiar standard in rejecting the equal protection claim based on disparate impact. That is, consistent with the lower appellate court's ruling, a defendant who brings a claim of an equal protection violation has the burden of establishing the presence of purposeful discrimination and that the purposeful discrimination had a discriminatory effect. In effect, McClesky would have had to establish specific intent to discriminate on the part of any of the relevant actors bearing upon his case (i.e., the State, the prosecutor, or the jurors). Even as the Court joined the lower appellate court in assuming the validity of the Baldus study, it found that specific intent to discriminate was not established.[147]

The Court's ruling in *McClesky* was striking not only in its strict requirement of discriminatory intent but also for its casual acceptance of an established disparity in the imposition of the death sentence. As noted by one commentator, the statement by the Court that "at worst the Baldus report indicates a discrepancy that appears to correlate with race" was similar to stating that "at most studies on lung cancer indicate a discrepancy that appears to correlate with smoking."[148] In effect, the Court accepted and endorsed the inevitability of racial bias in the imposition of

145. *Id.* at 286-87. In short, "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks." *Id.* at 287.

146. *Id.* at 287-90.

147. *Id.* at 292-93.

148. *See* LAZARUS, *supra* note 112 at 207.

the death penalty. Incidentally, there is a parallel between the Court's analysis in *McClesky* and that of the Court in *Plessy v. Ferguson*, which represents what may have been the worst application of equal protection principles in U.S. history. That is, as the Court in *McClesky* accepted racial disparity in the application of death sentences, its reasoning was similar to the Court in *Plessy* maintaining that laws could not alter the established customs of society, which at the time required Blacks and Whites to be segregated in public.

IV. THE INCONSISTENCY OF *BUSH v. GORE* WITH THE EQUAL PROTECTION PARADIGM

The decision of the Supreme Court in *Bush v. Gore* is wholly irreconcilable with its own equal protection paradigm established over the relevant part of the twentieth century. As demonstrated above, the equal protection standard developed in the non-voting rights cases has been one of strict application of the requirement that claimants—both civil plaintiffs and criminal defendants—establish intentional discrimination.[149] This analysis, however, is offered mainly to show the complete span of the equal protection doctrine. It also shows how those who were intended to be protected by the Fourteenth Amendment currently fare when seeking certain relief in the non-voting rights context. The Court, therefore, is not always eager to apply equal protection principles to remove various forms of arbitrariness and unequal treatment. Nonetheless, the more fitting analysis must focus on the line of voting rights cases.

As previously noted, the Court has treated the right to vote as a fundamental right.[150] Accordingly, the Court has generally applied strict scrutiny to governmental actions that restrict the franchise. In fact, it appears that the Florida Supreme Court itself predicated its decision to count all the votes (the undervotes) on the fundamental character of the right to vote, at least as provided for in the Florida Constitution. Likewise, the U.S. Supreme Court itself spent a great deal of ink on the right to vote as a fundamental right under the circumstances.[151] It is therefore tempting, at first glance, to justify the equal protection/strict scrutiny basis of the decision of *Bush v. Gore* on some overarching fundamental right to vote, as had been the case in the voting rights cases.[152] However,

149. It should be noted that Congress, in direct response to the Court's assault on the disparate impact doctrine, codified the doctrine in the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

150. *See supra* Part III.A.1.

151. *See supra* Part II.D.

152. At least one commentator has made that inviting leap, even though the valley that separates the circumstances of *Bush v. Gore* from the circumstances of the voting

the Florida recount procedures were of such a different nature and character from the challenged actions in the previous voting rights cases that the former simply did not warrant the heightened scrutiny applied to the latter.

A. Historical Background of the Voting Rights Cases

In order to demonstrate how far removed are the circumstances of *Bush v. Gore* from those of the previous voting rights cases, it is important to at least briefly present the history that led to the voting rights decisions of the past four decades. As noted in *Bush v. Gore*, the right to vote is not directly provided in the Constitution.[153] Yet most believe that the right to vote, in perhaps the most celebrated democracy in the world, has always been universal. At the very least, the general belief is that the right to vote by all members of American society had been attained through a gradual, if not inevitable, process. Nothing could be further from reality, as anti-democratic forces have always paralleled, or countered, with varying degrees of success, the efforts of disenfranchised members of society to participate in the electoral process.[154]

At bottom, it must first be recognized that the United States, at birth, was not a democratic nation at all.[155] It must likewise be recognized that James Madison and the other founding fathers could not have simply failed, by mere oversight, to consider the issue of suffrage when

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right cases could not be more vast. *See e.g.*, Michael W. McConnell, *Two-And-A-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001) ("in cases involving fundamental rights, such as the right to vote, the Court applies strict scrutiny to all disparities, without regard to whether the disparities reflect discrimination against any protected group"). As discussed in part IV.D, *infra*, even in voting rights cases, the Court does not always apply strict scrutiny.

153. While the right to vote is not explicitly provided for in the Constitution, it has implicitly been derived from: (1)The guarantee that every state have a republican form of government, *see* U.S. CONST. art. IV, § 4; (2) the description of the House of Representatives as chosen by the people of all the states, *see* U.S. CONST. art. I, § 2, cl.1; (3) the reference to the election of Senators, *see* U.S. CONST. art. I, § 3, cl.1; and (4) the reference to the election of the President, *see* U.S. CONST. art. II, § 1, cl.2.

154. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 2 (Basic Books 2000).

155. *Id.* For an alternative presentation of the history of the purpose of the American Revolution, *see* FRANCIS JENNINGS, THE CREATION OF AMERICA: THROUGH REVOLUTION TO EMPIRE (2000). The author explained that the American Revolution had very little to do with liberty and virtue. Rather, the colonists were concerned solely about creating their own empires independent of England. As such, most of the high sounding talk by the founding fathers was nothing but war propaganda to further their position in their battles with the British empire. *See id.* at 16-25. The author's account is hard to refute in light of the treatment of the natives and the slaves before, during, and well after the Revolution.

these men were so well-versed in political theory and philosophy. The cold fact is that the notion of "democracy" in the late eighteenth century was identified with disorder and chaos, and "government by the unfit."[156] The framers were simply not interested in giving everyone a voice in the new government because the interests of many inhabitants were clearly not compatible with those of the elite, whose goal was no different from that of England: conquest. It should therefore be no surprise that the Constitution made no direct mention of the right to suffrage, or that the Declaration of Independence was in no way referring to the slaves in its statement that all men are created equal.[157]

As a result of the intentional omission of the provision for the right to vote in the Constitution, it was naturally left to the individual states to enact and enforce their own suffrage laws. To the extent that the colonies (later the states) inherited their social and political concepts from the British, suffrage laws followed those of the British, which were highly restrictive along class lines.[158] One of the key restrictions was based on property ownership. In order to participate in elections, one had to own a certain amount of land of a minimum size or value. In some other states, a certain amount of personal property could suffice.[159]

For decades after the formation of the Union, these restrictions, along with others, carried the day. Blacks, who were considered less than whole persons at the time, were completely denied the right to vote.

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156. *Id.*

157. *See id.* at 3-7. As noted by the author in many parts of his book, the true surprise is the number of historians who have continually overemphasized the virtuous aspect of the Revolution while giving almost no coverage to the truer and less noble angle. *See also* JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION at 15 (2001) ("[W]e have yet to reach a genuinely historical perspective on the revolutionary generation."). Of course, no one can deny the brilliance of the Constitution as a blueprint for democracy. Nor can it be denied that the democratic principles currently embodied in the various institutions of this country have flowed directly from the Constitution. In fact, very few countries can boast of the individual freedoms and opportunities currently enjoyed by Americans of all walks of life. However, the current state of the country has been shaped not only by the revolutionary generation and its constitutional legacy, but by the courageous efforts of countless individuals who came well after the Revolution. Therefore, presenting the founding fathers and the Revolution solely along noble terms and as being somehow divinely responsible for the current state of the Republic is not only disingenuous, but does tremendous disservice to those who have since fought the ever-present antidemocratic elements of this country and who have continually endeavored to, indeed, make this place a "more perfect union." This view takes nothing away from the contribution of the founding fathers, nor does it diminish the strength of the Constitution as an outstanding blueprint for democracy, but rather it recognizes that democracy is a journey, not a destination.

158. *See* KEYSSAR, *supra* note 153 at 5.

159. *Id.*

While the push for suffrage reforms had gained strength from both individual politicians and changing social views, Blacks were simply never part of the equation.[160] In fact, as the states started changing and loosening their property requirement and other requirements, leading up to the middle of the nineteenth century, the conditions of Blacks failed to change in any respect, including suffrage.[161]

The Civil War, at least for a short while, brought an end to this state of affairs, leading to significant changes in Black suffrage (and in the conditions of Blacks in general). Once slavery was abolished, the claims of some four million newly freed citizens took on a new posture. These claims were made even more compelling by the fact that significant numbers of Blacks had fought and died for the Union.[162] As earlier noted, this Reconstruction period brought about various legislative acts to ensure the protection of these new citizens.[163]

Unfortunately, because of poor political leadership, the gains made during Reconstruction were short-lived. To the utter disappointment of Blacks, toward the end of the nineteenth century the states went back to their old ways and began circumventing the Reconstruction-era legislation, as well as the Fourteenth and Fifteenth Amendments.[164] Many states erected obstacles to prevent Black participation in elections. Among the invidious tactics used by the states were revived property ownership requirements and poll taxes, lengthy residency requirements, secret ballot laws, elaborate registration systems, White primaries,[165] criminal exclusion laws based on minor and bogus offenses, and literacy tests.[166]

The literacy tests were perhaps the longest-running way of keep-

160. *Id.* at 54-55.

161. This was made clear by the Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that Blacks, freed or not, were not citizens of the country). That decision has been seen as one of the worst decisions of the Court to the extent that it overturned the Compromise of 1850, taking the country straight into civil war. *See* Edward Lazarus, *The Supreme Court's Monday Oral Argument in Gore v. Bush, and the Meaning of Judicial Activism*, Findlaw (Dec. 12, 2000), at http://writ.news.findlaw.com/lazarus/20001212.html (last visited Dec. 14, 2000); *see also Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting) (referring to *Dred Scott* in contemptuous manner).

162. *See* KEYSSAR, *supra* note 153 at 88.

163. *See supra* Part III.

164. *See* KEYSSAR, *supra* note 153 at 111.

165. *See id.* at 247. "By 1920, racially exclusive primary elections in the Democratic party had become the norm not only in all southern state elections but in nearly every county in the South: since electoral outcomes invariably were determined in primaries, this was an extremely tidy and efficient vehicle for [B]lack disfranchisement." *Id.*

166. *Id.* at 111-12.

ing Blacks from voting. As if the tests were not sufficiently challenging for Blacks, whose educational level at the time was considerably low (certainly lower than the present time), they were also fraudulently administered. No one knew what standards were used by graders in determining who passed these tests.[167] Blacks were simply told that they failed the test and therefore could not vote in a given election. In addition, and even more effective, some states used a grandfather clause, which allowed Whites to avoid taking the very test Blacks were required to take.[168] At the end of the day, should all these various state legislative and administrative obstructions fail, physical intimidation and outright violence were used to prevent Blacks from voting.[169] It is fair to say that, in a very literal sense, voting—the actual act of it—was bad for the health of Blacks at that time.

Finally, in response to demonstrations by Blacks and violence perpetrated upon them in voter registration drives throughout the South, Congress passed the Voting Rights Act of 1965.[170] The Voting Rights Act, as amended in 1970, 1975, and 1982, eliminated these state legislative and administrative roadblocks against Blacks. Though the Voting Rights Act was later extended to all the states, it was initially directed at those southern states which, for years, fiercely resisted all prior federal legislation aimed at increasing Black voter participation in the body politic and the occasional judicial intervention to effect the same in those days. As best summed up by President Lyndon B. Johnson:

> Every device of which human ingenuity is capable has been used to deny [the right to vote]. The Negro citizen may go to register only to be told that the day is wrong, or the hour is late, or the official in charge is absent. And if he persists and if he manages to present himself to the registrar, he may be disqualified because he did not spell out his middle name or because he abbreviated a word on the application. And if he manages to fill out an application, he is given a test. The registrar is the sole judge of whether he passes the test. He may be asked to recite the entire Constitution, or explain the most complex provisions of state laws. And even a college degree cannot be used to prove that he can read or write. For the fact is

167. *Id.* at 112.
168. *See* Shaw, 509 U.S. at 639-40.
169. *See* KEYSSAR, *supra* note 153 at 93.
170. Pub.L. 89-110, 79 Stat. 437; *see also* LIEBERMAN, *supra* note 43 at 566.

> that the only way to pass these barriers is to show a white skin.[171]

This is the background against which any concept of voting rights can legitimately be considered. Matters affecting enfranchisement or disenfranchisement of the vote cannot be honestly resolved without incorporating the historical underpinnings of the Voting Rights Act of 1965. Thus, any application of some fundamental right to vote, while it cannot be said to be strictly limited to matters of race,[172] is nonetheless directly associated with race.

B. The History of Racial Discrimination is Embedded in the Voting Rights Case Law

The case law surrounding these historical events has recognized the insidious role race had played in the voting arena. The application of strict scrutiny has indeed been in that very context. *Gomillion v. Lightfoot*[173] and numerous other cases are instructive on this point.

Gomillion involved an act by the Alabama Legislature which redefined the boundaries of the City of Tuskegee in a most unusual manner. The Act turned the city from a square shape into a twenty-eight-sided figure. Black residents of the city brought suit and challenged the constitutionality of the act on the grounds that it removed 395 out of 400 Black voters from the city while keeping intact the number of White voters. The district court dismissed for failure to state a claim. On appeal, the Supreme Court reversed. The Court found that the plaintiffs did indeed state a proper claim inasmuch as, if true, it would show that the inevitable effect of the Act was to deprive Blacks of the right to vote in municipal elections.[174] As such, the Court held that regardless of the form of the statute, it had the impermissible effect of "despoil[ing]" Black citizens of their voting rights.[175] While the Court did not use the "strict scrutiny" terminology in the opinion, it made very clear that actions that restricted the right to vote along racial lines would indeed be viewed with a highly skeptical eye by the Court.

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171. *See* LIEBERMAN, *supra* note 43 at 566. In light of these circumstances, it is always curious when someone criticizes the civil rights legislation brought about by these phenomena as having been too broad.

172. *See generally* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (University of Chicago Press 1962). The author explains the process and propriety of extending legal principles to new facts and situations.

173. 364 U.S. 339 (1960).

174. *Id.* at 341-42.

175. *Id.* at 347.

For additional support, one need not go any further than the voting rights cases cited by the Supreme Court in *Bush v. Gore*, namely, *Harper v. Virginia Board of Elections*[176] and *Reynolds v. Sims*.[177] *Harper* involved a Virginia statute which required a poll tax of $1.50 as a precondition for voting. As if the poll tax were not a sufficient burden at the time, the statute had a complicated set of time hoops through which the voter had to jump in order to qualify to vote.[178] One section of the statute required payment to be "personally" made three years preceding the year in which the individual applies for registration. Yet another section required payment to be made six months prior to the subject election, and to the extent that the dates of election of state officials varied, that deadline also varied, requiring the voter to keep watch almost like a nervous stock market investor during a recession.[179]

Harper represented just the kind of obstructionist policy Blacks had to deal with and which was intended to be eradicated by the Voting Rights Act of 1965. The poll tax, though arguably neutral on its face, amounted to discrimination on the basis of wealth. The Court found a violation of equal protection as it stated, "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Needless to say, Blacks bore the brunt of this discrimination at the time, both as it related to their ability to comply with a confusing statutory scheme and, doubtless, as to the fact that Whites who did not comply with the statute were still allowed to vote.

Reynolds involved an equal protection challenge brought with regard to Alabama's refusal to reapportion itself for purposes of electing state legislators. The gist of the claim was that Alabama's continued apportionment based on the 1900 census, as opposed to the most recent 1960 census, which reflected a considerable increase in the population, violated the Alabama constitution and the federal Equal Protection Clause.[180] Reaffirming the principles enunciated in the previous case of *Baker v. Carr*,[181] 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,"[182] thereby establishing what has become known as the "one person, one vote" principle.

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176. 383 U.S. 663 (1966).
177. 377 U.S. 533 (1964).
178. *Harper*, 383 U.S. at 664-65 n.1.
179. *Id.*
180. *Reynolds*, 377 U.S. at 540-41.
181. 369 U.S. 186 (1962).
182. *Reynolds*, 377 U.S. at 555.

Reynolds represented yet again how the states attempted to deprive Blacks of the right to vote. As contrasted with *Harper*, which obstructed actual voting at the voting site by individual voters, the state action in *Reynolds* simply and effectively aimed at giving less weight to the vote of Blacks as a group.

Of course, not every one of these cases was cast in racial terms by the Court. *Reynolds* itself was certainly not. Nonetheless, the Court was most aware that voting schemes by the states were designed with the primary purpose to discriminate, allowing as many Whites and as few Blacks to vote as possible.[183] As proudly uttered by future Virginia senator Carter Glass at the 1901-02 Virginia convention, "That, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate."[184] The historical record, both recent and distant, was replete with similar statements and similar examples of invidious intent. It was, therefore, not hard for the Court to realize that the same state, Alabama, that created a twenty-eight-sided city to keep Blacks from the polls in *Gomillion* might have been motivated by the same purpose, just a few years later, in its 1960s apportionment in *Reynolds*. Therefore, strict scrutiny had to be applied.

The best recognition of the weight of this racial factor upon the rationale for the Court's approach to these cases is laid out in *Shaw*. As accurately noted by Justice O'Connor:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . . For much of our Nation's history, that right sadly has been denied to many because of race. The Fifteenth Amendment, ratified in 1870 after a bloody Civil War, promised unequivocally that "[t]he right of citizens of the United States to vote" no longer would be "denied or abridged . . . by any State on account of race, color, or previous condition of servitude."
>
> But "[a] number of states . . . refused to take no for an answer and continued to circumvent the Fifteenth Amendment's prohibition through the use of both subtle and blunt instruments, perpetuating ugly patterns of per-

183. *See* KEYSSAR, *supra* note 153 at 112.
184. *Id.*

> vasive racial discrimination." Ostensibly race-neutral devices such as literacy tests with "grandfather" clauses and "good character" provisos were devised to deprive black voters of the franchise. Another of the weapons in the States' arsenal was the racial gerrymander—"the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." In the 1870s, for example, opponents of Reconstruction in Mississippi "concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." Some 90 years later, Alabama redefined the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" in a manner that was alleged to exclude black voters, and only black voters, from the city limits.[185]

Borrowing further from Justice O'Connor's words, "[i]t is against this background" that the invocation of the strict scrutiny standard has been and must be viewed. Clearly, the common thread that runs through the vast majority of these cases is that the states were specifically acting to circumvent the rights of Black citizens (or White citizens as, ironically, found in *Shaw*). As such, there could be no question about the invidious nature of the intent of the states as it related to these practices. Likewise, there could be no question that the formulation and implementation of these policies did in fact negatively implicate the fundamental rights of these citizens. This is not to say that voting rights violations, to be a violation of equal protection, have to mirror those eradicated by these cases and the Voting Rights Act of 1965; not at all.[186] However, as explained below, the circumstances of *Bush v. Gore* lack the requisite discrimination, both direct and circumstantial, that would have required the use of the strict scrutiny standard.

C. *The Absence of Discrimination in* Bush v. Gore

The Court in *Bush v. Gore* totally failed to demonstrate an intentional or purposeful act of discrimination, be it through the Florida statutory scheme or the acts of election volunteers performing manual recounts. The Court did not even try. Nevertheless, any legitimate equal protection claim must be based on one of two specific sources of discrimination: Florida's election law, as written, or the application of that

185. *Shaw*, 509 U.S. at 639-40.
186. *See* LEVI, *supra* note 171.

law by the relevant state actors.

As to the law itself, the facial neutrality of the law would seem to pass conventional equal protection muster. As earlier noted in Part II, the Florida election code provided a detailed procedure,[187] albeit imperfect as evidenced by the events of the 2000 election, for the process of electing its officials and for determining the winner in disputed circumstances. Nowhere in the election code, however, could be found any evidence that the State intentionally set out to disenfranchise any particular voters. It was certainly not intended to confuse anyone, as had been the case with the administrative puzzles of yesteryear. Nor could it be said to have disfavored a particular candidate party. After all, Florida's statutory scheme had been put in place well before the 2000 election. The most controversial provision, as decided by both the state high court and the Supreme Court, was clearly the one providing for the determination of a legal vote through a "clear indication of the intent of the voter."[188] Yet, that statement could not be more facially neutral as it is impossible to infer any intent by the State to discriminate against any particular groups. In that vein, no equal protection violation can be demonstrated on the part of the State.

The closer call exists in the application of this "clear indication" standard. Yet upon closer examination no discrimination could be demonstrated. In order to crystallize this point, it is important to briefly consider the circumstances of a recount procedure in Florida leading up to the 2000 election. First of all, the counties in which a manual recount would likely come are those in which punch card voting machines were used (as opposed to optical scanning machines). Basically, a card with the names of the candidates on one or both sides is placed on a tray, and the person votes by punching a hole next to his favored candidate's name. Ideally, the part of the card that is dislodged, now universally known as the "chad," falls off the card. The card is then removed and processed through a machine that registers a vote by beaming light through the holes. The problem arises in the many instances in which, for various reasons, the chad is not punched through properly, resulting in the light being blocked. Once the light is blocked, the machine cannot register a vote. What is left in many of these instances is a card with a chad for the particular candidate hanging by one or more corners.

This, of course, was where the core of the controversy begun, for once the manual recount was under way, a sufficient number of cards

187. *See supra* Part II.

188. *Gore*, 772 So.2d at 1256; *Bush*, 531 U.S. at 105-06.

were found with these "hanging chads" and "dimple chads," formally referred to as the undervotes. As stated earlier, the election code charged each county canvassing board with determining the intent of the voter.[189] The way the counties did so was by simply having a counting team of two individuals (one Republican one Democrat) look at the card (holding the card up in the air) and ascertain whether a dimple or hanging chad reflected a vote. In the event there was no consensus, the card would then be presented by the counting team to the canvassing board members for them to determine, to the extent possible, the intent of the voter.

The U.S. Supreme Court found the lack of uniformity in this standard, since the Florida Supreme Court had ordered a recount of all undervotes in all the Florida counties, to violate equal protection principles.[190] In other words, as Broward County might find a particular hanging chad to constitute a legal vote while Palm Beach County might find that same chad not to constitute a legal vote, the Equal Protection Clause was violated, according to the Court. But, even assuming variations in the standard across counties, within a county, and even within a group of counting teams, where is the intent—inferred or otherwise—to misapply the standard by state actors here? And more importantly, where was the actual discrimination and who were the victims of the discrimination?

As discussed earlier and consistently applied by the U.S. Supreme Court, the gravamen of an equal protection claim in the non-voting rights cases is the establishment of intentional discrimination by state actors.[191] And in the voting right cases, intent may be inferred both from the face of the statute and the impact thereof. Neither of the candidates, nor any voter, ever even alleged that anyone manifested a conscious or purposeful practice to affect the vote through determining the intent of the voter. After all, though standards might have varied among counties, at no time did anyone use one standard for Gore voters and a separate standard for Bush voters.[192] That is a simple yet crucial point to the extent that counting team members and canvassing board members were basically doing the best they could to determine what a vote was. As such, everything they did was presumably done in good faith, whether it was in Palm Beach County, which may have used a more rigid standard in determining a vote, or in Broward county, which may have used a less rigid one. It would have been a different story, however, had a counting team determined a legal vote for Gore when two sides of the

189. *See supra* Part II.

190. *See supra* note 36.

191. *See supra* Part III.B-C.

192. *See* Richard A. Epstein, *"In Such a Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001).

chad were hanging, yet that same team determined otherwise for Bush from a similar card with two hanging chads. That would have clearly been discriminatory, independent of the racial element discussed earlier. But nowhere in the state was this even asserted. Therein lies the fundamental flaw in the Court's equal protection finding.

D. *The Court Does Not Always Apply Strict Scrutiny to All Voting Rights Cases*

Obviously, the Court felt it had to decide *Bush v. Gore* through the application of strict scrutiny. That rationale is, however, not delineated in the opinion. Regardless of the Court's true reason, the Court's decision is made even less justifiable by the fact that the Court has in the past decided not to apply strict scrutiny in cases that clearly warranted the heightened standard in the voting rights context. The Court has tolerated significant deviations from the revered one-person-one-vote principle, as demonstrated in *Mahan v. Howell*[193] and *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*[194]

Salyer involved a California statute that limited voting for the board of directors of a water storage district to landowners only. The purpose of the water district was to store and distribute water to farms in the district. The votes, however, were apportioned on the basis of the assessed valuation of land, but all landowners were allowed to vote regardless of residency. The enforcement of the statute resulted in individual corporations being able to cast tens of thousands of votes, based on their sizable land ownership, while lessees of farmlands, though residents, could not vote at all. A suit was thus brought by resident landowners—those owning small amounts of land—and registered voters, challenging the constitutionality of the statute on equal protection grounds.

The district court upheld the statute and the Supreme Court affirmed. The Court held that by virtue of the limited purpose of the district and how it disproportionately affected landowners as a group, the statute was a permissible exception to the principles enunciated in *Reynolds*.[195] In other words, the large landowners had a larger stake in the decision of the board by virtue of their sizable ownership. Importantly, the Court noted that the "Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation

193. 410 U.S. 315 (1973).
194. 410 U.S. 719 (1973).
195. *Id.* at 730-31.

of our Constitution."[196] This, however, was hardly minor in light of the fact that, as noted by the dissent, lessees of farmland were denied voting, non-owner residents who lived in the district were also denied the franchise, and the weighing of the vote according to land value clearly diminished the voices the small landowners. The ruling was even more indefensible in light of the fact that in *Kramer*,[197] the Court had invalidated a statute limiting the vote in school districts to owners or lessees of taxable real property or parents of enrolled children. One could certainly argue that those who are owners or lessees of taxable real property or who are parents of enrolled children in a school district have a greater stake in the decisions of a school board than those who are not. However, that argument was explicitly rejected in *Kramer*, yet embraced in *Salyer*.

A similar departure from strict scrutiny occurred in *Mahan*. *Mahan* involved a challenge to Virginia's apportionment statute for the election of state delegates and senators. As found by the district court, the maximum percentage variation from the ideal district was at 16.4%. The district court found the variation impermissible and invalidated the statute. The court then substituted its own plan, allowing for a 10% variation. The district court, in essence, applied strict scrutiny in its assessment of the deviation, as it found that Virginia failed to demonstrate a government necessity for adhering to political subdivisional lines in its deviation from the ideal district.

On appeal, the Supreme Court reversed the district court's decision. As framed by the Court, the issue was "whether or not the Equal Protection Clause of the Fourteenth Amendment likewise permits only 'the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality' in the context of state legislative reapportionment."[198] The court answered negatively and held that more flexibility is afforded states in legislative redistricting.[199] Accordingly, the Court explicitly and effectively applied the rational basis standard in validating the Virginia statute.[200] Notably, the Court seemed to have ignored some key facts to arrive at its decision. As noted by Justice Brennan, in dissent, the claimants had maintained that the deviation was in fact 23.6%. The Court, however, simply refused to take that into con-

196. *Id.* at 725 (citations and quotations omitted).

197. *See infra* Part III.A.1.

198. *Mahan*, 410 U.S. at 320-21 (citation omitted).

199. *See id.* at 323.

200. *Id.* at 328 ("We hold that the legislature's plan for apportionment of the House of Delegates may reasonably be said to advance the *rational state policy* of respecting the boundaries of political subdivisions.") *Id.* (emphasis added).

sideration in its refusal to apply strict scrutiny in what, arguably, was a quintessential violation of the one-man-one-vote principle.

As demonstrated by *Salyer* and *Mahan*, the Court has found some voting rights cases that did not warrant heightened scrutiny. Compared to these two cases, *Bush v. Gore* does not remotely rise to a level requiring strict scrutiny treatment. To the extent that the Court stated in *Salyer* that "the Equal Protection Clause does not make every minor difference in the application of laws to different group a violation of our Constitution,"[201] it is incomprehensible that it would find the circumstances of *Bush v. Gore* to have been violative of the Constitution. As also noted by the Court in *Mahan*, "the Equal Protection Clause requires that a State make *an honest and good faith effort* to construct districts, in both houses of its legislature, as nearly equal population as is practicable."[202] Was there not a good-faith effort to apply the Florida statutory scheme and its "intent of the voter" standard equally to Democrats and Republicans, rich and poor, Blacks, Whites, Hispanics and others? It would seem that, especially compared to the practices sanctioned by the Court in *Salyer* and *Mahan*, everyone was doing the best they could under the circumstances.[203]

V. CONCLUSION

The Court's equal protection ruling in *Bush v. Gore* is fundamentally flawed for the reasons set forth. The result cannot be justified by any of the Court's prior equal protection decisions. As explained above, the non-voting rights cases generally require intentional discrimination, as opposed to mere disparate impact, in order to get relief. While it is true that in the voting rights area the Court has not required a showing of intentional discrimination, it has inferred intentional discrimination in its application of strict scrutiny. This is born out by the historical underpinnings of the voting rights cases, reflecting the influence of an overarching racial element in various state statutory schemes. No such discrimination, racial or otherwise, direct or circumstantial, could be inferred from the circumstances of *Bush v. Gore*.

Nevertheless, despite the Court's departure from precedent, there is a potentially redeeming facet to the case. This departure can be seen, ironically, as a positive step. Of course, it would be naïve to expect the

201. *Salyer*, 410 U.S. at 725 (citations and quotations omitted).

202. *Mahan*, 410 U.S. at 339-40 (emphasis added) (citations and quotations omitted).

203. Incidentally, to the extent that the Court was so bothered by these recount procedures, one must wonder how the Court would have ruled on a claim regarding the confusing ballot in Palm Beach county.

Court to start applying the *Bush v. Gore* brand of equal protection when it has manifested such an aversion to it in the past. Besides, it can fairly be said that the Court attempted to foreclose that possibility by making a statement that limits its analysis to the facts of the case. But the Court cannot simply depart from precedent and simultaneously erase that departure as if it never happened. Otherwise, it would have no credibility.

Whether or not the Court likes it, key portions of *Bush v. Gore* will be invoked to renew some of the equal protection claims raised unsuccessfully in the past. A major theme that permeates the Court's opinion is that "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[204] Regardless of whether one agrees with how the Court reached its decision in *Bush v. Gore*, no one can argue with the principle which seeks to ensure that individuals be treated fairly and equally, whether in voting or in other aspects of life. That principle is not merely a great ideal, but one all Americans have come to expect in their relationship with their government.

Notably, there have always been inequities throughout the country with respect to voting equipment and its operation in low-income areas as opposed to wealthier ones, well after passage of the Voting Rights Act. In virtually every election, numbers of Blacks go their precincts to vote and face various problems, reminiscent perhaps of the old days. To the extent that the Court specifically recognizes that a state has an obligation to ensure "the equal dignity owed to each voter,"[205] should a state not be required to provide similar equipment to its poor citizens as well as to the affluent ones? Should the state not be required to prevent the various administrative mishaps that routinely occur in the poorer precincts? Prior to *Bush v. Gore*, a claim alleging an equal protection violation on the basis of unequal equipment and its operation would have been almost laughable. After *Bush v. Gore*, however, it is no laughing matter for a group to ask that they be provided equal treatment in every substantial aspect of voting, for "equal protection applies as well to the manner of [the] exercise"[206] of the franchise as to its initial allocation.[207]

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204. Bush v. Gore, 531 U.S. 98, 109 (2000).

205. *See id.* at 104.

206. *Id.*

207. Nothing illustrates this better than the circumstances of Florida's voter cleansing program. *See Florida's Flawed "Voter-Cleansing" Program, at* http://www.salon.com/politics/feature/2000/12/04/voter_file/index.html (last visited April 8, 2002). Pursuant to Florida's voter fraud law, which requires Florida's 67 counties to purge voter registries of duplicate registrations, deceased voters and felons, the

There is, however, less hope for the application of *Bush v. Gore*'s holding outside the voting rights context. Even so, the equal protection language used in *Bush v. Gore* is, at the very least, inspiring. Individuals who are continuously and wrongfully victimized through racial profiling, selective prosecution and arbitrary sentencing, for instance, should invoke some of the language used in *Bush v. Gore* to buttress their claims. The voting rights cases are, arguably, different from the run-of-the-mill equal protection cases. But why should the standard applied in *Bush v. Gore* not be applicable in instances in which a police department specifically, and sometimes unabashedly, incorporates race in its determination of when to stop motorists? As earlier discussed, if it can be shown that a law enforcement group routinely stops Black motorists in an arbitrary fashion, having nothing to do with whether they have committed any crime, should the burden not be on law enforcement to justify its practices, as opposed to the victims of the practices to show "intentional" discrimination? Should a law that penalizes minorities

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Secretary of State approved in 1998 a contract with a company, Choice Point, to provide the state with a list containing the names to be excluded. It turned out, however, the list provided by the company and used by many counties was fraught with errors itself, resulting in disenfranchising many voters, the majority of which were Black.

In Florida, felons cannot vote until they successfully petition to reinstate their right to vote. However, the list included both felons who could not vote and those who could. Amazingly, the list also mistakenly included many people who were not felons. One of the people included was a county judge, who had never been arrested. Another person included was Madison County's election supervisor, who likewise had never been arrested, prompting her to decide, along with a few other maverick county supervisors not to use the obviously erroneous voter list. According to statistics, some 7,000 to 8,000 voters were incorrectly targeted and perhaps forbidden from voting in the last election, based on the list. Recall that the election was decided by less than a thousand votes. It was also found that Blacks made up a disproportionate number of the names on the list. One of the election supervisors confirmed, for instance, that Blacks made up 54% of the list for Hillsborough County, even though they constitute only 11.6 % of that county's voting population. The company denies all responsibility in this sordid affair, but instead boasts of expanding its business in election throughout the country in the future. *See id.*; *see also* Anthony York, *Is Katherine Harris' Office Resisting Florida Election Reforms?, at* http://www.salon.com/politics/features/2001/08/04/florida (last visited April 8, 2002) (involving charges by county election supervisors that her top lieutenant is sandbagging efforts to clean up the state's voter roll mess).

It seems that these circumstances could not be more violative of equal protection principles. As mentioned above, the Court stated that "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied," *see* Bush v. Gore, 531 U.S. at 104, in arriving at its decision. Yet, the circumstances of Florida's voter cleansing program clearly lacks that assurance. What about the "equal dignity owed to each voter?" Indeed, these circumstances are eerily similar to those sought to be eradicated by the Voting Rights Act. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). So, if the Court wants to find a violation of fundamental rights relating to voting, no mental gymnastics are necessary, as these circumstances plainly show.

more for the use of drugs than it penalizes Whites for the use of that same drug not be held to the same exacting standard enunciated in *Bush v. Gore* as it relates to equal protection? How about a law that allows for the imposition of the death penalty disproportionately with respect to the race of the defendant or the victim? In other words, does the Supreme Court care only about arbitrariness in the *Bush v. Gore* voting scenario?

The fact is these non-voting contexts share a fundamental element with the traditional voting rights cases. The historical background of racial discrimination is just as palpable in racial profiling, selective prosecution, and disproportionate sentencing as it is in the voting rights context. As explained earlier, the racial element in racial profiling, disparate sentencing and capital punishment had been a disturbing feature of the criminal justice system dating back to slavery.[208] The same reversal of fortune that Blacks experienced in voting rights was also felt in the context of punishment and in their relationship with law enforcement authorities. It is this shared background that should compel the Court to extend strict scrutiny to these areas where arbitrariness is, at the very least, more patent and more injurious than in the scenario of *Bush v. Gore*.

In conclusion, equal protection has been turned on its head in *Bush v. Gore*, but perhaps for some good, albeit unintended, reason. Indeed, the integrity and credibility of the Court depend on the appropriate reconciliation of *Bush v. Gore* equal protection jurisprudence with post-*Bush v. Gore* equal protection claims.

208. *See supra* Part III.B.2.