

UNIFORM VOTING MACHINES PROTECT THE PRINCIPLE OF “ONE-PERSON, ONE-VOTE”

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INTRODUCTION

High-profile controversies surrounding the 2000 presidential election, the 2003 California gubernatorial recall election, and to a lesser extent, the 2004 presidential election exposed an ugly truth of American politics: a non-negligible percentage of votes are left uncounted in *every* election due to voting machine error, disproportionately affecting poor and minority voters.¹ Yet despite nearly a half-century of judicial intervention within the “political thicket” to enforce the one-person, one-vote principle, courts have thus far cast a blind eye to the problem of differential error rates among voting machines.

This Note discusses the political and constitutional ramifications of permitting States to employ different voting machines within intra-state electoral

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1. See U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, CHAPTER 9 FINDINGS AND RECOMMENDATIONS, at ch. 1 (2001) (finding that the “disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans” where “[s]tatewide, based on county-level statistical estimates, African American voters were nearly 10 times more likely than white voters to have their ballots rejected in the November 2000 election”), available at <http://www.usccr.gov/pubs/vote2000/report/ch9.htm>. See also Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 625 (2002) (stating that, in the 2000 presidential election, voters in the black majority district of Gadsen County were sixty-eight times more likely to cast an invalid vote than voters in the white majority district of Leon County, which employed more reliable voting technology); David Stout, *Study Finds Ballot Problems Are More Likely for Poor*, N.Y. TIMES, July 9, 2001, at A9 (reporting on a congressional study that “found that the votes of poor people and members of minorities were more than three times as likely to go uncounted in the 2000 presidential election than the votes of more affluent people”). However, it is not universally accepted that voting error correlates with affluence and race. See, e.g., Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection* 1 ELECT L.J. 61, 69 (2002) (concluding that while minorities were more likely to have their votes not counted, this was because of chance and not discriminatory intent). This Note expresses no opinion on the issue whether municipalities exercise discriminatory intent when choosing which voting machinery to employ.

districts. Part I describes the five types of voting machines currently available to States, and describes a number of elections in which the result may have turned on the use of different machines among intra-state districts. Part II surveys the remedial steps that Congress and various States have undertaken since *Bush v. Gore*² to remedy the problem of differential voting machine error rates. Part III traces the doctrinal evolution of the Supreme Court's voting rights jurisprudence and examines the lower courts' struggle to cope with "third level" voting infringements. Part IV considers and ultimately rejects the political arguments in favor of allowing States to address the problem extrajudicially. Part V examines the political malfunctions that flow from allowing local municipalities to choose which election machinery to use. Finally, Part VI explains why the Equal Protection Clause should be interpreted to require each State to use uniform voting technology within its borders.

I. STATE USAGE OF NON-UNIFORM VOTING TECHNOLOGY

There are five types of voting machines currently used in the United States: paper ballots, punch card machines, lever machines, optical scanners, and direct recording electronic machines ("DREs").³ Each type of machine produces a different error rate.⁴ In presidential races, paper ballots have a 1.8% error rate, punch cards have a 2.5% error rate, optical scanners have a 1.5% error rate, lever machines have a 1.5% error rate, and DREs have a 2.3% error rate.⁵ In gubernatorial and senatorial races, paper ballots have a 3.3% error rate, punch cards have a 4.7% error rate, optical scanners have a 3.5% error rate, lever machines have a 7.6% error rate, and DREs have a 5.9% error rate.⁶ Moreover, within the DRE category, error rates vary by manufacturer.⁷

At the time of the 2000 presidential election, several States already employed uniform or near-uniform voting methods within their borders.⁸ For example, during the 2000 general election, nearly every electoral district within Illinois employed punch card machines.⁹ Nearly every electoral district within New York and Connecticut used lever machines.¹⁰ Nearly every district within

2. 531 U.S. 98 (2000).

3. CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING, WHAT IS, WHAT COULD BE 18 (July 2001), available at http://www.vote.caltech.edu/Reports/july01/July01_VTP_%20Voting_Report_Entire.pdf [hereinafter VOTING, WHAT IS, WHAT COULD BE] (on file with Arizona Law Review).

4. *Id.* at 21.

5. *Id.*

6. *Id.*

7. See CALTECH/MIT VOTING TECH. PROJECT, RESIDUAL VOTES ATTRIBUTABLE TO TECHNOLOGY 4 (Mar. 2001), available at http://www.hss.caltech.edu/%7Evoting/Cal_Tech_MIT_Report_Version2.pdf [hereinafter RESIDUAL VOTES ATTRIBUTABLE TO TECHNOLOGY] (on file with Arizona Law Review). Some DREs use push buttons; some use touchscreen technology; some use paginated ballots; and some use ballots that take up the full screen. *Id.* at 3.

8. *Id.* at 4.

9. *Id.*

10. *Id.*

Alaska, Hawaii, Rhode Island, and Oklahoma used optical scan systems.¹¹ And most districts within Delaware and Kentucky used DREs.¹² By the 2004 election, Arizona, Georgia, and Nevada also used uniform voting equipment, and Illinois now uses a combination of punch card machines and optical scanners.¹³

By contrast, in many other States, the choice of which voting method to use is delegated to a county or precinct-level election official.¹⁴ In all of the States not mentioned above, a patchwork of voting machines is used. For example, a Michigan resident living in an electoral district using punch card machines, which have a relatively high error rate, would be more likely to cast an uncounted ballot than a fellow Michigander who happened to reside in a DRE district.

The glaring consequences of differential error rates were apparent in Florida during the 2000 presidential election, when less than 1,000 votes determined the forty-third President.¹⁵ Yet while Florida drew national attention for its voting blunders, Georgia, Idaho, Illinois, South Carolina, and Wyoming had higher rates of uncounted ballots during the same election.¹⁶ In total, approximately 1.5 million votes went uncounted during the 2000 presidential election.¹⁷ The most common culprit was the punch card machine, which had an error rate of 2.5% during that race,¹⁸ and which over thirty million voters used.¹⁹

In the 2004 presidential election, although President Bush's margin of victory was larger than his 2000 margin, problems still occurred. For example, Ohio—a pivotal "swing-state"—continued to employ a variety of voting machines, including punch cards, levers, optical scanners, and DREs.²⁰ In total, Ohioans cast nearly 100,000 ballots that did not include a valid vote for a presidential candidate.²¹ Additional problems also emerged as a result of the lack of uniformity amongst intra-state voting machines and ballots, as some precincts imported additional voting equipment from other precincts.²² This rotation of equipment caused the loss of votes because some reading machines were already formatted

11. *Id.*

12. *Id.*

13. The interactive map, available at *Electionline.org*, provides a state-by-state review of the voting technology used in each county throughout the United States. See *Electionline.org*, Interactive Map, at <http://www.electionline.org/interactiveMap.jsp?page=Interactive+Map> (last modified Mar. 31, 2004) [hereinafter Interactive Map].

14. See RESIDUAL VOTES ATTRIBUTABLE TO TECHNOLOGY, *supra* note 7, at 4.

15. See Fed. Election Comm'n, 2000 Official Presidential General Election Results (2001) (recording the official difference between Bush and Gore in Florida as 537 votes), <http://www.fec.gov/pubrec/2000presgeresults.htm> (on file with Arizona Law Review).

16. VOTING, WHAT IS, WHAT COULD BE, *supra* note 3, at 17.

17. *Id.* at 21.

18. *Id.*

19. *Id.*

20. See Interactive Map, *supra* note 13.

21. Michael Collins, *In Ohio, Almost 1 in 50 Votes for President Don't Count*, SCRIPPS HOWARD NEWS SERVICE, Dec. 22, 2004.

22. *Id.*

for the initial precinct and could not adapt to ballot variations between precincts.²³ As a result, some ballots listed George Bush on top and others listed John Kerry.²⁴

Simple arithmetic demonstrates the ease with which varying error rates can actually be outcome-determinative in close electoral races. Consider, for example, an election for state office—in which error rates are higher than in presidential elections—in a State with two million registered voters. If half of the voters (1 million) reside in electoral districts that employ optical scanners (with an error rate of 3.5%), and the other half reside in electoral districts that employ punch card machines (with an error rate of 4.7%), approximately 12,000 more votes will be counted in the district using optical scanners. In close elections, 12,000 votes may exceed the margin of victory. And if poor and minority voters are disproportionately clustered within the punch card districts—which is often the case due to the expense of more-reliable voting machinery—then the election may unfairly skew against their preferences.²⁵

The notion that 12,000 votes might decide an election is not merely the subject of academic conjecture. The closeness of the 2000 presidential election was not an anomaly, as other recent elections have turned on even slimmer margins. For example, in a 2003 race for a seat on Pennsylvania's Superior Court, the margin of victory was a mere twenty-eight votes out of the more than two million votes cast.²⁶ And Pennsylvania used a patchwork of all five voting methods in that election,²⁷ as it did in the 2004 presidential election.²⁸ One can easily surmise that had the Pennsylvanians who cast punch card ballots instead used a less error-prone voting method, a different judge might now be sitting on the Pennsylvania Superior Court.

Even more recently, Washington voters cast 2.9 million votes in the 2004 gubernatorial race, which was ultimately decided by only 129 votes.²⁹ Washington uses a combination of DREs, optical scanners, and punch card machines.³⁰ It is quite possible that differential voting machine error rates affected the outcome of this election.

Likewise, during Arizona's 2002 gubernatorial race, Janet Napolitano beat Matt Salmon by a mere 12,000 votes, in a race in which 1,226,111 votes were

23. *Id.*

24. *Id.*

25. See *Black v. McGuffage*, 209 F. Supp. 2d 889, 897–99 (N.D. Ill. 2002) (discussing disparate effect on minorities). See also Appellant's Opening Brief at *4, *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 913 (No. 03-56498) (“Compounding these geographical inequities is clear and troubling evidence that punchcard systems discriminate against minority voters in two distinct ways.”).

26. Marc Schogol, *Lawyer Takes Seat on Superior Court; Susan Gantman of the Main Line Faced a Battle After the Fall Election. Democrats Have Filed a Federal Suit*, PHILA. INQUIRER, Jan. 6, 2004, at 1.

27. *Id.*

28. See *Interactive Map*, *supra* note 13.

29. David Postman, *Election Dispute Attracts 5 Who Lost Race*, SEATTLE TIMES, Feb. 14, 2005, at A1.

30. See *Interactive Map*, *supra* note 13.

counted,³¹ and in which Arizona used a combination of punch card machines and optical scanners.³² Notably, approximately 960,000 Arizona votes were tabulated by optical scanners, while 266,000 votes were counted by punch card machines.³³ The respective error rates of these machines in gubernatorial and state senate elections are 3.5% and 4.7%.³⁴ As a result, an Arizonan residing in a punch card district had a 1.2% greater chance of having his or her vote go uncounted. Following this election, Arizona decided to implement, prospectively, uniform optical scanners,³⁵ which were used during the 2004 presidential election.³⁶

II. REMEDIAL EFFORTS FOLLOWING *BUSH V. GORE*

Following *Bush v. Gore* and its messy aftermath, the federal government and several States took steps to address the problems caused by the use of different voting machines. However, as described below, these remedial steps still leave much to be desired in producing sufficient uniformity to protect the equal protection rights of voters.

A. Federal Remedial Measures

In 2002, Congress passed the Help America Vote Act (“HAVA”) to improve the election process.³⁷ To accomplish its aims, HAVA allocated \$3.86 billion to the States for implementation costs.³⁸ This Note will only briefly address HAVA’s impact on voting machines.

Title I of HAVA specifically provided \$325 million to States to replace all punch card machines prior to the 2004 presidential election.³⁹ A State could opt out of the 2004 deadline by applying for a waiver by January 2004 and by making a showing of “good cause.”⁴⁰ HAVA also authorized another \$325 million for,

31. David Pittman, *Arizona Clean Election Law Series*, TUCSON CITIZEN, July 30, 2003, at 1. See also ARIZ. SEC’Y OF STATE, STATE OF ARIZONA OFFICIAL ELECTION CANVASS (2002), available at <http://www.azsos.gov/election/2002/General/Canvass2002GE.pdf> (on file with Arizona Law Review).

32. VOTING, WHAT IS, WHAT COULD BE, *supra* note 3, at 21.

33. *Id.*

34. *Id.* These figures were tabulated by researchers for the California Institute of Technology’s and Massachusetts Institute of Technology’s Voting Technology Project (“Cal Tech and MIT Project”).

35. See ELECTIONLINE.ORG, ELECTION REFORM, WHAT’S CHANGED AND WHAT HASN’T AND WHY 32, at http://electionline.org/site/docs/pdf/ERIP_AR2004.pdf (Jan. 2004).

36. See Interactive Map, *supra* note 13.

37. H.R. REP. NO. 107-329, pt. 1, at 31 (2001) (“The purpose of H.R. 3295, the Help America Vote Act of 2001, can be stated very simply—it is to improve our country’s election system. The circumstances surrounding the election that took place in November 2000 brought an increased focus on the process of election administration, and highlighted the need for improvements.”). Brian Kim, *Recent Development: Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 582–83 (2003).

38. See ELECTIONLINE.ORG, *supra* note 35, at 3.

39. Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, § 104(a)(2), 116 Stat. 1666, 1672 (codified at 42 U.S.C. § 15304).

40. *Id.* § 102(a)(3)(B), 116 Stat. at 1671 (codified at 42 U.S.C. § 15302).

among other things, improving voting systems and technology.⁴¹ Thus, HAVA provided roughly \$650 million for voting machinery and equipment improvements. Unfortunately, Congress has not yet provided States with any guidance as to which voting machines are recommended by HAVA for use in federal elections.⁴²

Title III of HAVA represents the biggest step toward establishing uniform voting machine requirements, although it only applies to federal elections. Title III provides that *every* machine used to vote in a federal election must allow the voter to inspect the ballot before he or she casts it,⁴³ allow the voter an opportunity to change the ballot before casting it,⁴⁴ notify the voter if he or she has voted for more than one candidate for a particular office,⁴⁵ inform the voter of the effect of voting for more than one candidate,⁴⁶ and provide the voter who has voted for two candidates with the opportunity to change his or her vote.⁴⁷ Additionally, Title III provides that all voting systems must abide by the error rates established by the Federal Election Commission.⁴⁸ Finally, Title III provides that any new "voting system shall produce a permanent paper record with a manual audit capacity for such system."⁴⁹

Despite HAVA's lofty goals, it has not produced major changes in the area of uniform voting machinery. Following the 2000 election, only four States adopted uniform voting equipment, with the majority of States preferring to use a patchwork of differing machines.⁵⁰ Thus, while HAVA represented a step toward improving voting technology, it failed to establish a right to have one's vote counted equally. Additionally, States can conduct statewide elections without abiding by HAVA's guidelines.

B. State Remedial Measures

Since the 2000 general election, almost every State has taken steps to improve its electoral technology. Forty-two States implemented new machines in at least one district for the 2004 election.⁵¹ Maryland, Florida,⁵² California, and

41. *Id.* § 101(b)(1)(F), 116 Stat. at 1669 (codified at 42 U.S.C. § 15301).

42. *Good Intentions, Bad Technology—The New Voting Machine*, ECONOMIST, Jan. 24, 2004, at 1.

43. HAVA § 301(a)(1)(A)(i), 116 Stat. at 1704 (codified at 42 U.S.C. 15481).

44. *Id.* § 301(a)(1)(A)(ii).

45. *Id.* § 301(a)(1)(A)(iii)(I).

46. *Id.* § 301(a)(1)(A)(iii)(II).

47. *Id.* § 301(a)(1)(A)(iii)(III).

48. *Id.* § 301(a)(1)(A)(5).

49. *Id.* § 301(a)(2)(B)(i).

50. See ELECTIONLINE.ORG, *supra* note 35, at 32, 34, 40, 44.

51. See *id.* at 4.

52. See Richard K. Scher, *Grasping at Straws, Rushing to Judgment: Election Reforms in Florida, 2001*, 13 U. FLA. J. L. & PUB. POL'Y 81, 98 (2001) (criticizing current reforms in Florida). As Professor Scher notes: "This is important, because the legislature did not mandate the use of uniform voting technology across the State. The failure to adopt state-mandated technology means that the gulf between poor and rich counties, in terms of the type, and thus accuracy, of the election machinery they could buy, would remain." *Id.*

Georgia forbade the use of punch card machines.⁵³ Nevada and California required the use of electronic voting machines with voter-verified paper audit trails by 2004 and 2006, respectively.⁵⁴

Additionally, a number of States that did not employ uniform voting equipment during the 2000 general election have since expressed their desire to implement uniform voting equipment in the future, and some have even done so. Georgia implemented uniform DREs for federal congressional races held in 2002, reducing the voting error rate from 3.6% to 0.86%.⁵⁵ However, despite Georgia's adoption of uniform DREs for federal elections, in statewide elections it appears that each city may choose among different types of machines, and many cities have in fact opted for older machines such as levers.⁵⁶

Following the 2000 election, Maryland proclaimed that it would adopt uniform DREs, but the City of Baltimore subsequently protested on the ground that it had just purchased new, non-DRE machines and did not want to spend more money on even newer machines.⁵⁷ Baltimore plans to seek legislation exempting it from Maryland's uniformity decree until after 2006—past the HAVA deadline.⁵⁸

In Michigan, the Secretary of State announced that all counties must install optical scanners by 2006, and must discard lever machines, punch cards, and paper ballots in order to receive HAVA money.⁵⁹ Mississippi has decided to implement DRE technology⁶⁰ in the future to replace its current patchwork of optical scanners, punch cards, lever machines, and DREs.⁶¹ Nevada instituted uniform touchscreen DREs that produce a written record for all voters.⁶² South Carolina also decided to implement uniform DREs.⁶³ Utah⁶⁴ and Virginia⁶⁵

53. See ELECTIONLINE.ORG, *supra* note 35, at 4.

54. *Id.*

55. Tova Andrea Wang, *It's Time to Replace Faulty Punch Card Machines*, ST. LOUIS POST-DISPATCH, Oct. 21, 2003 (“The election was, according to Georgians, a great success. In the 2000 election in Georgia, the number of ballots recorded as having no vote was 3.6 percent. For the 2002 U.S. Senate race, the figure was a historically low 0.86 percent.”).

56. Nancy Badertscher, *Election 2003: Voting Machines; Touchscreens Far From Universal*, ATLANTA J.-CONST., Nov. 5, 2003, at B1.

57. Michael Dresser, *City Seeks Exemption from State's Mandate on Voting Machines; Officials Want to Keep 'State of the Art' System*, BALT. SUN, Dec. 13, 2003, at 2B.

58. *Id.*

59. Editorial, *A Vote For Change; Election Reform Must Go Beyond Election Machines, Target Low Turnout*, GRAND RAPIDS PRESS, Sept. 13, 2003.

60. See MISS. SEC'Y OF STATE, STATE OF MISSISSIPPI PLAN FOR COMPLIANCE WITH THE HELP AMERICA VOTE ACT OF 2002 § 301(a) (2003), available at <http://www.sos.state.ms.us/elections/HAVA/StatePlanFinal.pdf>.

61. Julie Goodman & Andy Kanengiser, *Tyners Prepare Timely Welcome for Future Voters*, CLARION LEDGER (Miss.), July 6, 2003.

62. See ELECTIONLINE.ORG, *supra* note 35, at 26.

63. Amy Geir Edgar, *Plan Calls for Better Voting System, Statewide Electronic Voting, Training among Measures*, STATE, June 26, 2003, at B1.

64. ELECTIONLINE.ORG, *supra* note 35, at 46.

65. *Id.*

indicated that they also intend to adopt uniform voting machinery, but have not yet done so, and Arizona⁶⁶ has adopted uniform DREs.

While this list of proactive States is impressive, many other States have decided not to take advantage of HAVA, raising questions about the legislation's efficacy. In Missouri, for example, thirty-seven districts currently use punch card machines.⁶⁷ Of those thirty-seven, only four decided to participate in HAVA's "punch-card" buyout program.⁶⁸ Additionally, twenty-four of the thirty States that applied for HAVA's "buyout" program requested an extension until 2006.⁶⁹ Thus, those States largely used the same machinery in 2004 that they used in 2000.

This post-HAVA survey indicates that, absent a constitutional mandate, many States will continue to drag their feet rather than purchase new voting machines. For reasons such as cost and voter preference, many States have continued to resist uniform voting technology.⁷⁰

III. JUDICIAL RESPONSES TO VOTING MACHINE ERROR

Since mustering the courage to enter the "political thicket" a half-century ago, the Supreme Court has acted decisively in a wide array of contexts to stamp out infringements on the right to vote.⁷¹ Yet the Court has also recognized that *some* infringements fly below its constitutional radar.⁷² Indeed, in the case of state voting regulations, the Court has pointed to the Constitution's "Time, Place, and Manner" Clause⁷³ as a basis for eschewing strict scrutiny of all alleged infringements. Under this rationale, the Court permits States to adopt minimally-infringing regulations that serve other purposes.⁷⁴ The question raised by this Note is whether the decision to allow intrastate electoral districts to employ different voting machines should fall within this category of permissible, minimally-infringing regulations.

A. Supreme Court Regulation

In 1886, in *Yick Wo v. Hopkins*, the Supreme Court characterized "the political franchise of voting" as a "fundamental political right, because [voting is] preservative of all rights."⁷⁵ Despite this ringing language, however, over the next

66. *Id.* at 32.

67. *See* Interactive Map, *supra* note 13.

68. Editorial, *Devise a Reliable Voting System*, KAN. CITY STAR, Sept. 17, 2003.

69. ELECTIONLINE.ORG, *supra* note 35, at 23.

70. *See, e.g.*, Jerry Graff, *Punch Card OK for Now*, INDIANAPOLIS STAR, July 16, 2003.

71. *See* *Baker v. Carr*, 369 U.S. 186 (1962).

72. *See* *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (internal citation omitted)).

73. U.S. CONST. art. I, § 4, cl. 1.

74. *See* *Burdick*, 504 U.S. at 433, 434.

75. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

seventy-five years the Court's actions usually failed to match its rhetoric.⁷⁶ Prior to the Warren Court Era, the Supreme Court frequently upheld regulations that, by today's standards, unquestionably infringed the right to vote.⁷⁷ Oftentimes the Court cited the "political question doctrine" as a basis for abstaining from electoral controversies.⁷⁸

The Court *did* offer a few glimmers of things to come during the pre-Warren Court era. In 1915, Justice Holmes stated that it is "unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."⁷⁹ In *Moore v. Ogilvie*,⁸⁰ the Supreme Court held that the "idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."⁸¹ The Court also stated that "[o]bviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections."⁸² And in *Gray v. Sanders*,⁸³ the Court noted that "[t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."⁸⁴

However, it was not until the Warren Court confronted the problem of malapportionment in the 1960s that the promise of *Yick Wo* began to be realized. In *Baker v. Carr*,⁸⁵ the Supreme Court utilized the Fourteenth Amendment's Equal Protection Clause to hold that the plaintiffs stated a cognizable claim in challenging the state legislature's failure to redistrict congressional boundaries, which caused gross inequities between the value of rural and urban votes.⁸⁶ *Baker* opened the door for judicial intervention on equal protection grounds in an area that the Supreme Court traditionally termed "nonjusticiable" because of the "political question" doctrine.⁸⁷ Next, in *Reynolds v. Sims*,⁸⁸ the Court established the "one person, one vote" standard, holding that the Equal Protection Clause "requires that the seats in both houses of a bicameral state legislature must be

76. For example, the Supreme Court in *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), held that poll taxes do not violate the Fourteenth Amendment's Equal Protection Clause.

77. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (holding that Court should not enter the "political thicket" and only governments should deal with apportionment issues); *Giles v. Harrison*, 189 U.S. 475, 488 (1903) (upholding different voting tests based on ethnicity because issue constituted a "political question" and was thus nonjusticiable).

78. See, e.g., *Colegrove*, 328 U.S. at 556; *Giles*, 189 U.S. at 488.

79. *United States v. Mosley*, 238 U.S. 383, 386 (1915).

80. 394 U.S. 814, 819 (1969).

81. *Id.*

82. *United States v. Classic*, 313 U.S. 299, 315 (1941).

83. 372 U.S. 368 (1963).

84. *Id.* at 380.

85. 369 U.S. 186 (1962).

86. *Id.* at 232.

87. See *Colegrove v. Green*, 328 U.S. 549 (1946) (holding that apportionment disputes are not justiciable).

88. 377 U.S. 533 (1964).

apportioned on a population basis.”⁸⁹ The *Reynolds* Court further stated that “[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.”⁹⁰

Baker and its progeny make clear that the Equal Protection Clause, on an abstract level, forbids any rule, regulation, or statute that affords more weight to the vote of one state resident over another. Indeed, Alexander Keyssar, in *The Right to Vote*, deduced that the “right” to vote includes the right to go to the polls, the right to be free of coercion while voting, and the right to have one’s ballot counted equally in his or her State.⁹¹

The most recent Supreme Court decision shedding light on the issue of discrepancy between voting machines is *Bush v. Gore*,⁹² which decided the winner of the 2000 presidential Election. Because George W. Bush led Al Gore by only 1,784 votes in Florida, the Florida Division of Elections announced that the State would conduct an automatic recount pursuant to state law.⁹³ The Democratic Party specified certain counties in which it wanted recounts.⁹⁴ On November 13th, Katherine Harris, the Florida Secretary of State, stated that she would not accept any votes counted after November 14th, in accordance with Florida state law.⁹⁵ Al Gore and others promptly took action, and on November 21st, the Florida Supreme Court ordered Harris to extend the statutory deadline for a manual recount.⁹⁶

Bush appealed to the U.S. Supreme Court on the ground that the Florida Supreme Court’s decision was based on a misinterpretation of Florida law.⁹⁷ The U.S. Supreme Court granted certiorari⁹⁸ and asked the Florida Supreme Court to clarify the basis for its decision.⁹⁹ On December 8th, the Florida Supreme Court held that state law *required* a manual recount, and ordered election workers to “discern the intent of the voter,” if at all possible.¹⁰⁰ Again, Bush quickly appealed this decision to the U.S. Supreme Court. The Bush camp challenged this recount

89. *Id.* at 568.

90. *Id.* at 563.

91. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 287 (2000) (“By 1965, the Constitution was interpreted to mean that individuals not only had the right to register, cast their ballots, and have their ballots counted, but also that they had the right to have their votes count as much as the votes of other citizens.”).

92. *Bush v. Gore*, 531 U.S. 98 (2000).

93. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1225 (Fla. 2000), *vacated and remanded*, 531 U.S. 70 (2000).

94. *Id.*

95. *Id.* at 1226.

96. *Id.* at 1240.

97. Cass Sunstein, *Bush v. Gore: Order Without Law*, 68 U. CHI. L. REV. 757, 761 (2001).

98. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004 (2000) (mem.) (granting certiorari).

99. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000).

100. *Gore v. Harris*, 772 So. 2d 1243, 1256 (Fla. 2000) (“This Court has repeatedly held, in accordance with the statutory law of this State, that so long as the voter’s intent may be discerned from the ballot, the vote constitutes a ‘legal vote’ that should be counted.”).

procedure under a smorgasbord of legal theories, one of which—a novel variant on equal protection analysis¹⁰¹—was eventually accepted by the Court.

The *Bush* Court phrased the issue before it as “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.”¹⁰² Relying on *Reynolds*’s “one person, one vote” principle, the Court explained that “one source of [the right to vote’s] fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter,” and held that Florida’s recount procedure was unconstitutional because it would necessarily assign unequal weight to individual votes.¹⁰³

One could interpret this strong language in *Bush v. Gore* as holding that States cannot value people’s votes differently, and thus cannot allow residents of one intrastate electoral district to use voting machines with a higher error rate than residents of different electoral districts.¹⁰⁴ However, the Court’s holding was not this broad; instead, the Court limited its holding to the facts of the case,¹⁰⁵ specifically noting that its decision did not control the constitutionality of using different voting machines within a State: “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.”¹⁰⁶

The *Bush* majority missed the point. The Court held that Florida’s recount procedure was arbitrary and unreasonable, and therefore violated the Equal

101. Ordinarily, an equal protection claim that does not involve a “suspect class” fails under rational basis review. But in this case, the Supreme Court appeared to have used an “invigorated” level of scrutiny to conclude that the Florida Supreme Court’s decision was “arbitrary” or “unreasonable.” In addition, equal protection claims typically require a discernible class of people, but no such class was present in *Bush*. For a more detailed discussion on the ambiguous level of scrutiny that the *Bush* Court applied, see Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a Vehicle for Reform?* 9 GEO. J. ON POVERTY L. & POL’Y 357, 372–77 (2002) (“[The] language certainly suggests that a *Bush v. Gore* equal protection claim concerns fundamental rights and thus a strict scrutiny approach. But there are some reasons to think otherwise.” (internal citations omitted)).

102. *Bush v. Gore*, 531 U.S. 98, 105 (2000).

103. *Id.*

104. Professor Steven J. Mulroy agrees that *Bush*’s language suggests that it would apply to intrastate voting discrepancies. See Mulroy, *supra* note 101, 363 (“This language, along with the result in *Bush*, indicates that the Court has recognized a general right for voters to be free from election procedures that cause their votes to be given less mathematical weight than voters elsewhere in the State.”).

105. *Bush*, 531 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

106. *Id.* Legal experts have questioned the *Bush* Court’s decision to invoke the Equal Protection Clause yet limit its holding to the facts of the case. See, e.g., Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore*, 35 AKRON L. REV. 185, 194 (2002).

Protection Clause because there were no strict guidelines for divining voter intent, *but* also held that state precincts were free to use different ballots (even if error-ridden) or different voting machines with variable error rates. As Professor Schwartz perfectly noted: “[T]he Supreme Court’s vision of ‘equal protection’ safeguards only those citizens who vote with better technology and who have already survived the technology obstacle course.”¹⁰⁷ In other words, “one person, one vote” surely cannot mean ninety-five percent of a vote for one person and one hundred percent of a vote for another.¹⁰⁸ That is voting inequity; and, that is exactly what the Supreme Court has previously interpreted the Equal Protection Clause as preventing.

Even Justice Souter’s dissent echoed the majority’s conclusion that the Equal Protection Clause does not forbid the use of different voting machines among intrastate electoral districts:

It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters’ intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.¹⁰⁹

Yet notwithstanding these seemingly unequivocal words, Justice Souter’s statement may have been nothing more than an attempt to make his dissent seem like a reasonable, compromise proposition. Indeed, Justice Souter’s argument—that Florida should have the opportunity to create uniform standards to proceed with the recount because differing standards are arbitrary and violate equal protection—assumes that the right to vote subsumes the right to have one’s vote counted equally. Thus, when confronted with the issue again, in a case in which the issue was determinative, it is conceivable that Justice Souter would reach a different conclusion.

Ultimately, the *Bush* legacy remains uncertain. Read literally, the *Bush* opinion has no precedential value,¹¹⁰ and only illustrates how the Supreme Court addressed a narrow issue at a time of extraordinary political upheaval. On the other hand, despite the *Bush* Court’s attempt to limit the decision to its facts, lower courts have relied on *Bush* more broadly.¹¹¹ Additionally, due to the belief of many that the *Bush* decision was fueled less by objective legal analysis and more by

107. Schwartz, *supra* note 1, at 628.

108. Professor Mulroy also believes that *Bush v. Gore* prevents States from making it more likely that some residents’ votes will be counted than others. See Mulroy, *supra* note 101, at 363 (“This language, along with the result in *Bush*, indicates that the Court has recognized a general right for voters to be free from election procedures that cause their votes to be given less mathematical weight than voters elsewhere in the state.”).

109. *Bush*, 531 U.S. at 134.

110. *Id.* at 109.

111. See *Ellis v. Chao*, 336 F.3d 114, 119 (2d Cir. 2003) (questioning whether *Bush v. Gore* would apply to inter-union elections); *Walker v. Exeter Region Coop. Sch. Dist.*, 284 F.3d 42, 46 (1st Cir. 2002) (citing *Bush v. Gore* for the proposition that “[t]here is no issue here of a state-wide vote tabulated differently in constituent districts”).

unprincipled political considerations,¹¹² future judges or courts may choose to ignore *Bush*'s limiting instruction and require States to adopt uniform voting methods via the Equal Protection Clause. In fact, one court has already taken that step.¹¹³

B. Lower Courts

Several district courts¹¹⁴ and the Ninth Circuit have addressed the constitutional ramifications of error rate discrepancies among voting machines.¹¹⁵

The first challenge began in 2003, when the Southwest Voter Registration Education Project (“Southwest”) sought an injunction to postpone the 2003 California gubernatorial recall election because some, but not all, California electoral districts used punch card machines. Prior to Southwest’s lawsuit, the California Secretary of State had decertified punch card machines (in response to a lawsuit filed by another group of plaintiffs collectively termed the “*Common Cause* Plaintiffs”), but the decertification decree was not to take effect until after the date of the recall election.¹¹⁶

112. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 4 (2001); Kim Lane Scheppelle, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1430–31 (2001).

113. *Black v. McGuffage*, 209 F. Supp. 2d 889, 897–99 (N.D. Ill. 2002).

114. Although several additional district courts have examined this issue, this Note will only offer an in-depth analysis of *Black v. McGuffage* and of the Ninth Circuit’s en banc decision in *Southwest Voters Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc). Additional cases addressing the issue include *Weber v. Shelley*, 347 F.3d 1101, 1106–07 (9th Cir. 2003) (use of touchscreen DREs without a paper trail does not violate equal protection because, under *Burdick*, the “use of touchscreen voting systems is not subject to strict scrutiny simply because this particular balloting system may make the possibility of some kinds of fraud more difficult to detect” and “it is the job of democratically-elected representatives to weight the pros and cons of various balloting systems”), *Wexler v. Lepore*, 342 F. Supp. 2d 1097, 1108 (S.D. Fla. 2004) (holding that Florida’s new recount procedures, where one of the two types of permissible voting machines in Florida did not produce a paper trail, did not constitute an equal protection violation under *Bush v. Gore*), and *Stewart v. Blackwell*, 356 F. Supp. 2d 791 808–09 (N.D. Ohio 2004) (determining that rational basis is the appropriate level of judicial scrutiny to be applied when analyzing local municipalities’ decisions to employ particular voting machinery, and holding that cost considerations are sufficient to justify the use of different machines within a State).

115. This Note does not examine the Voting Rights Act ramifications of using different voting machines within a State.

116. *Southwest Voter Registration Educ. Project v. Shelley (Shelley I)*, 344 F.3d 882, 890 (9th Cir. 2003), *vacated*, 344 F.3d 914 (9th Cir. 2003) (en banc). In reliance on *Bush v. Gore*, the *Common Cause* plaintiffs asserted various constitutional challenges to the use of punch card machines. *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1107–08 (C.D. Cal. 2001). After the district court denied the state’s motion for summary judgment, and hinted that it would recognize an equal protection challenge to such ballots, the parties reached a consent agreement under which the State agreed to replace punch card machines by the 2004 presidential election. *Common Cause v. Jones*, 213 F. Supp. 2d 1110, 1111 (C.D. Cal. 2002) (“On February 19, 2002, this Court issued an order finding that, based on

The district court denied Southwest's request for injunction on several grounds, holding, *inter alia*, that the consent agreement from the *Common Cause* lawsuit was binding, so California was not obligated to get rid of punch card machines until 2004.¹¹⁷ Southwest appealed, and happened to draw a very liberal three-judge panel of the notoriously-liberal Ninth Circuit, which reversed the district court's decision.¹¹⁸

The three-judge panel applied an equal protection analysis, decided that the plaintiffs had "a sufficient likelihood of success on the merits regardless of the standard of review," and issued a preliminary injunction to delay the gubernatorial election until the State removed punch card machines from all jurisdictions.¹¹⁹ The panel explained that "deprivation of a right to have one's vote counted . . . traditionally has been examined under strict scrutiny" and concluded that the plaintiffs would even succeed under the more lenient rational basis standard.¹²⁰ The panel also asserted that the State did not possess a rational basis for using voting machines that the Secretary of State had already "decertified" in the recall election.¹²¹

The Ninth Circuit voted to rehear the case en banc,¹²² and reversed the three-judge panel's decision by a decisive eleven to zero vote.¹²³ The en banc court devoted only a short paragraph to the three-judge panel's equal protection analysis, conclusorily asserting that "the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim."¹²⁴ However, the en banc court did qualify this holding by stating "[t]hat a panel of this court unanimously concluded the claim had merit provides evidence that the argument is one over which reasonable jurists may differ."¹²⁵ Most likely, the en banc court did not address the initial panel's equal protection argument in more depth because it wanted to reach a unanimous decision, and could not have cobbled together eleven votes had it addressed the equal protection issue more specifically. Thus, while the initial three-judge panel decision lacks precedential value, at the very least it illustrates judicial discomfort with a voting system that necessarily values some votes more than others.

the uncontroverted evidence in the record, as well as the admission by Defendant at oral argument, it was feasible for the nine California counties currently using the pre-scored punch card voting systems to convert to 'other certified voting equipment' by March 2004. Therefore, as that was the only issue to be decided at trial, pursuant to the October 12, 2001 Stipulation and Order, the parties were directed to lodge a form of consent decree within seven days after the issuance of the order.").

117. *Shelley I*, 344 F.3d at 891.

118. Southwest Voter Registration Educ. Project v. Shelley (*Shelley III*), 344 F.3d 914, 917 (9th Cir. 2003) (en banc).

119. *Shelley I*, 344 F.3d at 900.

120. *Id.* at 899.

121. *Id.* at 900.

122. Southwest Voter Registration Educ. Project v. Shelley (*Shelley II*), 344 F.3d 913, 914 (9th Cir. 2003) (granting rehearing en banc).

123. *Shelley III*, 344 F.3d at 916, 920.

124. *Id.* at 918.

125. *Id.*

By contrast, an Illinois district court explicitly recognized, in *Black v. McGuffage*, that the Equal Protection Clause forbids the use of different voting machines amongst intrastate electoral districts.¹²⁶ The *McGuffage* court relied heavily on *Bush* in reaching this conclusion,¹²⁷ notwithstanding *Bush*'s explicitly-limited holding,¹²⁸ and reasoned that “[Illinois], through the selection and allowance of voting systems with greatly varying accuracy rates ‘value[s] one person’s vote over that of another.’”¹²⁹ The *McGuffage* court also held that “[w]hen the allegedly arbitrary system also results in a greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.”¹³⁰ Even though the *McGuffage* court did not say whether courts should apply strict scrutiny or rational basis,¹³¹ it did hold that a system in which local municipalities are allowed to choose among voting machines with variable error rates means that “[s]imilarly situated persons are treated differently in an arbitrary manner.”¹³²

Although the *McGuffage* court reached the correct conclusion, the court may have erred in its equal protection analysis by failing to address or discuss the countervailing state interests in favor of allowing local control over voting machinery. At a minimum, States can assert a financial interest in not requiring their poorest municipalities to purchase the most expensive (and most accurate) voting machines. The question then arises whether this financial interest justifies allowing some state residents’ votes to be accorded less weight than other residents’ votes. Although, as explained *infra*, courts should find that this financial argument lacks merit, the *McGuffage* court failed even to address it.

126. *Black v. McGuffage*, 209 F. Supp. 2d 889, 897–99 (N.D. Ill. 2002). Following the court’s denial of summary judgment to the defendants, the two parties settled. AM. CIVIL LIBERTIES UNION OF ILL., WORKING TO DEFEND BASIC AMERICAN VALUES, ANNUAL REPORT 2003–2004, at 10 (2004), available at <http://www.aclu-il.org/aboutus/annualreport2003.pdf>.

127. 209 F. Supp. 2d at 898 (“This case presents a situation much more analogous to that in *Bush* than that of other voting rights cases. Here, as in *Bush*, the State is not classifying citizens insofar as it is choosing one system of voting for some and a different system of voting for others, nor is it choosing to dilute the votes of some and not dilute the votes of others Rather, it leaves the choice of voting system up to local authorities. But that choice necessarily means that some authorities will choose a system with less accuracy than others.”).

128. *Id.* (“Although the Court limited its decision to the then present circumstances, the rationale behind the decision provides much guidance to the situation in this case” (internal citations omitted)).

129. *Id.*

130. *Id.*

131. *Id.* at 897 (“Since Plaintiffs’ complaints allege an arbitrary action by Defendants it is not necessary to decide this issue at this time.”).

132. *Id.* at 899. The logical conclusion is that States that employ different voting machinery violate the Equal Protection Clause even under the more deferential rational basis test.

IV. STATE INTERESTS FAVORING NON-UNIFORM VOTING TECHNOLOGY

Expanding on Justice Souter's *Bush* dissent, legal scholars have articulated a host of reasons why courts should not extend *Bush v. Gore* to require uniform voting technology within States.¹³³ Ultimately, these reasons tend to cluster into four categories. First, such a requirement might interfere with local control over elections, as mandated by the Constitution's Time, Place, and Manner Regulation. Second, States are laboratories and places of innovation, and if courts were to impose such a rule, the ability of States to experiment with different machinery might weaken. Third, the cost of requiring each district within a State to purchase new, uniform machines might prove prohibitive. And fourth, a rule requiring uniform voting machinery would seemingly place no stopping point on judicial intervention into the political arena, conceivably requiring judges to decide such minutiae as whether all ballots need to have identical font size.

A. Time, Place, and Manner Regulation

One justification for allowing States to determine which voting machine or machines to use within their borders is the Constitution's "Time, Place, and Manner" Clause,¹³⁴ which provides that States "shall" determine the manner in which to hold elections for federal office. In *Cook v. Gralike*, the Supreme Court described this provision as encompassing matters such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."¹³⁵ However, the Time, Place, and Manner Clause does not afford States *unfettered* discretion because it also provides that Congress may pass laws that preempt state-enacted electoral procedures.¹³⁶

Courts should find that the choice of a particular type of voting machinery is not a "regulation" as described in *Cook* because this decision potentially affects election outcomes (as discussed *supra* in Part II). After all, when a legislature decides to purchase more error-prone machinery in poorer areas, this disproportionately weakens the vote of residents of such districts. And it is clear

133. See, e.g., Sunstein, *supra* note 97, at 765-66 (2001) ("Suppose that voters in that area urge that the Equal Protection Clause is violated by the absence of uniformity in technology. Why doesn't *Bush v. Gore* make that claim quite plausible? Perhaps it can be urged that budgetary considerations, combined with unobjectionable and longstanding rules of local autonomy, make such disparities legitimate.").

134. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.").

135. 531 U.S. 510, 523-24 (2001) (internal quotations omitted) (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

136. U.S. CONST. art. I, § 4, cl. 1 ("Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.").

that a State cannot violate the federal Constitution when it creates its electoral procedures for federal elections.¹³⁷

Similar principles prevent the use of different voting machines in *statewide* elections. In *Burdick*, the Supreme Court reasoned that because States may regulate federal elections, it follows that “[s]tates retain the power to regulate their own elections.”¹³⁸ But just as in federal elections, while States may dictate the procedures and regulations—the “Time, Place, and Manner”—of statewide races, they cannot do so in a constitutionally infirm way.

Ultimately, courts should not find that the Time, Place, and Manner Clause is an obstacle to judicial scrutiny of non-uniform voting machine usage. As *Burdick* and *Gralike* make clear, the ability of States to regulate the “manner” of state and federal elections does not provide States with a license to violate other constitutional provisions. In other words, if the Equal Protection Clause forbids the use of different voting machines among intrastate electoral districts, it follows that States must abide by this rule—regardless of the Time, Place, and Manner Clause—when enacting electoral regulations.

Indeed, notwithstanding considerations of federalism,¹³⁹ over the past century both Congress and the federal judiciary have assumed increasingly interventionist roles in state elections. To list only a few noteworthy examples, Congress passed the Voting Rights Act¹⁴⁰ and the Supreme Court revolutionized state reapportionment in *Baker v. Carr* and *Reynolds v. Sims*. As Chief Justice Warren explained:

[U]ndoubtedly, 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.¹⁴¹

137. See, e.g., *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (deciding that states could not change the term limits for federal office when the Constitution already articulates the requirements).

138. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). *Burdick* also enunciates the rule that not all infringements on the right to vote will receive strict scrutiny, because every voting regulation is burdensome in some manner or another. *Id.* However, despite *Burdick*'s relaxed standard, if a court characterizes an infringement as “severe,” traditional strict scrutiny applies. *Id.* at 434. Thus, the state can regulate elections, but it cannot “severely” impair the right to vote unless the state provides a compelling state interest furthered by a narrowly-tailored regulation. *Id.* On the other hand, *Burdick* provides that when the state regulation imposes a “‘reasonable, nondiscriminatory restriction[]’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* at 433.

139. See *Weber v. Shelley*, 347 F.3d 1101, 1107 n.2 (9th Cir. 2003) (listing various cases saying that legislatures should make decisions about voting regulations).

140. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

141. *Reynolds v. Sims*, 377 U.S. 533, 562–63 (1964).

Thus, a State's decision about which voting machinery to use should not be classified as a mere "regulation" because this choice has and will continue to affect election outcomes.¹⁴²

B. Local Municipalities as "Laboratories"

Another argument against judicial intervention in this area—put forward by Justice Souter in his *Bush* dissent—is that allowing States to use non-uniform voting technology fosters "potential . . . innovation."¹⁴³ This argument traces its roots back to Justice Brandeis, who eloquently announced his vision of the State as a "laboratory for experimentation" in *New State Ice Co. v. Liebmann*.¹⁴⁴ Following *Liebmann*, the Court routinely relied upon Justice Brandeis's imagery in a wide range of contexts as justification for eschewing federal control over state affairs. For example, in *Grutter v. Bollinger*—which considered the constitutionality of state-administered affirmative action programs in higher education—Justice O'Connor evoked this concept to support her conclusion that state universities should function as laboratories to determine the best admissions policies.¹⁴⁵

Yet this argument utterly fails to explain why *intrastate electoral districts* should possess unfettered discretion to choose which voting machinery to employ. This Note does not suggest that all fifty States must use the same type of voting machine.¹⁴⁶ Rather, under the rule urged here, each State would still possess discretion to choose which type of voting machine to use within its borders¹⁴⁷—uniformity would only be required at the *intrastate* level. Thus, States would

142. See Part II where this Note provides a list of close elections.

143. *Bush v. Gore*, 531 U.S. 126, 134 (2000) (Souter, J., dissenting). For a more recent case stating this proposition and voting machinery see *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 809 (N.D. Ohio 2004) ("If states were not permitted to employ different types of voting technologies within their borders, this development could very well come to a halt."). This court did not address the benefits of uniform voting machinery or the fact that a number of states have already decided to employ uniform machinery.

144. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.").

145. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

146. A lack of uniform voting technology nationally does not implicate equal protection in the same manner as non-uniformity within an individual State. The selection of congressional representatives and presidential electors takes place within individual States or within districts of the States. U.S. CONST. art I, §§ 2, 3; *Id.* art. II, § 1. Uniformity within a State ensures that each voter in that State has uniform voting strength in choosing those figures. However, States enjoy national strength relative to one another based on the democratic and federalist interests memorialized in the Constitution. That relative strength is unaffected by the different voting technologies adopted by the different States.

147. This discretion would be bounded if a state desired to receive HAVA funds, in which case the state would only be allowed to choose among a list of federally-approved voting machines. But even in this circumstance, the laboratory concept would remain because voting machine usage would still vary *among* the states.

remain able to experiment with different types of voting equipment, but experimentation would take place on a state-by-state basis.

This result would accord with Justice O'Connor's reasoning in *Grutter*, in which she explained that “[u]niversities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.”¹⁴⁸ In the electoral arena, States could look at the election machinery in other States to deduce what machinery works best. For example, Georgia recently installed uniform DREs, enabling Georgia to reduce its error rate to 0.86% during the 2002 elections (compared to an error rate of 3.6% in 2000).¹⁴⁹ Another State, having received HAVA funds, could look to Georgia's success in reducing its error rate when deciding whether to use its HAVA funds to purchase DREs.

The main argument against having “laboratories” function only at the statewide level is cost. While it would unquestionably be more expensive to innovate and experiment at the statewide level, the current discrepancies that exist at the intrastate level outweigh the increased cost. The next section more closely examines the “cost” argument.

C. Cost

The most common justification for intrastate discrepancies among voting machinery is the cost of purchasing new equipment.¹⁵⁰ Unsurprisingly, more reliable voting machines tend to cost more than less reliable machines. A recent Massachusetts Institute of Technology study projects that the cost of a nationwide upgrade to touchscreen DREs would be \$2.6 billion, and the cost of a nationwide upgrade to optical scanners would be one billion dollars.¹⁵¹ The same study points out that States spend an average of \$150 million on new electoral technology each year.¹⁵² Therefore, a move to uniform voting machinery would require substantially more funds than States currently spend.

The positive correlation between cost and accuracy works to the detriment of economically-disadvantaged voters and communities in States that allow local control over the choice of election machinery. This is because affluent communities tend to purchase expensive machines that produce few voting errors,

148. *Grutter*, 539 U.S. at 342.

149. Wang, *supra* note 55.

150. Paul S. Herson, *Improving Election Technology and Administration: Toward a Larger Federal Role in Elections?* 13 STAN. L. & POL'Y REV. 147, 151–52 (2002).

151. VOTING, WHAT IS, WHAT COULD BE, *supra* note 3, at 52. As a threshold matter, the “cost” of buying new machines may not be as prohibitive as the MIT study implies. The billion-dollar price tags mentioned in this study actually average only \$1.40 per voter per year for DREs and only sixty cents per voter per year for optical scanners, assuming the machines last for their lifetime of fifteen years. *Id.* In addition, HAVA will provide \$650 million for equipment improvements. HAVA, Pub. L. No. 107-252, § 104(a), 116 Stat. 1666, 1672 (codified at 42 U.S.C. § 15304). States could also lease equipment and/or use computer equipment already located in local schools. VOTING, WHAT IS, WHAT COULD BE, *supra* note 3, at 54.

152. VOTING, WHAT IS, WHAT COULD BE, *supra* note 3, at 52–53.

while poorer communities choose the cheaper, and less reliable, machines.¹⁵³ For example, in the 2000 presidential election in Ohio, seven of the ten jurisdictions that recorded the most undervotes were also among the ten poorest jurisdictions in the State.¹⁵⁴ The phenomenon of poor communities purchasing error-prone voting machines only exacerbates the unfortunate fact that voting “turnout correlates positively with social class.”¹⁵⁵

That poor voters are disproportionately harmed by the use of non-uniform voting machines explains why Justice Souter’s “cost” argument is insufficient to excuse the practice from equal protection scrutiny.¹⁵⁶ The difficulty with Justice Souter’s argument is that it is unclear which level of constitutional scrutiny the *Bush* Court actually employed when striking down Florida’s recount scheme. “Cost” could only be a justification for infringement under a rational basis test, and would rarely or never serve as a *compelling* state interest.¹⁵⁷ Professor Richard Hasen goes so far as to say, “Under strict scrutiny, this disparate treatment [referring to States using an assortment of voting machines] in the *counting* of votes appears just as ‘dilutive’ of the right to vote and just as ‘arbitrary’ as the different methods of *recounting* votes struck down in *Bush v. Gore*.”¹⁵⁸ He continues: “There is no compelling interest for the different treatment; a decision about resource allocation by localities should not be able to trump a ‘fundamental right.’”¹⁵⁹

Notwithstanding *Bush*’s convoluted mandate, in future challenges to the use of non-uniform voting technology, courts will be faced with a choice between

153. See Mulroy, *supra* note 101, at 368 (listing cases in which plaintiffs have alleged that the more error-ridden equipment is in poorer communities, tending to affect minorities disproportionately).

154. Darrel Rowland, *Many Votes Uncounted in Ohio’s Poor Areas*, COLUMBUS DISPATCH, Dec. 17, 2000, at 1C.

155. KEYSSAR, *supra* note 91, at 320 (“In a pattern distinctively American, turnout correlates positively with social class: those with more education and higher incomes are far more likely to vote than are their less advantaged fellow citizens. The people who are least likely to be content and complacent (and most likely to need government help) are those who are least likely to vote.”).

156. Even Professor Briffault, who believes that federal judicial intervention in elections should only occur in state elections when the case is one of “patent and fundamental unfairness,” thinks that a proven relationship between wealth and voting ability would raise a constitutional question. Richard Briffault, *The Law of Presidential Elections: Issues in the Wake of Florida 2000: Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 327, 364 (2001).

157. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966); see also Mulroy, *supra* note 101, at 368 (citing Lawrence Tribe for the proposition that cost cannot satisfy a state interest with elevated scrutiny). Tribe’s statement is in contrast to Judge Dowd in *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 804 (N.D. Ohio 2004) (stating that the court would apply rational basis to decide whether local municipalities could employ different voting machinery and also stating that “if the Court were to apply strict scrutiny, the Court’s ruling would be the same”). Judge Dowd did not explain how this would be the case.

158. Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 395 (2001).

159. *Id.*

two forms of scrutiny that are often applied to electoral regulations.¹⁶⁰ First is the *Harper* version of elevated scrutiny, which holds that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”¹⁶¹ Second is the *Burdick* version of more deferential scrutiny, which provides that when an electoral regulation imposes a “reasonable, nondiscriminatory restriction[]” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.¹⁶² Lower courts often pick between these standards of scrutiny when analyzing voting-based equal protection challenges.¹⁶³

Under *Harper*, it is clear that “cost” considerations cannot excuse the prevalence of high-error-rate voting machines in poor communities.¹⁶⁴ The “choice” between expensive (reliable) and inexpensive (unreliable) voting machines is really no choice at all when a community is hamstrung by severe economic restraints. Consequently, when a State merely draws up a list of acceptable voting machines and leaves it to local election officials to choose from that list,¹⁶⁵ that State creates a direct link between affluence and political voice. Under *Harper*, this “manner” of holding elections is unconstitutional.¹⁶⁶

On the other hand, if a court followed *Burdick* rather than *Harper*, it would more willingly embrace the argument that cost can constitute a legitimate state interest.¹⁶⁷ Under *Burdick*, a court would have to characterize as a “reasonable, nondiscriminatory restriction[]”¹⁶⁸ the fact that allowing local jurisdictions to pick their own voting machinery (for example, punch cards over optical scanners) would result in tens of thousands of additional lost votes in the punch card jurisdictions or other jurisdictions employing inferior voting machinery.¹⁶⁹ If so characterized, the State would only have to proffer a sufficient regulatory interest for the nondiscriminatory practice—and the cost of

160. This statement assumes that *Bush* has presented a new level of somewhat elevated scrutiny.

161. *Harper*, 383 U.S. at 666.

162. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

163. For example, the Ninth Circuit’s recent opinion in *Weber v. Shelley*, 347 F.3d 1101, 1106–07 (9th Cir. 2003), relied on *Burdick* for its decision to apply rational basis and defer to the legislature.

164. See *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (“But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.”).

165. This is the practice in California. See CAL. ELEC. CODE § 19210 (2004) (“The governing board [of each county] may adopt for use at elections any kind of voting system, any combination of voting systems, any combination of a voting system and paper ballots, provided that the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law.”).

166. *Harper*, 383 U.S. at 665–66.

167. See *Weber v. Shelley*, 347 F.3d 1101, 1106–07 (9th Cir. 2003).

168. *Burdick*, 504 U.S. at 434.

169. See VOTING, WHAT IS, WHAT COULD BE, *supra* note 3, at 21–22.

implementing uniform voting machinery would possibly, although not certainly, suffice.¹⁷⁰

D. Slippery Slope of Increased Judicial Activism

If the courts intrude in *this* area of regulatory control over the electoral process, they will soon find themselves enmeshed in numerous lawsuits concerning the most insignificant of balloting differences (such as font size, font color, and opening and closing times of polling places). Such a state of affairs, the argument goes, would run counter to Justice Holmes's cautionary argument that "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints."¹⁷¹ Indeed, Justice Stevens seized on Justice Holmes's exhortation in his *Bush* dissent, arguing that the Court should have afforded Florida "a little play in its joints" when setting recount standards.¹⁷²

This fear of the slippery slope is overblown in the case of differential voting machines because there is no indication that the types of minor balloting differences mentioned above have any impact on voting *outcomes*. By contrast, simple arithmetic demonstrates that the intrastate use of different voting machines inexorably dilutes some voters' voices relative to others. With so many close elections, providing local municipalities with the choice about which voting machinery to employ is likely to affect election outcomes.

Moreover, even if the judiciary *did* insist on total ballot uniformity within States, would that really be such a bad thing? Several legal scholars believe that uniformity among voting procedures is desirable.¹⁷³ In addition, statewide uniformity among machinery and ballots would allow voter education groups to prepare educational materials that aid voters in casting countable votes.¹⁷⁴ The

170. See *Stewart v. Blackwell*, 356 F. Supp. 791, 808 (N.D. Ohio 2004) (deciding that cost satisfies rational basis inquiry).

171. *Bain Peanut Co. of Tex. v. Pinsons*, 282 U.S. 499, 501 (1931).

172. *Bush v. Gore*, 531 U.S. 98, 126 (2000).

173. See Sunstein, *supra* note 97, at 773 ("In fact the principle has even more appeal if understood broadly, so as to forbid similarly situated voters from being treated differently because their votes are being counted through different technologies."). See also Briffault, *supra* note 156 ("Election administration could very well benefit from state legislative decisions that provide for voting machinery that is of uniform quality statewide, that standardize ballot design, or that specify consistent statewide procedures for resolving questions concerning improperly marked ballots."); Hasen, *supra* note 158, at 399 ("The benefits of a precedent requiring scrupulous equality in the procedures and mechanics of elections are fairly obvious: such a precedent will increase resources used to conduct elections, so that at least twentieth century voting technology will be applied as we enter the twenty-first century. It will provide a means for those in poor, urban areas to have just as accurate a voting system as those used in wealthier areas. It will also likely ensure more reliable vote counting.").

174. Even when different races used the same voting machinery, an alarming difference in the votes counted between these races existed. See Spencer Overton, *The Law of Presidential Elections: Issues in the Wake of Florida 2000: A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 469-70 (2001) (stating that "[r]acial disparities appeared even when the same voting technology was used").

U.S. Commission on Civil Rights has gone so far as to recommend that the federal government establish minimum requirements for the production and distribution of information that helps educate voters.¹⁷⁵ For a State to ensure adequate voter education, using only one type of ballot and only one type of voting machine would greatly reduce the number of human voting errors.¹⁷⁶

Finally, requiring uniformity at the statewide level would actually *remove* courts from this portion of the political thicket, as courts would no longer be pressed to entertain all manner of equal protection claims (some meritorious, many others not) pertaining to voting regulations. By setting one standard to follow, the judiciary could foster predictability and reduce litigation costs.

V. STRUCTURAL IMPEDIMENTS TO LOCAL CONTROL OVER ELECTION MACHINERY

In *Democracy and Distrust*,¹⁷⁷ John Hart Ely explicated the “theory” that the electoral process is the one arena in which courts should shrug off their countermajoritarian limitations and insist on judicial intervention. According to Ely, “[m]alfun[ct]ion” occurs, and the political process breaks down, when the “ins . . . chok[e] off the channels of political change to ensure that they will stay in and the outs will stay out” and when “representatives beholden to an effective majority . . . systematically disadvantag[e] some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby deny[] that minority the protection afforded other groups by a representative system.”¹⁷⁸ Moreover, Ely argued that the political branches cannot be trusted to police themselves when it comes to electoral regulations because “our elected representatives . . . have an obvious vested interest in the status quo.”¹⁷⁹ Thus, judicial scrutiny of seemingly-democratic outcomes should be heightened in the political arena.

175. U.S. COMM’N ON CIVIL RIGHTS, ELECTION REFORM: AN ANALYSIS OF PROPOSALS AND THE COMMISSION’S RECOMMENDATIONS FOR IMPROVING AMERICA’S ELECTION SYSTEM 7 (Nov. 2001), <http://www.usccr.gov/pubs/vote2000/eleceref/summ.htm> (on file with Arizona Law Review).

176. See generally Susan A. MacManus, *Voter Education: The Key to Election Reform Success Lessons from Florida*, 36 U. MICH. J.L. REFORM 517, 520 (2003) (“Introducing new technology alone may not necessarily reduce voter error. In fact, switching equipment actually may introduce new opportunities for voter error unless the jurisdiction deals with the people aspects of successfully fielding new voting technology and offers voter education on how to use the new equipment effectively.”).

177. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1971).

178. *Id.* at 103.

179. *Id.* at 117. A more recent case shows that Ely’s theory remains alive. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, Justice Thomas noted that legislators, once elected, have an interest in reducing campaign spending to keep themselves in power, and therefore opined that the Court should have intervened to remedy this breakdown of the democratic process. 518 U.S. 604, 644 (1996) (Thomas, J., dissenting).

Ely's theory has obvious application to the question of whether States should be allowed to use non-uniform voting technology. Consider, for example, the motivations of a Republican state legislator who represents an economically diverse range of constituents and counties, and who was elected by the slimmest of margins during the previous election. This legislator would have no incentive to vote for a law that would improve the voting machinery of the poor precincts within his or her district, as (assuming the usual correlation between economic disadvantage and/or minority status with preference for Democratic candidates) such a change would only work to the benefit of his or her Democratic opponent in the next election (by decreasing the number of uncounted votes in Democratic-leaning precincts).¹⁸⁰ Recently, when asked about current voting inequities, Professor Heather Gerken said that both Congress and state legislatures are self-interested: "They have all been elected under the current system and have little incentive, absent significant public pressure, to change it."¹⁸¹ Given the potential for political malfunction concerning the choice of voting machinery, courts should not feel obligated to defer to the choices of the political branches.

VI. THE NECESSITY OF UNIFORM VOTING TECHNOLOGY

The judiciary finds itself at a critical juncture. It can continue on the path that was blazed in *Bush v. Gore*, and recognize equal protection violations whenever a State fails to treat all of its citizens in the same manner during the voting process. Alternatively, it can dismiss *Bush v. Gore* as an anomaly limited to the narrow factual question of "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,"¹⁸² and uncritically accept the *Bush* Court's statement that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."¹⁸³ This Note argues that the former path is preferable, and that the use of different voting machines within a State—no less than the use of different recount standards within a State—cannot pass constitutional muster.

Bush v. Gore expanded the Equal Protection Clause to encompass a third level¹⁸⁴ of voting rights—"equality in the procedures and mechanisms used for voting."¹⁸⁵ Accordingly, and despite its self-imposed limited applicability, *Bush v. Gore* provided a window into how the courts should rule where the issue is whether States may employ different types of voting machines intrastate. The proper answer is that such inconsistency violates the Equal Protection Clause

180. Of course, there may be times where someone is elected by a very slim margin and believes that he or she should have won by a larger margin and would therefore attempt to change the voting machinery.

181. Siobhan Gorman and Peter H. Stone, *Back From the Abyss*, NAT'L J., Nov. 6, 2004 (internal quotations omitted).

182. *Bush v. Gore*, 531 U.S. 98, 105 (2000).

183. *Id.* at 109.

184. Hasen, *supra* note 158, at 392–93 (stating that the first level of voting rights is the right for everyone to vote, and the second level of voting rights is the right to have every vote equally weighted).

185. *Id.* at 393.

because it treats citizens unequally, oftentimes negatively impacting minorities and less affluent citizens.¹⁸⁶ Delegating to local municipalities the choice of which voting equipment to use violates the Equal Protection Clause because it causes voter dilution and causes “voters assigned to bad voting machines [to] suffer[] concrete harms.”¹⁸⁷ To prevent these “concrete harms,” courts should apply an elevated level of scrutiny, like that of *Harper* and *Bush v. Gore*,¹⁸⁸ to require uniform voting machines within each State.

The positive changes that would flow from the use of uniform voting machinery within each State are clear. Such a rule would ensure that every voter has the same likelihood of casting a meaningful vote. And more practically, using only one type of voting machine would allow States to better organize educational programs intended to assist voters and reduce human error.

Additionally, the arguments against uniformity (discussed *supra* in Part IV) fail to justify the voting inequities caused by allowing local municipalities to choose inferior voting machinery. First, the Time, Place, and Manner Clause does not give States a license to violate other constitutional provisions. A poll tax is not permissible just because it is a “manner” of regulating elections.¹⁸⁹ Second, even if voting machine uniformity were required *within* States, there would still be ample opportunity for experimentation *among* States.¹⁹⁰ Third, the “cost” of implementing new machines has been made far less prohibitive by HAVA, and in any event “cost” is not an adequate justification for infringing the most preservative and fundamental of rights.¹⁹¹ Fourth, while requiring uniform voting equipment might initially produce more involvement by the judiciary, a clear, workable rule would, in the long run, actually reduce judicial intervention in the political process.¹⁹²

CONCLUSION

To protect the integrity of the democratic process, and to ensure that each vote is counted equally, the courts should call upon the tradition of *Harper*, *Reynolds*, and *Bush* to hold that States cannot permit the use of non-uniform voting machines within their borders: “To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas or democratic government.”¹⁹³

186. It is important to note that the Bush Court did not require this showing.

187. Schwartz, *supra* note 1, at 681.

188. Arguably, *Bush* did not employ rational basis review and instead employed a version of elevated scrutiny even though there was no “suspect class” recognized by the Supreme Court. Professor Hasen believes that *Bush v. Gore* did not apply rational basis but instead strict scrutiny. See Hasen, *supra* note 158 at 395–96 n.64 (stating that “[i]ndeed, *Harper* and *Reynolds*, the only cases relied upon by the majority, are among the important cases establishing that strict scrutiny applies to burdens on voting”).

189. See *supra* discussion in Section V.A.

190. See *supra* discussion in Section V.B.

191. See *supra* discussion in Section V.C.

192. See *supra* discussion in Section V.D.

193. *Reynolds v. Sims*, 377 U.S. 533, 563–64 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)).

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