

NEW WINE IN OLD BOTTLES: A COMMENT ON  
RICHARD HASEN'S AND RICHARD BRIFFAULT'S  
ESSAYS ON *BUSH V. GORE*

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The conventional wisdom in the wake of *Bush v. Gore*<sup>1</sup> was that the decision represented a significant departure from prior equal protection jurisprudence, and the contributions by Richard Briffault and Rick Hasen to this symposium provide confirmation of that view.<sup>2</sup> I want to make two points in response to their fine essays. First, it is a mistake to try to fit *Bush v. Gore* into existing equal protection frameworks. As I explain in Part I, *Bush v. Gore* is best understood as a new type of equal protection claim. On one reading, it addresses broad structural concerns rather than conventional individual harms.

Second, I argue in Part II that the structural reading is probably unfounded.<sup>3</sup> *Bush v. Gore* could, in theory, represent a sophisticated

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

2. See Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325 (2001); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377 (2001).

3. There is, of course, a less generous reading of *Bush v. Gore*: it may be an exercise in naked partisanship. Plenty of academics have hashed out that question. See, e.g., Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001); Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001); Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48; Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. OF BOOKS, Jan. 11, 2001, at 53, 53-55; Charles Fried, *A Badly Flawed Election: An Exchange*, N.Y. REV. OF BOOKS, Feb. 22, 2001, at 8, 8-10; Neal Kumar Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35; Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18, 18-21. I have little to add to that discussion. Moreover, even if one thinks *Bush v. Gore* involves bad faith decisionmaking, it is worth considering the doctrinal package in which the Court chose to wrap its decision, for that choice itself tells us something about the judicial culture. See generally Richard H. Pildes, *Democracy and Dis-*

effort to conceptualize democratic principles in structural terms. But it is far more likely that the Court, in announcing a new type of equal protection claim, is simply reverting to one of its bad habits in voting-rights cases: decisionmaking unmoored from an explicit normative theory. One of the great oddities in the Supreme Court's voting-rights jurisprudence dating back to the Warren Court is that the Justices often disavow the notion that they are importing a particular theory of democracy into the decision.<sup>4</sup> Their claim to agnosticism is, of course, implausible. And the Court's self-conscious preference for avoiding any discussion of its normative premises has led to the type of decisionmaking we see in the *Bush v. Gore* per curiam: an opinion that articulates the injury in an abstract, formal manner; announces a legal rule with no easily discernible limits; defines equality in mechanical, quantitative terms; and fails to address the hard normative issues embedded in the questions it resolves.<sup>5</sup> The Court has, in effect, poured new wine (the novel claim recognized in *Bush v. Gore*) into the old bottle of past jurisprudential habits.<sup>6</sup>

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order, 68 U. CHI. L. REV. 695, 696 (2001) (placing *Bush* within the context of "[the] judicial culture, . . . the empirical assumptions, historical interpretations, and normative ideals of democracy that seem to inform and influence the current constitutional law of democracy").

4. See, e.g., *Holder v. Hall*, 512 U.S. 874, 893 (1994); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

5. Cass Sunstein has written extensively on the value of "incompletely theorized agreements," and the benefits derived from the Court's failure to explain and develop the broad theories underlying decisions rendered on a case-by-case basis. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996). I share Richard Fallon's view that "incompletely theorized agreements" represent "a second-best approach." RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 106-07 (2001). Moreover, as I explain in greater detail elsewhere, even setting aside the benefits of transparency discussed by Fallon, *supra*, I believe that this strategy engenders more costs than benefits in the context of voting rights because of the difficult nature of the issues presented to the Court. In the voting context, the Court's failure to articulate its normative premises leads it to mistake structural claims about the aggregation of votes for conventional individual rights, a mistake that leads to circular descriptions of the constitutional injury, doctrinal incoherence, and an inappropriate reliance on mechanical rules. See Heather K. Gerken, *Lost in the Translation: Baker v. Carr and the Supreme Court's Inability to Translate the Equality Norm in Voting Cases*, 80 N.C. L. REV. (forthcoming 2002) (manuscript at 15-25, on file with author).

6. In this sense, I join Pam Karlan and Rick Pildes in thinking of *Bush v. Gore* as a continuation of the Court's prior jurisprudence, albeit for different reasons. See Pamela S. Karlan, *Nothing Personal: The Evolution of The Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345 (2001) [hereinafter Karlan, *Nothing Personal*] (arguing that *Bush v. Gore* resembles the *Shaw* line of cases in that it demonstrates the Supreme Court's confidence in its own abilities, its distrust of other institutions for resolving voting controversies, its solicitousness toward those who do not require judicial protection, and its willingness to suspend traditional standing requirements); Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in THE VOTE: BUSH V. GORE AND THE SUPREME COURT 77 (Richard Epstein & Cass Sunstein eds., 2001) [hereinafter Karlan, *The Newest Equal Protection*] (same); Pildes, *supra* note 3, at 696-97

I. NEW WINE: *BUSH V. GORE*'S NOVEL EQUAL PROTECTION CLAIM

In trying to explain the new equal protection injury announced in *Bush v. Gore*, Hasen's and Briffault's papers neatly complement one another.<sup>7</sup> Both struggle mightily to fit *Bush v. Gore* into conventional equal protection analysis, and both make interesting observations along the way. But it is the struggle itself that I find most intriguing, because it raises the question of whether we are making a mistake by trying to squeeze *Bush v. Gore* into the framework the courts have traditionally used to evaluate equal protection harms.

Hasen and Briffault, of course, do not seek to answer that question here.<sup>8</sup> They both take *Bush v. Gore* on its own terms. But the fact that neither of these able academics can offer a coherent theory for *Bush v. Gore*, let alone agree on its basic application, is worth noting. It suggests that we may need to discard the frameworks we have used in the past to understand voting claims.

Specifically, the reason that Hasen and Briffault struggle so much here is that they are talking about a different category of harm. Because they analyze the case in conventional terms, they try to figure out why the conduct challenged in *Bush v. Gore* harms an individual or a group. But even if the *Bush v. Gore* majority suspected that Florida officials were reading ballots in a manner that undermined Bush's chances of election, no one had solid proof of this bias. Because there was no evidence of a skew, intentional or otherwise, the right here is very different from traditional equal protection analysis—it is the right to equality in the abstract.<sup>9</sup> Hasen's and Briffault's

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(arguing that *Bush v. Gore* reflects the Justices' own views about democracy as strong or fragile, chaotic or robustly competitive).

7. The papers also complement each other in that both assess the implications of *Bush v. Gore* for the Court's federalism theories. Hasen sees the *Bush v. Gore* claim as more intrusive on federalism values than prior doctrine because, in his view, the nuts and bolts of redistricting are more intuitively local concerns than what he terms the "claims of localities to deny the franchise to certain groups of individuals or to count votes unevenly." Hasen, *supra* note 2, at 380. I disagree with him to some extent, but it may simply be a matter of how we frame the question. I understand those prior doctrines not as depriving the state of the right to disenfranchise or to count votes unfairly, but as depriving the state of the ability to choose how to structure its government and electoral system, which has also long been understood as an issue of local concern. Thus, in my view, the *Baker* and *Shaw* lines involve significant intrusion into local concerns. Briffault's important contribution to this debate provides a further puzzle. He argues that the Court's opposition to the use of a standard to count votes necessarily deprives local decisionmakers of the discretion one might think federalism would accord them. See Briffault, *supra* note 2, at 373-76. One leaves both pieces with a strong sense that "federalism" is so vaguely defined in the Court's jurisprudence that it does not provide a meaningful principle for deciding cases.

8. Few things are more unforgivable than a person commenting on a paper who, in fact, talks about a prior question or fails to address the author on his own terms. All I can offer by way of apology is that academics usually commit this sin when the author has written something intelligent and persuasive, leaving little room for direct criticism.

9. I do not mean to say that Bush and his supporters had no means of asserting standing in this case. If one analogizes *Bush v. Gore* to *Miranda*, see *infra* text accompany-

search for the elements of a *Washington v. Davis* claim, intent and effect, is therefore futile.<sup>10</sup> That is why we need a new framework. The one the two authors employ cannot possibly work here because it is not geared to this type of injury.

So where do we look to find this new framework? One possible explanation for the harm in *Bush v. Gore*, and its departure from traditional equal protection analysis, is that *Bush v. Gore* is really a structural claim.<sup>11</sup> It is a claim about how to order a well-functioning democracy, not a suit about individual rights. In this sense, *Bush v. Gore* may resemble other claims that do not fit easily into a conventional individual rights paradigm, like the right to an undiluted vote or the one-person, one-vote claims.<sup>12</sup> To the extent that such claims implicate broad democratic structures, we should not be surprised that it is difficult to identify a conventional individual harm.

If structural concerns are the source of *Bush v. Gore*, then we need to think of the claim differently. Perhaps we should think of the cause of action as something akin to a due process claim, as Briffault notes in passing and as others have argued here and elsewhere.<sup>13</sup> Procedural due process claims may be structural in this sense; they address the way a system of adjudication is supposed to work rather than intentional injury or differences in substantive outcomes. That is why a violation of procedural due process can be established with-

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ing notes 18-19, then Bush may raise a claim on behalf of his supporters regarding the risk of hidden discrimination. Similarly, as Larry Tribe helpfully pointed out to me, Bush was the officially certified winner of Florida's electoral votes at the time of the Supreme Court's decision. Any decision that might call that position into question—even the order of a recount where Bush was as likely to emerge the winner as Gore—would represent a concrete injury to Bush and his supporters. Imagine, however, that this case had been brought before any candidate had been certified the winner. In this context, the underlying injury asserted by the voters—the right not to be subject to a recount process that involved no skew against any type of voter or candidate—is quite abstract when viewed against the traditional equal protection doctrine. It is in this conception of the harm that I discuss here.

10. 426 U.S. 229, 245-48 (1976).

11. See Karlan, *The Newest Equal Protection*, *supra* note 6, at 78 (concluding that *Bush v. Gore* involves a structural principle designed “to regulate the institutional arrangements within which politics is conducted”); see generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (proposing a structural analysis of voting-rights cases).

12. I have briefly explored these questions elsewhere. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665, 1727 (2001) [hereinafter *Undiluted Vote*]; Gerken, *supra* note 5 (manuscript at 25-52). One key difference between the harm recognized in *Bush v. Gore* and the dilution injury is that in dilution cases, it is possible to identify a discrete group of individuals who have suffered a concrete injury. Gerken, *Undiluted Vote*, *supra*, at 1724-25. The same cannot be said of the *Bush v. Gore* injury, which seems to fall equally upon all voters. See *infra* text accompanying note 30.

13. See, e.g., Briffault, *supra* note 2, at 343; Richard A. Epstein, “*In such Manner as the Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 615 (2001); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 550-52 (2001).

out proof that a different result would have obtained had the treatment been nonarbitrary.<sup>14</sup>

If we still need to identify a source of individual harm, then perhaps we should look to an expressive harm theory.<sup>15</sup> It may be that the arbitrary and capricious treatment of ballots the Justices perceived in Florida conveys an improper message about the value of one's vote. If so, we might still care about the differential treatment of like ballots even if the conduct does not stem from an improper motive or result in a skew. For example, we might think a healthy, well-functioning democracy demands that voters have confidence in the sanctity of the ballots they cast, which in turn requires that state officials accord adequate respect to those ballots by treating similarly situated ballots alike.<sup>16</sup> In the words of the per curiam, the recount process violated equal protection because it was "not well calculated to sustain the confidence that all citizens must have in the outcome of elections."<sup>17</sup>

Alternatively we could envision *Bush v. Gore* as a prophylactic rule, like *Miranda*,<sup>18</sup> or as an effects test in discrimination cases. As-

14. See, e.g., *Carey v. Phipus*, 435 U.S. 247, 264 (1978).

15. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13-14, 34-35 (2000); Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 512-17 (2000); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998). In a recent e-mail exchange, Larry Tribe raised yet a third possibility: that the constitutive aspects of voting might serve as the source of the harm. See E-mail from Larry Tribe, Professor of Law, Harvard Law School, to Ellen Katz, Assistant Professor of Law, University of Michigan Law School (May 26, 2001, 14:45:50 EST) (on file with author); see also Katz, *supra*, at 491; Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 453-57 (1989).

16. I do not mean to suggest here that the ballots in question were similarly situated, just that the Court thought of them as such. After all, they were the products of quite different voting procedures and machines. See Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 177 (2001); see also Karlan, *Nothing Personal*, *supra* note 6, at 1364-65. Another bad habit of the Court's jurisprudence is its failure to pay adequate attention to the factual context of its decisions. See Heather K. Gerken, *Morgan Kousser's Noble Dream*, 99 MICH. L. REV. 1298 (2001) (reviewing J. MORGAN KOUSSER, *COLORBLIND INSURANCE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999)).

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

18. *Miranda v. Arizona*, 384 U.S. 436 (1966). A concern about the possibility that a broad recount standard would facilitate *sub rosa* discrimination has been raised by Einer Elhauge in a recent article, see Einer Elhauge, *The Lessons of Florida 2000*, 111 POL'Y REV. 15, 18-27 (2001-02), and in an amicus brief he and Charles Fried filed in *Bush v. Gore*, see Brief of the Florida House of Representatives and Florida Senate as *Amici Curiae* in Support of Neither Party and Seeking Reversal, *Bush v. Gore*, No. 00-949, 2000 WL 1868121. For an argument that *Shaw* can also be understood as a prophylactic rule, see Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1605-07 (2000).

suming that discrimination in the counting process is hard to detect, we might be especially concerned about the possibility of discrimination in the classic sense (an intentional effort to skew the count in favor of a particular candidate) when dealing with recounts governed by a flexible standard. After all, in contrast to rules adopted *ex ante* (or even variations in machinery that existed *ex ante*), at the point of a recount we may know what outcome will result from a more or less generous approach to determining the voter's intent.<sup>19</sup> Thus, we could read *Bush v. Gore*'s demand for uniformity as embedding within the structure of the electoral process a prophylactic protection against invidious discrimination.

There is one final possibility to play with. We could read *Bush v. Gore* as a reflection of the Court's efforts to vindicate a structural concern of a different sort: the value of "stability and measured change," to borrow Justice O'Connor's phrase.<sup>20</sup> As Richard Pildes has recently observed, *Bush v. Gore* may reflect the Justices' strongly held assumptions about democracy, whether they view the rough-and-tumble political process as threatening chaos or healthy democratic competition.<sup>21</sup> The Court has often expressed concern about destabilizing threats to the two-party system: blanket primaries,<sup>22</sup> fusion candidates,<sup>23</sup> party raiding,<sup>24</sup> and the like. In *Bush v. Gore*, the threat to stability may have been polarization—the fear that the disorderly recount process was exacerbating political divisions. In this sense, the danger the Court perceived in *Bush v. Gore* may have resembled the "exacerbation . . . racial bloc voting" the Court feared in *Shaw v. Reno*,<sup>25</sup> the "divisive sore-loser candidacies" it sought to avert in *Burdick v. Takushi*,<sup>26</sup> or the "destabilizing effects of

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19. Such an intuition may also help explain our collective concern over whether the Florida Supreme Court had changed the rules of the game midstream, a concern that may have animated Chief Justice Rehnquist's concurrence to *Bush v. Gore* as well. In offering this hypothetical justification for *Bush v. Gore*, I do not mean to make too much of the *ex ante/ex post* distinction, as the line is too often difficult to draw. Here, for example, at the time of the litigation both the Bush team and the Gore team were guessing as to which standard would most benefit their candidate, and neither guess appears to have been terribly accurate. See, e.g., Dan Keating & John Mintz, *From Election Audit, Most Uncertainty; Miami Herald Review Shows Result Hinges on Standard Used in Recount*, WASH. POST, Apr. 5, 2001, at A15. I am grateful to Larry Tribe for raising this point.

20. *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring). I am indebted to Lani Guinier for suggesting this point. See also Lani Guinier & Gerald Torres, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* ch. 6, at 18-19 (forthcoming Feb. 2002) (manuscript on file with author).

21. Pildes, *supra* note 3, at 704-05.

22. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577-78 (2000).

23. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366-67 (1997).

24. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 439 (1992).

25. 509 U.S. 630, 648 (1993).

26. 504 U.S. at 439. *But see* *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989) (no state interest in avoiding "intraparty friction").

party-splintering and excessive factionalism” it tried to avoid in *Timmons v. Twin Cities Area New Party*.<sup>27</sup>

The problem for the members of the *Bush v. Gore* majority, however, is that there was no easy doctrinal path for vindicating this concern. In cases like *Burdick* and *Timmons*, it has been quite easy for the Court to express its preference for stability-promoting democratic structures through the balancing test the Court uses to evaluate First Amendment claims; the Court could simply place a judicial thumb on the scale in favor of the state’s interest in stability.<sup>28</sup> *Bush v. Gore*, however, presented the Court with the same dilemma it faced in *Shaw*: it was the actions of the state itself that threatened to factionalize the electorate.<sup>29</sup> This may help explain the abstractness of the injury articulated in both *Bush v. Gore* and *Shaw*.<sup>30</sup> Because the legal claim at stake did not allow for the inclusion of the value of stability in the doctrinal equation, this concern may have seeped into the definition of the injury itself. On this view, the polarizing and chaotic recount process was the source of the harm in *Bush*. Because such a harm is what Justice Frankfurter would call “a wrong suffered by [the state] as a polity,”<sup>31</sup> it is not surprising that the injury seems abstract and amorphous when viewed through the traditional lens of Article III standing.

## II. OLD BOTTLES: THE COURT’S BAD HABITS IN VOTING-RIGHTS CASES

There is a second possible explanation for *Bush v. Gore*, one that is a more likely candidate for explaining the decision. While it may be tempting to think of the *Bush v. Gore* claim as a structural harm, the Court has not yet explicitly accepted scholars’ invitation to think of democracy in structural terms, and the opinion itself offers no hint that it is taking a structural view.<sup>32</sup> Thus, while *Bush v. Gore* may

27. 520 U.S. at 367.

28. See, e.g., *id.*; *Burdick*, 504 U.S. at 439.

29. In *Shaw*, the Department of Justice may also have been an instability-inducing culprit in the Court’s eyes, as it often intervened in the redistricting process during the 1990s to promote its policy of “maximization.” This may explain why the Department of Justice was so frequently and harshly rebuked by the Court. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 912-13 (1996); *Miller v. Johnson*, 515 U.S. 900, 907-08, 921-23 (1995).

30. See Karlan, *Nothing Personal*, *supra* note 6, at 1349-53, 1357-63 (arguing that *Shaw* and *Bush v. Gore* both involve attenuated injuries that are not sufficiently concrete to confer standing); Karlan, *The Newest Equal Protection*, *supra* note 6, at 20-21.

31. *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

32. Compare *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (discussing injury in terms of individual right to vote), with *Nixon v. Shrink Mo. Gov’t*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (suggesting that campaign finance doctrine should be recast as a principle “to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action”), and Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999) (discussing

have announced a new type of injury, it is best viewed as exemplifying a common problem in voting cases dating back to the days of the Warren Court: formalist reasoning unmoored from an explicit normative theory. The same tendency emerges in cases involving one person, one vote; vote dilution; and *Shaw*. This Part explores the weaknesses that result from the Court's avoidance of normative debate and argues that *Bush v. Gore* provides a good example of these problems. This Part concludes by speculating about why the Supreme Court is so uncomfortable with making normative pronouncements about democracy.

#### A. *Judicial Agnosticism*

Members of every generation of the Supreme Court's Justices have claimed that they have no theory about the way democracy should work.<sup>33</sup> It is an odd claim for many reasons. First, it seems strange that a group constantly making rules about how the game is played should admit that they have no view on why we play it and who should win.

Second, the claim of agnosticism is implausible. Whenever the Court inserts itself into the democratic process, it is making a judgment about how that process should work. One person, one vote presumably embodies a theory about majoritarianism;<sup>34</sup> vote dilution doctrine tells us something about the power that should be accorded to electoral minorities;<sup>35</sup> the right-to-vote cases incorporate a judgment about representation, participation, and community membership.<sup>36</sup> The Supreme Court similarly makes a decision about democratic values when it declines to act. The political question doctrine is a theory about how our constitutional system should work;<sup>37</sup> Justice

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structural approach of federalism cases and relating to questions of individual rights), and Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2000) (documenting and analyzing the structural approach adopted by the Court in its recent federalism decisions).

33. See, e.g., *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring) (arguing that courts should not recognize a harm that requires them to "resort to political theory [in order to] determine which electoral systems provide the 'fairest' levels of representation or the most 'effective' or 'undiluted' vote[']"); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 748 (1964) (Stewart, J., dissenting) (criticizing the majority opinion because "it imports and forever freezes one theory of political thought into our Constitution"); *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) (warning against courts "choos[ing] among . . . competing theories of political philosophy"); see also Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83 (1997) (critiquing Court for failure to consider democratic theory in term limits decision).

34. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 545-56 (1964).

35. See Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 124 (1994).

36. See Michelman, *supra* note 15, at 443.

37. See Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650-55 (2001).

Thomas's insistence that dilution claims are noncognizable implicates a particular understanding about the aggregative aspects of voting.<sup>38</sup>

Even when the Court does not self-consciously eschew normative theory, it often fails to articulate the normative premises of its decisions or offers them cloaked in such vague generalities as to be indecipherable. In *Bush v. Gore*, for example, the per curiam opinion stated that one source of the right at issue "lies in the equal weight accorded to each vote and the equal dignity owed to each voter,"<sup>39</sup> a phrase highly reminiscent of the Warren Court's suggestion that the mere failure to achieve exact population equality in districts somehow renders each person "that much less a citizen."<sup>40</sup> While the words have a lovely ring to them, it is hard to describe the injuries in question, let alone explain why those injuries rise to constitutional status. The same is true of the early vote-dilution cases handed down by the Burger Court.<sup>41</sup> While these decisions are often filled with stirring language about the right to vote, it is difficult to identify their precise doctrinal or normative parameters.

### B. Agnosticism's Effects

The problem is not just that the Court claims to be agnostic while it continues to worship at various altars of democratic theory. The problem is that the Court's purported agnosticism allows it to indulge in a number of bad habits in voting cases, all of which are readily identifiable in *Bush v. Gore*.

#### 1. *The Right is Defined in Abstract Terms*

First, when the Court fails to articulate the normative premises of its decision, it tends to describe the injury in abstract terms.<sup>42</sup> Consider, for example, the one person, one vote cases. These cases were originally fashioned as equal protection claims based on the assump-

38. See Guinier, *supra* note 35, at 122-23.

39. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

40. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

41. Compare *Reynolds*, 377 U.S. at 533, and *Baker v. Carr*, 369 U.S. 186 (1962), with *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

42. I should emphasize that when I argue that the right is defined in abstract terms, I do not mean to suggest that the doctrine itself lacks concrete, real-world consequences. To the contrary, as Richard Fallon has reminded me, one of the odd things about *Bush* and many other voting cases is that the Court relies on an abstractly defined right to justify inserting itself into the nitty-gritty details of redistricting. See Gerken, *supra* note 5 (manuscript at 2). What is missing in these cases—what makes the right seem abstract despite its real-world effects—is a principle for translating the broad equality norms on which the Court relies into a sensible definition of the right it is vindicating. For a detailed analysis of the problem of translation theories in voting cases, see *id.*

tion that rural voters had different interests than urban residents.<sup>43</sup> And the Court's early articulation of the one person, one vote principle might have developed into a sufficiently robust theory of democratic representation to take that truth into account.<sup>44</sup> Instead, the Court simply stopped talking about which voters were affected by the skewed districting system. It similarly abandoned any effort to explain why the disparities in question demanded judicial intervention or to offer a theory of representation that required equally populated districts. Without a normative theory to define the parameters of the constitutional harm, the Court's description of the injury became circular: population deviations cause an injury because they depart from the principle of one person, one vote. *In short, the description of the harm was transformed into its normative justification.*<sup>45</sup>

The same seems true of *Bush v. Gore*. Without a normative theory for why minor variations in recount efforts matter, it is difficult to say anything meaningful about the injury. For example, if *Bush v. Gore* had invoked a theory of aggregation, we could define the injury as the arbitrary treatment of votes that affects the election outcome. We would know to look for the skew that Briffault and Hasen search for in the opinion, and we would recognize that randomly distributed errors are constitutionally acceptable. If the Court had instead invoked an expressive harm theory, we would have to decide whether human error matters more or less than machine error for purposes of measuring the expressive injury. That analysis would, in turn, help us decide whether minor variations in a recount process are acceptable when remedying more significant disparities in machine counts. If the Court had adopted a prophylactic rule, we would know that variations in machinery are not constitutionally problematic, but that uniformity would be demanded of any ex post decisionmaking. As the opinion stands, however, we cannot describe the right in sufficiently concrete terms to resolve these questions.

## 2. *The Absence of Limiting Principles*

This brings me to a second parallel between *Bush v. Gore* and past voting-rights jurisprudence. In the absence of a theory like one of those identified in Part I, it is very difficult to figure out the limiting principle for an abstractly defined right like the one articulated in

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43. See *Baker*, 369 U.S. at 273 (Frankfurter, J., dissenting) (quoting complaint as challenging discrimination against a "geographical class of persons").

44. See *Reynolds*, 377 U.S. at 563 n.40, 565-66 (asserting that the Constitution mandated the "full and effective participation" of citizens within the democratic process, guaranteed "fair and effective representation" to them, and forbade efforts to undermine citizens' voting power "by any method or means"); *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (describing one person, one vote principle as fostering equal representation).

45. For a more detailed analysis of these problems, see Gerken, *supra* note 5.

*Bush v. Gore*, as Hasen's and Briffault's papers demonstrate.<sup>46</sup> Under traditional equal protection analysis, it is hard to understand why we should care about a minute percentage of ballots being treated differently as long as there is not an outcome-affecting skew. But the odd result in *Bush v. Gore* seems a natural outgrowth of the Court's vague and abstract approach.

Consider again what happened in the one person, one vote cases.<sup>47</sup> On one view, population equality represents a means to an important end, a well-functioning majoritarian system. But without an explanation as to why equality in population was necessary to achieve this important democratic value or whether that principle should always trump others, *population equality became an end unto itself*.

Because equal population became the definition of the harm rather than the means to measure or prevent it, no limiting principle existed for discerning when variations from population equality would be acceptable. At least at the federal level, absolute numerical equality became the standard for measuring the constitutional harm in these cases, and it became difficult to argue that the one-person, one-vote rule should be suspended when necessary to achieve the broader democratic aims that (one presumes) the rule was originally designed to serve. One could not, for instance, argue that some population disparities should be tolerated in order to implement other values that promoted the same goal of a well-functioning majoritarian system (for example, keeping communities of interest intact in order to facilitate better representation, or providing a forum for electoral minorities to obtain an adequate voice).<sup>48</sup> The Court's failure to articulate its normative premises in the one person, one vote cases has thus led to the type of formalism we do not often associate with the Warren Court;<sup>49</sup> it has become a jurisprudence where the rule is all that matters.<sup>50</sup>

### 3. *The Prevalence of Bright-Line Rules and Mechanical Proxies*

The third problem that arises from the Court's reluctance to articulate its normative premises is a marked trend toward using bright-line rules and mechanical proxies. Such tests can, of course, provide an efficient and sensible means to achieve a broader, norma-

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46. See Briffault, *supra* note 2; Hasen, *supra* note 2.

47. See, e.g., *Reynolds*, 377 U.S. at 533; *Wesberry*, 376 U.S. at 1; *Baker*, 369 U.S. at 186.

48. See *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964).

49. See Morton J. Horowitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 456 (1988) (praising the Warren Court for avoiding formalist judging).

50. For a more detailed analysis of these problems, see Gerken, *supra* note 5 (manuscript at 21-25).

tive agenda. The problem in the voting context, however, is that too often courts lose track of the normative foundations of the rules and proxies they have adopted. Again, the test becomes all that matters, and courts rigidly, often unthinkingly, apply it in contexts where it does not fit.

As I have discussed elsewhere,<sup>51</sup> section 2 of the Voting Rights Act<sup>52</sup> provides a good example of this problem. Section 2 prohibits vote dilution by preventing states from taking advantage of racially polarized voting among whites and racial minorities by drawing district lines so as to deprive minority voters of a fair share of political power. The qualitative approach to assessing dilution claims offered by the Supreme Court<sup>53</sup> and endorsed by Congress in 1982<sup>54</sup> all but demanded that courts make some normative judgments. To assess a dilution claim, they had to examine the dynamics of the election process and assess the quality of representation minority group members received.

The courts, however, have gradually moved away from this qualitative analysis toward a more rigid, quantitative approach for assessing dilution claims. To begin, in 1986 the Supreme Court adopted the three *Gingles* preconditions,<sup>55</sup> mechanical proxies for assessing whether racial minorities' potential voting strength has been undermined. Many thought that the Supreme Court's decision in *Johnson*

51. Gerken, *supra* note 16, at 1303-04.

52. 42 U.S.C. § 1973 (1994 & Supp. V 1999).

53. See *White v. Regester*, 412 U.S. 755 (1973).

54. Congress endorsed a number of qualitative factors for assessing vote dilution in the Senate report accompanying the 1982 amendments. See S. REP. NO. 97-417, at 23 (1982), reprinted in 1982 U.S.C.C.A.N. (96 Stat. 131) 177, 200-01. Termed "the Senate factors," they were pulled from a variety of dilution cases arising prior to 1982. See, e.g., *White*, 412 U.S. at 755; *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam). The factors include:

the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

*Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

55. According to *Gingles*, plaintiffs must prove that (1) the state could have drawn an additional, compact majority-minority district but failed to do so; (2) the minority group is politically "cohesive"—that is, its members vote in a similar fashion; and (3) the white electorate votes as a bloc, thus enabling whites usually to defeat the minority group's preferred candidates at the polls. 478 U.S. at 50-51.

*v. DeGrandy*<sup>56</sup> would revive the role of qualitative, contextual analysis in the dilution context. Although the Court specifically reminded courts to pay attention to the qualitative concerns endorsed by Congress in 1982,<sup>57</sup> it offered a new standard for evaluating dilution—the proportionality standard—that was equally amenable to unthinking, mechanical implementation. Proportionality requires that members of a racial group have a chance to exercise electoral control in a number of districts roughly proportional to their share of the population.<sup>58</sup> It is an easily applied mathematical standard that requires a court to count the number of districts group members are capable of controlling on election day.<sup>59</sup> Courts have quickly seized upon proportionality as the preeminent measure of vote dilution<sup>60</sup> and often apply it in a rigid way. In *Barnett v. City of Chicago*,<sup>61</sup> for example, the Seventh Circuit assumed that section 2 demanded precise mathematical equality for all racial groups and hinted that proportionality may even serve as a ceiling upon the number of majority-minority districts a locality can create.<sup>62</sup>

As the *Gingles* test and *DeGrandy*'s proportionality test take on a momentum of their own, as these numerical proxies become equated with democratic equality rather than measures of it, we can discern the potential costs to this approach. To begin, in adjudicating section 2 cases, courts may end up neglecting other important aspects of our democracy. For example, if all that matters is proportionality, courts will think that dilution claims deal solely with what happens on election day.<sup>63</sup> They will thus ignore other important aspects of the de-

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56. 512 U.S. 997 (1994).

57. *Id.* at 1011-12.

58. It is worth emphasizing that the proportionality standard does not suggest that only African Americans can represent African Americans and only Latinos can represent Latinos, nor does it guarantee a win to minority voters whether or not they show up to vote. To the contrary, in *DeGrandy*, the Court explicitly rejected the view that courts should look to election outcomes, specifically, how many minority legislators are elected in a district, in order to assess whether the districting scheme is "fair." *Id.* at 1014 n.11. The Court was unwilling to assume that racial minorities can be represented only by other racial minorities, and it similarly refused to grant racial minorities a guaranteed right to electoral success. *Id.* Thus, *DeGrandy* held that fairness should be measured against the *potential* voting power of a minority group, that is, whether group members are capable of electing a candidate of choice (whatever the race of that candidate) *if they choose to do so*. In the words of the Court, "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Id.*

59. *Id.* at 1013-14 (announcing the proportionality standard).

60. See, e.g., *African Am. Voting Rights Legal Def. Fund, Inc. v. Villa*, 54 F.3d 1345, 1356 (8th Cir. 1995); *Rural W. Tenn. African-Am. Affairs Council v. McWherter*, 877 F. Supp. 1096, 1100-03 (W.D. Tenn. 1995), *aff'd sub nom.* *Rural W. Tenn. African-Am. Affairs Council v. Sundquist*, 516 U.S. 801 (1995).

61. 141 F.3d 699 (7th Cir. 1998).

62. *Id.* at 703-05.

63. See Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1415 (1993); see also Kathryn Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L.

mocratic process (for example, the amount of political power minority groups enjoy once they have elected a candidate of choice to the legislature or the quality of representation they receive).<sup>64</sup> Courts will also be far less open to other types of voting concerns, for example, influence-district claims<sup>65</sup> or other models of representation.<sup>66</sup> After all, the proportionality standard, standing alone, offers no means for assessing whether the interests of racial minorities are better served by majority-minority districts that concentrate their voting power or districting plans that spread their influence across many districts but do not grant them political independence in any single district. *That* judgment necessarily requires a normative theory for identifying what constitutes the interest of a racial minority and a theory of representation.<sup>67</sup> Further, courts may apply rough proxies and mechanical tests even when the normative theory behind those rules would counsel a different result.<sup>68</sup>

The question is whether *Bush v. Gore* will continue this trend.<sup>69</sup> Initially, for the reasons Hasen provides in his analysis of the costs of extending *Bush v. Gore*, I had thought that the Court would never pursue this line of reasoning because it would involve significant intrusion upon state decisionmakers carrying out traditional state duties. Now I am not so sure.<sup>70</sup> It may be that judicial intrusion into

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REV. 449, 455-56 (1988); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 186-87, 198 (1989); Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 441, 450 (1999). Pamela Karlan has argued that the Supreme Court has adopted an unduly narrow definition of equality in the *Shaw* case as well, focusing on the "claims of individual voters to the exclusion of claims about race-conscious districting's contributions to the achievement of effective political equality for minority communities." Karlan, *Nothing Personal*, *supra* note 6, at 1364.

64. *See, e.g.*, *Presley v. Etowah County Comm'n*, 502 U.S. 491, 510 (1992) (rejecting third-generation governance claim regarding the allocation of political power within local governing body).

65. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (rejecting influence-district claim).

66. *See, e.g.*, *Cousin v. Sundquist*, 145 F.3d 818, 822 (6th Cir. 1998) (declining to adopt a cumulative voting scheme as remedy for vote dilution).

67. Gerken, *supra* note 16, at 1312-13.

68. The same problems seem to plague the Court's jurisprudence under section 5, where the retrogression standard has been applied in a similarly rigid fashion. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997).

69. To be fair, I suppose that if *Bush v. Gore* is indeed intended as a prophylactic rule guarding against intentional discrimination, there is a stronger reason for the bright-line rule to be given such prominence. A prophylactic rule remains a means to an end (detering discrimination), but it cannot function effectively as such if judges constantly return to its normative underpinnings and engage in a case-by-case contextual analysis to root out discrimination; they must apply the rule in something akin to the unthinking fashion I have criticized above.

70. My confidence has been undermined in part because of the questions both pieces raised about whether the Court is serious about federalism issues in this context. If *Shaw*

state affairs is less likely to deter the Court than the absence of easily applied mechanical standards. After all, the latter allow the Court to *think* it is avoiding, often incorrectly, assessments about individual substantive preferences or broad structural judgments about representation and the democratic process. Thus, it may be that the Court was willing to restructure virtually every state redistricting scheme on equal protection grounds precisely because the one person, one vote cases were eventually reduced to what Justice Stewart termed “sixth-grade arithmetic.”<sup>71</sup> We may find in the future that courts are more willing to strike down state redistricting plans if section 2 liability becomes nothing more than a mechanical application of *Gingles* and a rigid adherence to proportionality.

If this hypothesis proves accurate, then the *Bush v. Gore* injury is just the kind of claim that the Court is likely to develop. The injury is easy to quantify, and it does not appear (at least superficially) to require endorsement of a particular theory of democracy or representation. Absolute equality among counting mechanisms will become an end unto itself, and we will never have a theory explaining why this type of democratic equality matters, save a few Kennedyesque phrases about equal treatment.

That is also why I think that Hasen’s cautious hope that *Bush v. Gore* might lead to development of new principles in the context of campaign finance and vote aggregation rules is misplaced.<sup>72</sup> For the Court to venture down *that* road, it would have to adopt a thicker normative theory about representation and the democratic process, and this Court seems to lack the judicial imagination to do so.

#### 4. *The Court’s Failure to Come to Grips With the Normative Stakes of the Questions Before It*

This leads me to my fourth and final concern about the Court’s agnosticism regarding democratic theory: the Court should not avoid these inquiries. The reasons for this trend are easy to explain and sympathize with—these questions are hard. For example, qualitative assessments of dilution claims would require courts to make judgments about the interests of minority voters, the quality of representation they receive, and the allocation of political power among groups. The one-person, one-vote cases demand an assessment of what constitutes effective representation and how to balance the dictates of majoritarianism against the interests of distinct minorities. It is understandable that judges prefer to latch on to a mechanical

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and the one-person, one-vote cases provide any indication of this Court’s proclivities, the level of intrusion is unlikely to bother the Court.

71. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 750 (1964).

72. Hasen, *supra* note 2, 402-05.

proxy or a thinly defined injury and thereby avoid, or more accurately, *think* they are avoiding, these difficult judgments.<sup>73</sup>

We know, however, that the Court is necessarily making such judgments and it should therefore face them squarely in doing so. Consider, for example, *Hunt v. Cromartie*,<sup>74</sup> the Court's latest iteration of *Shaw*. In the early days of the *Shaw* doctrine, *Shaw* was all norms and no empirics.<sup>75</sup> The doctrine centered upon a normative assessment of the role race should play in politics, which led to a spirited debate among the Justices that filled hundreds of pages in the *U.S. Reports*.

It is striking how easily the Court was able to set aside those normative debates in *Cromartie*. Both the majority and the dissent are formal and mechanical. Each takes an agreed-upon set of facts, applies the same standard, and reaches different conclusions.<sup>76</sup> And both opinions are bereft of any sense of the broader issues at stake. They debate whether registration rates accurately reflect political affiliation, whether a given precinct contained more Democrats than African Americans, and whether particular legislative statements signaled a racial motive.<sup>77</sup> But the two opinions do not wrestle with the normative questions embedded in the controversy. This is the jurisprudence of the technocrat: mechanical, seemingly neutral adjudication that conceals, but does not eliminate, the normative theories that necessarily undergird the decision.

The same may prove true of *Bush v. Gore*. The Court seems to be vindicating a principle of equality, but it is equality of an extraordinarily narrow sort. In mandating the equal treatment of ballots that appear identical, the Court simply ignores the deep, systemic inequalities that plague our democratic process. For example, as Spencer Overton discusses in this symposium, the poor and racial minorities in Florida may have been less likely to have their ballots counted under *any* recount standard due to disparities in electoral resources;<sup>78</sup> thus, as Larry Tribe has noted, straining ballots "through a uniformly metered sieve will [still] yield an unequal stream of results."<sup>79</sup> The Court's failure to wrestle with these questions—what does equality mean, and how far should we go to attain

73. For a more in-depth analysis of the reasons behind the Court's agnosticism, see Gerken, *supra* note 5 (manuscript at 25-52).

74. 121 S. Ct. 1452 (2001).

75. See Gerken, *supra* note 16, at 1317-18.

76. *Cromartie*, 121 S. Ct. at 1466, 1475.

77. *Id.* at 1459-65, 1474-75.

78. Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 469-71 (2001). Recently released studies by various media consortia reveal that this issue is more complex than previously suspected. See, e.g., Ford Fessenden & John Broder, *Examining the Vote*, N.Y. TIMES, Nov. 12, 2001, at A1.

79. Tribe, *supra* note 16, at 256.

it when the twin problems of race and poverty permeate our democratic structures?—gives an unwarranted patina of legitimacy to the election system.

Nor does the Court address the normative questions necessarily implicated by the more limited injury it recognizes. For example, if the injury at stake is an expressive harm, how do we decide whether such a harm exists? Should the Court consult its own intuitions? Public opinion polls?<sup>80</sup> Similarly, how would the Court respond to Richard Briffault's argument that the source of the injury in *Bush v. Gore*, the grant of discretion to local decisionmakers, is federalism itself?<sup>81</sup> How should we weigh the concrete costs of judicial intrusion Hasen has documented against the equal protection values the Court seeks to vindicate?<sup>82</sup> What do we make of the contested and contestable assumptions about the locus of democratic decisionmaking Spencer Overton has identified in the Court's preference for a rule over a standard?<sup>83</sup>

I do not mean to suggest that every court must engage in normative hand-wringing each time it renders an opinion or that we should abandon bright-line rules. Nonetheless, we should expect, or at least hope for, some recognition of the normative stakes in the opinions judges render and a concomitant willingness to reexamine those normative premises where appropriate. That is especially true where, as here, the Court is announcing a newly minted voting claim in a highly charged political environment. If the Court decides to recognize a right that does not fit easily within conventional equal protection doctrine, it should provide a normative map so we can tell where we are heading within this political thicket. The unfortunate fact is that explicit normative engagement has not always been evident in voting-rights decisions dating back to the Warren Court, and there is little hope that it will be forthcoming should *Bush v. Gore* spawn progeny of its own.

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80. If so, then the problem of butterfly ballots and overseas voters should have concerned the Court more than the claim Bush raised. As my British research assistant observed, people seemed far more upset about "elderly Holocaust survivors voting for Buchanan" or "our boys in uniform, fighting for our rights on foreign soil, being denied the right to vote" than the differences in the standards used to count ballots.

81. Briffault, *supra* note 2, at 375.

82. Hasen, *supra* note 2, at 399-402.

83. See Spencer Overton, *Rules, Standards, and Recounts: Form and the Law of Democracy*, 36 HARV. C.R.-C.L. L. REV. (forthcoming 2001) (manuscript at 16-18, on file with author).