

UNDULY PARTIAL: THE SUPREME COURT
AND THE FOURTEENTH AMENDMENT
IN *BUSH V. GORE*

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An implicit moral of Peter Shane’s insightful *Disappearing Democracy*¹ is that Laurence Tribe made a key strategic error in the first sentence of his oral argument in *Bush v. Palm Beach County Canvassing Board* by directing the Supreme Court’s attention away from the Due Process Clause.² Rather than simply dismissing Bush’s due process arguments,³ Tribe should have argued that both substantive and procedural due process in fact *required* the Florida Supreme Court to protect the right of every Florida voter to have his or her vote counted. The central message of *Disappearing Democracy* is that the due process problems with stopping the Florida recounts were far more serious than any equal protection problem with letting them continue.

Disappearing Democracy offers two major arguments. The first argument focuses on the Reduction-of-Representation Clause of Section 2 of the Fourteenth Amendment. That clause requires a reduction in a state’s population base for apportionment purposes when a state denies or abridges “the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof.”⁴ Shane

* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. I presented some of the ideas in this Comment at Florida State University College of Law’s live symposium on March 23, 2001; others reflect several months’ additional thought about *Bush v. Gore*, the Supreme Court, and the right to vote. Many of these ideas came from my collaborative work with Sam Issacharoff and Rick Pildes, both on our comprehensive casebook, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (2d ed. 2001) [hereinafter *THE LAW OF DEMOCRACY*], and on our shorter casebook, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (rev. ed. 2001) [hereinafter *WHEN ELECTIONS GO BAD*]. I also appreciate several suggestions from Viola Canales.

1. 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 (2001).

2. Tr. of Oral Argument at 44-45, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836), available at <http://election2000.stanford.edu/00-836.pdf> (“I think I would want to note at the outset that the alleged due process violation which keeps puffing up and then disappearing . . . is really not before the Court.”).

3. For a brief discussion of this issue, see *infra* text accompanying notes 76-78.

4. U.S. CONST. amend. XIV, § 2. More precisely, Section 2 requires that a state’s population basis be reduced when the right to vote:

argues that implicit in this clause is a “background understanding that individual citizens in the several states would now be guaranteed some form of franchise in presidential elections, as well as in House contests.”⁵ This conclusion is reinforced, Shane suggests, both by the Privileges or Immunities Clause and by subsequent doctrinal and constitutional developments.⁶

The second argument focuses on the Due Process Clause.⁷ Shane points out that voting is a species of liberty (or property) interest.⁸ Vote tabulation is a “governmental process for making adjudicatory decisions”⁹: whether a citizen cast a valid ballot; for whom each valid ballot was cast; and ultimately who has won an election. Shane then shows how fairly straightforward procedural due process analysis leads to the conclusion that inaccuracies in machine-only tabulation of ballots required Florida to have some manual reexamination process.¹⁰ The recount ordered by the Florida Supreme Court was necessary to bring Florida’s otherwise inadequate adjudicatory process into compliance with the Due Process Clause.

In this Comment, I make three points. The first two focus on Shane’s analysis. I am skeptical that Section 2 necessarily transformed the process by which electors are selected into “one in which individual citizens must be allowed to participate” through popular elections.¹¹ To my mind, substantive due process is a stronger vehicle for safeguarding that right. In a related vein, without resolving, or at least analyzing, the nature of the liberty interest at stake in voting rights cases, it is impossible fully to flesh out the procedural due process issue. The final point is more speculative, and focuses on a due process claim that Shane does not discuss: George W. Bush’s allegation that the Florida Supreme Court’s decisions changed the ex-

is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime [by the] proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id. Some aspects of Section 2—such as its protection only of men’s right to vote and its age reference—have presumably been superseded by later constitutional amendments. *See id.* amend. XIX (forbidding discrimination in voting on account of sex); *id.* amend. XXVI (giving 18 year-olds the right to vote). Other aspects, such as its implicit approval of felon disenfranchisement statutes, *see Richardson v. Ramirez*, 418 U.S. 24 (1974), remain both vital and controversial. *See THE LAW OF DEMOCRACY*, *supra* note *, at 21-40 (discussing the question of felon disenfranchisement).

5. Shane, *supra* note 1, at 544.

6. *See id.* at 546-47.

7. U.S. CONST. amend. XIV, § 2.

8. Shane, *supra* note 1, at 562.

9. *Id.* at 552.

10. *Id.* at 562-68.

11. *Id.* at 539.

isting law unfairly.¹² Even the three Justices who pressed the Article II theory—that the Florida Supreme Court had infringed the legislature’s federally inviolable prerogative to determine the manner in which a state’s electors are appointed¹³—ignored a squarely pertinent line of due process cases. I suggest that the Court had several reasons, none of them admirable, for relying on the Equal Protection Clause instead. In particular, reliance on the Due Process Clause would have made clear what the Court’s invocation of equal protection worked to obscure: that the only litigants whose interests the Court’s decision actually served were George W. Bush and Dick Cheney, and not any of the voters in Florida.

I. THE FUZZINESS OF SECTION 2

Shane’s argument regarding the constitutional consequences of the Reduction-of-Representation Clause can be described as quasi-originalist. The central concern that animated the drafters was that the readmitted Southern states would have their black population included fully in a state’s apportionment base, thereby increasing their relative number of House seats (and concomitantly, electoral votes), but would disenfranchise black citizens, thereby enhancing the political power of white, unreconstructed Democrats (and diminishing the power of the Northern Republicans who then controlled Congress). Shane argues that “[s]o long as we interpret the Constitution as making popular involvement in presidential elections a state legislative prerogative,”¹⁴ Southern states could accomplish precisely their goal of using their black inhabitants as inert ballast for enhancing white political strength (the very effect of the now-repealed “three-fifths” clause):

All that need happen in a Southern state intent on maintaining white control of presidential elector appointments is for the majority-white legislature to institute or maintain a practice of having itself select slates of presidential electors without any popular vote involvement.¹⁵

I think Shane’s argument focuses too narrowly on the language about the right to vote in elections for presidential and vice-presidential electors. In light of the full list of covered elections, I think it is more sensible to read Section 2 conditionally. *If* the state employs an election, *then* it cannot deny or abridge the right to vote in that election without incurring a reduction in its apportionment base.

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

13. *Bush v. Gore*, 531 U.S. 98, 112-15 (2000) (Rehnquist, C.J., concurring).

14. Shane, *supra* note 1, at 544.

15. *Id.*

The Reduction-of-Representation Clause specifies denials or abridgements of the right to vote in five distinct sets of elections as triggering a reduction of representation.¹⁶ In addition to the federal offices on which Shane focuses, the Clause also covers elections for state legislators, the state “Executive,” and state judicial officers.¹⁷ But many states, both in the 1860s and today, do not select their judges through popular elections. Thus, they consistently and categorically deny the right to vote for state judicial officers to *every* inhabitant.¹⁸ Moreover, “[t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor.”¹⁹ Several states have constitutional provisions that authorize the state legislature to choose the governor if no candidate receives an outright majority of the votes cast in a popular election.²⁰ These provisions, too, might be described as denying or abridging a right to vote. But it would be absurd to conclude that Section 2 was intended to strip states with appointed judiciaries or legislatively selected governors of all their representation in Congress and all but two of their electoral votes. Put somewhat differently, Section 2 is relative, not absolute. State law defines whether there is to be an election, but once a state decides to fill an office through popular balloting, it faces a strong federal incentive to treat citizens equally.

Moreover, the danger that concerns Shane is relatively remote. The likelihood of a state’s abolishing popular election altogether was quite low even in 1868 (and essentially nonexistent today). As Shane notes, by the time of the Fourteenth Amendment, all states used popular election to select their electors.²¹ To disenfranchise black voters in presidential elections without losing congressional seats, a state would also have to disenfranchise white voters who had long enjoyed (and exercised—voter turnout in the nineteenth century was far higher than today) the right to vote. Making that change would be politically risky.²² As Justice Holmes observed, “[a] thing which

16. See U.S. CONST. amend. XIV, § 2.

17. *Id.*

18. Of course, the Constitution *requires* every state to use elections to fill House seats. See *id.* art. I, § 2.

19. *Fortson v. Morris*, 385 U.S. 231, 234 (1966).

20. *Morris* noted then-existing constitutional provisions in Georgia, Mississippi, and Vermont and also referred to constitutional or statutory provisions in thirty-eight other states that would turn to legislative selection if the popular election produced a tie. *Id.* at 234-35.

21. Shane, *supra* note 1, at 545.

22. That does not mean it would be impossible. During Redemption, Southern states passed disenfranchising provisions that aimed at black voters but also swept large numbers of white voters off the rolls. But even in those cases, the states did not strip *most* white voters of the right to vote. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 294 (1997).

you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”²³ The legislators who voted for such a change would likely face the angry consequences at *their* next election. And of course, it is not entirely clear that the state legislatures would either have, or perceive themselves as having, the right to make such a drastic change through ordinary legislation.²⁴ There is no reason to suppose that nineteenth-century state legislatures would view themselves as receiving powers from the federal government that were denied them by their own state constitutions. Moreover, I do not read the *Bush v. Gore* per curiam’s remark that “[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors”²⁵ as necessarily going that far. A state legislature that acts beyond its authority under the state constitution arguably no longer *is* the state. And if a constitutional amendment were required to abolish popular balloting for presidential electors—as would be the case in many states—it would be hard to imagine the plebiscitary ratification process in which a majority of the electorate would vote to disenfranchise itself.

Finally, there is little reason to think that creating an affirmative right to vote in elections to choose electors adds anything very significant to the operation of Section 2, assuming that Section 2 works at all.²⁶ Section 2 protects the right to vote in state legislative elections.²⁷ If *that* right were fully respected—and of course it was not²⁸—then it often would not matter to the outcome whether a state used popular election or legislative selection to pick its presidential electors. In a state with a white majority and racially polarized voting, the outcome of a winner-take-all popular vote will be that the white-preferred candidate gets all the state’s electoral votes. That will be

23. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

24. For extensive discussion of this issue, see James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625 (2001).

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

26. Despite its sweeping language, Section 2 turned out to be toothless because neither Congress nor the courts ever showed themselves willing to pull the trigger, despite roughly a century of black disenfranchisement in the South. See, e.g., *Lampkin v. Connor*, 360 F.2d 505 (D.C. Cir. 1966) (dismissing a Section 2 claim challenging the number of seats given to Southern states); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961) (recounting the lack of post-ratification enforcement of Section 2 by Congress).

27. See U.S. CONST. amend XIV, § 2.

28. For a recent discussion of the various devices Southern states used to disenfranchise black voters during the nineteenth century, see J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 16-38 (1999).

true whether black voters are permitted to participate or not. The number of black voters in Mississippi has skyrocketed since the passage of the Voting Rights Act of 1965, which effectively reenfranchised African Americans. And yet, in the last nine presidential elections, despite overwhelming black support for the Democratic candidate, the Republicans have carried all the state's electoral votes eight times.²⁹ The same is true for South Carolina, the state with the second-highest percentage of black residents.³⁰ And if a state legislature were fairly drawn to reflect a state's racial composition,³¹ and there were significant racial polarization, then legislative selection would produce the same sweep for the white-preferred candidate. A majority of the legislators would represent majority-white districts and would vote for the white-preferred candidate.

By contrast, in a state where the white community was split between the two parties, and the black community was politically cohesive, then the black community might be the swing vote.³² In a popular election, the black-preferred candidate would win if black votes plus the votes of white faction *A* were greater than the votes of white faction *B*.³³ And if the state legislature were fairly districted (again, a counterfactual hypothesis), there is a reasonable probability that legislative selection would produce the same result.

Moreover, a targeted disenfranchisement strategy might be counterproductive to a state wishing to preserve white political supremacy. If blacks could fully participate in every aspect of a state's political system other than how it selected its electors, unsuccessful white factions would continue to have an incentive to build political coalitions with the black community to gain control over the state government. Over time, this might either result in the reintroduction of popular balloting or result in legislative selection throwing the state's electoral votes to the candidate supported by the biracial coalition. Disenfranchisement across the board was the only stable

29. See NATIONAL ARCHIVES RECORDS ADMINISTRATION, U.S. ELECTORAL COLLEGE: 2000 ELECTION RESULTS, at <http://www.nara.gov/fedreg/elctcoll/index.html> (last updated Apr. 5, 2001) (providing state by state electoral votes).

30. During Reconstruction, both Mississippi and South Carolina were majority-black states. As long as each had a majority-black electorate, Republican candidates won all the states' electoral votes. See KOUSSER, *supra* note 28, at 20-22, 29.

31. This, too, is a deeply counterfactual assumption. Many of the most heavily black states engaged in white-driven racial gerrymanders throughout Reconstruction. See *id.* at 28-31.

32. I explore the conditions under which blacks can be the swing vote in Karlan, *supra* note 22, at 295.

33. Note that black participation is outcome-determinative only if two things are true: (1) the black vote is larger than the difference between the two white factions (otherwise, the gap between the white factions will determine the outcome) and (2) the black community forms a coalition with the *smaller* of the two white factions (otherwise, the result does not change whether blacks participate or not).

strategy. Southern states pursued it ferociously and Congress and the courts proved themselves unwilling to pull the Section 2 trigger even then.³⁴

II. SUBSTANTIVE DUE PROCESS AND THE RIGHT TO VOTE

The Supreme Court has also foreclosed Shane's other candidate for an express constitutional guarantee of the right to vote in presidential election—the Privileges or Immunities Clause of the Fourteenth Amendment.³⁵ In October 1872, Virginia Minor, “a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years, wishing to vote for electors for President and Vice-President of the United States,” sought to register.³⁶ The registrar refused her application because she was a woman.³⁷ She sued, squarely pleading that voting was a privilege or immunity of United States citizenship protected by the Fourteenth Amendment.³⁸

In *Minor v. Happersett*, the Supreme Court unanimously rejected that argument. It noted that women had always been considered citizens of the United States “the same as men.”³⁹ But, the Court concluded, all citizens were not necessarily voters. At the time of the framing, no state had universal citizen suffrage. States commonly restricted the franchise to adult, male property owners who had resided in the state for a substantial period of time,⁴⁰ despite the fact that children, women, and poor people were undeniably citizens. And at the time the Fourteenth Amendment was adopted, every state—including the readmitted Southern states whose constitutions were reviewed by the Reconstruction Congress—continued to restrict the franchise to adult males.⁴¹ Thus, the common understanding of citizenship, the Court suggested, was not coextensive with voting. If the Privileges or Immunities Clause did not protect Virginia Minor's ability to vote in the 1872 presidential election, it is unclear why it would protect anyone else's right to vote, let alone anyone's right to have an election in which to vote.

34. See *supra* note 26.

35. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”). See Shane, *supra* note 1, at 546-47.

36. *Minor v. Happersett*, 88 U.S. 162, 163 (1874).

37. *Id.* at 163-64.

38. *Id.* at 164. Happersett, the registrar who refused to enroll Mrs. Minor, did not even bother to retain a lawyer to represent him in the Supreme Court. See *id.*

39. *Id.* at 169.

40. See *id.* at 172-73 (describing the original states' restrictions on the franchise).

41. *Id.* at 176-77.

In contrast to Shane, the *Minor* Court thought that Section 2 of the Fourteenth Amendment actually undercut the idea of voting as a privilege or immunity of citizenship:

[I]f suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the [reduction of representation provision] to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens.⁴²

Minor v. Happersett ended with a Court "unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one."⁴³ And yet, as Shane notes, "the plain democratic trajectory of constitutional development since 1868"⁴⁴ rejects that consensus. That is why the per curiam's assertions in *Bush v. Gore* are so jarring: they are completely out of step with the Court's general jurisprudence.

Indeed, the per curiam's citation of Article II as giving state legislatures plenary power over how presidential electors are selected⁴⁵ cannot be taken at face value. Even under the most robust interpretation, a state's Article II powers are constrained by later constitutional amendments. After the Nineteenth Amendment, the states cannot strip women and women alone of the right to vote in presidential elections.⁴⁶ After the Twenty-sixth Amendment, they cannot decide to exclude the elderly from voting in presidential elections.⁴⁷ And the Equal Protection Clause constrains the states in a variety of ways: they cannot establish a popular balloting process that weighs the votes of some voters more heavily than others (*Bush v. Gore* itself suggests this equal protection constraint)⁴⁸ or restrict the popular franchise to longstanding state residents. Nor, under the suspect-classification strand of equal protection doctrine, could a state legislature adopt a process for picking electors because of its adverse effects upon a suspect or quasi-suspect class.⁴⁹ Under contemporary doctrine, the Equal Protection Clause would forbid a state from abol-

42. *Id.* at 174-75.

43. *Id.* at 178.

44. Shane, *supra* note 1, at 548.

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

46. *See* U.S. CONST. amend. XIX, cl. 1.

47. *See id.* amend. XXVI, § 1.

48. *Bush v. Gore*, 531 U.S. at 104.

49. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

ishing popular elections if the change were motivated by the desire to “maintai[n] white control of presidential elector appointments.”⁵⁰

Moreover, the enforcement clauses of the Reconstruction and later voting-related amendments give Congress power under appropriate circumstances to override a state’s sovereign prerogatives.⁵¹ To take just one salient example, section 5 of the Voting Rights Act forbids certain covered jurisdictions from adopting any change with respect to voting if that change would have a retrogressive effect on minority voting rights.⁵² The Supreme Court has explicitly held that abolishing elections and replacing them with appointive systems is covered by section 5: “In [this case], an important county officer in certain counties was made appointive instead of elective. The power of a citizen’s vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters.”⁵³ Thus, if a covered jurisdiction (like Mississippi or Arizona) were to abolish popular election, under section 5 it would first have to prove that the change had neither the purpose nor the effect of diminishing the voting power of African-American, Hispanic, or Native-American citizens.⁵⁴

The second part of *Disappearing Democracy*, which focuses on procedural due process, is both perceptive and persuasive. Shane surely is right that voting is a species of liberty interest.⁵⁵ But the implications of his own analysis, as well as the democratic trajectory of constitutional development, raise important questions about the contours of the right to vote. And they suggest a substantive, as well as a procedural, due process component to the right to vote.

To begin with, Shane draws too sharp a distinction between equal protection- and due process-based analyses of claims about voting. As I have explained elsewhere,⁵⁶ the Court’s pronouncements about voting rights are often “double-barrelled,” reflecting judicial skepticism about a state’s restrictions of the franchise under both the suspect-classification and the fundamental-rights strands of strict scrutiny. The paradigmatic example of such a case is *Harper v. State Board of*

50. Shane, *supra* note 1, at 544.

51. See U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

52. 42 U.S.C. § 1973c (1994). For a full treatment of section 5, which is a very complex statute, see THE LAW OF DEMOCRACY, *supra* note *, at 546-671.

53. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-70 (1969).

54. There are some jurisdictions—Florida is one of them, see 28 C.F.R. pt. 51 app. (2000)—which are only partially covered. The question whether preclearance would apply to them is somewhat knottier, see *Lopez v. Monterey County*, 525 U.S. 266, 271-77 (1999) (addressing this issue in the context of changes to how California, also a partially covered state, elects municipal judges), but my own view is that it would.

55. See Shane, *supra* note 1, at 562-63.

56. See Pamela S. Karlan, *Just Politics?: Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 297-99 (1997).

Elections,⁵⁷ which struck down poll taxes as a violation of the Equal Protection Clause. The Court offered two now distinct reasons for its conclusion. First, it described the right to vote as “a fundamental matter in a free and democratic society”; thus, “any alleged infringement . . . must be carefully and meticulously scrutinized.”⁵⁸ Second, it found that “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored”; thus, “the requirement of fee paying causes an ‘invidious’ discrimination.”⁵⁹ In hindsight, the first line of cases lead to the current black letter law that the right to vote is a fundamental right, while the second line is an evolutionary dead end. But before it petered out, the suspect-classification argument may have contributed to the Court’s adoption of a fundamental rights perspective—the importance of protecting the right to vote was driven home by the invidiousness of the distinction that kept some citizens from the polls.⁶⁰

While the Court pigeonholes fundamental rights cases as raising equal protection claims, it could just as easily have denominated them as substantive due process claims. A number of scholars have suggested that the Court’s entire equal protection jurisprudence in the area of voting rights may be little more than a Warren Court recasting of substantive due process concerns in more palatable doctrinal language.⁶¹ The Court has certainly termed the right to vote

57. 383 U.S. 663 (1966).

58. *Id.* at 667 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)).

59. *Id.* at 668 (citation omitted).

60. I also think Shane may have conflated two different areas of equal protection doctrine related to voting. In addition to applying a conventional kind of equal protection analysis, the Court has developed doctrines of equal protection in the political arena that have no counterpart elsewhere. The most salient example is the “one-person, one-vote” standard. Because the one-person, one-vote cases treat the right to vote as fundamental, avoidable population deviations trigger heightened scrutiny. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964). In a unique formulation, the state must show that the disparities are “necessary to achieve some legitimate goal.” *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (emphasis added). This test blends the permissible-ends language from rationality review cases with the appropriate-means language from strict scrutiny. Moreover, there is no requirement in one-person, one-vote cases that the plaintiffs show that the population deviations were the product of intentional discrimination against a group of voters. *Cf. James U. Blacksher & Larry T. Menefee, From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982) (noting the irony that malapportionment claims brought by white suburbanites face a lower standard of proof than racial vote dilution claims brought by black voters).

Thus, I disagree with Shane as to the relevance of the fact that *Bush v. Gore* involved “no allegation that any [of the differential treatments of ballots] amounted to an intentionally invidious discriminatory practice—the kind of practice that the Court normally requires before it elevates the intensity of its constitutional scrutiny of state practices under the Equal Protection Clause.” Shane, *supra* note 1, at 552. The redistricting cases on which the *Bush v. Gore* Court relied did not require any proof of intentional invidious discrimination. That “unconstitutional classification” equal protection claims require proof of intent is arguably beside the point.

61. *See, e.g., Ira C. Lupu, Untangling the Standards of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1068 (1979). For the best extended discussion of how the Court has

“fundamental,”⁶² and has held that infringements on the right are subject to strict scrutiny.⁶³

The now constitutionally recognized fundamentality of the right to vote is relevant to the question raised in *Disappearing Democracy* in two respects. First, as Shane recognizes, the importance of the right to vote informs the operation of the three-part procedural due process calculus of *Mathews v. Eldridge*⁶⁴ by putting a heavy thumb on the side of requiring more reliable procedures.⁶⁵ A critical flaw in the Supreme Court’s decision is that it in fact fails to vindicate *any* identifiable voter’s interest in having her ballot counted.⁶⁶

Second, the substantive strand of the Due Process Clause goes beyond requiring fair procedures to “barring certain government actions regardless of the fairness of the procedures used to implement them.”⁶⁷ If the right to vote is now understood as a fundamental aspect of the liberty the Due Process Clause protects—and the Court has recognized that analysis of liberty interests is deeply informed by tradition, as reflected in longstanding federal and state practices⁶⁸—then a Court sensitive to our traditions of ordered liberty should find a substantive liberty interest in voting to elect the President. That interest, as it has evolved and solidified, outweighs an Article II interest in replacing popular election with some other method of select-

commingled and confused various doctrinal strands, see James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893 (1997).

62. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Reynolds*, 377 U.S. at 562; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

63. See *Dunn*, 405 U.S. at 337.

64. 424 U.S. 319, 332-49 (1976).

65. See Shane, *supra* note 1, at 564-66.

66. I disagree with Shane on one subsidiary point, though. He sees Al Gore as an appropriate plaintiff in a due process lawsuit and “elide[s] . . . the question of a candidate’s standing.” Shane, *supra* note 1, at 562 n.125. I think, for reasons I discuss elsewhere, that using the candidates as the vehicles for assessing what ultimately are the voters’ claims may divert judicial attention from the proper remedial questions. I argue that George W. Bush, for example, was precisely the *wrong* person to vindicate voters’ equal protection interests because his own remedial desire was to see the manual recounts stopped altogether (since he was ahead), regardless of how many votes remained uncounted. 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).

67. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

68. The most elegant expression of this insight appears in Justice Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961):

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . , having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

See also, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.) (adopting Justice Harlan’s formulation).

ing electors that over the last two centuries has fallen into desuetude. The Fourteenth Amendment has simply evolved beyond the point at which a state can strip citizens of their right to participate in choosing the President.

The Court's voting cases do, however, raise a complicating factor for procedural due process analysis. Put simply, the Court has never precisely defined the "right to vote" to which strict scrutiny applies. Strict scrutiny, if applied across the board, would invalidate many practices that courts have consistently upheld, from somewhat restrictive registration requirements⁶⁹ and absentee-ballot laws to bans on write-in voting⁷⁰ and other sorts of limitations on ballot access.⁷¹ Instead, what the Court has done, in effect, is to recognize two sorts of "right to vote": a "core" right to which strict scrutiny attaches and a less fundamental "right to vote" to which a shifting-scale sort of intermediate scrutiny applies. In cases that fall in this second category, the Court asks whether a sufficiently weighty state interest is served by a reasonable and nondiscriminatory restriction on voters or voting.⁷²

The case law, it turns out, does not give real guidance on a critical question in *Bush v. Gore* for any form of due process analysis: what are the rights of voters who cast ballots that do not comply with state law? Many of the Justices were skeptical that a voter who failed to punch the chad out completely had cast a legal vote in the first place.⁷³ If the votes that machine counts failed to pick up were not legally cast as a matter of Florida law, then a state's decision to use a tabulation process that fails to capture them arguably causes no due process problem, since no state-created liberty interest is implicated. My own view, which Shane shares, is that, as a matter of Florida law, the "clear intent of the voter" standard meant that many of the ballots that were out of strict compliance with Florida law were nonetheless legal votes. Thus, for me, the due process analysis proceeds as Shane suggests. But it is important at least to notice the countervailing position: if ballots with pregnant or dimpled chads or

69. See, e.g., *Marston v. Lewis*, 410 U.S. 679, 679-81 (1973) (upholding Arizona's decision to cut off registration fifty days before state and local elections, despite the fact that for federal elections only a thirty-day cutoff is permitted, see 42 U.S.C. § 1973aa-1 (1994)).

70. See *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii's refusal to count write-in votes).

71. For a fuller treatment of these cases, see THE LAW OF DEMOCRACY, *supra* note *, at 362-73, 418-27.

72. See *Timmons v. New Party*, 520 U.S. 351, 357-59 (1997) (describing the standard).

73. See *Bush v. Gore*, 531 U.S. 98, 119 (2000) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring). At oral argument, Justice O'Connor also expressed this concern: "[W]hy isn't the standard [for deciding if a ballot contains a legal vote] the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?" Tr. of Oral Argument at 58, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at <http://election2000.stanford.edu/949trans.pdf>.

other forms of noncompliance do *not* contain legally cast votes, then a recount process that includes them might infringe upon the voting rights of those citizens who *did* comply with the state's requirements.⁷⁴

This sentiment may well have played some role in the Court's decision. That is, the Court might have decided the equal protection claim the way that it did only because it thought there was little risk of there being a meaningful number of uncounted but legal votes or because it thought that the Florida process was so out of control that it was likely to produce a less fair final accounting. I think those assumptions are wrong. I suspect that the Court's willingness to indulge in either might be a manifestation of what Paul Brest memorably termed "selective sympathy and indifference."⁷⁵ That is, the five Justices in the majority might have been affected by the fact that the voters whose votes were not being included were Democrats who simply couldn't follow the rules, for goodness sakes!, and were being bailed out by a Democrat-dominated state supreme court. Without some substantive conception of the right to vote, then, pure procedural due process theory can only take us part of the way toward explaining why the Supreme Court's equal protection decision is so bankrupt.

III. DUE PROCESS AND EQUAL PROTECTION AS RHETORICAL STRATEGIES

There was another due process claim lurking in *Bush v. Gore*. As Shane notes, Governor Bush also argued that the manual recounts ordered by the Florida Supreme Court violated the Due Process Clause.⁷⁶ That claim was never really addressed, at least as a matter of due process. But it was embraced de facto by the Chief Justice and Justices Scalia and Thomas, whose Article II-based concurrence offered a presidential election-specific version of the argument that changing electoral rules in midstream is unconstitutionally unfair to candidates and voters.⁷⁷

I don't propose to analyze Bush's due process claim here. Rick Pildes's Article contains a discussion that reflects our collaboratively

74. See *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995) (counting absentee ballots that did not strictly comply with various requirements of Alabama law would "dilute the votes of those voters who met the requirements of [the absentee ballot law] as well as those voters who actually went to the polls on election day").

75. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976).

76. Shane, *supra* note 1, at 570.

77. See *Bush v. Gore*, 531 U.S. at 112-15.

developed perspective.⁷⁸ Faced with an unprecedented situation and an ambiguous and contradictory statute, it would be difficult for any interpretation of state constitutional law to rise to the level of a due process violation. Rather, I want to consider *why*, with all these Due Process Clause claims in the air, the Court employed the Equal Protection Clause instead.

Disappearing Democracy suggests the beginning of the answer: any reference to due process could have made it uncomfortably clear that the Court was “apply[ing] the Equal Protection Clause in a way that [would] disenfranchise thousands of Florida voters.”⁷⁹ Only by ignoring the substantive content of the right to vote and focusing instead solely on the comparative treatment of ballots could the Court reach its desired outcome.

But the problems with the per curiam go beyond that. In the end, the decision to stop the recount had virtually nothing to do with equal protection. It vindicated no identifiable voter’s interests.⁸⁰ The form of equality it created was empty: it treated all voters whose ballots had not already been tabulated the same, by denying *any* of them the ability to have his ballot counted.⁸¹ And its remedy perpetuated other forms of inequality that were far more severe: between voters whose ballots were counted by the machine count and voters whose ballots were not, and even between voters in counties that performed timely manual recounts (like Volusia and Broward) and voters in other counties.

Even if there had been an equal protection problem with aspects of the procedure ordered by the Florida Supreme Court, that would not have justified the remedy the U.S. Supreme Court ordered. To stop the recount, the per curiam essentially smuggled in through the back door the Article II rationale advanced explicitly by Chief Justice Rehnquist’s concurrence: any constitutionally acceptable recount would require disregarding the Florida Legislature’s presumed interest in obtaining the safe-harbor benefits of the Electoral Count Act.⁸² So why did the per curiam insist on relying on the Equal Protection Clause?

I think the decision was political, in the broad sense of the word. The Court was trying to wrap its decision in the mantle of its most popularly and jurisprudentially successful intervention into the po-

78. See Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001). See generally WHEN ELECTIONS GO BAD, *supra* note *, at 5-19.

79. Shane, *supra* note 1, at 538.

80. For a full discussion of this point, see Karlan, *supra* note 66; see also Pamela S. Karlan, *Equal Protection: Bush v. Gore and the Making of a Precedent*, in THE UNFINISHED ELECTION OF 2000, at 159, 185-93 (Jack N. Rakove ed., 2001).

81. See *Bush v. Gore*, 531 U.S. at 110-11.

82. *Id.* at 111-15 (Rehnquist, C.J., concurring).

litical process: the one-person, one-vote cases. This is a familiar strategy. Consider *Planned Parenthood v. Casey*,⁸³ the case in which the Court reaffirmed the central right to reproductive autonomy recognized in *Roe v. Wade*.⁸⁴ The joint opinion written by Justices O'Connor, Kennedy, and Souter invoked another iconic Equal Protection Clause case, *Brown v. Board of Education*.⁸⁵ It too treated the responsibility of articulating binding principles of constitutional law as an unsought responsibility. And it saw a special dimension “present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”⁸⁶ It identified only two such occasions “in our lifetime, . . . the decisions of *Brown* and *Roe*.”⁸⁷

Perhaps the Supreme Court saw *Bush v. Gore* as a third such occasion. Once again, the Court was asking the nation to end its close division by accepting a common mandate rooted in the Constitution and accepting a judicial resolution.⁸⁸ And as between the Equal Protection Clause—source of some of the Supreme Court’s finest moments—and the other contenders, it was no contest. If the Supreme Court was going to stop the recount, it had to use a constitutional provision with a pedigree. The Equal Protection Clause provided exactly that. Moreover, it allowed the Court to invoke the specter of unfair treatment of voters, whereas the other available constitutional contenders protected either the prerogative of state legislatures (Article II, Section 1) or, even worse, the interests of candidate George W. Bush (the Due Process Clause as it was actually raised in *Bush v. Gore*).

CONCLUSION

Shane concludes his Article with a discussion of the political question doctrine. He argues that “Article II and the Twelfth Amendment are readily interpretable as embodying a textually demonstrable commitment to Congress of the power to resolve all issues related to the proper tabulation of electoral votes.”⁸⁹ While I agree with him that the Constitution confides the question of how to count electoral votes to Congress, I do not think that necessarily makes *Bush v. Gore* nonjusticiable. Even if the question of which slate of electors to accept is ultimately for Congress to decide, that cannot dispose of the

83. 505 U.S. 833 (1992).

84. 410 U.S. 113 (1973).

85. 347 U.S. 483 (1954).

86. *Casey*, 505 U.S. at 867.

87. *Id.*

88. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

89. Shane, *supra* note 1, at 581-82.

antecedent question of whether a state has conducted its election process in compliance with the Equal Protection and Due Process Clauses. I imagine that Shane would be disturbed if, faced with the due process claim he identifies—the hypothetical case of *Gore v. Harris*—the Supreme Court were to say to excluded voters, “go complain to Congress; we are unwilling to step in even if a state chooses to use unreliable methods of counting votes.”

Disappearing Democracy is ultimately an Article about why it matters through which lens we examine a problem. As Shane notes, it isn’t just a question of vocabulary.⁹⁰ It actually affects how courts see the facts and resolve the issues. But just as how we denominate a claim can matter, so too can what we call an institution.

We are not the only country recently to have faced the question whether we could hold our presidential inauguration as scheduled. Iran also had that problem. Its inauguration was postponed because the Iranian Constitution requires that the ceremony be carried out in the presence of “all the members” of the Guardians Council, and the reformist parliament was at loggerheads with the conservative judiciary over voting to fill the vacant seats.⁹¹ The Iranian Constitution provides for something our Constitution doesn’t: an “Expediency Council.”⁹² Faced with the problem, the Expediency Council simply rammed through a settlement: the seats would be filled by a plurality vote, rather than the previously required majority vote, and the inauguration could go forward. Our Constitution makes no mention of an Expediency Council. Both in describing the right to vote in presidential elections and in reviewing how Florida sought to protect that right, our Supreme Court acted more like an Expediency Council than a principled judicial body. Ultimately, it denied all of us due process of law.

90. *See id.* at 551-52.

91. For an account of this controversy, see Neil MacFarquhar, *Iran Parliament Clears Way for Khatami’s 2nd Inauguration*, N.Y. TIMES, Aug. 8, 2001, at A3.

92. *Id.*