BUSH V. GORE: THE EQUAL PROTECTION CLAUSE AND VOTING RIGHTS IN THE UNITED STATES

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ABSTRACT

Voting rights in the United States have expanded and grown the electorate throughout American history. In a similar way, the equal protection clause of the XIV Amendment has experienced an increased application since its ratification in 1868. From that point in history until 2000, there was limited interaction between these two principles. As a result of the 2000 Election and Florida Recount, however, both principles came before the U.S. Supreme Court in *Bush v. Gore*, and the Court’s decision created a relationship that should ensure that they will be bonded together hereafter.

This paper traces the origin of the equal protection clause and growth of its application by the Court with a focus on how it addresses fundamental rights. Additionally, this work tracks the evolution of voting rights in the country after the Civil War that led to the circumstances of the 2000 Election. This includes the administration of the Florida Recount and how the ensuing court cases surrounding alleged equal protection clause violations served as the basis for *Bush v. Gore*.

Based on the way the events occurred, the Court fused the relationship between the equal protection clause and voting rights. Although the decision came with its
share of critics, to ensure that this convergence continues moving forward, this paper argues that – despite the self-proclaimed limited scope of Bush v. Gore – the Court should use the principle that voting rights are fundamental as a precedent for future equal protection clause cases.
ACKNOWLEDGEMENTS

For my family – my parents, Alfredo and Jane, and my brother, Al. Thanks for the love and support.
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CHAPTER I
INTRODUCTION AND BACKGROUND

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.¹

– *Per curiam* opinion, *Bush v. Gore*

General Introduction

The *Bush v. Gore* decision ended the 2000 Presidential Election, but – as this paper will assert and prove – this decision solidified the bond that exists between the equal protection clause of XIV Amendment and voting rights in the United States. Therefore, this paper will argue that – based on how these issues interact through the ruling in *Bush v. Gore* – voting rights in the United States in modern times should automatically trigger application of the equal protection clause. Because of this assertion, the key question presented by this paper is, “what is the role the equal protection clause then plays with respect to voting rights?”

Although there continues to be differences of opinions on the Constitutional interpretations of the equal protection clause, the text of the amendment itself does provide the initial guidance on the matter of the application of law in the country. As one of the provisions of XIV Amendment, the equal protection clause states, “No state

shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

This analysis requires the establishment of a connection among the subjects of the equal protection clause, voting rights, and *Bush v. Gore*. In order to establish the connection, an examination of the equal protection clause itself and the evolution of its application by the Court are necessary. Accordingly, Chapter II will explore the evolution of the equal protection clause since its inception and will examine the parameters of an existing model that defines threshold requirements for equal protection application. Further, Chapter II will use this model to describe the relationship between the application of the equal protection clause and fundamental rights.

While Chapter II examines the development and application of the equal protection clause, Chapter III will concurrently detail the expansion of voting rights in the United States since the ratification of the Constitution. In doing so, this chapter will track the progression of voting rights in the country from its beginnings in a historical context and through amendments ratified on the expansion of voting rights. Furthermore, Chapter III will examine language in the XIV, XIX, and XXVI Amendments and the provision in each amendment that states, “Congress shall have power to enforce this article by appropriate legislation.”

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2 U.S. Constitution, amend. 14, cl. 1.

3 U.S. Constitution, amend. 15, 19, 26
authority to enforce voting rights leading up to 2000, it assisted in elevating voting rights to that of a fundamental right.

While Chapters II and III detail the evolution of equal protection and voting rights, respectively, Chapters IV and V will demonstrate how \textit{Bush v. Gore} is the convergence of the two moving forward. In formally establishing this connection, these chapters will show how the unique circumstances in electing the President of the United States in 2000 raised Constitutional questions that required review by the Court. These circumstances were due to the outcome of the 2000 Election, the actions and events of the Florida Recount, and the Court’s decision in \textit{Bush v. Gore}. Without any of these items occurring, the idea of connecting the equal protection clause and voting rights in this way is moot.

With respect to the 2000 Election, most individuals anticipated a quick conclusion and a definitive winner at the end of the night on November 7, 2000. However, as the final polls closed throughout the country, all eyes turned to the outcome in the State of Florida. Excluding Florida’s electoral votes, Vice President Al Gore held possession of 267 electoral votes – 3 short of the 270 needed to claim victory – while Governor George W. Bush secured 246 electoral votes.\footnote{Mark Whitman, “Appendix B: The U.S. Presidential Election of 2000: Electoral and Popular Vote Totals by State,” in \textit{Florida 2000: A Sourcebook on the Contested Presidential Election}, ed. Mark Whitman (Boulder, CO: Lynne Rienner Publishers, Inc, 2003), 326-327.} Therefore, the winner of Florida’s 25 electoral votes would be the next President of the United States.
When the unofficial total was reported in Florida during the waning hours of Election Day, Bush tallied 2,909,661 votes to Gore’s 2,907,877 votes – a margin of 1,784. Under the stipulations of a Florida statute that was adopted in 2000, “If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office…the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure.” Based on a computation of the unofficial vote totals in Florida, the 1,784 margin of votes out of the 5.8 million cast fell within the stipulated number that prompted an automatic recount under the existing statute.

In accordance with Florida law, the state automatic vote recount occurred, which then triggered a series of events where vote recounts only happened in selected counties. When vetting the votes in those counties, the recount process led to Constitutional questions involving the equal protection clause and voting rights. Both campaigns – attempting to make effective use of the equal protection clause in their respective arguments – brought in sophisticated teams of skilled politicians and attorneys to help make their respective case to the courts and to the public. For Governor Bush, James A. Baker II, the former Secretary of State under President George H.W. Bush, led the recount team. For Vice President Gore, Warren

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6 Florida Statutes, sec. 102.141(4) (2000).
Christopher, Secretary of State under President Bill Clinton, was at the helm of the recount efforts.⁷

To understand the significance of these events, it is necessary to put the Florida Recount in the proper contemporary context. News stories that surrounded the Recount engaged Americans of all types. During the height of the events in November 2000, a poll administered by NBC News and the Wall Street Journal showed that more than 80% of Americans were “watching the recount closely” while 55% were “observing events ‘very closely.’”⁸

As the disputed results of the 2000 Presidential Election and recount of votes in Florida unfolded, a national audience witnessed political theater while legal history was being made. Ultimately, the matter ended up before the U.S. Supreme Court where it stopped the Recount. Here, the Court noted that any further action by Florida courts would delay the outcome of the election beyond the specified day of completion and create “open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.”⁹ The day following this opinion by the Court, Vice President Gore conceded,¹⁰ thus pushing

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⁷ Pleasants, Hanging Chads, 3.
⁸ Pleasants, Hanging Chads, 11.
Bush past the threshold of electoral votes needed to be officially elected 43rd President of the United States.

However, the controversy surrounding the close outcome in Florida and the state’s recount of votes raised larger political – and academic – questions. Were Florida voters being disenfranchised? If so, how were these rights infringed? Because only a small number of counties – Broward, Duval, Miami-Dade, Palm Beach, and Volusia11 – were ultimately the subject of the most scrutiny during the recount, did this act disenfranchise the voters in the counties that were not the subject of the recount? Were there uniform standards in the way that recounts occurred, and how did that impact the outcome? How would the outcome and procedure that occurred in Florida affect future elections? Lastly, what impact would the opinion in *Bush v. Gore* have on the future of voting rights?

The events surrounding *Bush v. Gore* inspired a contemporary look at how the equal protection clause interacts with voting rights. In doing so through this case, the arguments utilized by both the Bush and Gore legal teams on the equal protection clause were groundbreaking based on the relative lack of Court precedent on the issue of voting rights.12 Even though the Court delivered opinions on limited items


12 This is not to say that the Supreme Court has never heard any case regarding equal protection clause application for voting rights. In fact, the Court has heard cases that addressed narrow, and limited, areas of voting rights. For example, take note of Carrington v. Rash, et al., 380 U.S. 89 (1965), where the Court held that the State of Texas could not deprive an individual of the Armed Forces from voting in the state. Further note Reynolds v. Sims, 377 U.S. 533 (1964), where the Court held that the
regarding voting rights, both the Bush and Gore campaigns believed that the citizens of the State of Florida had the fundamental right to vote and their voices to be heard. Otherwise, each respective campaign would not have relied as heavily on this premise. Despite the statement from the Court in *Bush v. Gore* that it would prefer to “leave the selection of the President to the people, through their legislatures, and to the political sphere,”13 it recognized that the fundamental right of voting required action on this matter. The resulting decision subsequently fused the equal protection clause and voting rights in an unprecedented manner.

**Role of Voting**

When considering a Constitutional issue of this nature, a few questions immediately come to mind. Why voting? Why is the participation of the eligible electorate important for a democracy to survive and thrive over the course of more than two centuries? Should it be considered a fundamental right?

An initial starting point to these questions comes from two academics. Robert Dahl defines voting as the “processes by which ordinary citizens exert a relatively high degree of control over leaders.”14 When delving into this issue further, John Stuart Mill argues that political institutions that exert influence over voting are “organic” in

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nature and reflect the will of people because they are a “product of their habits, instincts, and unconscious wants and desires, scarcely at all of their deliberate purposes.”

Including further perspectives assists in understanding the underlying, and fundamental, nature of the role that voting plays in a democracy. Here, Mill provides further insight to this very point. He wrote, “political institutions (however the proposition may be at times ignored) are the work of men, owe their origin and their whole existence to human will.” Therefore, it is reasonable to interpret that, based on this claim, voting plays a role in forming the “human will” that Mill describes.

These analyses provide justification to the importance of voting in the success and accountability for governments to operate in any form of democracy. These observations are further echoed by the Supreme Court itself. In the case of *Reynolds v. Sims*, although the Court primarily addressed the matter of apportionment and how Congressional districts are drawn and not broader individual voting rights, the Court commented on the role of voting. Here, the Court stated, “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the

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16 Mill, *Considerations on Representative Government*, 5.

right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”^{18}

With both an academic and judicial interpretation of what role voting has in a democracy, understanding the execution of voting rights in the United States provides the initial link to the equal protection clause. When electing the President, Article II of the U.S. Constitution and commonly referred to as the Electoral College, the presidential electors are determined by the total number of Representatives and Senators assigned to the State as apportioned after each census.^{19} This is further supplemented by earlier language in Article I that states, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”^{20}

Due to these structures of the American government, the state must take action in order for voting to occur. This early premise of how the practical structure of voting takes place demonstrates a connection to the XIV Amendment. In the general and theoretical sense, the states must afford equal protection of the laws and must administer elections for federal officials, so at this level; they are connected in that form.

^{19} U.S. Constitution, art. 2, sec. 1, cl. 2.
^{20} U.S. Constitution, art. 1, sec. 4, cl. 1.
In the *per curiam* opinion in *Bush v. Gore*, the Court reaffirmed the power of states in the administration of elections. In its opinion, the Court stated that the “individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”21 In addition to providing insight to states’ rights, for the purposes of this work, this comment from the Court also provides a link to the relationship between the equal protection clause and voting rights.

In the immediate aftermath of the 2000 Presidential Election, there were a number of proposals floated to reform the Electoral College due to the fact that Vice President Gore won the overall popular vote, but did not win the Electoral College over Governor Bush. While thought provoking, this is a topic that is too expansive for the purposes of this work.22 This paper will instead investigate the connections of voting rights and the equal protection clause within the current structures on how elections are administered that exist in the United States.

Although we have a glimpse into the basics of how American elections are administered at the state level, the underlying question of the importance of voting still exists. If voting is a key component to the structure of democracy, the election is a


conduit of how the act operates in a democracy. Here, Dahl provides an analysis to address this point. As he states, “the election is the critical technique for insuring that governmental leaders will be relatively responsive to non-leaders.”

Therefore, with this understanding, voting is the means by which elected officials remain accountable to their constituencies, and therefore, needs to have protection to ensure the continued success of a legitimate democracy.

To that end, as indicated by the structure of the Constitution, states have the latitude to appoint electors and conduct oversight over elections. With that premise in mind and when utilizing comments by the Court in Reynolds v. Sims on the role of voting and both Mill and Dahl’s arguments on the essential role served by elections, voting and elections serve as the foundation for democracy and governmental accountability in the United States. Therefore, these ideas are codependent, which means that state application of voting rights serves as the launching point to examine how the equal protection clause is connected to voting.

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23 Dahl, A Preface to Democratic Theory, 125.
Establishment

To understand the role and significance of the equal protection clause in *Bush v. Gore*, one must first understand the history of the equal protection clause and the evolution of its application by the Court. This chapter will describe the historical context for the creation of the XIV Amendment, and it will discuss—through relevant legal cases—how this clause has been applied by the Court with a focus on its modern interpretation. Additionally, this chapter will introduce the use of a model that demonstrates the relationship between a fundamental right and the application of the equal protection clause that will assist in establishing the convergence of the equal protection clause and voting rights.

Why did the XIV Amendment need to be ratified in the first place? To answer this, the origin of the XIV Amendment is within the Bill of Rights. From the historical perspective, the V Amendment can be considered to be a precursor to the XIV Amendment because it is the first Constitutional language that speaks to the notion of due process of law. It states, “No person shall be…deprived of life, liberty, or property, without due process of law.”

After the Bill of Rights was ratified as part of the Constitution, there remained questions as to how the rights within the first ten amendments would be applied at the federal and state levels. It was not until the 1833 case of *Barron v. Baltimore* that the

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1 U.S. Constitution, amend. 5.
Supreme Court made this distinction. In its opinion in this case, the Court – through Chief Justice John Marshall – provided significant latitude to the states in exercising control over their own jurisdictions. On the protection of rights by states, Marshall noted that had states, “required changes in their constitutions; had they required additional safe-guards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and could have been applied by themselves.”²

The ruling in *Barron v. Baltimore* was consistent with the intent of the framers, as argued by James Madison in *Federalist* No. 45. Here, Madison stated, “The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of people, and internal order, improvement, and prosperity of the State.”³ Therefore, under Madison’s interpretation of the Constitution via *Federalist* No. 45, the powers of the federal government “are few and defined.”⁴

Based on the framer’s intent and the ruling in *Barron v. Baltimore*, Michael Kent Curtis asserts that the Bill of Rights as a whole – which includes the due process clause – had a federal focus in the years leading up to the Civil War. Using the context of *Barron v. Baltimore*, he argued that the V Amendment was only adopted to protect

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² Barron v. City of Baltimore, 32 U.S. 243 (1833).


people from “abuses of power by the federal government” and thus “had no application to the states,” leaving states – if they so chose – the ability to suppress certain rights in the South to “deny procedural and substantive rights to blacks.”5 As a result of this decision, there was no uniform federal standard by which states had to act with respect to the application of the Bill of Rights, and the V Amendment.

After the Civil War, Congress attempted to ensure the extension of these guaranteed rights to former slaves with the passage of the Civil Rights Act of 1866. This was codified in statute because the intent of this legislation was a “view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of involuntary servitude.”6 However, while this was an attempt at extending of the Bill of Rights and equal protection of the law at the state level, this law fell short of ensuring these rights on similar grounds of federal implementation that were raised by Barron v. Baltimore.

Reconstruction Republicans recognized the inability to fully incorporate the Bill of Rights at the state level. Coupled with the potential problems of enforcing the Civil Rights Act of 1866, Republicans needed to find a way to guarantee the protection of rights established by the Bill of Rights within the states. Therefore, Reconstruction Republicans chose to amend the Constitution with the goal of ensuring the same


liberties at the state level as the federal level. In this context, James E. Bond argued that the XIV Amendment “emerged as part of a larger effort to democratize and nationalize the American republic, at least with respect to the protection of individual liberties.”

The language utilized in the XIV Amendment reflected this attempt both within the sense of due process of the law as established by the V Amendment and its equal protection. Specifically, the XIV Amendment states, “No State shall…deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” This language demonstrates the fact that the principles of the due process were rooted in the V Amendment, but now with the intent to extend these protections at the state level that had been absent before the Civil War.

On the matter of the equal protection clause, with the ratification of the XIV Amendment, its proponents intended the clause to bring an end to discriminatory treatment of African Americans after the Civil War. Rauol Berger noted that the intension of this clause was indentified as, “the law that operates upon one man shall operate equally for all.” Furthermore, in order for the equal protection clause to be effective, Michael J. Perry notes that it must be “construed not only to forbid states to

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8 U.S. Constitution, amend. 14, sec. 1.

deny the equal protection of protective laws, but also forbid them to make or enforce
racially or otherwise invidiously discriminatory protective laws.”¹⁰ Perry expanded on
this point to state that equal protection applied to “not just ex-slaves, but all citizens,
and not just all citizens, but all persons.”¹¹

In the context of the XIV Amendment, Berger stated that the primary function
of the equal protection clause is to combat discrimination, and it is the only language
within the XIV Amendment that addresses the matter.¹² With respect to the framers of
the Constitution, the equal protection clause can be considered a state response and
extension of the Bill of Rights when it addressed a “ban on discrimination with respect
to particular rights.”¹³ In theory, this was the incorporation of the Bill of Rights to the
states that did not exist prior to the Civil War.

While these elements sound laudable, during the historical time period in which
the XIV Amendment was ratified, these ideas were not uniformly accepted. In fact, as
will be evident by the application of the equal protection clause, there were many
efforts in which states continued to systematically deprive individuals of these newly
established rights. So, while the elements of the equal protection clause and the XIV
Amendment work in an academic and theoretical sense, this became more difficult for
states to enforce in reality.

¹⁰ Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999), 54.
¹¹ Perry, *We the People*, 54.
¹² Berger, *The Fourteenth Amendment and the Bill of Rights*, 123.
¹³ Perry, *We the People*, 123.
Court Application

Although the equal protection clause – and the XIV Amendment as a whole – had been ratified by the states in 1868, it still faced an uphill battle in terms of how it would be applied by the Supreme Court, which is pertinent for the eventual interpretation of the clause in *Bush v. Gore*. In the first several years following the ratification of the amendment, Curtis argues that there was “significant support for a libertarian reading of the amendment.”14 This would have seemingly provided proponents of the amendment hope that this interpretation of direct application of the Bill of Rights to the states would become the standard among scholars and the Court.

However, in 1873, the XIV Amendment as whole suffered what proponents would have believed to be a setback in its application in the eyes of the Court. This obstacle presented itself, not in the form of a challenge that would have been anticipated legally, but in the form of an economic matter by the way of a Louisiana state law that addressed the regulation of slaughterhouses. In the *Slaughterhouse Cases*, the Court had to make the determination as to whether or not this law violated the XIV Amendment.

In this particular case, the Court decided in a 5-4 decision that the rights afforded by the XIV Amendment were not an extension of the Bill of Rights.15 In addition to the challenges presented to the entire amendment, the Court addressed the equal protection clause by stating that the clause was targeted at “newly emancipated


15 *Slaughterhouse Cases*, 83 U.S. 36 (1873).
negoes” and that in cases of “gross injustice and hardship against them as a class,” the clause would apply. However, the Court argued that it did not apply in this instance because it would be a matter handled by Congress.

For proponents of the XIV Amendment, this was a major blow to the idea of the equal protection clause, and in terms of the Court’s perspective, this only became worse in 1896. In the case of *Plessy v. Ferguson*, the Court once again had to look at the XIV Amendment, and specifically the equal protection clause, when it came to the treatment of African Americans on railroad cars in Louisiana. Here, as it did in the *Slaughterhouse Cases*, the Court rejected a broad interpretation of the equal protection clause because it stated that the purpose of the XIV Amendment was “to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color.” Instead, the Court developed the “separate but equal” doctrine. Under this premise, states could circumvent the equal protection clause so long as that equal accommodations were made for individuals of different races.

In the decisions handed down in these two cases, and the establishment of “separate but equal,” considered Court precedent, changes in application of the equal protection clause remained dormant for over 50 years. Under the guidance of Chief Justice Earl Warren, the Court shifted its interpretation of application of the equal protection clause.

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16 Slaughterhouse Cases, 83 U.S. 36 (1873).
17 Plessy v. Ferguson, 163 U.S. 537 (1896).
18 Ibid.
protection clause to what is now perceived by contemporary standards. This shift began with the case of *Brown v. Board of Education*.

In its unanimous decision, the Court directly addressed the XIV Amendment with a focus on the equal protection clause and the “separate but equal” doctrine in the arena of public education. Here, the Court noted the contrasting views of the application of the XIV Amendment, but it indicated that while investigating those previous positions was useful, it was “inconclusive.”19 Therefore, as it stated, the Court was forced to “consider public education in the light of its full development and its present place in American life.”20

When examining the issue at hand, the Court determined that “education is perhaps the most important function of state and local governments” and in states that provide education, it “is a right which must be made available to all on equal terms.”21 Therefore, the idea of “separate but equal” could not exist because, “Separate educational facilities are inherently unequal.”22 As a result, by nullifying the “separate but equal” doctrine in *Brown v. Board of Education*, the Court overturned previous precedent established by *Plessy v. Ferguson* on how equal protection clause was applied on matters of race.


20 Ibid.

21 Ibid.

22 Ibid.
In areas that involve the equal protection clause that do not include race, the Court – even before *Brown v. Board of Education* – made decisions that addressed the idea of fundamental rights being protected under the equal protection clause. That begs the question: what exactly can be defined as a fundamental right? Curtis argues that the idea of fundamental rights are left to be interpreted by the Court because “we live in a nation where the constitutional rights of the individual are so sacred that they are protected from the power of the government, even from the power of the majority.”

Using this argument, the Court modified its interpretation of the equal protection clause, thereby expanding the number of fundamental rights that warrant protection in the eyes of the Court. In growing the number of rights that are to be considered fundamental, it bolsters the argument of the sacred nature of constitutional rights.

When considering both the race considerations and other fundamental rights that warrant equal protection clause application, how does the Court implement these principles in a modern day setting? With this in mind, during a class lecture on March 28, 2009, Georgetown University Professor Rory Quirk provided a test on the

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implementation of the equal protection clause. Hereafter referred to as the Quirk Model, it encompasses a series of sequential questions that analyze the application of the equal protection clause as it currently stands.\textsuperscript{25}

When utilizing the Quirk Model, it provides a step-by-step guide on how the Court currently interprets the equal protection clause. The first two questions of the Quirk Model are straightforward. Is there some sort of state action involved?\textsuperscript{26} In being the first question of the Model, it establishes the basis by which other sequential questions are asked. The second question is also clear because it asks if there is a person involved in the matter, and under the Model, this can be interpreted regardless of American citizenship.\textsuperscript{27} If there is no state action and no person involved, then the alleged equal protection violation did not occur.

At this point, the Quirk Model becomes more complicated. The next question that must be asked is whether or not there has been an allegation of inequitable treatment of that person by the state action.\textsuperscript{28} Again, a claim of a violation of the equal protection clause hinges on this point. In fact, according to the Model, this is the crossroads of the sequential questions. Each of the first three questions must be


\textsuperscript{26} Ibid.

\textsuperscript{27} Ibid.

\textsuperscript{28} Ibid.
answered in the affirmative before forging ahead in the Model. If the answer to any of these is no, then the Model stops and the ability to make an equal protection clause violation claim is moot.

On the other hand, if the answer to each of the first three questions is yes, then the fourth question serves as the proverbial fork in the road. The fourth question asks if this potential violation of the equal protection clause has affected a suspect classification of people or if it has potentially violated one of the Court’s pre-established fundamental rights. When answering this question in the Model, this creates two paths that must be taken depending on the answer to question four.

At this point, if the alleged violation of the equal protection clause involves either the suspect classification or a fundamental right, then there must be another threshold that is met for the alleged violation to be established. In this case, the next test is that the state action must meet a strict scrutiny test. Here, the alleged violation must adhere to a compelling state interest in which there is a specific, and narrowly tailored, purpose of the highest order for that state action to be permitted. Based on

29 Ibid.

30 For purposes of the Quirk Model, a suspect classification refers to African Americans, Asian Americans, Hispanic Americans, and Native Americans. For the proper citation to this note, please see note 29.

31 Please see note 24 to view the list of “fundamental rights” currently under consideration by the Court.


33 Ibid.
this path, the state action that leads to the allegation of violating the equal protection clause is often ruled to be unconstitutional.34

Going back to the fourth question, alleged violations that do not affect a suspect classification or fundamental right must meet a different standard. Here, the test that the state action must meet is the rational basis test, in which there is a legitimate state interest, and a rational relationship between the state action and alleged violation of equal protection must be in place for it to be upheld.35 In most cases, these state actions are usually not considered to be violating the equal protection clause and are considered constitutional.36

Now that the tenets of the Quirk Model have been established in theory, it is necessary to review a practical example of the Model in order to see its application. Take, for example, the case of Pierce v. Society of Sisters where the question of education came to the center of the equal protection clause. In this case, the State of Oregon had established a law in 1922 that mandated all children between the ages of eight and sixteen to attend a local public school,37 and this was challenged by the Society of Sisters due an alleged violation of equal protection clause, as the Court noted, due to “the right of parents to choose schools where their children will receive

34 Ibid.
35 Ibid.
36 Ibid.
37 Oregon Statutes, sec. 5259 (1922).
appropriate mental and religious training, the right of the child to influence the parents' choice of a school.”

When going through the test, the first three questions have been answered already. Was there state action? With the adoption of the Oregon law, the state acted to limit the choices in education. Next, is there a person involved? Yes, based on the fact that the Oregon law was directed at individuals between eight and sixteen, Question Two has been answered in the affirmative. Next, Society of Sisters challenged the state law based on inequitable treatment under the law. Specifically, the Society of Sisters contended that the Oregon “statute would unlawfully deprive them of patronage” in an educational setting.

Now that the first three questions have been answered in the affirmative, the Quirk Model leads to a question of suspect classification or fundamental right. Here, as was established in *Meyer v. Nebraska*, where a Nebraska state law preventing the instruction of foreign languages in schools was ruled unconstitutional, education was elevated to a fundamental right. Therefore, based on this precedent, in *Pierce v. Society of Sisters*, the fourth question is also answered yes. The Court illustrated that point when it said, “Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think

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39 Ibid.

40 *Nebraska Laws*, ch. 249 (1919).

it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children.”42

Therefore, based on the progression of the Quirk Model in this instance, the strict scrutiny test applies. The Court stated that the Oregon state law was “expected to have general application.”43 When examining this Oregon law using strict scrutiny, it fails the Quirk model because the law was not narrowly tailored. The structure of the law negatively impacted the Society of Sisters as a private corporation because it was an interference considered to be “arbitrary, unreasonable and unlawful” that led to “consequent destruction of their business.”44 Based on this interpretation, the Court ruled in favor of Society of Sisters as this law being a violation of the equal protection clause.

Although this is just one example, Pierce v. Society of Sisters is emblematic of the application of the Quirk Model that can be utilized in contemporary cases where the equal protection clause is in play because it provides a basis for analysis of the clause. However, despite the Quirk Model, there is still a further question that needs to be raised. How does equal protection apply to voting and Bush v. Gore, if at all?

As will be analyzed further in the next chapters, the history of progression and governmental efforts in voting rights in the United States will add substance to the discussion as to whether or not these rights should be considered fundamental.


43 Ibid.

44 Ibid.
Additionally, the circumstances of the 2000 Election and subsequent Florida Recount will also provide evidence to why voting rights potentially require automatic application of the equal protection clause.
CHAPTER III
VOTING RIGHTS ROADMAP

Historical Timeline

While the evolution of the application of the equal protection clause was occurring after the ratification of the XIV Amendment through the present, the progression of voting rights in the United States was taking place simultaneously. In order to make the argument that voting rights should be considered one of the fundamental rights before the Supreme Court with respect to the 2000 Election, it is first necessary to trace the history of these rights in the United States as they were expanded. Based on this understanding, it will become clearer to see the connection that the equal protection clause and voting rights have.

In addition to following the path of how voting rights were expanded in the country through amendments to the Constitution, this chapter will also examine the efforts taken by Congress to enforce the expansion of voting rights. The combination of these two elements provides the needed background on the state of voting rights in 2000. The evolution of voting rights in this regard demonstrate how these rights have been viewed and interpreted to the point where they could be considered fundamental before the Court when it came to Bush v. Gore.

Although voting rights were considered broad in 2000, this was not always the case throughout the history of the United States. At the very beginning of the American republic, voting rights were rather limited when compared to modern day
standards. This is a rudimentary assessment that can be made when comparing modern voting rights with those from the 18th, 19th, and even parts of the 20th Century. Former Representative Barbara Jordan (D-Texas), who served in the U.S. House of Representatives 1973 to 1979, articulated this very point when she once noted in a speech that the initial system created by the Constitution only “enfranchised some of the people” and “did not recognize the right to vote for black people and women.”

From a modern perspective, there was a systematic way in which voting rights were denied to a large number of the population in the early years of the country. This can be traced all the way back to the Constitution itself. As was earlier indicated, in Article I of the Constitution, states were provided with the latitude in setting the parameters for elections and voting. Although the Constitution was drafted in 1787, the fact that states had such power in establishing voting standards would be relevant years later as it related to the equal protection clause of the XIV Amendment.

In the decades before – and even after – the establishment of the equal protection clause, one way to view the expansion of voting rights in the country is through the analysis of former member and Chair of the U.S. Commission on Civil

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3 U.S. Constitution, art. 1, sec. 4, cl. 1.
Rights, Mary Frances Berry. This federal entity has the mission of investigating allegation of individuals being “deprived of their right to vote” or denied “equal protection of the laws under Constitution.” In Berry’s characterization, she made the case that the history of voting rights in the United States can be traced as a “history of barriers erected and erased.”

With states having the ability to set their own voting requirements, many of them used this as a tool of disenfranchisement. In the years leading up to the Civil War, this was demonstrated by the way that Native Americans and African Americans were treated when denied the right to vote. How was this type of disenfranchisement conducted by the states? Put simply; states used provisions of Article I as the basis for their actions. Based on the arguments noted by Berry on the Constitution, Native Americans were not taxed, as a result, they did not need representation. Therefore, they were denied the right to vote. Furthermore, under Article I of the Constitution, enslaved African Americans were only considered to be three-fifths of a

4 Mary Frances Berry served on the U.S. Commission on Civil Rights from 1980-2004. In 1993, she was appointed as Chair of the Commission by President Bill Clinton, and served as Chair from 1993-2004. She has been a Geraldine R. Segal Professor of American Social Thought and Professor of History at the University of Pennsylvania since 1987. University of Pennsylvania Department of History, “Mary Frances Berry,” University of Pennsylvania, http://www.history.upenn.edu/faculty/berry.shtml (accessed June 12, 2010).


7 U.S. Constitution, art. 1, sec. 2, cl. 3. Note: This clause was later amended by Section 2 of the XIV Amendment.

8 Berry, “Voting,” 64.
person for purposes of representation in Congress,\(^9\) and as a result, they were also denied the right to vote.

State action on voting rights before the Civil War represented the systematic nature of disenfranchisement of segments of the population. As a result, there is not an effective argument that voting rights would become fundamental during this time period. It was not until after the Civil War – much like the advent of the equal protection clause – that voting rights began to see an evolution that would put it on a path of expansion. One of the first steps to help link these two elements occurred during Reconstruction.

In the years immediately following the Civil War, the XIII, XIV, and XV Amendments were all ratified, and they were commonly referred to as the Civil War Amendments.\(^10\) As discussed throughout Chapter II, the equal protection clause within the XIV Amendment plays a role of incorporating former slaves into society. The XV Amendment is the Civil War Amendment that was the first constitutional expansion of voting rights in the United States. This amendment states, “The rights of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.”\(^11\)

\(^9\) U.S. Constitution, art. 1, sec. 2, cl. 3. Note: This clause was later amended by Section 2 of the XIV Amendment.


\(^11\) U.S. Constitution, amend. 15, sec. 1
Much like the premise of the XIV Amendment, the XV Amendment includes language that has parallels to the equal protection clause. Specifically, the XV Amendment declares that the United States, nor any of the states, can disenfranchise an individual – for the time being, men – based on race.\textsuperscript{12} Although this amendment did not change Article I of the Constitution that provided the latitude to the states on voting and elections, it did put in place the mechanisms to expand voting rights to include more of the population. With its ratification in 1870, the XV Amendment was essential in the expansion of voting rights because it was the first constitutional action on the matter. If the XV Amendment had not been ratified, then one can infer that advances in suffrage for other parts of the population would have been delayed.

While the establishment of the XV Amendment provides important initial steps in the expansion of voting rights, there was still a demographic of the American population that was excluded from the political process – women. Women’s suffrage was not specifically addressed in the XV Amendment since voting was an institution implemented and administered by states. Therefore, leaders in the women’s suffrage movement adopted a state-by-state approach.\textsuperscript{13} In the years between 1866 and 1919, this strategy was particularly successful in the West during the expansion of the country.

\textsuperscript{12} U.S. Constitution, amend. 15, sec. 1.

While this was primarily limited to the West, women’s suffrage expanded in those states because allowing women to vote would bring “Puritan norms of behavior into public life”\textsuperscript{14} to counter was what seen the vices of traditional societies in the West of “saloons and other venues of gambling and prostitution.”\textsuperscript{15} By 1919, thirteen of sixteen states in the West had granted women the right to vote.\textsuperscript{16} Despite the successes of women’s suffrage movements in the West, this still was not accepted across the country and would not be addressed until the XIX Amendment.

Due to the persistence of the women’s suffrage movement, the XIX Amendment to allow women the universal right to vote was finally ratified in 1920.\textsuperscript{17} From the perspective of the Constitution, both the XV and XIX Amendments broke the racial and gender barriers that existed in terms of voting rights. This was later supplemented by the ratification of the XXVI Amendment in 1971 to allow individuals 18 years of age to vote.\textsuperscript{18} While there were additional amendments that addressed different portions of voting,\textsuperscript{19} these three amendments demonstrate a broad expansion of voting rights.

\begin{footnotes}
\item[16] Ibid., 55.
\item[17] U.S. Constitution, amend. 19.
\item[18] U.S. Constitution, amend. 26, sec. 1.
\item[19] While the three mentioned amendments were critical to broad expansion of voting rights, there were additional amendments that addressed other areas of voting. See U.S. Constitution, amend.
\end{footnotes}
By granting suffrage to these demographics within the American population, these amendments assist in establishing the connection between voting rights and the equal protection clause that would later become apparent in *Bush v. Gore*. With the ratification of these three amendments, suffrage was expanded, and this bolsters the case that voting rights are fundamental. However, while having these amendments in place was an essential component to expand voting rights, these amendments did not guarantee that states would comply. Therefore, it was necessary for Congress to have the ability to enforce these constitutionally protected voting rights to ensure that states carry out the will of the U.S. Constitution.

**Congressional Action**

While the idea of ratifying amendments expanded voting rights in its entirety, there is relevant language in each of the three amendments that provides an enforcement mechanism for Congress. In each the XV, XIX, and XXVI Amendments, this language states, “Congress shall have power to enforce this article by appropriate legislation.”\(^20\) The enforcement language in each of these amendments has allowed Congress to use its authority to assist in expanding voting rights. Without this language in each amendment, it is difficult to show how these rights in 2000 became potentially fundamental in the eyes of the Court for the equal protection clause.

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\(^{17}\) for the direct election of U.S. Senators. Please also note U.S. Constitution, amend. 23 that provided representation within the Electoral College to the District of Columbia. Lastly, please note U.S Constitution, amend. 24 that abolished the use of the poll tax as a means of denying individuals ability to vote.

\(^{20}\) U.S. Constitution, amend. 15, sec. 2, amend 19, cl. 2, amend. 26, sec. 2.
In the years following the ratification of the XV Amendment, Congress did initially act to preserve the voting rights of African American men. Through the Enforcement Act of 1870, Congress required state election officials to make the same voting opportunities available to African Americans and made it a federal crime to interfere with a citizen’s right to vote.\(^{21}\) With this early federal commitment to enforcing voting rights, there was a direct correlation in the enforcement and resulting voter registration. In the nine years following the Enforcement Act of 1870, nearly 70% of eligible African Americans were registered to vote.\(^{22}\) In terms of Congressional enforcement of expanded voting rights, this statistic demonstrates the relationship that Congress had with effectively implementing policy that increased voting eligibility and registration. This initial action by Congress to enforce the XV Amendment begins to exhibit the development of voting rights from a quantitative perspective.

However, despite the increases in voting registration that resulted from the Enforcement Act of 1870, Congress did not take any further action to enforce the XV Amendment between 1871 and 1957.\(^{23}\) Therefore, in the absence of Congressional action, there were a number of tactics that were implemented – particularly by states in

\(^{21}\) Enforced Act of 1870, 41st Cong., 2d sess. (May 31, 1870), U.S. Statutes at Large 16 (1870): 140.


the South – with the intention of systematically disenfranchising African Americans after Reconstruction. Two of these disenfranchisement methods that were adopted by twelve states in the South were the establishment of a literacy test and a poll tax.24

Without enforcement of these voting rights by Congress, there was a subsequent impact on how this affected the eligible electorate based on the XV Amendment. Statistics of voting registration in a two southern states illustrate this point. In Mississippi in 1867, 70% of eligible African Americans men were registered to vote, and by 1889, that figure was 9%.25 In Louisiana, there were over 130,000 African Americans registered to vote in 1896, and by 1900, that number dropped to just over 5,300.26

Much like increased voter registration demonstrated a correlation with Congressional action, the lack of Congressional action between 1871 and 1957 also exhibits the effect that Congress had on expanding voting rights. Without action, it limits the ability to connect the equal protection clause and voting rights during this time period. Armand Defner added a layer to this argument when he noted that the equal protection clause of the XIV Amendment did not exist within the realm of voting


26 Ibid., 3.
rights during this time period.\textsuperscript{27} In order for voting right to be expanded, it was therefore necessary that Congress take action to ensure the spirit of – at the time – the XV and XIX Amendments. This is why the implementation of the Voting Rights Act of 1965 became the next step of Congressional action to assist in expanding voting rights that is still relevant through 2000 and beyond.

With its passage, the Voting Rights Act in 1965 became the broadest implementation of Congressional enforcement of voting rights after the enactment of the XV and XIX Amendments. Specifically, Section 2 of the law stated, “No qualifications or prerequisite to voting…shall be imposed or applied by any state…to deny or abridge the right of any citizen of the United States to vote on the account of race or color.”\textsuperscript{28} Furthermore, Section 5 – commonly referred to as the preclearance clause – denied the ability for localities to further disenfranchise African Americans when it which required counties to seek the permission from the Department of Justice before making any changes to election laws.\textsuperscript{29}

As witnessed in the years following the enactment of the Voting Rights Act of 1965, disenfranchisement tactics that were utilized in southern states began to end. This was evidenced by the fact that between 1965 and 1968, “millions of blacks registered to vote” and the trend of counties with large African American populations


\textsuperscript{29} Ibid.
with few African American voters ended.\textsuperscript{30} Once again, the direct correlation of Congressional enforcement of voting rights led to an expansion that assists in building the argument that voting rights should be fundamental before the Court.

At the time of the passage of the Voting Rights Act of 1965, it was argued that this legislation represented an “appropriate, if not belated effort” by Congress to expand voting rights.\textsuperscript{31} Furthermore, in the context of how this law interacts with the 1964 case of \textit{Reynolds v. Sims} where the Court stated that the “right of suffrage is a fundamental matter in a free and democratic society,”\textsuperscript{32} the Voting Rights Act of 1965 reinforces this view of voting because it “seeks to protect a civil right which is perhaps more fundamental than any other in a free society.”\textsuperscript{33} This assessment of the legislation embodies the notion that Congressional efforts to expand voting rights were timely to protect a citizen’s right to vote.

However, despite the development voting rights associated with the Voting Rights Act of 1965, further Congressional efforts were necessary to ensure the protection from different types of disenfranchisement tactics. For example, this was done by switching to at-large elections when African American voting strength was concentrated in particular areas, extending the terms of incumbent white officials, changing election dates suddenly, and gerrymandering voting districts, just to name a

\begin{footnotes}
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Therefore, further tweaks and reauthorizations of the Voting Rights Act were necessary to ensure this “fundamental” civil right that was argued at the time of the legislation’s enactment.

In the four legislative efforts to reauthorize the Voting Rights Act leading up to 2000, further steps by Congress were taken in order to abide by Section 2 of the XV Amendment and continue to expand voting rights. These included measures to ban literacy tests in all states and to provide bilingual election materials as a way to further include growing minority populations in the voting electorate. Additionally, these four reauthorizations all included extensions of the preclearance clause – Section 5 – that was designed to use the Department of Justice as a means to deter localities from disenfranchising eligible voters.

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Each of these actions by Congress impacted the progress of voting rights leading up to the 2000 Election. Without this particular sequence of events – whether they were amendments to the Constitution or Congressional action – it can be argued that voting rights are fundamental in the eyes of the Court and warrant automatic application of the equal protection clause. Leading up to the 2000 Election, the expansion of voting rights in the United States removed the barriers that had been associated with race, gender, age, and language.

Therefore, based on the efforts made to expand voting rights by the federal government in the form of amendments to the Constitution and Congressional action to enforce those amendments, the expansion of voting rights that had occurred by the time of the 2000 Election justify the fact that they should be considered fundamental. In 2000, these two issues intersected at the juncture of the election, the Florida Recount, and *Bush v. Gore*. Understanding how this event established the connection between voting rights and the equal protection clause will clarify the convergence of these issues moving forward.
2000 Presidential Election and Florida Recount

For the purpose of examining the bond between the equal protection clause and voting rights, as noted at the outset of this paper, one of the most important aspects of \textit{Bush v. Gore} and the 2000 Election was how close the outcome was. Upon looking at the final outcome, George W. Bush ended up with 271 electoral votes, one more than the needed 270 to be elected, yet Al Gore won the national popular vote by a margin of 544,683 out of the 101,463,105 cast for the two candidates.\footnote{Mark Whitman, “Appendix B: The U.S. Presidential Election of 2000: Electoral and Popular Vote Totals by State,” \textit{Florida 2000: A Sourcebook on the Contested Presidential Election}, ed. Mark Whitman (Boulder, CO: Lynne Rienner Publishers, Inc, 2003), 326-327.} Due to the steady progression of both the application of the equal protection clause and the expansion of voting rights, the Supreme Court would not have addressed this issue if the 2000 Election was not as close as it ended up being or if the Florida Recount never occurred. Therefore, due to the way the events of the 2000 Election and Florida Recount unfolded, it is necessary to examine the how the events of this election unfolded to demonstrate the convergence of voting and the equal protection clause.

To set the table for the 2000 Election, it served as what is referred to as a “succession election”\footnote{Hebert F. Weisberg and Timothy G. Hill, “The Succession Presidential Election of 2000: The Battle of Legacies,” in \textit{Models of Voting in Presidential Elections: The 2000 U.S. Election}, eds. Herbert E. Weisberg and Clyde Wilcox (Stanford, CA: Stanford University Press, 2004), 27.} with a variance. President Bill Clinton was term-limited under...
the XXII Amendment,\(^3\) and ultimately, it was his Vice President, Al Gore who received the Democratic nomination. Texas Governor George W. Bush, son of the 41\(^{st}\) President, George H.W. Bush, received the Republican nomination.

Once the primaries for both candidates had been settled,\(^4\) the campaign issues that provided contrast between the candidates emerged. For Vice President Gore, one issue that seemed to be in his favor was the state of the national economy. In 2000, unemployment was less than 5%, inflation had fallen to 1%, interest rates were low, and for the first time in years, there were long-term projected budget surpluses.\(^5\) In his speech to formally accept the Democratic nomination, he stated, “This election is not an award for past performance. I’m not asking you to vote for me on the basis of the economy we have. Tonight, I am asking for your vote on the basis of the better, fairer, more prosperous America we can build together.”\(^6\) This was an attempt by Gore to remind voters of the strength of the economy while at the same time, distancing himself from President Clinton.

Why was it that Gore tried to distance himself from President Clinton in the first place? Due to the moral legacy that Clinton had in office that stemmed from an

\(^3\) U.S. Constitution, amend. 22, sec. 1.

\(^4\) Vice President Gore dispatched former Senator Bill Bradley (D-NJ) in the Democratic Primary while Governor Bush secured victory in the Republican Primary over Senator John McCain (R-AZ).


inappropriate sexual relationship with White House intern Monica Lewinsky, Clinton was impeached by the U.S. House of Representatives\textsuperscript{7} but not convicted by the U.S. Senate and removed from office.\textsuperscript{8} However, this issue lingered within the minds of the voters in 2000, and Governor Bush attempted to tie Gore to the Clinton Administration and this moral legacy. The most apparent way in which Bush used this issue in the campaign was in his acceptance speech of the Republican nomination. Throughout his speech, he made comparisons of the character of Gore to his running mate, Dick Cheney. Bush reiterated this point several times during his nomination speech when he repeated, “They have not led. We will.”\textsuperscript{9}

Throughout the general election, the campaign remained very close. Based on a retrospective economic voting model developed by Helmut Norpoth, he predicted that Gore would carry 55% of the national vote because this model relied on the fact that “a voter does not have to be familiar with the economic policies pursued by government, or with the proposals by the opposition. All that matters is whether at the end of the day economic times are good or bad.”\textsuperscript{10} With the economic conditions that existed at the time, Gore held the advantage in this regard.


Despite this economic model’s prediction, the race remained tight up until Election Day. In fact, in one of the final national polls before the election, the CNN/USA Today/Gallup tracking poll had Bush maintaining a slight lead over Gore with 47% to 45% with the undecided vote at 3% and the margin of error at 2%. As this poll indicated, the outcome of the election would be close, both in the popular vote as well as the tally in the Electoral College, which is why the margin in Florida would become such a heated issue.

For the purposes of the connection between the equal protection clause and voting rights, the close finish in Florida was essential. If the election was not going to be close in the Electoral College, then even a razor thin margin in Florida was inconsequential to the outcome of the election. Therefore, there would not have been a reason for the public or the Court to use this election to reexamine voting rights. As a result, any potential connection between these two principles based on this election would be thwarted. However, because the vote was close nationally, the outcome depended on Florida. When removing Florida’s electoral votes, Vice President Gore held possession of 267 electoral votes while Bush held 246 electoral votes with Florida’s 25 hanging in the balance.

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Due to the Florida election law that mandated an automatic recount for races with a margin of victory less than one half of one percent,\(^{13}\) the 1,784 initial lead on Election Night for Bush prompted this law to be invoked. Concerns were raised shortly after Election Day that there were deliberate efforts to violate the spirit of the Voting Rights Act. Specifically, allegations were launched that claimed that individuals were disenfranchised by “complicated ballots that may have caused ‘overvotes’ or ‘undervotes,’” establishing an unauthorized law enforcement checkpoint in Leon County, or minority groups were “not provided with language assistance.”\(^{14}\)

As events unfolded, the premise of the Florida Recount was whether or not an individual’s voting rights were being violated. One of the primary sources where these allegations can be linked is to the use of the “butterfly ballot” – with a focus in Palm Beach County. When the butterfly ballot was being utilized, a voter had to distinguish the candidates running for President of the United States “on two adjoining pages of the ballot book instead of on the single column page.”\(^{15}\) Although the butterfly ballots used in Palm Beach County had arrows clearly pointing to the names of the appropriate candidate,\(^{16}\) there were still results from that county that were troublesome for the Gore Campaign.

\(^{13}\) Florida Statutes, sec. 102.141(4) (2000).


For example, Reform Party candidate Pat Buchanan out performed in Palm Beach County relative to his overall tally across the rest of Florida. Buchanan received 3,407 votes in Palm Beach County, which accounted for 20% of his overall total of votes throughout the state, while he received slightly over 500 and 800 votes in Miami-Dade and Broward Counties, respectively. This discrepancy can largely be attributed to the placement of Buchanan’s name on the ballot in proximity to Gore’s.

With these allegations in mind and the fate of the 2000 Election in the balance, under Florida election law, it had to be Gore who had to instigate the Recount for it to occur. Under the law, “the certification of election…may be contested in the circuit court by any unsuccessful candidate.” Therefore, with this point of existing Florida law in mind; Bush had the luxury of being on the defensive since he held the initial lead of 1,784 votes.

Throughout the month of November, 2000, the events that occurred within the Florida Recount can be equated to a political circus. At the center of the controversy was the method of vote counting and the time frame in which votes needed to be conducted. The reason that this occurred was due to the number of allegations of voting errors that yielded vote tabulation errors. Under Florida election law at the time, a manual recount of selected precincts within a county could be ordered to garner a sample of the county. In the event that errors occurred in the manual recount of the selected precincts, for example, if there was “an error in the vote tabulation which

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17 Ibid., 7.

18 Florida Statutes, sec. 102.168 (1) (2000).
could affect the outcome of the election,” then the local canvassing board was required to “manually recount all votes”\textsuperscript{19} in the county. This is what happened in four counties – Broward, Duval, Miami-Dade, Palm Beach, and Volusia Counties\textsuperscript{20} – and what would become the focus of the Florida Recount as a whole.

In addition to having a focus on four counties across the state for the Recount, differing interpretations of the Recount timeline as well as the ballots that needed to be included in the vote tabulation added further complications to determining the winner. For the basis of the Florida Recount, this surrounded three particular points of Florida election law. The first of these points stated, “No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.”\textsuperscript{21} The next point of law stated, “If the county returns are not received…by 5 p.m. of the seventh day following an election, all missing counties shall be ignored.”\textsuperscript{22} The last of these three points of Florida law stated, “If the returns are not received by the department by the time specified, such returns may be ignored.”\textsuperscript{23}

Based on these three points of Florida law, there was delicate balance to be had found because voter intent in a number of cases had to be determined, but it had to be

\textsuperscript{19} Florida Statutes, sec. 102.166 (5) (2000).


\textsuperscript{22} Florida Statutes, sec. 102.111 (1) (2000).

\textsuperscript{23} Florida Statutes, sec. 102.112 (1) (2000).
done quickly. The differing interpretations focused on the tabulation deadlines, and this caused a difference of opinions between Florida Secretary of State Katherine Harris and Florida Attorney General Bob Butterworth. Because this was a slow process, these two had competing viewpoints of how this was supposed to be done, largely in part because these ballots would have likely come after the specified deadline. Harris, as she later stated, “I had no authority to reconstitute the intricate framework the Florida legislature devised for challenges to an election. As secretary of state, I had plainly sworn to uphold the law.”

Ultimately, Harris believed that within the recount, ballots that were marked incorrectly were due to voter error, and not tabulation error. Therefore, she interpreted the state law on its face that these were invalid and should have not been counted.

On the other hand, Butterworth issued a Legal Opinion in his role as Attorney General that diverged from Harris’ interpretation. He believed that during the Recount, “the intent of the voter is of paramount concern and should be given effect if the voter has complied with the statutory requirement and that intent may be determined.” His example illustrates his difference of opinion with Harris. Here, Butterworth stated, “For example, if a voter has clearly, physically penetrated a

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25 Harris, Center of the Storm, 69.

punchcard ballot, the canvassing board has the authority to determine that the voter's intention is clearly expressed."\(^{27}\)

With the 2000 Election in the balance, this example of diverging views in high levels within the Government of the State of Florida indicated that the Florida Recount was much more than just a simple exercise of counting and recounting votes. It had unfolded to a political saga, and with eventual intervention within the judicial system, the Recount also became a legal saga.

**Equal Protection Clause Argument**

Due to the political ramifications that were associated with the Recount, immediate legal challenges were raised on how the manual recounts were being conducted in the four specified counties. Although Florida election law required the defeated candidate – in this case, Gore – to petition for a manual recount,\(^{28}\) it was the Bush team that joined the first lawsuit to challenge the methods used in the manual recounts. It was at this point of the Recount that the claim of an equal protection clause violation was first made by the Bush campaign.

On November 13, 2000, Ted Olson, who was the lead attorney for the Bush campaign during the Florida Recount, made this case before the U.S. District Court for Southern District of Florida. He argued that the Florida law that governed a manual recount violated the equal protection clause because there are not “sufficient standards

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\(^{28}\) *Florida Statutes*, sec. 102.166 (4) (2000).
to guide the discretion of county canvassing boards in granting a request for a manual recount or in conducting such a recount.”29 Under this argument, the varying ways in which counties could apply the election law for vote tabulation in an inequitable way, and therefore, would violate the equal protection clause with respect to voting, thus creating as Olson called, “irreparable harm” to Bush.30

To a certain degree, Olson’s argument can be linked to an argument made by the Court in Reynolds v. Sims. Although this case was based on the premise of apportionment, the Court stated on voting that “a denial of constitutionally protected rights demands judicial protection.”31 When applying this principle to Olson’s argument, it can fall under the category of “irreparable harm” because only four counties in Florida were subject to a manual recount while voters in the other counties were left out of the Recount altogether. Under this argument, “irreparable harm” for the candidate meant harm for those voters in the 63 counties across the State of Florida not subject to the Recount.

Laurence Tribe, the attorney who argued for the defense in Siegel v. LePore and remained as counsel to the Gore team, criticized the substance of this argument by the Bush team. In a work published after the 2000 Election was resolved, he contended that the equal protection clause approach utilized by the Bush team was

\[29\] Siegel v. LePore, 234 F. 3d 1218 (11th Cir. 2000).

\[30\] Ibid.

unconvincing and was instigated by the truncated judicial schedule and the “television close-ups that became the enduring legacy of the entire dispute” because it “became axiomatic that ballots identical in appearance might end up being counted differently in different counties or in the same county differently.”

However, under the premise of the Gore argument, the equal protection argument to be made was indirect, and it was not geared at the way that standards of the Recount were being conducted, but instead, it focused on the fact that any undervotes would violate Florida law on the acceptance of a ballot based on voter intent.

This would result in a separate violation of the equal protection clause in that voter intent was not upheld, and this outcome would favor Gore.

For the purposes of the Bush team’s equal protection clause argument, they were dealt a setback when the District Court denied the request for a preliminary injunction on the manual recounts on November 13, 2000, to which the Bush team promptly appealed this decision to the 11th Circuit Court of Appeals.

Based on this appeal, the next action that addressed the equal protection clause argument was the holding of the 11th Circuit Court on December 6, 2000 in the case of Siegel v.

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34 Siegel v. LePore, 234 F. 3d 1218 (11th Cir. 2000).
Much like with the U.S. District Court for Southern Florida, Olson maintained the same argument on the Bush team’s appeal, which also included the idea that the “absence of statutory standards for when a manual recount occurs permits arbitrary and partisan decision-making, exacerbates the potential for unequal treatment of ballots.”

Despite the arguments made by the Bush team, the 11th Circuit Court affirmed the ruling of the U.S. District Court for Southern Florida by a vote of 8-4, citing the basis that the Bush argument on the equal protection clause and its associated irreparable harm lacked merit. To this point, the 11th Circuit Court stated, “the candidate Plaintiffs (Governor Bush and Secretary Cheney) are suffering no serious harm, let alone irreparable harm, because they have been certified as the winners of Florida's electoral votes notwithstanding the inclusion of manually recounted ballots.”

Although the majority of the 11th Circuit Court disagreed with the premise of the way that the equal protection argument was structured by the Bush team, there

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35 Please note that throughout the Florida Recount, there were multiple legal challenges pending in state court occurring simultaneously that dealt with other matters of the Recount, specifically the deadlines in which returns were scheduled to be submitted to the Florida Secretary of State. As noted in Siegel v. LePore, 234 F. 3d 1218 (11th Cir. 2000), the Florida Supreme Court ruled in Palm Beach Canvassing Bd. v. Harris, 772 Fla.2d 1220 (2000) to extend the deadline by which returns could be submitted to November 26, 2000. On appeal to the U.S. Supreme Court via Bush v. Palm Beach Canvassing Board, 531 U.S. 70 (2000), the Court vacated the holding of the Florida Supreme Court on December 4, 2000 asking the Florida Court to clarify its ruling in the Recount as it pertained to federal law.

36 Siegel v. LePore, 234 F. 3d 1218 (11th Cir. 2000).

37 Ibid.
were points raised in one of the dissenting opinions filed in the case by Judge Edward Earl Carnes that addressed the equal protection clause argument. Carnes illustrated this point as follows:

The selective manual recounts in some of the Florida counties that use the punch card system of voting violate the equal protection rights of the voters in the other punch card system counties. The harm from that violation exists and will continue so long as the results of any of those selective manual recounts are included in Florida's certified election results. Because the existence and nature of the constitutional violation is inextricably linked to the question of irreparable injury, I turn first to a discussion of the selective manual recounts in this case, and how those recounts violated the constitutional rights of the similarly situated voters who did not receive the benefit of them.38

Carnes was fully embracing the idea that an equal protection clause violation existed. As he concluded this dissent, he raised a point that provides a clear connection between the equal protection clause and voting rights. Here, he stated, “the constitutional harm is inflicted when the ballots of similarly situated voters are counted and weighted differently, and that harm exists regardless of the outcome of the election.”39 Under this argument, anything short of this standard results in an unequal application of the law, and thus, a violation of the equal protection clause.

The ruling by the 11th Circuit Court provided a setback for the Bush team’s equal protection clause argument, much like the ruling at the District Court level. However, with the political and legal climate that existed in Florida surrounding the Recount, there would be another opportunity for this argument to be made. In the

38 Ibid.

39 Ibid.
waning days of the Recount after Bush was certified the winner of Florida by 537 votes\textsuperscript{40}, the Gore team – in its efforts continue the Recount to secure more votes for the Vice President – challenged the certification of the election, which made its way to the Florida Supreme Court.\textsuperscript{41}

On December 8, 2000, the Florida Supreme Court held in a 4-3 decision that – in a different type of equal protection argument – it “must do everything required by law to ensure that legal votes that have not been counted are included in the final election results.”\textsuperscript{42} Furthermore, the Florida Supreme Court stated, “we cannot in good faith ignore the appellants’ right to relief as to their claims concerning the undercounted votes in Miami-Dade County.”\textsuperscript{43} Under this argument, the Florida Supreme Court said that if an individual legally voted, every possible method should be utilized to count that vote. Otherwise, that act itself is an unequal application of the law, and would be subject to a violation of the equal protection clause. This followed the path of the equal protection clause argument that was made by the Gore team.

After the decision by the Florida Supreme Court was delivered, the Bush team appealed this decision to the U.S. Supreme Court. For the Bush equal protection argument, although there was a setback in that approach from the holding in \textit{Siegel v. LePore} by the 11\textsuperscript{th} Circuit Court, this appeal to the Court provided the Bush team with

\textsuperscript{40} Gore v. Harris, 772 Fla. 2d 1243 (2000).
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
the vehicle by which they could once again make this argument. However, based on
the holding of the Florida Supreme Court, it was the Gore team’s equal protection that
held the advantage at this point.

For the purposes of connecting the equal protection clause and voting rights,
both the Bush campaign and the Gore campaign made arguments that hinged on an
alleged violation of the equal protection clause within voting. Regardless of the
outcome, both sides were dependent on this type of argument before the Court. As a
result, there would be a direct link between voting rights and the equal protection
clause that resulted from this case.

During oral arguments that were heard by the Supreme Court on December 11,
2000, Olson, who represented the Bush campaign, used this venue as a way to again
make the point on inconsistencies within the standards of the Recount. When
receiving questions from Justice Stephen Breyer on how varying standards could
impact the equal protection clause, Olson emphasized the point that “there would be a
uniform way” in which manual recounts were to be conducted for the Recount to be
adhering to the equal protection clause.44 Furthermore, Olson made the point that even
when there was a standard in place, there were inconsistencies in the way that the
standard was treated by the counties. To this point, he stated, “Not only was there not
a standard, but there was a change two or three times during the course of this process

with respect to the standard.\textsuperscript{45} This argument was consistent with the Bush position from \textit{Siegel v. LePore} on the equal protection clause that the lack of a uniform standard was a violation.

As displayed during the oral argument for Gore, David Boies echoed the earlier sentiment of the equal protection strategy by Gore that focused on the ensuring the application of the Florida election law on voter intent.\textsuperscript{46} Boies made this point to the Court when – in responding to Justice David Souter on how to count votes – he stated, “I would tell them to count every vote.”\textsuperscript{47} Boies also attempted to discredit the Bush approach on equal protection when he stated that differing standards in the Recount would not violate the equal protection clause.\textsuperscript{48} Much like the way Olson reasserted the Bush strategy before the Court, Boies attempted to accomplish the same goal in perpetuating the Gore argument. However, through the line of questioning by the Justices, Boies also tried to undermine the basis by which the Bush strategy was being conducted.

Regardless of the minutia of the details in which both sides argued in front of the Court, there was consistency on one issue. Both made an equal protection clause application as a focal point of their respective arguments. In doing so, regardless of the eventual outcome, this effort alone acknowledged the clear connection that the equal

\textsuperscript{45} Ibid.

\textsuperscript{46} Florida Statutes, sec. 101.5614 (5) (2000).


\textsuperscript{48} Ibid.
protection clause and voting rights had finally reached in 2000. Raising this argument to the level of the U.S. Supreme Court provided credence to the argument that voting rights should be considered fundamental and in need of heightened Constitutional protection. As the ruling in the *Bush v. Gore* case would indicate, the decision by the Court would become the point at which the equal protection clause and voting rights converged and established its connection moving forward.
CHAPTER V

BUSH V. GORE: THE AFTERMATH

Ruling

Due to the shortened time frame by which the U.S. Supreme Court had to render a decision in Bush v. Gore, the opinion in this case was issued only a day after oral arguments were heard on December 12, 2000. After over a month since Election Day, the Court’s opinion represented the decisive moment for the 2000 Election, the Florida Recount, and the formal recognition of the fundamental bond between the equal protection clause and voting rights.

Within Bush v. Gore, the Court rendered two decisions. First, the Court followed the Bush team argument on the equal protection clause and in a 7-2 decision by overturning the holding by the Florida Supreme Court, but as the Court stated, “The only disagreement is as to the remedy.” With Justices David Souter and Stephen Breyer dissenting in how this would be addressed, this is what became the basis for the controversial 5-4 decision that is now commonly associated with this case. Although both decisions issued by the Court ultimately influenced the outcome of the 2000 Election, it is the 7-2 ruling that the method of the Recount violated the equal protection clause that will serve as the focus of this analysis.

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1 George W. Bush, et al. v. Albert Gore, Jr., et al., 531 U.S. 98 (2000). The seven members of the Court that voted in favor of the per curiam opinion were Chief Justice Rehnquist, and Justices O’Conner, Scalia, Kennedy, Souter, Thomas, and Breyer. Justices Stevens and Ginsburg opposed this holding.

When arriving at this ruling, the Court first confirmed the commentary on voting rights that was addressed in *Reynolds v. Sims*. In that case, the Court addressed voting rights when it stated, “the right of suffrage is a fundamental matter in a free and democratic society.”\(^3\) To echo this point in *Bush v. Gore*, the Court stated, “When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”\(^4\) The use of the word “fundamental” in this instance by the Court reinforced the notion that voting rights – once granted by the state – are in fact fundamental and in need of equal protection clause application.

In terms of how the Court addressed the Recount, it aligned its opinion around the equal protection argument that was made by the Bush legal team. Under the auspices of voting being considered fundamental, the Court therefore determined that “once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”\(^5\) That statement bolstered the principle argument that Olson made before the Court on behalf of Bush.

Furthermore, in the way the Recount was being conducted, the Court determined that there were disparate manners in which votes were being counted and examined. In its characterization of the Recount process, the Court – in a statement


\(^5\) Ibid.
that is noted at the beginning of this paper – stated, “The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount.”6 For the purposes of acknowledging the connection between the equal protection clause and voting rights, this statement by the Court made the point that variations across Florida violated the equal protection clause while also signifying that voting is a fundamental right.

Despite the 7-2 decision on the violation of the equal protection clause, both Justices John Paul Stevens and Ruth Bader Ginsburg dissented in this matter. Understanding their rationale for this vote on the Court provides some insight as to why these two Associate Justices disagreed with the majority of the Court on the matter of the equal protection clause. Within Justice Ginsburg’s dissent, she believed that the Bush argument was not a “substantial equal protection claim.”7 She further cited the circumstances that allow for some error and difference in the way in which votes are tabulated to be permitted.

To this point, Justice Ginsburg stated, “we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or

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6 Ibid.

7 Ibid.
precise than the certification that preceded that recount.” With this philosophy in mind, she believed that any process was going to be somewhat flawed in determining the final outcome of the Florida Recount, but what was being conducted across the state was just a plausible as any other. Throughout her dissent, Justice Ginsburg mainly attacked the process of the Recount without addressing the point made by the *per curiam* opinion that held voting to be a fundamental right.

Although there was disagreement on how to best address the equal protection violation stipulated in the *per curiam* opinion that led to the 5-4 holding, there is one aspect of the Court’s decision that goes to the scope of precedents to be used in the future. Often times, when the Court issues an opinion, case law precedent is established in order allow for a basis of comparison in future instances by the Court. In the *per curiam* opinion in *Bush v. Gore*, the Court commented on how the scope of this case would impact future analysis with its desire to have this ruling be limited. As the Court stated, “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”

Due the political nature of this case in helping to determine the outcome of a presidential election in Florida, it is understandable that the Court took the posture that it did to maintain the separation of powers between the executive and judicial branches of government. In fact, the Court was correct in its characterization that the equal

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8 Ibid.
9 Ibid.
protection clause within the realm of voting is complicated due to what occurred in the Florida Recount. However, in the Court’s *per curiam* opinion, it also answered some of the questions as to how the equal protection clause and voting are connected that go beyond the scope of just the Florida Recount in 2000.

When considering the Court’s ruling in this context, the best way to analyze the opinion is through the Quirk Model that was established and discussed in its entirety in Chapter II. Seeing its application helps to understand how it is difficult to limit the scope of this decision to circumstances that surrounded the Florida Recount. Moving directly to the fourth question of the Model, one must ask if an alleged equal protection violation involved either a suspect classification of people or if a fundamental right was involved.

The Court answers this fourth question of the Model when it stated, “the right to vote as the legislature has prescribed is fundamental.” Because the Court acknowledged that a fundamental right was involved in this case, then a heightened level of scrutiny must be applied to determine if an equal protection violation occurred. In *Bush v. Gore*, it had to be determined whether or not the standards of the Recount

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11 For the purposes of the Quirk Model in regards to *Bush v. Gore*, the first three questions are answered in the affirmative. One, was there state action? In holding the election, this occurred. Two, was an individual involved. Yes, the voters. Three, was there an allegation of the violation of the equal protection clause. Yes, both Bush and Gore made arguments before the Court to satisfy this question.

12 Ibid.

implemented by Florida were narrowly tailored to achieve the goal of ensuring equal application of the law.\textsuperscript{14}

As the \textit{per curiam} opinion indicated, the application of the methods of the Recount were not narrowly tailored. To this point, the Court characterized the structure of the Recount as “a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.”\textsuperscript{15} This statement by the Court asserted that the method of the way the Recount was conducted was not narrowly tailored. As a result, the Court held in its 7-2 decision that the Recount was a violation of the equal protection clause, and thus, unconstitutional.

Moving back to the point of the efforts of the Court to keep this ruling in \textit{Bush v. Gore} limited to the set of circumstances within the Florida Recount, how does the Court examine this situation in a vacuum after stating voting to be a fundamental right? For instance, in order to adhere to the idea of the limited scope of this case, is there a subsequent sacrifice to voting rights that would be permitted in a future case? If, as the Court stated, that voting rights are fundamental after establishment by the state, then one can presume that this standard can only apply to the set of facts within \textit{Bush v. Gore}? While understanding the desire of the Court to keep a limited scope for this particular case because of political ramifications associated with determining the winner of Florida’s 25 electoral votes, there are elements that should be considered


beyond the reach of this ruling. Here, the Court’s declaration that voting rights are fundamental is one principle that warrants the reach beyond the circumstances of *Bush v. Gore* to demonstrate the convergence of the equal protection clause and voting rights moving forward.

On December 12, 2000, the Court’s 7-2 decision – albeit in self-described limited scope – is the event that solidified the connection between the equal protection clause and voting rights in the United States through the 2000 Election and the Florida Recount. In this holding, the Court acknowledged the steps taken to ensure equal application of the law to this fundamental right of voting. However, as the 5-4 decision indicated, “any recount seeking to meet the December 12 date will be unconstitutional”\(^{16}\) and subsequently halted the Recount. This aspect of the decision was controversial, and the ramifications it presented lingered in the country after the Court rendered its decision.

**Post Case Ramifications**

For the outcome of the 2000 Election, the *per curiam* opinion of the Court in *Bush v. Gore* provided the resolution to the disputed 25 electoral votes in Florida. On the day after the Court’s ruling, Al Gore conceded the election, thereby allowing George W. Bush to be elected as 43rd President of the United States by the Electoral College. However, the Court’s *per curiam* opinion did not avoid controversy on the matter of equal protection. In the aftermath of the case, this controversy arose in the

\(^{16}\) Ibid.
form of criticism by lawmakers and scholars that focused on how to avoid similar
equal protection clause problems in the future.

The first – and most public – display of dissatisfaction with the ruling of the
Court came in a Joint Session of Congress. On January 6, 2001 in the dawn of the
107th Congress, the House and Senate met in joint session for the ceremonial counting
of the electoral votes of each state. In disagreement with the actions of the Court,
Members of the U.S. House launched a number of objections to the counting of the
electoral votes of Florida. The Members who challenged the outcome in Florida on the
floor of the U.S. House based their objections on the continued allegations of voter
disenfranchisement across the State of Florida. However, these objections were all
an act of political theater because none of them were “formally” heard due to the lack
of a signature from a Member of the U.S. Senate on one of the objections.

Within academia, there were also published works that questioned the
legitimacy of the Court’s action and the ruling on the equal protection clause. For
example, Harvard Law Professor Lani Guinier had a different perspective on the
opinion of the Court. She asserted that the “Court ultimately decided the closely
contested presidential election of 2000 on the grounds of the equal protection clause
simply highlights these contradictions between our rhetoric and our practice.”

Election: Debating Bush v. Gore, the Supreme Court, and American Democracy, ed. Ronald Dworkin
Guinier argued that the actions by the Court were misguided in the sense that the equal protection clause protection was placed on the wrong type of individual, i.e. the candidate and not the voter. To this point, she stated, “the Supreme Court boldly entered the political thicket to declare the right of a political candidate – and only one political candidate at that – to have all of the votes counted using a single standard.”

Furthermore, Yale Law Professor Jack Balkin also criticized the opinion of the Court on the equal protection clause in *Bush v. Gore*. To challenge the merits of the opinion, Balkin argued that the equal protection ruling issued by the Court was “inconsistent with previous precedents that suggest in counting, qualifying, and tabulating votes, states and localities must be given great discretion.” Additionally, he noted that “in most equal protection cases of this nature, the Court applies only a test of rational basis; that is, it asks whether the challenged law is rationally related to a legitimate governmental purpose.” Balkin also criticized the ability of the Court to keep the limited scope of this particular case to the set of circumstances that surrounded the 2000 Election. Here, the problem that Balkin foresaw was that “if the Court does not take its newly announced equal protection principle seriously in future cases, this will cast grave doubt on the how important that principle really was.”

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20 Guinier, “And to the C Students,” 237.


23 Ibid, 1429.
In the midst of criticism of the Court’s opinion in *Bush v. Gore*, University of Chicago Law Professor Cass Sunstein also defended certain elements of the Court’s holding. Sunstein argued two specific points on this basis. First, he stated that “the Court brought a chaotic situation to an abrupt end,” and “any other conclusion would have been worse.”

When making this point, Sunstein acknowledged that this situation could have spiraled even further out of control without the intervention of the Court at the time. The next point he made addressed the equal protection clause. Here, he stated that “the equal protection ruling had considerable appeal” because “it is not easy to explain why votes should count in one area when they would not count elsewhere.”

In making this argument, he explained the ease of understanding and the appeal of the Bush argument on equal protection in the Florida Recount that was ultimately upheld by the Court. The observations made by academics that criticized and defended the *per curiam* opinion illustrate the different views held after the Florida Recount was settled.

In addition to the analyses of *Bush v. Gore* by legal scholars, the underlying problems of the equal protection clause application that Court found in the Florida Recount prompted Congressional action. During the 107th Congress, both the House and the Senate took decisive action when it enacted the Help America Vote Act. In

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December 2001, the House passed its version of the legislation on a bipartisan basis,\textsuperscript{26} and in April 2002, the Senate passed its version of the bill – also with bipartisan support.\textsuperscript{27} In October 2002, both chambers agreed to the Conference Report for the Help America Vote Act with bipartisan support with House passing it by a vote of 357-48\textsuperscript{28} and the Senate passing the Conference Report by a vote of 92-2.\textsuperscript{29}

In the aftermath of \textit{Bush v. Gore} case, the bipartisan support for the Help America Vote Act assisted in eliminating the partisan divide on the 2000 Election that manifested itself on the floor of the U.S. House during the Electoral College certification. The bipartisan support for this bill resulted from provisions aimed to address the equal protection concerns that existed as a result of the 2000 Election and the Florida Recount. Specifically, in section 102 of this law, the federal government provided funding to states “that used a punch card voting system or a lever voting system to administer the regularly scheduled general election for Federal office held in November 2000”\textsuperscript{30} to help them replace these technologies. Additionally, title II of this law created an independent agency with the charge of serving as a “clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general,” conduct studies on election

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\item \textsuperscript{26} Cong. Rec., 107\textsuperscript{th} Cong., 1st sess., 2001, 147, pt. 172: H9308.
\item \textsuperscript{27} Cong. Rec., 107\textsuperscript{th} Cong., 2d sess., 2002, 148, pt. 39: S2544.
\item \textsuperscript{28} Cong. Rec., 107\textsuperscript{th} Cong., 2d sess., 2002, 148, pt. 133: H7853-H7854.
\item \textsuperscript{29} Cong. Rec., 107\textsuperscript{th} Cong., 2d sess., 2002, 148, pt. 136: S10515.
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issues, and to carry out to grant programs to replace punch card and lever voting systems.\textsuperscript{31}

With these major provisions in the Help America Vote Act, Congress wanted states to avoid a repeat of the Florida Recount in future federal elections by rectifying the problems that occurred in 2000. At the same time, this legislation provided the states continued flexibility in how to administer elections afforded to them within Article I of the Constitution. The non-partisan Congressional Research Service (CRS), which serves as the research arm of Congress, provided commentary for the rationale that Congress used in the Help America Vote Act. Here, CRS noted, “While initial reactions after the 2000 election had tended to focus on technological fixes such as eliminating punchcards, a consensus emerged subsequently that the issues, and the solutions needed, were more complex.”\textsuperscript{32}

In its characterization, CRS stated that the Help America Vote Act “reflects those developments” in the complexities needed for reform and that the law provided “broader improvements in election administration.”\textsuperscript{33} In the years following the implementation of the Help America Vote Act, the continued commitment by Congress has been evidenced, particularly through the funding mechanisms established

\footnotesize{\textsuperscript{31} Ibid.}

\footnotesize{\textsuperscript{32} Congressional Research Service, \textit{The Help America Vote Act and Elections Reform: Overview and Issues} (Washington: CRS, 2009), 2.}

\footnotesize{\textsuperscript{33} Ibid., 2.}
by this law. Through Fiscal Year 2009, $3.4 billion has been provided in federal funding to carry out this legislation since its enactment in 2002.\footnote{Ibid., 7.}

Through the continued commitment to ensuring that the provisions of the Help America Vote Act are completed, Congress has addressed some of the causes that led to the Florida Recount in 2000. In doing so, Congress has acknowledged the need to ensure equal protection of the law through the implementation of the Help America Vote Act, and has remained committed to assist in this regard by continuing to provide the necessary funding. Although the Court has not taken further action that would apply the equal protection principles in voting, Congress has acted in the Court’s absence to allay the concerns of the critics of Bush v. Gore, and it continues to take action on this matter close to a decade later.
CHAPTER VI

CONCLUSION

At the outset of this paper, the explicit goal was to establish how the *per curiam* opinion by the U.S. Supreme Court in *Bush v. Gore* solidified the formal bond between the equal protection clause and voting rights in the United States. To begin this summation, it is necessary to restate the initial question posed. What is the role that the equal protection clause plays with respect to voting rights? The progression of the equal protection clause and voting rights in the United States occurred independently during the same time period following the Civil War. However, despite their respective developments, the application of the equal protection clause and voting rights had limited interrelation before 2000.

Before *Bush v. Gore*, the Court had addressed some elements of voting and the equal protection clause,¹ and within these cases, the Court did comment in *Reynolds v. Sims* that “the right of suffrage is a fundamental matter in a free society.”² However, the basis of this case was the apportionment of legislative seats in Alabama.³ It was not until *Bush v. Gore* that the Court reinforced this statement and addressed voting in a way that represented the connection it had with the equal protection clause. In the *per curiam* opinion from *Bush v. Gore*, the Court established a principle that voting

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¹ For list of the areas of voting rights and their relationship with the equal protection clause before *Bush v. Gore*, please see note 12 of Chapter I on page 7.


³ Ibid.
rights were fundamental, and as a result, in need of heightened equal protection application.4

Critics of the *per curiam* opinion questioned the credibility of the Court as a result of *Bush v. Gore*. One example of this is the 5-4 ruling on the way to best remedy the equal protection clause violation. Without having a “unanimous or near-unanimous decision,” the Court could not assure the American people that it was “speaking for the law, and not for anything resembling partisan or parochial interests.”5 In undermining the Court’s decision, concessions were made by critics on the unique circumstances presented by this case. One commentary to this point stated that “*Bush v. Gore* cannot be deemed comparable to any issue the Court had ever previously confronted.”6 Due to the close outcome of the 2000 Election and a lack of historical comparison for *Bush v. Gore*, this criticism illustrated a belief that the Florida Recount represented a crisis.

However, Nelson Polsby refuted this argument when he stated, “A close election is not a crisis, and need not cause a crisis.”7 Even though individuals

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questioned the legitimacy of the election of George W. Bush, Polsby did not believe that the outcome of *Bush v. Gore* represented what he would call a true crisis. As he stated, “Tanks did not rumble in the streets. There were no shootouts at polling places. Nobody stormed the TV stations. The armed forces went about their usual business. Americans are accustomed to peaceful transfers of power, and the election of 2000 provided no exception.”

In the absence of a crisis that could shake the foundation of the U.S. Constitution, *Bush v. Gore* represented an expansion of voting rights as a result of the application of the equal protection clause. The Court stated, “When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.” When establishing that voting is a fundamental right, the Court added protection to these rights that assisted in expanding voting in the country. Cass Sunstein defended this position when he stated, “On its face, the Court appears to have created the most expansive voting right in many decades.” Therefore, instead of a creating a crisis, the ruling of *Bush v. Gore* solidified Constitutional rights for the electorate in the United States.

In addition to expanding voting rights by asserting these rights to be fundamental, *Bush v. Gore* also validated the Quirk Model for equal protection clause application by the Court. One of the criticisms of the *per curiam* opinion was that “in

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10 Sunstein, “Lawless Order and Hot Cases,” 96.
most equal protection cases of this nature, the Court applies only a test of rational basis; that is, it asks whether the challenged law is rationally related to a legitimate governmental purpose.”

Upon usage of the Quirk Model, this criticism of the Court is refuted.

When looking at *Bush v. Gore* through the Quirk Model, the aspect that provides the ability to nullify this criticism lies within the Court’s statement that voting is fundamental. Without that assertion made by the Court, there is a different level of scrutiny that is used to determine how an alleged equal protection violation should operate. Had the Court not stated that voting is fundamental, then the basis by which the application of the law is conducted would be a rational relationship. However, because the Court had indicated the fundamental nature of voting in *Bush v. Gore*, then a strict scrutiny test is applied to see if the action – in this case, by the State of Florida during the Recount – was narrowly tailored to accomplish a compelling state interest. The Court noted that the Recount did not “satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right.” With this characterization, the Court determined the Recount standards did not meet the objective of a compelling state interest and was unconstitutional. In utilizing this


13 Ibid.

method to render its decision, the Court validated the application of the Quirk Model on a question of equal protection by a 7-2 vote.

In solidifying the connection between the equal protection clause and voting rights, *Bush v. Gore* merged these two principles within the United States. The ability for the set of circumstances that surrounded this case through the 2000 Election and subsequent Florida Recount is predicated on the progression of both the equal protection clause and voting rights. The origin of the equal protection clause and its development through the Court’s application of fundamental rights provided one component of this connection. In a similar manner, the efforts made to amend the Constitution\(^\text{15}\) and acts of Congress to expand voting rights in the country also factored into this connection.

Both the progression of the application of the equal protection clause and voting rights occurred independently after the Civil War. Although this was occurring, it was the circumstances that surrounded the 2000 Election, the Florida Recount, and *Bush v. Gore* that triggered the analysis that resulted in the convergence of these principles. All of these events – the development of equal protection application, the expansion of voting rights, and the events of the 2000 Election – were necessary to take place in the way that they did in order for this connection to be established. Had any of these elements not be in place the way they were in 2000, then the foundation for this connection could not exist.

\(^{15}\) U.S. Constitution, amend. 15, 19, 26.
Moving forward, how should *Bush v. Gore* be treated from a legal and public policy perspective? In addition to serving as the convergence between the equal protection clause and voting rights by deeming these rights to be fundamental, the Court stated, “Our consideration is limited to the present circumstances.”\(^{16}\) In making this assertion, the Court attempted to avoid becoming involved in future elections. In a concurring opinion, Chief Justice William Rehnquist defended this position by the Court due to the fact that the Electoral College is comprised of individuals chosen at the state level.\(^{17}\) He stated, “In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.”\(^{18}\)

However, when examining the principle of voting as a fundamental right that was established by the Court in *Bush v. Gore*, does limiting the scope of the *per curiam* opinion undermine the equal protection clause connection with voting rights? Balkin contended that it would when he stated, “if the Court does not take its newly announced equal protection principle seriously in future cases, this will cast grave doubt on how important that principle really was.”\(^{19}\) In the decade since *Bush v. Gore*, there has not been a similar case before the Court that could put this principle to the test of a precedent. With the Court’s limitation of the circumstances to the 2000


\(^{17}\) U.S. Constitution, art. 2, sec. 1, cl. 2.


\(^{19}\) Balkin, “*Bush v. Gore* and the Boundary Between Law and Politics,” 1429.
Election and Florida Recount, this principle of connecting the equal protection clause with voting rights could be sacrificed if it is not utilized in the future.

Laurence Tribe referenced this point when he stated that the limited scope of the per curiam opinion “effectively precluded Bush v. Gore from having any significant precedential value.”20 As a result, because “a similar scenario may never arise again, the legal effect of Bush v. Gore could be a virtual nullity, despite the best efforts of voting rights advocates to leverage it into a brave new world of voter equality.”21 As a result of the limited scope of the case, a criticism of the Court that arose was the lack of ability to use this opinion to set a precedent. With the limitation, Tribe argued as follows:

…the Court was trying to free itself from the discipline of stare decisis, which forces a court to eat its words in future cases or else give good reasons why it is spitting them out. Whenever a real court renders a decision…that decision must have precedential effect. It is no good for a court to employ reasoning that resembles a one-way, non-refundable railroad ticket, good for this day and this destination only.22

Without using Bush v. Gore to set a precedent, the question becomes, how will the Court act should a future case involving voting rights and the equal protection clause come before it?

Although the Court has remained silent on this issue, Congress has acted to ensure the protected voting rights that were deemed by the Court in Bush v. Gore.

20 Tribe, “Freeing erG v. hsuB From its Hall of Mirrors,” 131.
21 Ibid., 131.
22 Ibid.
Congressional interpretation of the ruling has resulted in the enactment of legislation to extend the principle of equal protection application with regards to voting. With the enactment of the Help America Vote Act, Congress remedied some of the problems that occurred when ensuring equal protection clause application in the Florida Recount by replacing the punch card and lever ballots.23

With Congressional action and continued funding on the extension of voting rights through *Bush v. Gore*, the legislative branch bolstered the argument that *Bush v. Gore* did set a precedent on voting rights and how they are connected to the equal protection clause. However, how will the Court act on a similar issue in the future, should it occur? If the Court chooses to use the principle of voting as a fundamental right as a precedent, one way to examine this approach is how the justices that make up the Court approach the precedents set in previous cases.

Understanding the current expectation of Supreme Court nominees on how they approach precedence provides a view of how the future justices would act on this matter. For example, during Justice Elena Kagan’s confirmation hearings in front of the Senate Judiciary Committee, she was asked about established precedents and how she, as a justice, would use them moving forward. Since it is now almost a decade since *Bush v. Gore* without Court action on a similar matter, her answers assist in speculating how the Court may act.

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In one line of questioning, Senator Patrick Leahy (D-VT) – Chairman of the Senate Judiciary Committee – asked then Solicitor General Kagan how she would approach the set of facts presented by *McDonald v. Chicago*. This case was the first of the Court to examine firearm ownership since it set a precedent on the issue in *District of Columbia v. Heller*. This case declared that the II Amendment was an “individual right” and ruled that the District of Columbia’s prohibition of firearm ownership was unconstitutional. In the first case addressing this matter since the *District of Columbia v. Heller* decision, the Court ruled in *McDonald v. Chicago* that – through the XIV Amendment – that “the Second Amendment right is fully applicable to the States.”

In the opening set of questions in the confirmation hearing, Leahy asked, “Is there any doubt after the Court’s decision in *Heller* and *McDonald* that the II Amendment to the Constitution secures a fundamental right for an individual to own a firearm?” Kagan responded, “There is no doubt, Senator Leahy. That is binding precedent entitled to all of the respect of binding precedent in any case. That is settled

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24 U.S. Constitution, amend. 2. The II Amendment states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”


law.”28 This question and answer from Kagan’s nomination hearing provides evidence of what the expectation of the Senate in its confirmation proceedings as well as the how nominees now and in the future will approach established case law.

Although this example from Justice Elena Kagan’s confirmation hearing addresses the issue of the II Amendment, there are some parallels that serve as a basis for comparison to voting rights and the equal protection clause. There is the issue of a fundamental right under consideration by the Court. There is also the question of how precedent was addressed on a fundamental right and how it may be viewed in future cases. Until there is another case before the Court regarding voting rights and the equal protection clause as there was in Bush v. Gore, the question of the Court’s approach will remain.

Due to the structures of government in the United States, there is a need to have a separation of elections from the judiciary. Chief Justice Rehnquist was correct in his concurring opinion on the issue of leaving the matter of elections to the state and avoiding the Court becoming the final decision on elections. At the same time, when the Court is needed to step in to protect the guaranteed rights of the American people, action must be taken, as it was in Bush v. Gore.

If the Court does not use the fundamental nature of voting rights as it claimed as a precedent due to the limited scope of the, then the criticisms of the Court would be valid. After elevating voting rights to being fundamental, a strict adherence to the

The limited scope of *Bush v. Gore* will undermine the action taken by the Court to ensure the equal application of the Florida Recount to protect voting rights of the electorate. The voting rights that the Court expanded through the *per curiam* decision would be nullified by not applying the principles of equal protection in future cases since the Court – as witnessed by Kagan’s confirmation hearing – has the expectation to apply precedents when available. With its passage of the Help America Vote Act, Congress understood the need to have heightened protection of voting through better technology. If Congress can act in this way to protect voting rights in the future, then the Court can follow that lead by guaranteeing the expanded voting rights it granted in *Bush v. Gore* whenever it addresses a similar matter again.

What is the role that the equal protection clause plays with respect to voting rights? After the progression that occurred for both equal protection and voting rights, *Bush v. Gore* demonstrated the convergence of these two principles moving forward. In the establishment of voting as a fundamental right, the Court determined that there was a need to ensure this right for the electorate. Despite the fact that the Court limited the case to set of circumstances of the 2000 Election and Florida Recount, the Court should extrapolate the guarantees afforded to voting rights that established in *Bush v. Gore* and use it as a precedent in the future.
BIBLIOGRAPHY


