The Cites That Counted:
A Decade of Bush v Gore Jurisprudence

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The Supreme Court tried to specifically limit the holding of Bush v Gore to the instant facts. However, in the decade since the decision, lawyers and judges have repeatedly cited it and some have sought to expand its precedential value for both election and non-election related cases. In short, judges have used the opinion to expand the equal protection analysis of election related claims. While litigants have attempted to push the Bush v Gore analysis into other topic areas, the courts have generally been unwilling to allow it. Finally, because a growing body of litigants point to Bush v Gore as appropriately guiding non-election related questions, it remains to be seen if, in the long run, Bush v Gore will remain a precedent of limited application.

Introduction

When the Supreme Court issued the opinion that resolved the 2000 presidential election in George W. Bush's favor, the five justice coalition responsible for the decision went to great lengths to stress that the opinion should not be construed as an explication or expansion of any legal doctrine or concept. The per curium opinion, presumably authored by Chief Justice Rehnquist, specifically tried to narrow the applicability of the legal reasoning that resolved the equal protection claim by including the following passage:

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 (*Bush v. Gore* 531 US 98, 109 (2000)).

In the immediate aftermath of the decision, the scholarly community primarily assessed either the nuanced legal arguments of the various dissenting and concurring opinions of *Bush v. Gore* or the impact the decision might have on the public regard for or institutional standing of the Court (Chemerinsky 2001; Gibson, Caldeira, and Spence 2003; Gillman 2001). Shortly after the initial round of scholarly analysis, the academy turned to questions about the more broad implications of the opinion for the doctrine of equal protection, public support of the Court, and the political preferences of the justices (Banks, Cohen, & Green 2005; Clayton 2002; Hasen 2001, 2004; Levinson 2002; Posner 2001; Sunstein and Epstein 2001). The Court and the opinion were criticized for a variety of defects and generally problematic legal reasoning (Gillman 2001; Balkin 2001; Garrett in Sunstein and Epstein 2001; Dershowitz 2003; Mebane 2004). The concept of judicialization, the widely recognized phenomenon of expanded judicial activity into areas of politics and policy nominally and normally under the control of legislatures and executives, was the frame for consideration of the impact of the opinion on the other branches of government and the political process in general (Smith and Shortell 2007; Ferejohn 2002; Hasen 2005; Hirschl 2004; Hirschl 2002; Pildes 2004; Shapiro and Stone Sweet 2002; Tate and Vallinder 1995). The opinion opened the door to an expansion of litigation as a normal part of the campaign process and presented an example of judicialization in the context of presidential elections in the United States (Smith and Shortell 2007). Eventually, the scholarly treatment of *Bush v Gore* focused primarily on a

consideration of the impact the decision had or could have on elections and election related litigation (Foley 2007; Hasen 2005; Lowenstein 2007; Tokaji 2005; Smith and Shortell 2007). Given the language limiting the scope of the opinion to the case at bar, *Bush v. Gore* had clear strategic implications for elections, but seemed at first to have been effectively limited as a precedent.

A broad scholarly meme quickly took hold that *Bush v. Gore* was designed to do nothing more than ensure George Bush rather than Al Gore became president (Dershowitz 2001). Subsequently, the fact that the Supreme Court did not utilize the holding to cure any of a host of problems with election administration that orbit around equal protection deficiencies solidified this early assessment of the lack of precedential value of the case (Flanders 2006, Hasen 2006). Because the Supreme Court completely avoided any reliance on or citation to the case, whether in any majority opinion, even one concurrence, or any dissent, *Bush v. Gore* was declared "dead" by the academy (Hasen 2007). The reports of the demise of *Bush v Gore* now seem, perhaps, to have been premature.

Although the United States Supreme Court has yet to cite *Bush v Gore,* the balance of the judicial structure has not been so reticent to embrace the case. By March of 2011, federal courts had cited *Bush v Gore* 152 times and a host of state courts had cited it 111 times. After explaining the methodology used for the data collection and analysis, I show the expanse of judicial reliance on *Bush v Gore*, consider some of the more important federal opinions that cite it, and then assess the overall impact of the ruling as well as the efficacy of the limiting language in the per curium opinion. I conclude with a

consideration of the implications as well as some conclusions and avenues of additional research.

Data

In order to determine the extent and nature of citation of *Bush v Gore,* I used the legal citation database *Shepard's Citations* ("*Shepard's*") accessed through the *LexisNexis Academic* portal. *Shepard's* has two unique features that make this approach to gathering the data especially appropriate. First, *Shepard's* lists all opinions that cite any previously decided case. Second, the specific legal treatment of the previously decided case is operationalized by categorical legal concept. The accuracy of the *Shepard's* case roster as well as the appropriateness of the legal treatment categorization have been rigorously tested and determined to be reliable and sound (Spriggs and Hansford 2000).

Table 1 shows all citations by the Federal Courts of Appeals to *Bush v Gore* by Circuit and opinion type. Two aspects of the citations stand out. First, all Circuits but the 4th and 7th Circuits have cited the case. Secondly, the case has been cited in majority opinions 35 times and in dissenting opinions 11 times while being specifically followed 5 times including 1 concurrence. This initial analysis suggests that the explicit effort to limit *Bush v. Gore* did not preclude the judges on the various Courts of Appeals from some level of reliance on the case.

Table 1: Cites to Bush v Gore by Federal Courts of Appeals

CT App.	Opinion	Dissent	Concur	Followed	Follow/C	Disting	Total
1st	6	3	1				10
2nd	4						4
3rd	1	1				1	3
4th							0
5th	5						5
6th	7	3		3	1		14

7th							0
8th	1	1					2
9th	10	2		1			13
10th						1	1
11th	1	1					2
All App	35	11	1	4	1	2	54

Table 2 shows all citations by the Federal District Courts to *Bush v Gore* by District and opinion type. Here, the Courts have cited the case 98 times and specifically followed it 7 times. Like the Courts of Appeals, a notable feature of the roster of citations is that the citation of the case is spread across the Districts.

Table 2: Cites to Bush v Gore by Federal District Courts

District	Opinion	Distinq	Followed	Explained	Total
1st	5		1	2	8
2nd	14	2			16
3rd	7	2			9
4th	1				1
5th	2	3			5
6th	11	1	4		16
7th	4	2	2		8
8th	2	1		1	4
9th	13	4		2	19
10th	1	1			2
11th	7	1			8
DC	2				2
total district	69	17	7	5	98

This initial count and distribution of the citations for *Bush v Gore* at the federal level suggests that the case has been used when and as the federal opinion writers see fit regardless of the limiting language in the per curium opinion. When combined with the 111 state and territorial courts that have cited the case, there have been 263 citations to *Bush v Gore* despite the declaration of the Supreme Court that the case was limited to the

"present circumstances." The state supreme courts from 22 states from all regions of the country have cited the case. An additional 25 court systems beyond the supreme courts, ranging from the Texas and Alabama Courts of Criminal Appeals to the New York and New Jersey Superior Courts, have also all cited the case.

Still, although from a simple procedural stand point, the case has indeed been regularly cited, understanding the nuance of the case citation as a demonstration of precedential value or importance is largely dependent upon the substantive dimension of the citations (Dear and Jessen 2007). Accordingly, beyond the citation count, the substantive basis for the citations of *Bush v Gore* must be determined in order to assess what, if any, jurisprudence has developed as a result of the case.

Shepard's uses editorial categories that have been developed by and taken from *LexisNexis* to explain and register the substantive manner in which a case is cited. These categories of editorial analysis are referred to as *LexisNexis Headnotes* ("*Headnotes*") (Dear and Jessen 2007). The *Headnotes* represent discrete legal points made by specific passages from the cited case. The *Headnotes* are represented by a string of de-limiting words which narrow the range of applicable fact patterns or legal topics to which the specific *Headnote* could apply. For example, HN1, the designation for *Headnote* 1, is de-limited by the phrase "*Constitutional Law > Elections, Terms & Voting > Electoral CollegeGovernments > Federal Government > Elections*" and refers to the passage and authority from the *Bush v. Gore* opinion reproduced beneath the string of key words like this:

> **HN 1** Constitutional Law > Elections, Terms & Voting > Electoral College Governments > Federal Government > Elections
> 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. U.S. Const. art. II, § 1.

There are 8 *Headnotes* that encompass the various citations of *Bush v Gore.*

Notably, of the 8 categorical *Headnotes*, numbers 3 through 7, inclusive, are specific explications of some dimension of equal protection with respect to voting while notes 1, 2, and 8 involve dimensions of elections other than concerns about equal protection.

The *Headnotes*, each with an italicized short title I have provided for rhetorical ease, are as follows:

Headnote 1: *No Individual Right to Vote*
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. U.S. Const. art. II, § 1.
keyword string Constitutional Law > Elections, Terms & Voting > Electoral College Governments > Federal Government > Elections

Headnote 2: *State has plenary power to choose electors*
The state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself.
keyword string Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner Governments > Federal Government > Elections

Headnote 3: *Equal Protection of votes, State can take the right to vote back*
When the state legislature vests the right to vote for President of the United States 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. The state, of course, after granting the franchise in the special context of U.S. Const. art. II, can take back the power to appoint electors.
keyword string Governments > Federal Government > Elections

Headnote 4: *Equal Protection and vote dilution*
The right to vote is protected in more than the initial allocation of the franchise to choose electors for the President of the United States. Equal protection applies as well to the manner of its exercise. Having 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. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

keyword string Constitutional Law > Equal Protection > Scope of Protection
Governments > Federal Government > Elections

Headnote 5: *Equal protection, standards*
A state supreme court's command to consider the intent of the voter in counting legally cast votes is unobjectionable as an abstract proposition and a starting principle. The problem inheres when there is an absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on recurring circumstances is practicable and necessary.
keyword string Constitutional Law > Equal Protection > Scope of Protection
Governments > Federal Government > Elections

Headnote 6: *Speed cannot supersede Equal Protection*
A desire for speed is not a general excuse for ignoring equal protection guarantees.
keyword string Constitutional Law > Equal Protection > Scope of Protection

Headnote 7: *Equal Protection, Statewide recounts*
When a court orders a statewide remedy, such as a statewide recount, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.
keyword string Constitutional Law > Equal Protection > Scope of Protection
Governments > Federal Government > Elections

Headnote 8: *Safeharbor date*
3 U.S.C.S. § 5 requires that any controversy or contest that is designed to lead to a conclusive selection of electors for President of the United States be completed by December 12.
keyword string Governments > Federal Government > Elections

Table 3 below presents the *Headnotes* by the short title I have provided along with the citation count for each individual *Headnote*. The total of 319 specific *Headnotes* citations exceeds the total number of opinion citations because the citations in some opinions refer to more than one *Headnote*. Recall that 5 of the 8 categories of *Headnote* are concerned with equal protection in the context of voting.

Table 3: Headnotes and Cite Counts

HN #	**Short Description**	**Cites**
HN1	*No Individual Right to Vote*	42
HN 2	*State has plenary power to choose electors*	7
HN 3	*EquPr of votes, State can take rt to vote back*	50
HN 4	*Equal Protection and vote dilution*	65
HN 5	*Equal protection, standards*	67
HN 6	*Speed cannot supersede Equal Protection*	43
HN 7	*Equal Protection, Statewide recounts*	29
HN8	*Safeharbor date*	16
Total		319

Simply sorting the citations to *Bush v Gore* by the broad categories of "equal protection" and "other" reveals the area and focus of the development of the jurisprudence of the case. Equal protection is the explicit subject of 254 of the 319 citations. In other words, roughly 80% of all the citations to *Bush v Gore* are in the context of equal protection. The information gleaned from the *Headnotes* is even more

suggestive than the mere citation count of the idea that *Bush v Gore* has persevered beyond the intended scope of its authors. Even more telling, the context and language of the citing opinions presents a compelling argument that the jurisprudence of equal protection has developed in particular ways in response to and because of the case. Accordingly, while space constraints prohibit analysis of each case, some illustrative cases taken from the federal and state courts demonstrate the point that *Bush v Gore* has emerged as a precedential force despite the limiting language.

In *League of Women Voters v. Brunner*, 548 F. 3d 616 (6th Cir. Ohio 2008)(HN 3,4), the court considered the action brought by The League of Women Voters of Ohio, the League of Women Voters of Toledo-Lucas County, and some individual registered voters in Ohio. The action was based on allegations that during the November 2004 election, some citizens were arbitrarily denied the right to vote or were overly burdened in their efforts to exercise their right to vote. Specifically, the petition alleged problems with voting machines that malfunctioned, some inaccurate purges of qualified and registered voters from voter registration lists, inadequately trained poll workers that were unable to resolve registration issues, instances of voters prematurely turned away from polling stations, as well as the failure of some absentee ballots to arrive at the home of the voters that requested absentee ballots before the election. The plaintiffs/appellees argued that these issues inhibited lawful voting and therefore deprived some citizens of the equal protection of the law through an arbitrary or burdensome deprivation of their right to vote based upon nothing more than the idiosyncrasy of where they lived. The 6th Circuit agreed with the plaintiffs/appellees and the lower court and affirmed that the voting system in Ohio violated the Equal Protection Clause. The court cited *Bush v. Gore* with

the *Headnote 4* quote "…having once granted the right to vote on equal terms, the State may not by later arbitrary and disparate treatment, value one person's voter over that of another…" The court determined that *Bush v. Gore* at a minimum meant that equal protection requires a non-arbitrary treatment of voters. Although the court recognized that *Bush v. Gore* claimed to be limited in application, because several district courts had utilized the case in assessing challenges to voting systems, the court concluded that case was relevant to the case at bar and was properly considered to be binding.

In *Stewart v. Blackwell*, 444 F. 3d 843(6th Cir. Ohio 2006) (HN 3,4,5,6,7) the court considered the argument of some voters in Hamilton, Montgomery, Sandusky, and Summit Counties in Ohio that the use of unreliable and deficient voting equipment in these counties, but not in other counties, constituted a violation of the Equal Protection Clause. A critical dimension of the allegations was that the punch card ballots used in some of the counties were especially vulnerable to counting errors when tabulating votes. Following the logic of *Bush v Gore*, the argument was that all the votes cast in Ohio are not counted at the same rate so they are not valued the same across the state. Although the district court ruled against the plaintiffs, as appellants, the aggrieved voters persuaded the court of appeals to reverse the ruling. The 6th Circuit found that, because voters in some counties in Ohio are statistically significantly less likely to have their votes counted than voters in other counties, the administration of the election violated the Equal Protection Clause. Also relying on the language referenced by *Headnote 4*, the court cited *Bush v. Gore*, and pointed out that the right to vote extends beyond the initial grant of the franchise but also encompasses a necessity that votes be equally weighted. Although the dissent criticized the majority for any reliance on *Bush v. Gore* given the

limiting language, the majority took the position that Supreme Court opinions all have precedential value until repudiated or overturned by the Court.

In *Black v. McGuffage,* 209 F. Supp. 2d 889 (ND Ill. 2002) (HN 3,5,7) the district court considered the claims of some Latino and African-American voters in Illinois who sued members of the Illinois State Board of Elections, the Chicago Board of Election Commissioners, and various counties and county clerks alleging that the use of a punch card voting system, voting systems that had no effective way for a voter to notify the county about errors, and voting systems without adequate voter education or assistance from election judges, violated the Equal Protection Clause. The court relied on *Bush v Gore* to deny the defendants' motions to dismiss the equal protection claims. Although the court acknowledged that the Supreme Court limited its decision in *Bush v. Gore* to the circumstances presented there, the court nonetheless declared that the rationale of *Bush v. Gore* provided guidance in the case. The court determined that people in different counties in Illinois face significantly different probabilities as to whether their votes will be counted and that probability is shaped by which voting system is used by the county in which the voter happens to reside. This disparate treatment values one person's vote over another based on an arbitrary designation, which, pursuant to *Bush v. Gore* and in particular relying on the language referenced by *Headnotes 3* and *4,* violates the Equal Protection Clause.

In *Bay County Democratic Party v. Land,* 347 F. Supp. 2d 404 (E.D. Mich. 2004)(HN 3,4) the district court considered the claim by The Bay County Democratic Party and the Michigan Democratic Party that a directive issued by the Michigan Secretary of State and the Director of Elections to local election officials violated the Help America Vote Act of

2002. The directive at issue ordered local officials to disregard and not count any provisional ballots cast by a voter in the incorrect precinct even if that voter was otherwise in the proper jurisdiction, city, village or township. The court found that the failure to count certain votes prevented every voting from having equal value. The court enjoined the directive and determined that eligible voters have a right to cast provisional ballots and have them counted even when those votes were cast outside of the designated or proper precinct.

Two related cases from the 6th Circuit merit particular attention because of the facts presented and the reliance of the court on *Bush v Gore*. First, in *State ex rel. Skaggs v. Brunner* 588 F. Supp. 2d 819 (S.D. Ohio 2008) (HN 1,3,4) the court embraced the role of the federal courts in resolving election disputes that might encompass equal protection claims. Before the November 4, 2008 election, two directives were established that provided guidelines for the counting of provisional ballots. Recall that provisional ballots are those cast under some procedural question such as whether the voter is at the correct precinct or is actually registered. One was issued by the Secretary of State of Ohio and the other one was issued by the state court. The plaintiffs filed a complaint with the Ohio Supreme Court that argued the Secretary of State had reversed an earlier interpretation of Ohio Election law. As a result of a defense motion, the case was then removed to federal court in the Southern District of Ohio on November 14, 2008. The plaintiffs opposed the removal of the case from state to federal court, while the Secretary of State contended that the removal was proper. The district court found that the removal was proper because the original state court complaint filed by the plaintiffs alleged a violation of a federal court order by the Ohio Secretary of State and, relying on *Bush v. Gore*, alleged

equal protection violations by Ohio. The court, like the plaintiffs, relied on *Bush v. Gore* in assessing the legal foundation for understanding the equal protection claims, and unlike the plaintiffs, in assessing the proper venue for the case.

In the related litigation *State ex rel. Skaggs v. Brunner* 588 F. Supp. 2d 828 (S.D. Ohio 2008) (HN 1,3,4,5) the court reviewed the merits of the dispute beyond the question of whether the removal was proper. The thrust of the case involved the disposition of 1,000 contested provisional ballots that had been cast during the November 4, 2008 election in Ohio. The plaintiffs did not argue that these provisional ballots were fraudulent or had been cast by ineligible voters or suffered from any other substantive flaw. Instead, the plaintiffs claimed that these provisional ballots should not be counted because they were technically deficient in some way. That is, the provisional ballots all suffered from one of several technical flaws. The plaintiffs claimed that these provisional ballots should have been excluded from the vote count because they were missing a signature, were missing printed names, contained printed names or signatures in the wrong location on the form, or there was no proof that the voter presented proper forms of identification in order to obtain the ballot. The Secretary of State contended that these 1,000 provisional ballots should still be counted in the vote tally because the deficiencies were due to poll worker error rather than some mistake by the voters. All parties agreed that all of the voters who cast these 1,000 provisional votes were eligible to vote. The Secretary argued that Ohio electoral law requires that all eligible voters have the right to have their votes counted equally, so as to not violate the Equal Protection Clause. Relying on *Bush v. Gore*, the Court agreed with the Secretary of State that all votes must

be counted according to a unified criteria and law so as to ensure all votes are counted equally.

The reliance on *Bush v. Gore* has not been limited to the federal courts. Indeed, as noted earlier, state and territorial courts have cited the case over 100 times. The Montana Supreme Court cited *Bush v. Gore* when it resolved *Big Spring v. Jore* 2005 MT 64, 326 Mont. 256 (2005) (HN 1, 5). The case arose from a dispute over the November 2, 2004 election held in Lake County, Montana. Seven ballots had markings for more than one candidate. These types of ballots are referred to as "overvotes" since the voter has chosen more than the appropriate number of candidates. These overvote ballots were rejected by the scanning machine in Lake County. A county election official, upon examination of the overvote ballots, determined that the voters actually intended to vote for the candidate Jore. The plaintiff, Anita Big Spring, an elector in Lake County, argued that counting the overvotes would violate the Equal Protection Clause because any such counting would depend on altering the standard by which all the other ballots had been counted. The Court relied on *Bush v. Gore* and agreed with the plaintiff. The Montana Supreme Court ruled that the votes could not be counted or considered in determining the outcome of the election. If the votes were counted, the Court reasoned, there inherently would be inconsistent standards governing the counting of all the ballots, which would undermine the equal value of each vote.

In New Hampshire, a state supreme court concurring opinion specifically followed *Bush v. Gore* while a second concurrence cited it in the *Appeal of McDonough (Ballot Law Commission)* 149 N.H. 105, 816 A. 2d 1022 (2003)(HN 5). In that case, Peter McDonough, a candidate for Hillsborough County Attorney, argued that the New

Hampshire Ballot Law Commission (BLC) erred in certifying his opponent as the winner. The complaint focused on 172 ballots where voters marked their choice for straight ticket voting whereby all candidates from one party would be chosen. The ballots McDonough challenged were those where the voter (1) appropriately marked the ballot for a straight ticket Republican vote and (2) appropriately marked ballots to vote for some individual candidates (either Democrat or Republican); but (3) did not make any mark on the ballot in the race for county attorney. Because the voter demonstrated the intent to vote a straight ticket for the Republican Party, the BLC ruled that those voters who failed to select a candidate in the county attorney race intended to vote to support the Republican candidate. The New Hampshire Supreme Court determined the BLC acted properly when it counted the 172 contested ballots as supporting the Republican candidate. In the concurring opinion, some justices grounded the support for the actions of the BLC in the jurisprudence of *Bush v. Gore.* In essence, because the BLC had followed uniform rules in its determination of how to count the contested 172 ballots, all votes (and voters) were treated equally.

The reach of *Bush v. Gore* even extends to the territories of the United States. In *Underwood v. Guam Election Commission* 2006 Guam 17 (HN 3,5,6) the Guam Supreme Court considered whether to count overvotes in the election for governor and lieutenant governor. The plaintiffs, Underwood and Aguon (candidates for governor and lieutenant governor), contended that 504 ballots determined to be overvotes should be counted. The Guam Election Commission did not count the overvotes in accordance with the Organic Act of Guam. This resulted in the plaintiffs' opponents, Camacho and Cruz, winning the election. The Guam Supreme Court applied the analysis and guidance from *Bush v.*

Gore, in order to assess how to define a vote. The Guam Supreme Court began its reasoning with this quote from *Bush v. Gore* "in certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements." *Bush v. Gore* deferred to Florida law and determined that a legal vote was one in which there was a clear indication of the intent of the voter. In the Guam election, the Guam Supreme Court ruled against the plaintiffs, specifically relied on *Bush v. Gore*, and deferred to the law of Guam, which states that overvotes are not to be counted.

Equal Protection

Seven Justices accepted that there were equal protection issues in the facts that gave rise to the *Bush v. Gore* litigation. Five Justices of the "equal protection seven" voted to end the recount because Florida would not have been able to meet the "safe-harbor" deadline to ensure the state's electoral votes would be counted while two would have remanded the case to the Florida courts for recounting bounded by a uniform standard. The three Justices who recognized equal protection issues but declined to remand the case or otherwise provide a remedy for those equal protection issues were Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. These three also asserted a rationale not grounded in equal protection which turned on the idea that the Florida Supreme Court made "new law" when it ordered the recount and thereby undermined the exclusive authority of the Florida legislature to choose the electors for the state. The two major rationales – equal protection concerns on the one hand and "new law" subverting the authority of a state legislature in a field of legislative prerogative on the other – have not proven to be equally robust in the decade of the litigation since. While judges and

litigants at almost all levels of the judiciary have presented *Bush v. Gore* in support of various equal protection claims, the premise of the "new law" objection to the actions of the Florida Supreme Court has not gained traction.

Still, the issue of whether *Bush v. Gore* has pushed the development of equal protection jurisprudence in one way or another is not obvious. As has been pointed out (Hasen 2007), in the Ninth Circuit in *SW Voter Registration Ed. Project v. Shelley* 278 F. Supp. 2d 1131 (C.D. Cal. 2003), a conservative en banc panel reversed the original three judge panel that had determined the variant reliability of punch-card voting systems violated equal protection as explicated by *Bush v. Gore*. In *Stewart v. Blackwell*, 444 F. 3d 843(6th Cir. Ohio 2006) *superceded en banc* 473 F 3d 692 (6th Cir. Ohio 2007) the Sixth Circuit voted to hear the case *en banc* after the three judge panel applied strict scrutiny and found that a *Bush v. Gore* grounded equal protection claim from the anticipated use of punch-card ballots had merit. The vote to hear the case *en banc* vacated the ruling automatically per 6th Circuit Rule 35 (a).

Despite these apparent efforts to limit *Bush v. Gore*, there is reason to believe that the case will persevere as it moves towards an established precedent of broad applicability. Specifically, even these efforts at limitation by the en banc panels in the Sixth and Ninth Circuits revealed some dimension of what may lie ahead. The en banc panel in the Ninth Circuit referred to *Bush v. Gore* as "the leading case on disputed elections" (344 F. 3d 914, (9th Cir. 2003) at p.918). The vacated Sixth Circuit opinion is even more assertive. In a split opinion, Judge Martin delivered the opinion of the court, in which Judge Cole joined. Judge Gilman dissented and took the majority to task for relying on *Bush v. Gore.* In response to this critique, the majority pointed out:

> Of note, *Bush v. Gore* appears to be the first case where a court recognized the developing problem with technology that we confront today. The per curiam opinion noted that the case "brought into sharp focus a common, if heretofore unnoticed, phenomenon" — that nationwide an "estimated 2% of ballots cast do not register a vote for President for whatever reason," and that "punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter." *Bush*, 531 U.S. at 104, 121 S.Ct. 525. We also note that the dissent begins by criticizing our "reliance on the Supreme Court's murky decision in *Bush v. Gore*." Dis. Op. at 880. Murky, transparent, illegitimate, right, wrong, big, tall, short or small; regardless of the adjective one might use to describe the decision, the proper noun that precedes it — "Supreme Court" — carries more weight with us. Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it… 444 F.3d 843, 898 fn 8 (2006)

In fact, the opinion seems to present a strong rebuke to any adherent of the conventional wisdom that denigrates *Bush v. Gore* or embraces a notion of the case as little more than an historical oddity:

> In response to the dissent, we are of course aware that some of these cases were reviewed on the pleadings or on a motion to dismiss under Rule 12(b)(6). Coming from district courts and other circuits, they are not binding upon us (as Supreme Court decisions are). These decisions do have, however, the power to persuade, and it would be irresponsible not to consider their reasoning — both good and bad — simply because they are not binding. If we then agree with their reasoning, we ought to apply it here. If we do not agree, then we should not adopt their reasoning. This, of course, differs from Supreme Court decisions, such as *Bush v. Gore*, where we are bound to apply their reasoning regardless of whether we agree with them, find them "murky," Dis. Op. at 880, or believe that the Supreme Court issued its decision with a "lack of seriousness," Dis. Op. at 886 (quoting Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 Fla. St. U.L.Rev. 377, 391 (2001)).

That hundreds of opinions have cited the case for some assessment of some aspect of equal protection in the context of election administration suggests that despite the limiting language and despite the apparent desire of some in the federal judiciary, *Bush v Gore* continues to persevere.

Another aspect of the prospective role of *Bush v Gore* that has been given little attention is the broad efforts of some to expand the holding beyond election litigation into criminal procedure. No court has yet embraced this expansion of the notion that equal protection as clarified by *Bush v Gore* dictates that citizens be treated equally, even apart from voting. However, some state courts have determined that some criminal case litigants who have sought to expand *Bush v Gore* merit an explanation embedded in opinions that explain why *Bush v Gore* is not applicable. This wave of explanatory citations suggests that members of the judiciary take the argument seriously enough to spend time and resources distinguishing the *Bush v Gore* equal protection analysis in the context of criminal procedure from the *Bush v Gore* equal protection analysis in other contexts.

Implications, Conclusions, and Additional Research

The straight forward implication here is that *Bush v. Gore* has begun to develop a place in the jurisprudence of equal protection despite the efforts by the Supreme Court to limit its applicability. While the Supreme Court has so far abided by the peculiar limitation in the per curium opinion, federal appellate, federal district, and state and territorial courts of all levels have cited the primarily in the context of equal protection issues in election litigation cases. *Bush v. Gore* has been the filter through which

problems associated with voting technologies have been considered. Perhaps this should not be surprising. The *Bush v. Gore* analysis seemed odd in the context of the facts that gave rise to it. After all, concern over the accuracy and fairness of a vote tally might reasonably be expected to lead to a fair and accurate vote rather than an embrace of a clearly questionable status quo and a premise that more counting is undesirable. But despite the slippage between the facts upon which the per curium opinion was constructed and the conclusions reached therein, the insight from the opinion in the abstract might simply present a modest extension of the logic of *Reynolds v. Sims* 377 U.S. 533 (1964) (one person one vote means districts should be about equal). If the legacy of *Bush v. Gore* is a gradual movement toward greater refinement of election processes so that more votes are actually counted in more accurate ways, then ultimately the limiting language will be, perhaps appropriately, thought of as little more than rightfully ignored partisan-driven dicta.

Of course, if the notion that every vote must be counted and political subdivisions within a state, whether counties or precincts, must count votes the same way at the same rate, then the modest logical extension of *Reynolds v. Sims* could become a significant practical alteration of the manner in which states conduct elections. Such an expansion of *Bush v. Gore* might even alter the fundamental relationship between the federal government and the states regarding election management. The early institutional choice of a home-rule approach to federal management of elections has had broad implications for the manner in which the elections are actually held (Ewald 2009). If the counties or precincts must harmonize vote counting behavior or the other elements of the

administration of elections because of the demands the equal protection clause, there is at least some potential for a demand of cross-state harmonization as well.

Beyond issues regarding the administration of elections, if the efforts by litigants outside of the realm of election litigation succeed in foisting *Bush v. Gore* upon a so-far reluctant judiciary in non-election litigation arenas, then the case could actually become the vehicle for wide-spread changes in criminal justice. For instance, if equal protection as contemplated by *Bush v. Gore* was applied to the right to a full and fair defense in death penalty cases, limitations on DNA testing might fall by the wayside. Although it seems unlikely that the judiciary will allow this expansion given the ubiquitous judicial push-back against it so far, if the defense bar continues its efforts to introduce this nuanced understanding of equal protection, successful advocacy may not be out of the question. *Bush v. Gore* might also have a substantial impact on immigration cases if a broader understanding of equal protection made its way into what is now akin to summary resolution of claims of undocumented status. Additionally, if these non-election fields of litigation can bring a *Bush v. Gore* driven but expanded approach to equal protection, government management of issues such as the census might also be effected.

Still, the mostly likely long term impact of *Bush v. Gore* seems to be found in election litigation. Future research should consider the manner in which the case has been cited by the litigants in addition to the presentation of the case by the various courts. The arguments put forward in the briefs may reveal whether the litigation bar has settled on a robust interpretation of *Bush v. Gore* even if those on the bench continue to contest the bounds of the case. Moreover, a secondary consideration of the citations of the cases that cite *Bush v. Gore* may reveal a greater heft to the current precedential value than has been

shown here. Specifically, time will reveal whether cases that affirmatively cite *Bush v. Gore* are then in turn affirmatively cited, creating a second generation of citation support for *Bush v. Gore*. Second generation citations may not generate the hostility from en banc panels that the Sixth and Ninth Circuits have perhaps demonstrated to direct citations of *Bush v. Gore* and could solidify the jurisprudence without a reliance on the controversial case alone.

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