PUNCH CARD BALLOTS V. DIRECT RECORD ELECTRONIC VOTING: WHY OHIO'S USE OF DIFFERENT METHODS TO COUNT BALLOTS VIOLATES THE EQUAL PROTECTION CLAUSE.

STEWART V. BLACKWELL, 356 F. SUPP. 2D 791 (N.D. OHIO 2004).*

*Jason W. Hilliard***

I. INTRODUCTION

After the 2000 presidential election was decided in Florida by a difference of less than the statistical margin of error in that state, the old saying that *every vote counts* never seemed more relevant.[1] As the Florida Board of Elections scrambled to manually recount the ballots, however, the mantra among legal scholars of "one-person, one-vote"[2] seemed to be cast into doubt.

Problems with "hanging chads" and "butterfly ballots"[3] brought the

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*Prior to publication, the Sixth Circuit reversed and adopted much of the same reasoning proposed by the author of this Note. *See Stewart v. Blackwell*, 444 F.3d 843, 2006 Fed. App. 0143P (6th Cir. 2006) (holding that the lower court should have applied strict scrutiny, but concluding that punch card ballots violate Equal Protection even under a rational basis review).

** Executive Editor for Publication 2006-2007, Staff Writer 2005-2006, University of Dayton Law Review; J.D./MPA expected May 2007, University of Dayton School of Law; B.A. in Social and Political Studies, Wilmington College 2003. This author would like to thank Richard B. Saphire for his insight, as well as editors Mary Walsh and Melissa Winter for their hard work. Special thanks to Paul Moke for his teaching and inspiration.

[1] Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and Ensuing Litigation*, 2000 S. Ct. Rev. 1, 3, 36, 38 (2000) (finding that machine error accounted for almost 0.5 percent, and in addition, there were estimates of over 170,000 voters who improperly cast ballots state wide, while the difference between the two candidates was less than 0.5 percent); *see also* Daniel P. Tokaji, *The Paperless Chase*: *Electronic Voting and Democratic Values*, 73 Fordham L. Rev. 1711, 1725 (2005) (noting that nationwide statistics indicated that over two percent of ballots did not register a vote for President in 2000).

[2] Jessica Post, *Uniform Voting Machines Protect the Principle of "One-Person, One-Vote,"* 47 Ariz. L. Rev. 551, 562-75 (2005) (arguing that using different voting technology is contrary to the idea of "one-person, one-vote," and urging equality in the procedures and mechanisms used for voting).

[3] Tokaji, *supra* n. 1, at 1713 (pointing out that problems with punch card ballots and "hanging chads" prompted much litigation and legislation); *see also* Steven J. Mulroy, *Substantial Noncompliance and Reasonable Doubt*: *How the Florida Courts Got it Wrong in the Butterfly Ballot Case*, 14 Stan. L. & Policy Rev. 203, 204-29 (2003) (explaining the legal and practical problems with "butterfly ballots"); Caltech/MIT Voting Tech. Project, *Voting: What is and What Could Be* 17,

flaws of punch card balloting systems to the forefront. One Supreme Court decision[4] and an act of Congress[5] later, some states continue to use punch card balloting.[6] In fact, many states employ several different methods of voting technology that produce various margins of error.[7] The likelihood of having your vote counted in those states is entirely dependent upon which county or precinct in which you live.[8]

In *Stewart v. Blackwell*,[9] the Northern District Court of Ohio ruled that the use of punch card ballots in some counties and electronic technology in others does not violate the Equal Protection Clause of the Fourteenth Amendment.[10] The Court applied the rational basis test,[11] and found that the difference in residual votes[12] in counties using punch cards in comparison to those using electronic technology was *de minimis*,[13] despite the clear statistical evidence to the contrary.[14]

This Note will argue that using punch card ballots in some counties while using electronic voting in others does violate the Equal Protection

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http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf (accessed Mar. 16, 2006) [hereinafter Caltech/MIT] (noting that due to the Florida controversy, problems with "butterfly ballots" and "dangling chads" became part of the national lexicon).

[4] *Bush v. Gore*, 531 U.S. 98, 104 (2000) (ruling that Florida's use of different methods of re-counting votes violated the Equal Protection Clause, and commenting on the problems of punch card ballots).

[5] *Help America Vote Act of 2002*, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (to be codified at 42 U.S.C. §§ 15301-15523) (provides federal money to states to replace punch cards with new voting technology).

[6] Nineteen million voters used punch cards in the 2004 election. In Ohio alone, punch cards were used by seventy-two percent of the voters. Tokaji, *supra* n. 1, at 1738-39.

[7] Paul M. Swartz, *Voting Technology and Democracy*, 77 N.Y.U. L. Rev. 625, 634 (2002) (finding that the failure rate for various voting technology used within the same state ranges from less than one percent to over six percent).

[8] Tokaji, *supra* n. 1, at 1756 (explaining the "dramatic" intrastate disparities due to differences in voting technology).

[9] 356 F. Supp. 2d 791 (N.D. Ohio 2004).

[10] *Id.* at 807-10. The Court also held that using different voting technology did not violate the Due Process Clause or the Voting Rights Act. *Id.*

[11] The *rational basis* test is the most deferential standard of review employed by the Supreme Court when analyzing an Equal Protection claim. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985) (defining the rational basis test as it applies to Equal Protection). Applying this test, the Court will presume the constitutionality of the law or classification, and uphold it so long as it is "rationally related to a legitimate state interest." *Id.* at 440; *see also* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center*, 88 Ky. L.J. 591 (2000) (providing a general discussion of rational basis as it applies to modern Equal Protection judicial review).

[12] A *residual vote* is a vote that is not counted. Caltech/MIT, *supra* n. 3, at 20 (explaining residual votes). It is a catch-all term for over-votes and under-votes. *Id.* An over-vote occurs when someone accidentally votes for two candidates for the same office. *Id.* An under-vote happens when a voter accidentally or purposefully fails to cast a vote for a particular office. *Id.*

[13] *De minimis* is Latin for "of the least." *Black's Law Dictionary* 464 (Bryan A. Garner ed., 8th ed., West 2004). It is defined as "trifling, minimal," or "so insignificant that a court may overlook it in deciding an issue or case." *Id.*

[14] According to the statistics in Ohio, you are three times as likely to have your vote excluded if you live in a punch card county. *Stewart*, 356 F. Supp. 2d at 806.

Clause and that the strict scrutiny test[15] should have been applied. Using *Bush v. Gore*, where the United States Supreme Court decided that employing different methods to re-count votes is an Equal Protection violation,[16] this Note will argue that the original counting of votes should be as well.

The next section outlines the types of voting technology used in the United States, and examines the problems with punch card ballots. It also will discuss the reaction to the 2000 presidential election and the trend toward newer electronic voting technology. Finally, it provides a summary of the holding in *Bush v. Gore*, and describes the cases involving claims of an Equal Protection violation where counties used various forms of voting technology. Section III discusses the holding in *Stewart v. Blackwell*, and argues that the Court should have applied the strict scrutiny test and found an Equal Protection violation. Section IV will conclude that due to the significant statistical disparity between electronic voting and punch cards, the Court should have found an Equal Protection violation, regardless of what level of scrutiny it applied.

II. HISTORY AND BACKGROUND

Voting technology has come a long way. From voice votes and paper ballots to punch cards and direct record electronic machines ("DRE"), innovation has led to more efficient, accurate, and reliable systems.[17] While there are currently five different methods to cast a vote in the United States,

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[15] The *strict scrutiny* test gives no deference to the government, and carries with it a *strong presumption* that the classification is not constitutional. *Gratz v. Bollinger*, 539 U.S. 244, 270 (defining the *strict scrutiny* test). This test is implicated when a suspect class or fundamental right is involved. *Id.* The government must show that the law or classification is necessary to achieve a "compelling governmental interest." *Id.* The law or classification must also be "narrowly tailored" so as to be the least discriminatory means available to achieve that government interest. *Id.* Several voting rights cases have employed language strongly suggesting the use of strict scrutiny though others contend that the level of scrutiny depends upon the burden placed on the right to vote. *Id.*; *see also Harper v. Va. St. Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)) (ruling that due to the fundamental interest in voting, "'any alleged infringement . . . must be carefully and meticulously scrutinized'"); *but see Burdick v. Takushi*, 504 U.S. 428 (1992) (finding that the level of scrutiny varies with the burden placed on the right to vote). Several commentators have argued that *Bush v. Gore* employed strict scrutiny. S*ee* Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 Fla. St. U. L. Rev. 377, 396 (2001) (stating that *Bush v. Gore* "mandate[s] strict scrutiny"); Richard B. Saphire & Paul Moke, *Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 Vill. L. Rev. 229, 258-67 (2006) (arguing that *Bush v. Gore* used strict scrutiny); Steven J. Mulroy, *Lemonade From Lemons: Can Advocates Convert Bush v. Gore Into A Vehicle For Reform?* 9 Geo. J. on Pov. L. & Policy 357, 372-74 (concluding that given the Court's discussion of the *fundamental* nature of the right to vote, the *Bush* opinion employed strict scrutiny).

[16] 531 U.S. at 103.

[17] Tokaji, *supra* n. 1, at 1717-24 (exploring the reliability of various methods of voting); Swartz, *supra* n. 7, at 633-38 (briefly describing the voting systems employed by voters).

punch cards, DREs, and optical scan systems are the most prevalent.[18]

Problems with punch cards were known for some time,[19] but the 2000 presidential election brought the issue to the public's attention.[20] The election prompted studies,[21] legislation,[22] and a Supreme Court opinion.[23] The consensus was that punch card ballots disenfranchise voters due to their high rate of error.[24] Quickly, states began to replace their punch card systems with more reliable technology.[25] Some states, however, have not made the change.[26] Several lawsuits were initiated to force these states to stop using punch card technology.[27] An Ohio case, *Stewart v. Blackwell*, was the first of these cases to be heard on its merits.[28]

A. *From Throwing Balls to Punching Holes*

The word *ballot* comes from an ancient Italian word for ball, while

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[18] In 2004, DREs were used by almost thirteen percent of voters, and optical scans were used by over thirty percent. Tokaji, *supra* n. 1, at 1737. Punch card usage was almost tied with mechanical lever machines at over thirteen percent each, while less than one percent of voters still used hand counted paper ballots. *Id.*

[19] Roy G. Saltman, *Accuracy, Integrity, and Security in Computerized Vote-Tallying* §§ 1.7.2, 3.4.4, http://www.itl.nist.gov/lab/specpubs/500-158.htm (accessed Mar. 16, 2006) (this 1988 study recommends that counties discontinue the use of punch card ballots altogether due to their inaccuracies); *see also* Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000*, at 27 (Oxford U. Press 2001) (quoting a 1982 patent application by the manufacturer stating that punch cards can clog up so as to prevent a clean punching operation, which leads to "serious errors" in data processing).

[20] *See* Political Staff of the Wash. Post, *Deadlock: The Inside Story of America's Closest Election* (Public Affairs 2001) (discussing the overwhelming media coverage of the event).

[21] *See generally* Henry E. Brady et al., *Counting All the Votes: The Performance of Voting Technology in the United States*, http://ucdata.berkeley.edu:7101/new_web/countingallthevotes.pdf (accessed Mar. 16, 2006).

[22] 116 Stat. at 1666.

[23] *Bush*, 531 U.S. at 158.

[24] Eric A. Fischer, *Voting Technologies in the United States: Overview and Issues for Congress* 14-18, http://www.eng.yale.edu/debates/CRS%20Voting%20Technologies.pdf (accessed Mar. 16, 2006) (this commission suggested a national uniform voting system, and spoke of the attributes of DREs); *see also* Spec. Investigations Div. of Minority Staff of H.R. Comm. on Govt. Reform, 107th Cong., *Income and Racial Disparities in the Undercount in the 2000 Presidential Election* 7 (July 9, 2001), http://www.democrats.reform.house.gov/Documents/20040629065057-51969.pdf (accessed Mar. 16, 2006) (determining that punch cards disenfranchise minority voters) [hereinafter *Income and Racial Disparities*].

[25] A number of states have banned punch card ballots, and the overall trend has been away from punch cards. Tokaji, *supra* n. 1, at 1739. In the 2000 election, forty-four million voters (one in three) used punch card systems, while only nineteen million used DREs. *Id.* In 2004, however, DREs were used by forty-six million voters, while only nineteen million were still using punch card ballots. *Id.*

[26] *Id.* at 1740 (pointing out that in Ohio, seventy-two percent of voters still used punch cards in 2004).

[27] *Com. Cause v. Jones*, 213 F. Supp. 2d 1106, 1110 (C.D. Cal. 2001); *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 920 (9th Cir. 2003); *Black v. McGuffage*, 209 F. Supp. 2d 889, 902 (N.D. Ill. 2002). For a discussion of these cases, see *infra* § II.A.

[28] 356 F. Supp. 2d 791.

casting refers to throwing.[29] Indeed, in early Greece, votes were cast by throwing a ball into a clay pot or box of the candidate of your choice.[30] Though the first paper ballots were used in Rome as early as 139 B.C.E., the United States used a system of "voice voting"[31] well into the early nineteenth century. During this time, votes were cast by simply calling out your choices which were duly noted by the clerk.[32]

There was no right to secret ballot, and voter registration was accomplished by swearing on the Bible, and having the voters' names recorded by the clerk.[33] The clerk did not record who each individual voted for, but simply kept a running tally of how many votes had been cast for each candidate.[34] Thus, there was no real way for a candidate to contest an election, or have their votes re-counted. Voter fraud occurred frequently, and over-voting only occurred when someone would return several times to cast their ballot.

By the early nineteenth century, paper ballots began to appear in the United States.[35] Originally, they were blank slips of paper provided by the voters with the names of the candidates they wished to support.[36] Before long, candidates and political parties began pre-printing their own paper ballots.[37] This practice was originally contested, but eventually became the norm by the late nineteenth century.[38] The concern over preprinted ballots was their lack of privacy and potential for fraud.[39]

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[29] Douglas W. Jones, *A Brief Illustrated History of Voting*, http://www.cs.uiowa.edu/~jones/voting/pictures/ (accessed Mar. 16, 2006).
[30] *Id.*
[31] *Id.* The first use of a paper ballot in the United States was in 1629 to elect a pastor of a Salem, Massachusetts church, but paper ballots were not widely used until the late eighteenth century. *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* A scanned copy of a record kept by a clerk shows the general practice whereby the voter's name was recorded, but not their choice. *Id.* Instead, a running tally of votes cast for each candidate appeared at the top. *Id.*
[35] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 142-43 (Basic Books 2000).
[36] Jones, *supra* n. 29.
[37] Political parties used distinctive paper in order to identify how people voted. Saphire & Moke, *supra* n. 15, at 236. Votes were often exchanged for jobs, and some were required to vote for certain candidates in order to keep their jobs. *Id.*
[38] *Henshaw v. Foster*, 9 Pick. 312, 323 (Mass. 1830). In this case, the High Court decided to finally allow the use of preprinted paper ballots which had been rejected in the past. *Id.*
[39] Worth Robert Miller, *Harrison Count Methods: Election Fraud in Late 19th Century*, *Locus: Regional and Local History* (1995) (available at http://history.missouristate.edu/wrmiller/Populism/texts/harrison_county_methods.htm (accessed March 28, 2006)) (discussing voter fraud in relation to preprinted ballots); Joseph P. Harris, *Election Administration in the United States* (George Banta Publg. Co. 1934).

These concerns came to fruition in the presidential election of 1876. In that election, Rutherford B. Hayes eventually won a contested electoral vote, though he clearly lost the popular vote.[40] Much like the 2000 election, this close vote brought the problems of voting technology to the public's attention.[41] Stories of votes not being properly counted led to congressional hearings. In one instance, a poll worker admitted to ignoring the ballots completely and simply having his ward bosses announce the winner.[42] By 1888, during another disagreement between the popular vote and Electoral College, reports of widespread voter fraud led the United States to seek new voting technology.[43]

The Australian secret ballot was introduced to remedy these problems.[44] With this system, a preprinted ballot allowed voters to place a mark beside the name of their preferred candidate. The Australian ballot greatly enhanced voter privacy and significantly reduced voter fraud. Much like the problems in the 2000 election, however, determining voter intent was sometimes impossible.[45] Further, with the ever increasing voter population, it was becoming infinitely more difficult to count the ballots.[46]

The problem of counting the votes was solved a few years later with the introduction of mechanical lever voting machines ("AVM").[47] These machines allowed the voter to line up the ballot and pull a lever to cast their vote.[48] The total for each candidate was tallied instantly.[49] Though quick and efficient, AVMs easily jammed up, left no individual voter trail, and were bulky and hard to store.[50] Despite these problems, AVMs became the

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[40] Louise Story, *Election Hints at Years Past*, Yale Daily News (Nov. 13, 2000) (available at http://www.yaledailynews.com/article.asp?AID=13613 (accessed Mar. 16, 2006)). Originally, both the electoral vote and the popular vote were cast for Samuel Tilden, but contested elections in three states, including *Florida*, held up the final vote. *Id.* This election was eventually decided by an electoral commission, which only cast the votes for Hayes when Republicans agreed to remove troops from the South. *Id.*

[41] Jones, *supra* n. 29.

[42] *Id.*

[43] *Id.* In this election, Grover Cleveland won the popular vote, but Benjamin Harrison was alleged to have paid off some of those in the Electoral College in order to claim victory. *Id.*

[44] Saphire & Moke, *supra* n. 15, at 236 (commenting on the privacy afforded by the Australian ballot); *see also* Richard Briffault, *The Contested Right to Vote*, 100 Mich. L. Rev. 1506, 1518 (2002) (noting that by the late nineteenth century, the "secret ballot" was adopted to prevent fraud).

[45] The ballots required check marks, and where the check strayed from the line or did not slant properly, the vote may not be counted. Jones, *supra* n. 29.

[46] Australian ballots are still used in rural areas, and accounted for 1.5 percent of voters in 2000, but only 0.6 percent in 2004. Tokaji, *supra* n. 1, at 1737.

[47] Fischer, *supra* n. 24, at 3 (explaining the AVM).

[48] *Id.*

[49] *Id.*

[50] Saphire & Moke, *supra* n. 15, at 237 (stating that the major problem with the AVM was that it was bulky and expensive to store).

dominant voting technology by the mid-twentieth century.[51]

Due to their inexpensive and portable nature, punch card systems quickly replaced AVM's as the most popular apparatus used to cast a vote in the United States.[52] The reliability problems with the punch card system, however, have led many states to move away from this technology.[53] Originally introduced by IBM in the 1960s, punch cards provide a portable, inexpensive, and efficient way to cast votes.[54] The system employs the use of a stylus to punch holes in a card containing pre-scored, perforated chads corresponding to the names of the candidates.[55] A beam of light then counts the open spaces left in the card.[56]

The pre-scored cards themselves do not contain the names of the candidates.[57] The names appear on a separate booklet mounted on the Votomatic or data-punch machine.[58] The card is inserted and aligned in the machine, and the voter then punches the holes corresponding to their candidate of choice.[59]

Though the quick and efficient nature of the punch card ballot was immediately recognized, so were the system's many problems.[60] Punch card machines quickly clog up with chads, making it difficult to completely perforate the hole.[61] If one of the holes is not punched through completely, the tabulator will not read it.[62] This creates the problem of under-voting.[63]

This problem is exacerbated during a manual re-count.[64] Hand re-

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[51] *Jones*, *supra* n. 29.
[52] Brady et al., *supra* n. 21, at 12 (noting that punch card systems became very popular because of their low cost and speed).
[53] Punch card ballots were used by thirty percent of voters in 2000, but only thirteen percent of voters used punch cards ballots in 2004. Tokaji, *supra* n. 1, at 1737.
[54] Jones, *supra* n. 29.
[55] Saphire & Moke, *supra* n. 15, at 237 (discussing punch card systems).
[56] *Id.*
[57] Fischer, *supra* n. 24, at 3-4. There are two types of punch card systems. *Id.* at 3. The main type, "Votomatic," does not list the candidate's names on the actual card, while the second type, "Datavote," does have their names on the card. *Id.* at 4. The Datavote makes up only a small percentage of punch cards, and was only used by four percent of precincts in 2000. *Id.*
[58] Marshall Camp, *Bush v. Gore: Mandate for Electoral Reform*, 58 N.Y.U. Ann. Surv. Am. L. 409, 445-46 (2002) (explaining the differences between Datavote and Votomatic machines).
[59] Tokaji, *supra* n. 1, at 1720.
[60] Saltman, *supra* n. 19, at 11 (1988 study recommending that the use of punch cards "be ended"); Caltech/MIT, *supra* n. 3, at 7 (pointing out that IBM quickly recognized the problems with punch cards and stopped producing them).
[61] Dershowitz, *supra* n. 19, at 27.
[62] *Id.*
[63] Under-voting occurs where a vote is not registered for a particular office. Tokaji, *supra* n. 1, at 1720.
[64] Dershowitz, *supra* n. 19, at 20-30 (explaining the difficulty in determining voter intent).

counts require the tabulators to determine voter intent.[65] The problem is whether or not to count hanging, dimpled, penetrated, or pregnant chads.[66] That is, there is no way to determine whether or not the voter intended to cast the vote.[67]

Another prevalent problem with punch cards is voter confusion.[68] Some punch card ballots make it difficult for voters to understand exactly for whom they are casting their vote.[69] This problem is compounded because once a voter removes their card, there is no way for them to know who they actually voted for.[70] Because there are no names on the actual card, if the card was not properly aligned in the machine, the holes punched by the voter might be casting a vote for a candidate they did not intend.[71]

Over-voting is another product of voter confusion.[72] This occurs where someone accidentally casts a ballot for more than one candidate for the same office.[73] As an example, a butterfly ballot in Florida led an alarming number of citizens to punch the wrong hole, thereby casting a vote for the wrong candidate.[74] Others, seeing the names of both the presidential and vice-presidential candidates listed together, punched a hole for each, which actually cast a vote for two different presidential candidates.[75] Such instances of over-voting are particularly problematic, and unique to punch card systems.[76]

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[65] *Id.*
[66] *Id.* at 28 (explaining the various forms of chad problems).
[67] Though they might have intended the vote, perhaps they thought about it and changed their mind or realized that they were about to cast a vote for the wrong candidate. Intentional under-voting, where the voter intentionally does not cast a vote for a candidate, also is a possibility. *Id.*
[68] *Id.*
[69] *Id.* at 24 (explaining the problems with butterfly ballots).
[70] Tokaji, *supra* n. 1, at 1720 (explaining that Votomatic cards do not have the candidates' names on them).
[71] *Id.*
[72] Dershowitz, *supra* n. 19, at 24-25.
[73] *Id.*
[74] The final vote had Bush winning by 537 votes. *Id.* at 25. It was estimated, however, that in just one heavily Democratic county, the butterfly ballot caused 5,330 votes intended for Gore to be thrown out because they were unintentionally cast for him and another candidate, Pat Buchanan. *Id.* This does not include an additional 2,908 that were likely intended for Gore that were accidentally cast for the Socialist candidate whose hole was just below Gore's. *Id.* In this instance, voter's thought that they were voting for Gore and Lieberman. *Id.* One Jewish lady who accidentally voted for Buchanan was reported as stating, "I would rather have had a colonoscopy than vote for that son of a bitch Buchanan." *Id.* at 25.
[75] A lady told the Washington Post that, "I voted for Gore, but I also voted for the vice president. I punched two holes instead of one." *Id.*
[76] Tokaji, *supra* n. 1, at 1720 (explaining the unique problems of Votomatic punch cards).

To combat these flaws, optical scan systems were introduced.[77] Similar to taking the ACT or SAT, voters use a pencil to fill in the box corresponding to their choice.[78] Less confusing and just as efficient, optical scan machines reduce residual voting significantly.[79] Another great feature is that the tabulation machine notifies voters when they have under-voted or over-voted.[80]

The latest technological advancement in voting has been the DRE.[81] Much like an ATM, voters use a touch screen computer to cast their vote.[82] The machine makes it impossible to over-vote and notifies a voter when they have under-voted, making unintentional under-votes impossible as well.[83] Before a ballot is cast, a verification screen shows the voter who they have voted for, giving them a second chance to check their ballot and make changes as necessary.[84]

Many states, including Ohio, also have a feature that creates a voter verified paper trail in case of machine malfunction.[85] Due to the high accuracy of the DRE machines, and the significant problems with punch cards, many states have gotten rid of their punch cards in favor of the DREs over the past six years.[86]

B. *The Numbers Game*

Much like the 1888 election, the close election of 2000 prompted a number of legislators and scholars to take a hard look at the way we cast our votes.[87] Immediately following the 2000 presidential election, the

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[77] Optical scan systems were used by roughly thirty percent of voters in 2000 and thirty-six percent in 2004. *Id.* at 1721.
[78] Jones, *supra* n. 29.
[79] Tokaji, *supra* n. 1, at 1721-22.
[80] *Id.* Only precinct optical scan systems where the tabulation is done on site give notification of an instance of over/under-voting. *Id.* Central tabulation systems do not. *Id.*
[81] In 2000, 10.7 percent of voters used this technology, increasing to nearly thirty percent by 2004. *Id.*
[82] Brady et al., *supra* n. 21, at 14.
[83] *Id.* at 14 (noting that DRE systems "do not allow overvotes"); Caltech/MIT, *supra* n. 3, at 23 (finding that miscounting is virtually impossible with DREs).
[84] Camp, *supra* n. 58, at 446 (pointing out that not only do DRE systems prevent over-voting, but they also provide confirmation of selections, and give voters a chance to make corrections).
[85] Ohio H. 262, 125th Gen. Assembly, 2004-05 (May 7, 2004) (requires a certified paper trail).
[86] In election 2000, forty-four million voters (one in three) used punch card systems, while only nineteen million used DREs. Tokaji, *supra* n. 1, at 1738. Four years later, however, those numbers flipped. In 2004, DREs were used by forty-six million voters, while only nineteen million were still using punch card ballots. *Id.*
[87] Caltech/MIT, *supra* n. 3, at 17 (one of the major studies conducted after the election); *see also* Post, *supra* n. 2, at 553 (though many remember that Gore won the popular vote, but lost the electoral vote after losing Florida by 537 votes, many forget how close some other states were. In Iowa, New Mexico,

Commission on Civil Rights conducted an investigation of the voting irregularities in Florida.[88] Their report concluded that nearly three percent of the votes cast in Florida (180,000) were not counted.[89] A majority of these were over-votes caused by punch cards.[90] The Civil Rights Commission recommended that Florida discontinue the use of punch cards, and enact legislation requiring electronic technology.[91]

A nationwide study conducted by Caltech/MIT estimated that four to six million presidential votes were *lost* in 2000 due to poorly functioning punch card balloting systems.[92] The study found that counties using punch card systems had residual voting rates fifty percent higher than counties employing better technology.[93] The Caltech/MIT study also suggested replacing punch cards with electronic technology.[94]

A subsequent examination by a congressional committee agreed that the problem was prevalent throughout the nation and that electronic technology should replace punch cards.[95] The Carter-Ford Commission found the number of uncounted votes to be directly correlated to poor voting technology, but urged for statistical benchmarks as a basis for determining what type of technology to employ.[96]

Heeding the call for statistical benchmarks, the University of California at Berkley adopted a scale to indicate what percentage of residual voting should be tolerated.[97] Counties with less than one percent should be considered "good," while those between one and two percent are "adequate."[98] Anything above two percent is "worrying," and where residual votes exceed three percent, the Berkley study found that number to be "unacceptable."[99]

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and Wisconsin, the difference between the candidates was less than 0.5 percent. In Georgia, South Carolina, Illinois, Wyoming, and Idaho, the percentage of over-votes and under-votes significantly exceeded Florida).

[88] U.S. Commn. on Civ. Rights, *Voting Irregularities in Florida During the 2000 Presidential Election*, http://www.usccr.gov/pubs/vote2000/report/ch1.htm (accessed Mar. 16, 2006) [hereinafter USCCR].

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] Caltech/MIT, *supra* n. 3, at 3.

[93] *Id.* at 21. A residual vote is a term used to describe both over and under-votes combined. *Id.*, *see also supra* n. 12

[94] *Id.*

[95] *Income and Racial Disparities*, *supra* n. 24, at 9.

[96] *See generally* Fischer, *supra* n. 24 (suggesting uniform technology).

[97] Brady et al., *supra* n. 21, at 22. Berkley actually adopted a scale originally proposed by the National Commission on Federal Election Reform. *Id.*

[98] *Id.*

[99] *Id.*

The federal response to the problem was the Help America Vote Act ("HAVA").[100] Early drafts of the bill proposed uniform standards and better technology.[101] Eventually, however, it became watered down causing many of its initial proponents to vote against it.[102] Though the language of HAVA seems to encourage states to get rid of punch cards, it does not require it.[103] HAVA does provide money for states to replace punch card systems, and many states acted quickly to secure the funding to improve their technology.[104]

Florida became the first state to ban the use of punch card technology in 2001, and using money from HAVA, the state had every precinct using optical scan or electronic voting by 2002.[105] California also passed similar legislation and got rid of most of their punch card ballots by 2001.[106] Both Maryland and Georgia passed legislation banning any type of voting equipment except for DREs.[107]

Before the 2004 election, most states had moved away from punch card ballots.[108] In the 2000 election, forty-four million voters (one in three) used punch card systems, while only nineteen million used DREs.[109] Four years later, those numbers flipped. In 2004, DREs were used by forty-six million voters, while only nineteen million were still using punch card ballots.[110]

A few states, including Ohio, did not make the transition. In 2000, seventy-four percent of Ohio voters used punch card ballots, which only decreased to seventy-two percent in 2004.[111] Ohio continues to have a high number of residual votes that could be avoided.[112] In Georgia, for example, the state went from primarily using punch cards in 2000 to only DREs in

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[100] 116 Stat. at 1666.
[101] Saphire & Moke, *supra* n. 15, at 242-52 (generally discussing the legislative history of HAVA).
[102] *Id.* at 21-25 (commenting on the problems that some lawmakers had with the final draft).
[103] Brian Kim, *Help America Vote Act*, 40 Harv. J. on Legis. 579, 589 (2003) (explaining how states may opt out of replacing punch cards).
[104] Congress earmarked $325 million to replace punch cards. *Id.* at 589.
[105] Tokaji, *supra* n. 1, at 1730-32.
[106] *Id.* at 1731.
[107] *Id.*
[108] *Id.* at 1737.
[109] *Id.* at 1738.
[110] *Id.*
[111] *Id.* at 1739.
[112] *See* James Dao, *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. Times A1 (Dec. 24, 2004); Adam Liptak, *Voting Problems in Ohio Set off an Alarm*, N.Y. Times 37 (Nov. 7, 2004); DNC, *Ohio Voters Plagued by Systemic Problems on Election Day 2004*, Federal News (June 22, 2005) (all discussing the voting problems in Ohio).

2004.[113] The percentage of residual votes went from 3.5 percent (unacceptable), to 0.39 percent (good).[114] In Ohio, residual voting between 2000 and 2004 remained stagnant at over two percent.[115] Sixty-nine of eighty-eight counties in Ohio still use punch card ballots and maintain residual voting percentages up to eight percent, while the average residual voting percentage in the five counties that use DREs is less than one percent.[116]

C. Bush v. Gore

The outcome of the 2000 presidential election depended upon which candidate won Florida.[117] The final vote count had George W. Bush beating Al Gore by less than 0.5 percent of the vote, while the number of votes excluded by punch card machines exceeded three percent.[118] By statute, Vice-President Al Gore was entitled to a manual re-count.[119] The Florida Secretary of State set a deadline of November 14 for the re-count to take place.[120] It became clear, however, that more time would be needed to conduct the re-count and the Florida Supreme Court moved the date to November 26.[121]

The United States Supreme Court vacated this order, and the canvassing board certified the election.[122] Gore challenged the certification, and the Florida Supreme Court ordered a manual re-count of all of the votes.[123] In *Bush v. Gore*, the Court halted the manual re-count, holding that it violated the Equal Protection Clause of the Fourteenth Amendment.[124] Thus, the *Bush* Court ruled that a state violates the Equal Protection Clause where there are no uniform standards to re-count votes, which leads to votes in one county being counted differently than in others.[125]

The *Bush* Court stated that when the state legislature vests the right to vote in its people, the right is "fundamental" and its "fundamental nature

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[113] Tokaji, *supra* n. 1, at 1740.
[114] *Id.* at 1739.
[115] *Id.*
[116] *Blackwell*, 356 F. Supp. 2d at 813.
[117] Dershowitz, *supra* n. 19.
[118] *Bush*, 531 U.S. at 101 (acknowledging that the margin of victory was less than 0.5 percent); USCCR, *supra* n. 88 (noting that nearly 3.93 percent of punch card votes were not counted in Florida).
[119] *Bush*, 531 U.S. at 101.
[120] *Id.*
[121] *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 74 (2000).
[122] *Id.* at 72-78.
[123] Dershowitz, *supra* n. 19, at 35.
[124] *Bush*, 531 U.S. at 103-11.
[125] Hasen, *supra* n. 15, at 378-79.

lies in the equal weight accorded to each vote and the equal dignity owed to each voter."[126] This indicated that the Court intended to use the strict scrutiny test.[127] In beginning their Equal Protection analysis, the Court noted that "[h]aving 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."[128]

The *Bush* Court went on to quote *Reynolds v. Sims*, stating that the right to vote can be denied by "debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting" it.[129] The Court concluded that the absence of specific standards to re-count votes led to "unequal evaluation of [the] ballots."[130] *Bush* relied in part upon their ruling in *Moore v. Ogilvie*,[131] where a county-based procedure diluted the influence of citizens in other counties in a presidential race.[132]

The decision in *Bush v. Gore* immediately came under fire.[133] First, the Court applied the Equal Protection Clause where there was no standing.[134] That is, no individual voter or class of voters who were harmed by the re-count could be identified. Next, the Court seemed to, for the first time in this context, consider voting a fundamental right thereby subjecting it to strict scrutiny.[135] Though in previous cases the Supreme Court used strict scrutiny where African Americans were disenfranchised, they had never applied it where a non-suspect class was involved.[136] Finally, the Court did not find purposeful discrimination, as the majority writers had

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[126] *Bush*, 531 U.S. at 104.
[127] There is disagreement over the type of scrutiny the Court employed in *Bush*. In applying the Equal Protection Clause, however, the *Bush* court quoted from two cases where it is generally agreed that strict scrutiny was used. *Id.* at 104-05; *see Harper*, 383 U.S. at 667; *Reynolds*, 377 U.S. at 561-62 (both finding that any infringement on the right to vote must be "carefully and meticulously scrutinized"). The *Bush* court went on to say that the re-count mechanisms did not even "satisfy the minimum requirements for non-arbitrary treatment," leaving the possibility open for some to argue that the rational basis test was used. *Bush*, 531 U.S. at 104-05; *see* Hasen, *supra* n. 15, at 396 (stating that *Bush v. Gore* mandates strict scrutiny); *see also* Saphire & Moke, *supra* n. 15, at 258-67 (arguing that *Bush v. Gore* used strict scrutiny); Mulroy, *supra* n. 14, at 372-74 (concluding that the *Bush* opinion employed strict scrutiny).
[128] *Bush*, 531 U.S. at 104-05.
[129] *Id.* at 105.
[130] *Id.* at 106.
[131] 394 U.S. 814 (1969).
[132] *Id.* at 818-19.
[133] *Dershowitz*, *supra* n. 19, at 5 (pointing out the extensive criticism of the *Bush* decision).
[134] *Id.* at 77-81 (noting that a review of Equal Protection Supreme Court cases finds that there was always a cognizable victim, and that Justice Antonin Scalia has refused to hear cases where a victim could not be ascertained).
[135] Dershowitz, *supra* n. 19, at 75-77 (stating that the Court did not follow existing precedent and "invented this application of the right").
[136] Hasen, *supra* n. 15, at 390 (finding that no Rehnquist Court opinion had ever relied upon *Reynolds* or *Harper* to expand the franchise in such a way).

before required.[137]

Curiously, the solution for the apparent violation was to stop the re-count.[138] In voter dilution cases, the Supreme Court would typically fashion a remedy to correct the problem.[139] Here, the *Bush* Court could have easily set forth standards for re-counting votes. The *Bush* Court could have even remanded the case and allowed Florida to come up with standards. Instead, the *Bush* Court chose to simply stop counting. The *Bush* Court also attempted to limit their decision to the "present circumstances."[140] Finally, the *Bush* Court decided in an area almost exclusively reserved to the states by interpreting a state election law, and overturning the interpretation laid out by Florida's highest court.[141]

D. *Prior Cases*

The *Bush v. Gore* case spawned many lawsuits challenging the use of punch card ballots. In fact, the *Bush* decision seemed to encourage such suits. In *Bush*, the Court wrote about the "problem of equal protection in election processes"[142] and seemed to be concerned with the fact that "2% of ballots cast did not register a vote for President."[143] The Court also found that "punch card balloting machines can produce an unfortunate number of ballots" which are not counted, and "legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting."[144]

The first case was *Common Cause v. Jones*, where California

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[137] Though some of the Justices only require a disparate impact, the Justices writing for the majority in *Bush* had always insisted upon purposeful discrimination. Dershowitz, *supra* n. 19, at 75-78. Justice Clarence Thomas, who joined the majority opinion, once commented, "'[t]he Equal Protection Clause shields only against purposeful discrimination: A disparate impact, even upon members of a racial minority . . . does not violate equal protection.'" *Id.* at 147 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 135 (1996)).

[138] In all prior voting rights cases where an Equal Protection violation was found, the Court remedied the situation so that the voters were not disenfranchised. Dershowitz, *supra* n. 19, at 76; *see also Reynolds*, 377 U.S. 533 (fashioning a remedy whereby districts are determined by population and thus the vote cannot be diluted).

[139] *See supra* n. 134 and accompanying text.

[140] *Bush*, 531 U.S. at 109; *see also* Dershowitz, *supra* n. 19, at 123 (pointing out that Scalia has written "[t]he Supreme Court of the United States does not sit to announce unique dispositions. Its principle function is to establish precedent"); Hasen, *supra* n. 15, at 386-87 (finding that the limiting language in *Bush* was a strong deviation from the Court's usual practice in election cases, and suggesting that it will be used as precedent anyway).

[141] Dershowitz, *supra* n. 19, at 145-50 (quoting several Justices who had always refused to hear cases where states' rights were involved, and also pointing out cases where interpretations of state voting laws by state courts would not be heard by the Supreme Court).

[142] *Bush*, 531 U.S. at 103.

[143] *Id.* at 109.

[144] *Id.* at 104.

residents alleged that punch card ballots were not reliable, and individuals in counties where punch cards were employed were effectively denied the right to vote.[145] The plaintiffs pointed out that while only half of the voters used punch card ballots, these voters accounted for three-fourths of the votes thrown out.[146] The *Common Cause* court denied the defendant's motion for judgment on the pleadings, and echoed *Bush v. Gore*, referring to the right to vote as *fundamental*.[147]

The *Common Cause* court went on to note that even if a rational basis review were conducted, the fact that the Secretary of State allows counties to choose punch cards or more reliable means is unreasonable.[148] The Secretary of State, suspecting that he would lose the case, decertified the punch card equipment in the state, thereby rendering the litigation moot.[149]

California planned to replace their punch cards before the 2004 election, but Governor Davis was recalled in 2003.[150] This meant that an election had to take place before 2004, and the state had not yet purchased enough DREs. This led to another case, *Southwest Voter Registration Education Project v. Shelley*,[151] where the plaintiffs sought an injunction to stop the recall until the punch cards could be replaced.[152] In essence, they argued that the punch card ballots which were decertified by the Secretary of State could not be used.[153]

The district court, using a backward approach of the strict scrutiny test, determined that the state had a "compelling interest in not disenfranchising the voters" who wanted the recall, and that "the limited use of punch cards . . . [was] a narrowly tailored means to achieve that end."[154] This decision was quickly overturned on appeal. The Ninth Circuit stated that plaintiff's "equal protection claim is much the same as the one in *Gray v. Sanders*" and "almost precisely the same issue as the Court considered in

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[145] 213 F. Supp. 2d at 1107.
[146] Mulroy, *supra* n. 15, at 539.
[147] *Com. Cause*, 213 F. Supp. 2d at 1108.
[148] *Id.* at 1109.
[149] Saphire & Moke, *supra* n. 15, at 282 (noting that the Secretary of State decertified the punch card equipment in the nine counties that were the subject of the litigation).
[150] *S.W. Voter Registration Educ. Project*, 344 F.3d at 916-17.
[151] 278 F. Supp. 2d 1131, 1141 (C.D. Cal. 2003).
[152] *Id.* at 1133.
[153] *Id.* at 1141.
[154] *Id.*

Bush."[155] The court stopped the recall.[156]

A week later, however, the Ninth Circuit reversed itself in a rare en banc opinion, deciding that the original decision by the district court was not an abuse of discretion.[157] In this way, the *Shelley* court avoided the constitutional question, and bailed the Supreme Court out of having to address their decision in *Bush v. Gore.*

While the California cases were being litigated, a similar case, *Black v. McGuffage*, arose in Illinois.[158] The statistical disparity in that state was worse than in California. According to their complaint, while error rates remained below one percent in counties using DREs and optical scan technology, Chicago had an error rate over seven percent.[159] The *Black* court denied the defendant's motion to dismiss.[160]

The *Black* court quoted *Bush* calling the right to vote *fundamental* and rejected the contention that the *Bush* opinion should not be applied.[161] The *Black* court held that the plaintiffs sufficiently alleged an Equal Protection violation where voters in punch card counties were "statistically less likely" to have their votes counted.[162] *Black* did not address whether strict scrutiny should be applied, because it appeared as though using punch cards was arbitrary and could violate Equal Protection even under a rational basis standard of review.[163] Though it seemed the case would be heard on its merits, the parties settled out of court before the case went to trial.[164]

E. Stewart v. Blackwell

Stewart v. Blackwell became the first case challenging punch card ballots to be heard on its merits.[165] Mirroring prior cases brought in California and Illinois, voters in Ohio alleged that the use of punch card ballots violated the Equal Protection Clause.[166] Though the *Stewart* court

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[155] *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 895 (9th Cir. 2003).
[156] *Id.* at 913.
[157] *S.W. Voter Registration Educ. Project*, 344 F.3d at 920.
[158] 209 F. Supp. 2d 889.
[159] *Id.* at 893.
[160] *Id.* at 902.
[161] *Id.* at 898.
[162] *Id.* at 890.
[163] *Id.* at 897-99.
[164] ACLU of Ill., *Current Legal Docket*, http://www.aclu-il.org/legal/docket.shtml (accessed Mar. 16, 2006) (noting the judicial approval of a series of agreements to replace punch cards).
[165] *Blackwell*, 356 F. Supp. 2d at 801.
[166] *Id.* 807-09. The plaintiffs also claimed that the use of punch cards violated the Voting Rights Act and Due Process as well. *Id.*

cited the rulings from the California and Illinois cases, as well as the *Bush v. Gore* decision, the *Stewart* court questioned the standing of Ohio voters, and decided that the rational basis test should be applied.[167] The *Stewart* court also determined that the statistical difference between counties using DREs and those using punch cards was *de minimis*.[168] Therefore, the court held that there was no Equal Protection violation.[169]

III. ARGUMENT

This Note will argue that the *Stewart* court should have applied the strict scrutiny test, and found an Equal Protection violation. Though the *Stewart* court correctly declared that the right to vote was *fundamental*, they ignored the ruling in *Bush v. Gore* by applying the rational basis test. Even applying the rational basis test, however, the *Stewart* court should have concluded that differences in counties using punch card ballots and those using DREs were significant, and continuing to use punch cards is unreasonable under any standard of review.

A. *The* Stewart *Court's Ruling*

At first, *Stewart v. Blackwell* seemed like it might come to the same fate as its predecessors when the Secretary of State agreed to use money from HAVA to replace the punch card ballots with electronic voting.[170] Accordingly, the Court issued a stay to allow Ohio to phase out the use of punch cards.[171] The Ohio General Assembly did not get the funding they expected from HAVA, however, and Secretary J. Kenneth Blackwell refused to decertify punch card ballots.[172] Thus, it became clear that punch cards would still be used in the 2004 election, and the Court agreed to hear the case.[173]

The plaintiffs relied heavily on statistical data and four expert witnesses to support their contention that the use of punch card ballots diluted voting power in counties that used them.[174] The data showed that

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[167] *Id.* at 804.
[168] *Id.* at 807.
[169] *Id.* at 808.
[170] *Id.* at 820. The Secretary of State stated that punch cards should be phased out to avoid a Florida-like calamity in a letter to the President of the Ohio Senate, Doug White. Tr. Ex. 24, *Stewart*, 356 F. Supp. 2d 791.
[171] Saphire & Moke, *supra* n. 15, at 287.
[172] *Id.* at 288.
[173] *Stewart*, 356 F. Supp. 2d at 792-94.
[174] *Id.* at 792-96.

counties using DREs maintained less than a one percent error rate, while counties employing punch cards ranged anywhere from two to eight percent.[175] Recall that a rate of error below one percent is considered good, while two percent is worrying, and anything over three percent is unacceptable.[176] Thus, the plaintiffs contended that the statistical differences between counties employing various voting technologies was unacceptable and amounted to an Equal Protection violation.

The defense, using their own statistics and experts, focused on prior elections and emphasized under-voting that could have been intentional.[177] Their strategy was to dispute the plaintiffs' numbers and skew the results.[178] The defense also exposed the fact that several counties in Ohio did not keep accurate records of their votes.[179] That is, some counties separated under-votes from over-votes while some did not.[180] Therefore, the defense sought to combine the statistics for over and under-voting.

The plaintiffs allowed the over-votes and under-votes to be combined under the catch-all term "residual votes."[181] This was a major concession by the plaintiffs, because combining over and under-votes does not accurately reflect the disparity between the two technologies. For example, in just three counties, it was estimated that there were close to 7,000 over-votes, while none of the counties using DREs had a single over-vote.[182] DREs do not allow over-voting.[183] This means that there is no error rate for over-voting. DREs do allow for under-voting, because in some instances, people may not want to cast a ballot for a particular office. When someone does under-vote, however, the DRE machine informs the voter that they have done so, thereby eliminating any unintentional under-voting.[184]

Punch cards allow for both over and under-voting, and do not inform the voter when they have under-voted.[185] Therefore, there is no way to determine if they were intentional or unintentional. Due to Ohio's inadequate statistical records, there was no way to know how many over-votes occurred in certain counties, and the plaintiffs were forced to combine

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[175] *Id.* at 795, 806-25.
[176] Brady et al., *supra* n. 21, at 22.
[177] *Stewart*, 356 F. Supp. 2d at 797-98.
[178] Saphire & Moke, *supra* n. 15, at 289-91.
[179] *Stewart*, 356 F. Supp. 2d at 804.
[180] *Id.*
[181] *Id.* at 803.
[182] Saphire & Moke, *supra* n. 15, at 287.
[183] Brady et al., *supra* n. 21, at 14.
[184] *Id.*
[185] Dershowitz, *supra* n. 19, at 19-28.

the numbers.[186]

This concession allowed the defense to argue that because there was no way to tell whether someone had under-voted intentionally or not, there was no way to differentiate human from machine error.[187] The two sides finally agreed upon numbers that heavily favored the conclusions of the defense experts.[188] The numbers still established a statistically significant difference between counties using punch cards and those using DREs.

It was agreed that in the 2000 election, 2.3 percent of the votes cast in counties using punch cards were thrown out, compared to 0.7 percent of those using DREs.[189] That is, for every 1,000 votes cast, twenty-three were excluded using punch cards while only seven were excluded using DREs. Of the seven excluded by DREs, the plaintiffs argued that these were intentional under-votes.[190]

Judge David Dowd began his opinion by commenting that in all his years he had never had any trouble with punch cards, and even where one makes a mistake, they have the opportunity to check their work.[191] The *Stewart* court wrote that a "careful voter has every opportunity to scrutinize his or her ballot after removal from the voting tray to determine if a mistake has been made in the context of . . . a mistaken vote."[192]

Next, the court responded to the defense argument that the plaintiffs lacked standing because no individual voter could state that their vote was not counted, by writing "[t]he court is of the view that the defendants have the better argument on the issue of standing, but declines the invitation to dismiss."[193]

Beginning the Equal Protection analysis, the *Stewart* court quoted *Bush*, stating that "once a state has granted its citizens the right to vote, it

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[186] *Stewart*, 356 F. Supp. 2d at 807-08.
[187] *Id.* at 811-14.
[188] *Id.* at 806.
[189] *Id.*
[190] *Id.* at 800.
[191] *Id.* at 824-27. There are two kinds of punch card systems used. Fischer, *supra* n. 24, at 3. The main type, Votomatic, does not list the candidate's names on the actual card, while the second type, Datavote, does. *Id.* at 4. Seventy-three counties in Ohio use the Votomatic. *Stewart*, 356 F. Supp. 2d at 824-27. Only one county uses the Datavote. *Id.*
[192] *Id.* at 807. This statement is simply wrong. As mentioned, no matter how careful someone is using a Votomatic punch card, they still will not recognize when they have over-voted once the card is removed.
[193] *Id.* at 802.

'may not . . . value one person's vote over that of another.'"[194] The court then curiously decided that the rational basis test should be applied, and concluded that where the Ohio General Assembly has any rationale for using punch cards in some counties and DREs in others, there is no violation.[195]

The court noted that they need not identify a rationale, but insisted that cost savings was a reasonable factor.[196] The court further pointed out that the statistical differences in counties using different technology was *de minimis*, and also concluded that "if this court were to apply strict scrutiny, the court's ruling would be the same."[197] Therefore, the Court ruled that there was no Equal Protection violation.

B. *Analysis*

The *Stewart* court incorrectly applied the rational basis standard of review. Numerous Supreme Court cases have held that the right to vote is fundamental.[198] The Supreme Court has specifically stated that laws that impair or infringe upon the right to vote must be "carefully and meticulously scrutinized."[199] In *Bush*, the Supreme Court reaffirmed their stance that voting is a fundamental right, and any law that inhibits voting is subject to strict scrutiny.[200] Moreover, the *Bush* Court concluded that using different methods to re-count votes in different counties was a violation of the Equal Protection Clause.[201]

Though the *Stewart* court correctly determined that the right to vote is *fundamental*, they incorrectly applied the *rational basis* standard of review. In doing so, the court ignored a long line of Supreme Court precedent. The *Stewart* court came to this conclusion based upon its misunderstanding of punch card ballots and Equal Protection jurisprudence. Finally, even if the *Stewart* court applied the correct standard of review, it still came to the wrong conclusion, because the use of punch cards is unconstitutional under any standard of review.

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[194] *Id.* at 808.
[195] *Id.* at 804.
[196] *Id.* at 808-09.
[197] *Id.* at 804-10.
[198] *See Reynolds*, 377 U.S. 533; *Harper*, 383 U.S. 663; *Gray v. Sanders*, 372 U.S. 368, 390 (1963); *Baker v. Carr*, 369 U.S. 186, 349 (1962).
[199] *Harper*, 383 U.S. at 667.
[200] Hasen, *supra* n. 15, at 396 (stating that *Bush v. Gore* mandates strict scrutiny); Saphire & Moke, *supra* n. 15, at 258-67 (arguing that *Bush v. Gore* used strict scrutiny); Mulroy, *supra* n. 15, at 372-74 (concluding that the *Bush* opinion employed strict scrutiny).
[201] Hasen, *supra* n. 15, at 378-79.

The *Stewart* court's statement that *every* voter using punch cards can check for errors *after* they remove their card from the tray illustrates the court's unfamiliarity with punch card voting.[202] The names of the candidates are not listed on the Votomatic punch card,[203] and once the card is removed, there is no way of telling who you voted for and who you did not.[204]

During the trial, one of the experts attempted to explain this to the court. Judge Dowd responded that "the voter using the punch card always has the option of pulling out the punch card, looking at the holes that are punched and comparing them to the people or issues they wish to vote for."[205] He went on to say, "I have been doing that for 30 years so I know it's possible."[206] If Judge Dowd truly believes this, contrary to his contention that he has had *no trouble* voting, perhaps some of his own votes might have been discarded.

The *Stewart* court's comment on the issue of standing is also misplaced. It is true that the United States Supreme Court has often rejected Equal Protection claims where there was no one who could claim injury.[207] In *Bush*, however, there was no identifiable voter that was injured in Florida, and the majority did not have a problem with this standing issue.[208] The *Stewart* court cites *Bush* approvingly and therefore cannot dispute the standing issue.

The *Stewart* court specifically cites *Bush* when it begins its Equal Protection analysis as well.[209] In one instance, the *Stewart* court quotes *Bush*, finding that one person's vote cannot be valued over another's.[210] In the very next sentence, however, the *Stewart* court concludes that the rational basis test should be applied.[211] Thus, *Stewart* ignores the precedent

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[202] *Stewart*, 356 F. Supp. 2d at 807.
[203] As mentioned before, there is one type of punch card ballot that was used in one county in Ohio that does list the names of the candidates, but Judge Dowd's blanket statement that *every* voter has the opportunity to check their ballot once it is removed is clearly wrong, considering sixty-eight other counties use punch cards that cannot be checked.
[204] Brady et al., *supra* n. 21, at 12 (explaining the near impossibility of checking a Votomatic ballot after it is removed).
[205] Transcr. of Proc. at 130, *Stewart*, 356 F. Supp. 2d 791.
[206] *Id.*
[207] *See Powers v. Ohio*, 499 U.S. 400 (1991); *United States v. Hays*, 515 U.S. 737 (1995); *Allen v. Wright*, 468 U.S. 737 (1984) (all notable cases discussing standing problems).
[208] *Bush*, 531 U.S. at 107 (referring to a prior decision where the court upheld an Equal Protection violation that diluted the voting power of those in large counties).
[209] *Stewart*, 356 F.Supp.2d at 808.
[210] *Id.*
[211] *Id.*

established by the case they cite.

To come to the conclusion that the rational basis test should be employed, the *Stewart* court cites from a dissenting opinion in *Bush*.[212] The problem is that the *Stewart* court applies the *Bush* majority opinion's Equal Protection analysis, but then cites to Justice David Souter's dissenting opinion, which questions the majority's application of Equal Protection.[213] Though not mentioned by the *Stewart* court, Justice Souter's dissent also argued that the *Bush* Court should have remanded the case so that Florida could fashion a remedy wherein the state would use "uniform standards" to count the votes, because using different methods is "arbitrary."[214]

Stewart concludes, without discussion, that had it applied the strict scrutiny test, the court would have come to the same result.[215] Had *Stewart* applied strict scrutiny, however, the result clearly would have been different. The only reason offered in the *Stewart* opinion is that punch cards are "cost effective."[216] The Supreme Court has never found that something being cost-effective is a compelling governmental interest. More importantly, DREs are arguably more cost-effective than punch card machines.[217]

When applying strict scrutiny, it also must be shown that the use of punch cards is the least restrictive means available.[218] Disenfranchising sixty-nine of eighty-eight Ohio counties and seventy-two percent of voters is not narrowly tailored to achieve a cost-effective interest. Further, Ohio has received funding from HAVA to replace their punch cards, and the fact that their long term cost is comparable to DREs, establishes that this is not the least restrictive means available.[219]

Even applying the rational basis test, the *Stewart* court should have found that the use of punch cards was irrational and therefore violated Equal Protection. Under a rational basis review, a court may still find a law to be

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[212] *Id.*
[213] *Bush*, 531 U.S. at 134 (Souter, J., dissenting). Justice Souter refers to the Equal Protection claim as "meritorious," but seems to question the way and extent to which the majority applied it. *Id.* at 133-34. Justice Souter also mentions that Equal Protection does not forbid the use of a variety of voting machines, indicating that the majority believes the opposite. *Id.* at 134. Importantly, however, Justice Souter questions why the case was not remanded for a remedy if there was a violation. *Id.*
[214] *Id.*
[215] *Stewart*, 356 F. Supp. 2d at 804.
[216] *Id.* at 809.
[217] Caltech/MIT, *supra* n. 3, at 59 (pointing out that DREs have no printing costs and the price of the equipment continues to drop rapidly).
[218] *See supra* n. 15 and accompanying text (explaining the strict scrutiny test).
[219] Pub. Broad. Serv., *Help America Vote Act: Background*, http://www.pbs.org/newshour/vote2004/primaries/sr_technology_act.html (accessed Mar. 16, 2006).

unconstitutional where the law inhibits a constitutional right and is arbitrary and unreasonable.[220]

The *Stewart* court's conclusion that using punch cards is not arbitrary and unreasonable is based upon its determination that the statistical differences between counties using DREs (0.7 percent) and punch cards (2.4 percent) is *de minimis*.[221] Thus, the court determines that being three times as likely not to have your vote counted is not a significant disparity. The court ignores that of the 5,700,000 voters in Ohio, replacing punch cards with DREs could eliminate close to 96,800 lost votes. The exclusion of nearly 100,000 voters is not *de minimis*.

In *Black*, the court commented that based on similar statistics, the use of punch cards was so arbitrary that it did not make a difference what standard of review was used.[222] Similarly, in *Common Cause*, the court found that if allowing some counties to use punch cards while others used DREs created statistically significant differences, it would be "irrational."[223] Finally, in *Southwest Voter Registration Education Project*, the Ninth Circuit noted that the Secretary of State had already decided that using punch cards was "unacceptable."[224] Thus, the *Stewart* court not only overlooks the decision in *Bush*, but also ignores several federal cases which held that the use of punch cards was irrational and could violate Equal Protection under any standard of review.

IV. CONCLUSION

The *Stewart* court's decision to apply the rational basis test in a case of voter dilution and outright disenfranchisement ignores the Supreme Court decision in *Bush v. Gore.* By concluding that a statistical disparity whereby one is three times as likely not to have their vote counted is *de minimis*, the *Stewart* court has left little room for citizens to challenge the use of voting equipment that significantly dilutes their voting power. In an era where presidential elections can be decided by just a few hundred votes, the *Stewart* court has determined that using punch card ballots in some counties and DREs in others, thereby disenfranchising millions of voters, is constitutional.

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[220] *See supra* n. 11 and accompanying text (explaining the rational basis test).
[221] *Stewart*, 356 F.Supp.2d at 806.
[222] *Black*, 209 F. Supp. 2d at 898-99.
[223] *Jones*, 213 F. Supp. 2d 1110.
[224] *S.W. Voter Registration Educ. Project*, 344 F.3d at 900.