Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of *Bush v Gore* as a Chapter in the History of Ideas about Law

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In this Essay, I am going to try to do what many distinguished legal scholars have said cannot and should not be done. I am going to take the equal protection holding in *Bush v Gore*[1] seriously. My project is loosely akin to intellectual history: I hope to show that much in the Court's opinion is indeed "reconcilable with the general jurisprudential commitments of the Justices,"[2] for better or for worse.[3] This seems an appropriate enterprise for a second generation of scholarship on the decision, after some of the shouting has died down. Although most of the first generation of scholarly works that addressed the subject stressed how out of tune the decision was with the commitments of the justices who made it,[4] a few identified increasingly familiar leitmotifs.[5] Among those I, too, shall stress

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1 531 US 98 (2000).

2 Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 Cal L Rev 1721, 1734 (2001). I shall seek such reconciliation at a jurisprudential, not a narrowly doctrinal, level. Certain ideas are in the air or part of the spirit of the times, apart from their articulation by the exact same justices in their majority opinion in a case in a direct precedential line leading to or from *Bush v Gore*.

3 My project is different than arguing that the equal protection holding is sensible, that it will in fact be extended to future cases, or even that it was reached in good faith. An analogy may help clarify this point: Let us suppose that the Supreme Court had determined a winner in *Bush v Gore*, not by constitutional adjudication, but by divination, as the ancients often claimed to select leaders. In that case, it might be noteworthy whether the decision was framed by reference to astrology rather than palmistry or the reading of entrails, although it is possible to choose any of these techniques in good or bad faith, to apply any one well or badly by its own terms, and to make a choice of technique consistent with or divergent from one's usual choices. See Saul Lieberman, quoted in Cynthia Ozick, *The Heretic: The Mythic Passions of Gershom Scholem*, New Yorker 143, 145 (Sept 2, 2002) ("Nonsense is nonsense, but the history of nonsense is scholarship.").

4 An exception was their tendency to arrogate all decisionmaking power to themselves and mistrust other constitutional actors, which commentators frequently noted.

5 Those who have undertaken such an analysis in the most depth have concentrated on cases involving voting rights and related issues of democracy. See, for example, Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 NC L Rev 1345 (2001) (situating the case in a line emphasizing "structural" equal protection); Richard H. Pildes, *Democracy and Disorder*, 68 U Chi L Rev 695 (2001) (seeing the case as consonant with the

are commitments to rules over standards, theoretical abstractions over messy realities, "surface appearance"[6] over what lies beneath, and uniformity over diversity.

At a high level of abstraction, *Bush v Gore* holds that standards must be reduced to rules. Several things are of note here. First, from the perspective of the history of ideas about law, this is a recurring proposition, at one extreme in the arc of a pendulum that has been swinging for centuries between the forms of action and the Chancellor's foot.[7] The most recent full arc of this pendulum on the Court extends from *Bush v Gore* back to the Burger Court's concern with irrebuttable presumptions. For a time in the early 1970s, across a wide spectrum of subjects from voting rights[8] to sex and gender,[9] a Court majority took a position diametrically opposite to the *Bush v Gore* majority, repeatedly holding, in effect, that the Constitution required rules to be relaxed into standards.[10] Had the majority that decided *Vlandis v Kline*,[11] or *Cleveland Board of Education v La Fleur*[12] been faced with the Florida election laws, they not only would have seen no difficulty with an "intent of the voter" standard, they would likely have found objectionable any attempt, through rigid and arguably overbroad uniform rules, to preclude an individualized assessment of voter intent. From the moment of his appointment to the Court, however, Justice Rehnquist set his face against his brethren's insistence on turning rules into standards. While his brethren saw dangerous arbitrariness in unbending rules, Rehnquist's vision of equal protection and due process focused on the dangers of individualized discretion. He was finally able to turn his dissenting views into a majority opinion in *Weinberger v Salfi*,[13] the case that definitively swung the pendulum back in the direction of

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Court's previously revealed distaste for the messy disorder of democracy).

6 Laurence H. Tribe, *eroG .v hsuB: Through the Looking Glass*, in Bruce Ackerman, ed, Bush v. Gore: *The Question of Legitimacy* 39, 46 (Yale 2002).

7 Longtime University of Chicago law professor Kenneth Culp Davis was one of those who tracked the pendulum as it swung, in his view, too far in the direction of discretion. See generally Kenneth Culp Davis, *Discretionary Justice* (Louisiana State 1971).

8 See, for example, *Carrington v Rash*, 380 US 89, 96 (1965) (holding unconstitutional a conclusive presumption that soldiers were not bona fide residents of the town in which they were stationed).

9 See, for example, *Stanley v Illinois*, 405 US 645, 658 (1972) (mandating individualized determination of a nonmarital father's fitness as a parent).

10 I have discussed at length the relationship between this Burger Court tendency and the development of modern constitutional sex discrimination law in Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L Rev 1447, 1466–69 (2000).

11 412 US 441, 452 (1973) (mandating an individualized assessment of an incoming student's intent to become a state resident).

12 414 US 632, 643 (1974) (striking down uniform cutoff dates for pregnant teachers to leave the classroom).

13 422 US 749, 771–83 (1975) (upholding a bright-line rule for conferring survivor's benefits).

rules, a direction in which it kept swinging until the arc reached a peak in *Bush v Gore.*

Justice Scalia is perhaps most famous for his insistence on "the Rule of Law as a Law of Rules."[14] But, given that Rehnquist for decades has argued that a "preference for 'individualized determination[]' is in the last analysis nothing less than an attack upon the very notion of lawmaking,"[15] his willingness to join the *Bush* majority in insisting on "specific rules designed to ensure uniform treatment" is, like Scalia's, consistent with at least some of his longstanding jurisprudential commitments.[16]

Indeed, as commentators have observed, a repudiation of standards in favor of rules has been a hallmark of the Rehnquist Court in statutory, as well as constitutional, cases. Thus, for example, Alan Schwartz has noted in the Court's bankruptcy cases what can be seen as well in *Bush v Gore*, to wit, that, even when the text of a statute "is intended to confer on administrators a large discretion, . . . [t]he Court . . . exhibits a strong tendency to transmute . . . standards into bright line rules that maximally confine [ ] discretion."[17] To "advance the rule of law virtues of certainty and predictability," the Court refuses to "construe statutory standards as standards."[18]

Even Justices Souter and Breyer, who agreed with the majority that Florida's recount had equal protection problems despite strong disagreement on remedy, each has some history of exhibiting "preference for categorical treatment"[19] over "standards requiring sensitive, case-by-case determinations."[20] In *Atwater v Lago Vista*,[21] argued within a week of *Bush*, Souter's majority opinion concededly valued the "clarity and sim-

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14 In his article of that title at 56 U Chi L Rev 1175, 1176 (1989), Scalia presages the Bush majority when he argues "[s]tatutes that are seen as establishing rules of inadequate clarity or precision are . . . , on that account, . . . in the extreme, unconstitutional."

15 *Cleveland Board of Education*, 414 US at 660 (Rehnquist dissenting). See also Scalia, 56 U Chi L Rev at 1176 (cited in note 14) (repudiating "one image of how justice is done—one case at a time, taking into account all the circumstances").

16 See, for example, Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 Georgetown L J 113, 123 (2001) (noting that Rehnquist wrote the opinion in *Allegheny Pittsburgh Coal Co v County Commission*, 488 US 336 (1989), involving arbitrary and "widely varying assessments of property currently worth essentially the same amount").

17 See Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 NY L Sch L Rev 149, 154, 185 (2001) (direct quotes are taken from abstract in SSRN, online at http://ssrn.com/id=271817).

18 Id at 152–53. To say that the Rehnquist Court values rules and wishes to constrain discretion does not mean its members agree on how best to do this. Consider, for example, *US Airways, Inc v Barnett*, 122 S Ct 1516 (2002), in which the Breyer majority, O'Connor concurrence, and Scalia's dissent each elevated the value of "fair, uniform treatment," id at 1524, 1526–28, 1531–32, but took a different view of how best to attain it.

19 *Atwater v Lago Vista*, 532 US 318, 326–27 (2001) (Souter) (upholding the custodial arrest and imprisonment of a mother for violating a seatbelt law, a misdemeanor with a maximum penalty of fifty dollars).

20 Id at 347.

21 532 US 318 (2001).

plicity" of "readily administrable rules" over justice in the individual case.[22] Before joining the Court, Breyer was "the guiding force"[23] behind an enterprise whose vision of equality in the uniformity of rules has much in common with *Bush v Gore*'s—the current incarnation of the Federal Sentencing Guidelines.[24]

Shortly before it held the Florida vote recount unconstitutional because it gave officials too much unfettered discretion, the Court did the same for the Chicago Gang Loitering Ordinance.[25] In their concurrences, both Justices O'Connor and Breyer stressed the constitutional difficulties with a law's failure to provide "sufficient minimal standards to guide law enforcement officers."[26] Both Justices O'Connor and Breyer had previously expressed great concern with the "arbitrary results" that can follow from an absence of "meaningful standards" to "constrain [ ] discretion" in the punitive damages context.[27] The belief that such standards could have

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22 Acknowledging Atwater had suffered "pointless indignity and confinement" and "gratuitous humiliation," Souter admitted that "if we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail." Id at 321, 346.

23 Kate Stith and José A. Cabranes, *Fear of Judging* 58 (Chicago 1998).

24 Both enterprises, starting with what seemed like arbitrary and unjustifiable variations in judging, focused on the need to eliminate apparent disparities and impose greater uniformity by rule, but were subject to the criticism that they sought to reduce to rigid formulae events not fairly capable of such mechanical reduction. Compare Stith and Cabranes, *Fear of Judging* 58, 84 (cited in note 23):

> By largely eliminating . . . the power of any individual to consider the circumstances of the crime and of the defendant in their entirety . . . the Guidelines threaten to transform . . . sentencing into a puppet theater in which defendants are not persons, but *kinds* of persons—abstract entities to be defined by a chart, their concrete existence systematically ignored and thus nullified.

with Tribe, *eroG .v hsuB: Through the Looking Glass* at 44 (cited in note 6) (decrying the "illusion of a technical 'fix' . . . [by] justices who acted as though machine-like algorithms could workably replace human judgment"). In each case, it may be a question of picking your poison. Is it more disturbing when the appearance of disparate, even arbitrary, treatment covers the reality of more uniform treatment once all not immediately visible factors are taken into account, or alternatively, when an appearance of uniform treatment masks the reality of arbitrary, disparate treatment?

25 Of course, this sort of criminal ordinance is a much more usual site of worry over excess discretion.

26 *Chicago v Morales*, 527 US 41, 65–66 (1999) (O'Connor concurring); id at 72 (Breyer concurring). Ironically, Scalia, in dissent, criticizes precisely this attitude on the part of his brethren in terms familiar from criticisms of *Bush v Gore*:

> As far as appears from Justice O'Connor's and Justice Breyer's opinions, *no* [ ] officer may issue *any* order . . . unless the standards for the issuance of that order are precise. No modern urban society . . . could function under such a rule. . . . [E]ven if it were possible to list in an ordinance all of the reasons that are known, many are simply unpredictable.

Id at 87. See also Richard Friedman, *Trying to Make Peace with* Bush v. Gore, 29 Fla St U L Rev 811, 828 (2001) ("Even on the face of a single ballot, there is an infinite range, across several dimensions, of evidence bearing on the intent of the voter.").

27 See, for example, *Pacific Mutual Life v Haslip*, 499 US 1, 43 (1991) (O'Connor dissenting) ("[S]uch instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results. . . . I see a strong need to provide juries with standards to constrain their discretion. . . . The Constitution requires as much."); *BMW of North*

been, but were not, articulated for the counting of votes in Florida was central to the *Bush* per curiam equal protection holding.

If I were to identify a single decisive moment in the oral argument of *Bush v Gore*, it would be the moment when Justice Kennedy, putative author of the per curiam opinion, asked David Boies "from the standpoint of [the] equal protection clause, could each county give their own interpretation to what intent means, so long as they are in good faith and with some reasonable basis finding intent? ... Could that vary from county to county?"[28] Boies, the consummate practitioner, whose view is from the trenches, responded by acknowledging what for him is an obvious reality of his experience:

> I think it can vary from individual to individual. ... I think on the margin, on the margin, ... whenever you are interpreting intent, whether it is in the criminal law, an administrative practice, whether it is in local government, whenever somebody is coming to government. ... I think there are a lot of times in the law in which there can be those variations from jury to jury, from public official to public official.[29]

If the tone of Boies's answer can be summarized by the colloquial, "Well, duh!", the tone of Kennedy's reaction harks back to an earlier catch phrase: "I'm shocked, shocked to find that gambling is going on here." Unlike the cynical and corrupt French police officer in *Casablanca* with whom the line originated, however, Justice Kennedy actually sounded shocked.[30] "But here you have something objective," Kennedy insisted:

> You are not just reading a person's mind. You are looking at a piece of paper, and the supreme courts in the states of South Dakota and

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America v Gore, 517 US 559, 587–88 (1996) (Breyer concurring, joined by O'Connor and Souter) ("Requiring the application of law, rather than a decisionmaker's caprice ... helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself. ... The standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results.").

28 Transcript of Oral Argument, *Bush v Gore*, No 00-949, 49–50 (Dec 11, 2000), online at http://www.supremecourtus.gov/florida.html (visited Dec 2, 2002). Kenneth Starr also identifies this exchange as decisive. See Kenneth Starr, *First Among Equals: The Supreme Court in American Life* 275–76 (Warner 2002).

29 Transcript of Oral Argument, *Bush v Gore*, No 00-949, 50–52 (cited in note 28) (internal interjections omitted).

30 The line, of course, is from the movie *Casablanca* (Warner Brothers 1942), and the parallel to *Bush v Gore* can be extended. Like the *Bush v Gore* majority, the officer faced a scene of political disorder, with French and Germans, rather than Democrats and Republicans, competing noisily. Asked to shut down the scene by the numerically weaker but politically more powerful Germans, the officer originally demurs saying he "has no excuse to" do so. Told to "[f]ind one," he complies, declaring, "This cafe is closed until further notice." When asked by the proprietor, "How can you close me up? On what grounds?" the officer responds with the line quoted in the text, just as a cafe employee hands him his winnings from the gambling table.

> the other cases have told us that you will count this hanging by two corners or one corner, this is susceptible of a uniform standard, and yet you say it can vary from table to table within the same county.[31]

A cynical observer, who views the Court as no more naive than Casablanca's police, might claim that the precedent most directly relevant to *Bush* is the census enumeration case.[32] The same majority that decided for Bush decided that case, also knowing that the decision it reached would advantage the Republican party over Democrats.[33] The cases both involved a conflict over concepts of accuracy in tallying. Some have suggested that the political character of both decisions is evidenced by a reversal of arguments by all sides in the two cases.[34] But I actually see the approach of the majority as consistent in the two cases—in each case it opted for the superficial appearance of precision—after all, what can be less manipulable, less fuzzy than "actual enumeration" or more precise and accurate than a machine recount? Yet imprecision lurked beneath the surface in both cases.[35] Included in the count the Court accepted was data that suffered from exactly the same problems as that rejected in both the Florida election[36] and the census.[37]

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31 Transcript of Oral Argument, *Bush v Gore*, No 00-949, 50 (cited in note 28).

32 *Department of Commerce v House of Representatives*, 525 US 316, 335–43 (1999) (interpreting the statute at issue to prohibit statistical sampling for use in calculating the population for apportionment purposes).

33 This is because it is predictably more likely to be voters in Democratic groups, such as "renters, residents of large cities, and racial minorities," Nathaniel Persily, Book Review, *The Right to Be Counted*, 53 Stan L Rev 1077, 1081 (2001), who are most susceptible to undercount in an enumeration but to inclusion through statistical sampling. Note that, as with the continued counting of votes under a broad standard of voter intent in Florida, the advantage to Democrats and corresponding loss to Republicans can only be the subject of an educated guess, not a certainty, at the time the Court decides. And, in both cases, the effect of the Court's decision is to cut off a full comparison of the workings of the two methods. Note also that in both cases those less likely to be counted are more likely to be poor, racial minorities, or immigrants.

34 See id at 1077 (seeing both cases as "pitting humans against machines" and claiming that "consistency of argument . . . took a back seat to the logic needed to win" with "[t]hose who argued against a manual recount of ballots usually demand[ing] that only manual methods" be used for the census and vice versa). But see Tushnet, 90 Georgetown L J at 117 (cited in note 16) (noting the similarity of lineup but claiming the two cases "clearly raised legal questions that had nothing whatever to do with each other").

35 Fortunately, the census could provide what Florida could not—a remedy for the worst of the undercounting: "Republican lawmakers sought to counter the charge that their opposition to adjustment reflected their resignation to the differential undercount and an inaccurate census. . . . Republicans adopted a 'roll up your sleeves' approach,' which translated into an additional billion dollars . . . to make the headcount more accurate." Persily, 53 Stan L Rev at 1097 (cited in note 33).

36 Consider, for example, the Rehnquist concurrence's assertion that there is "no basis for reading the Florida statutes as requiring the counting of improperly marked ballots." *Bush*, 531 US at 120. Even assuming, arguendo, that were true, this shouldn't solve the majority's equal protection problem, but rather further complicate it. It is clear that at least some improperly marked ballots were included in the existing tally. Remember the many imperfectly marked absentee ballots counted for Bush? Combining the majority's rigid "treat like ballots alike" model with the Rehnquist view of voter error, the reviewing court, instead of searching for yet more valid ballots among the imperfectly marked, would need to undertake the perhaps equally massive task of throwing out all those ballots

A non-cynical observer, assuming Justice Kennedy was indeed sincere in his shock, might see even more frightening implications. Among these are, as Linda Greenhouse has observed, that on the Rehnquist Court, "something vital has been lost—a framework for seeing the world in all its gritty reality from inside the marble cocoon."[38] There are several related dangers to this cocooned perspective. The first is simply the apparent lack of awareness of just how thoroughly, in the words of Justice Ginsburg's *Bush* dissent, "we live an imperfect world."[39] As Boies, together with Ginsburg and Stevens (the only two Justices not to find equal protection problems with the Florida recount), realized all too clearly, there were, indeed "a lot of times in the law in which there can be those variations."[40] To hold each such variation an equal protection violation would be paralyzing; to focus on the relatively trivial deviations in counting standards and ignore much larger disparities is, as the *Bush* dissenters point out, to worsen inequality under the guise of curing it.[41]

The second danger is the Court's susceptibility to the illusion that by intervening it can achieve greater perfection. In the case of *Bush v Gore*, examining this illusion begins with the empirical question of whether the standard of voter intent can fruitfully be reduced to uniform rules. The majority finds that "the formulation of uniform rules . . . is practicable."[42] Well, yes, it almost always is,[43] but practicable does not mean fair,[44] or, in

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that, though defective, were counted anyway. The fact that the Rehnquist concurrence does not demand this resonates with its joiners' view of merit in affirmative action cases—anyone who managed to slip through already, regardless of whether he actually punched his ticket correctly, is by virtue of little more than that alone, innocent, meritorious, and worthy of protection. Anyone who hasn't is out of luck, even if the reason is, for example, inferior resources in poor neighborhoods. See Spencer Overton, *A Place at the Table:* Bush v. Gore *Through the Lens of Race*, 29 Fla St U L Rev 469, 472 (2001) (criticizing the Court's "merit-based vision" of voting).

37 See *Department of Commerce*, 525 US at 363 (Stevens dissenting) (noting various forms of sampling already necessarily used in enumeration).

38 Linda Greenhouse, *Ideas & Trends: Impolitic; The Separation of Justice and State*, NY Times § 4 at 1 (July 1, 2001) (criticizing justices for "blithely assum[ing]" that defending the Paula Jones suit "would not be a burden for" Clinton).

39 531 US at 143.

40 Transcript of Oral Argument, *Bush v Gore*, No 00-949, 52 (cited in note 28).

41 See, for example, 531 US at 145–46 (Breyer dissenting).

42 Id at 106 (majority).

43 For example, "off with their heads," is a rule, but not one well suited to the demands of the Constitution. That the arbitrariness of uniform rules has dangers equal and opposite to the arbitrariness of individualized discretion became clear in the Court's death penalty jurisprudence as it oscillated from fears of standardless discretion in *Furman v Georgia*, 408 US 238 (1972) to fears in later cases, such as *Lockett v Ohio*, 438 US 586 (1978), of rules too rigid to allow all appropriate mitigating factors to be taken into account.

44 As Richard Friedman (a specialist, it should be noted, in the law of evidence) put it in *Trying to Make Peace with* Bush v. Gore, 29 Fla St U L Rev at 828 (cited in note 26):

> Certainly uniform rules *could* be developed, but they would not necessarily be very good rules for determining a voter's intent.... Any simple rule by definition will exclude relevant information from the inquiry and so inevitably lead to inaccurate determinations. Any complex rule will inevitably lead to variations in application, even if one entity makes all the decisions; ask any-

anything but the most formalistic sense,[45] offering the equal protection of the law to persons.[46] Nevertheless, a willingness to, as Pam Karlan puts it, "achiev[e] esthetic regularity at significant cost"[47] may be another hallmark of the Rehnquist Court.

Not only has the "Court . . . strained at a gnat only to swallow an elephant"[48] but also, like the scribes and pharisees, it binds heavy burdens and lays them on others' shoulders.[49] The same Court that faults Florida officials for failing clearly to articulate and consistently to apply a rule of decision has notoriously been unable to formulate such rules itself, particularly in those areas Karlan and I have referred to as "the new Redrupping."[50] This raises the paradox that, if Florida's recount is unconstitutional, so is much of what the Supreme Court itself has done and fails to do.[51] Since the Court is a "[nation]wide court with the power to assure

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body who has to perform a recurring task of any complexity, such as calling balls and strikes throughout a baseball game.

45 This may be enough for some members of the *Bush* majority. In *Law of Rules*, Scalia uses the example of a parent making rules for children's television viewing to stress that what matters is that all get treated alike in an immediately observable way, not the reason for such treatment or the relevant differences among those affected by the rule. See 56 U Chi L Rev at 1177 (cited in note 14). But children, like voters, differ in respects relevant to the application of rules governing them. While it may be simpler to impose superficial uniformity, it should matter whether the child allowed to "watch television when the others do not" is older or younger, whether the program is of special interest or importance to him or her, whether s/he has completed all chores and homework first, etc.

46 Compare *Reynolds v Sims*, 377 US 533, 580 (1964) ("Again, people, not land or trees or pastures, vote.").

47 Karlan, 79 NC L Rev at 1353 (cited in note 5). A concern for the surface appearance of regularity is not quite the same as a commitment to rules, despite some overlap. Although they are generally less insistent on rules than some of their brethren, appearances seem to matter most to Justices Kennedy and O'Connor, the Justices most closely associated with the *Bush v Gore* per curiam equal protection holding. Particularly in both her Establishment Clause and her reapportionment jurisprudence, O'Connor has repeatedly and explicitly insisted that "perceptions" and "appearances do matter." See, for example, *Shaw v Reno*, 509 US 630, 647 (1993). For further discussion, see Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses*, 2000 S Ct Rev 325, 354. Justice Kennedy's concern for the constitutional dimensions of appearances comes through, for example, in his dissent in *Stenberg v Carhart*, the partial birth abortion case, where he stresses the state's interest, even in cases where some form of abortion will in any event take place, in banning a form of abortion that, because of its "stronger resemblance to infanticide . . . presents a greater risk of disrespect for life." 530 US 914, 963 (2000).

48 Karlan, 79 NC L Rev at 1365 (cited in note 5).

49 See Matthew 23:4.

50 See, for example, Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses*, 2000 S Ct Rev at 353–54 n 114 (cited in note 47) (describing the Court's "particularistic examination of individual cases in [ ] area[s] for which it has been unable to articulate a workable test of general applicability," including Establishment Clause cases involving use of public property for religious holiday displays and the *Shaw v Reno* line of voting rights cases). For an explanation of the origin of the term "Redrupping" see note 54.

51 The argument I make here is not undercut by the *Bush* majority's explicit statement that its "consideration is limited to the present circumstances," 531 US at 109, because the particular characteristics of those "circumstances" explicitly enumerated by the Court, namely a "court with the power to assure uniformity . . . order[ing] a [ ] remedy" without assuring compliance with "the rudimentary requirements of equal treatment" are precisely what I am focusing on here.

uniformity" and since it frequently these days "orders a [nation]wide [remedy] with minimal procedural safeguards," is every failure to grant certiorari now a potential equal protection violation, at least where fundamental rights are at stake? Is a conflict in the circuits now unconstitutional? What assurance have we that "the rudimentary requirements of equal treatment and fundamental fairness are satisfied" in that vast bulk of Rehnquist Court cases in which a court majority shows itself unwilling or unable to articulate standards that bind its discretion or that of lower courts?

As an example of the application of impermissible arbitrariness, the *Bush* majority cites a Dade monitor who testified to having "observed that three members of the county canvassing board applied different standards in defining a legal vote."[52] But the three members of the board each examined all disputed ballots and voted on them,[53] so, assuming, as the majority appears to, that the board's votes were cast in good faith, the fact that each member applied his or her own standard does not mean that the results over a range of ballots were at all arbitrary or inconsistent. In the days of Redrupping,[54] the nine members of the Court did far worse. Each of them applied his own standard of obscenity in viewing a film, and voted, without bothering to articulate reasons. What was at stake was not the validity of a ballot, but the constitutionality of a prison term—sometimes up to twenty years. But, like a ballot, an allegedly obscene film or photo is "scratches on an inanimate object, a piece of... paper.... The factfinder confronts a thing, not a person."[55] In the days of Redrupping, the Court was not "confined by specific rules designed to ensure uniform treatment."[56] Is it today, given the multitude of cases in which, judging by the proliferation of concurrences, "members of the [Court] appl[y] different standards in defining" the law?[57]

Just as with the irrebuttable presumption cases, so with *Bush v Gore*, to take the holding seriously "would turn the doctrine ... into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth

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52 Id at 106.

53 See, for example, Lynne H. Rambo, *The Lawyers' Role in Selecting the President: A Complete Legal History of the 2000 Election*, 8 Tex Wes L Rev 105, 208–09 (2002).

54 Taking its name from *Redrup v New York*, 386 US 767 (1967), this was the era, from 1967–73, of "per curiam reversals of convictions for the sale or exhibition of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." Geoffrey R. Stone, et al, *Constitutional Law* 1169 (Aspen 4th ed 2001).

55 531 US at 106. The captions on many obscenity cases made this quite clear, naming no person, just the inanimate object. See, for example, *United States v 12 200-Ft Reels of Super 8MM Film*, 413 US 123 (1973); *United States v 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun"*, 373 F2d 635 (4th Cir 1967).

56 *Bush*, 531 US at 106.

57 Id.

Amendments."[58] Unlike its predecessors, however, the *Bush* majority explicitly disclaims any role as a broad agent of destruction. The role in which it casts itself is, instead, that of restorer of order. This is a role author Tom Wolfe once ascribed to the waitresses at Schrafft's, whose activities, as he described them,[59] had much in common with those of the *Bush* majority. According to Wolfe, at Schrafft's "esthetic regularity" and uniformity was all important:

> [T]he idea was to pace one's consumption along with everyone else's at the table, so that one did not finish up more than thirty seconds ahead of anyone else and, furthermore, so that one's very last bite—*the final shape*—would be a *perfect miniature* of the original cheeseburger . . . with precisely the same proportions of hamburger, cheese, and bread . . . as the cheeseburger . . . had at the outset.[60]

Another way of phrasing the central question posed by the equal protection holding of *Bush v Gore* would then be, when does the Constitution permit one to order simply a plain hamburger or a grilled cheese sandwich?[61] And when will the courts intervene to reestablish the proportions, like the waitresses at Schrafft's who, "underst[anding] . . . about the final shape and its importance," whisk away one's plate to add just the right amount of extra cheese when a careless customer, having "eaten it incorrectly" would otherwise be left with "a perfect mini-burger two inches in diameter . . . except that the cheese was all gone"?[62]

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58 *Weinberger*, 422 US at 772 (Rehnquist).

59 Tom Wolfe, *Honks and Wonks* in *Mauve Gloves and Madmen, Clutter and Vine* 216, 277 (Farrar 1976).

60 Id at 227.

61 One context in which this question will inevitably come up is that of the continuing viability of local community standards for obscenity, a question the Court began to take up last term, but has yet to answer definitively. See *Ashcroft v ACLU*, 122 S Ct 1700 (2002) (rejecting a facial challenge to the community standards component of the Child Online Protection Act, but remanding for further factfinding). The possibility that varying community standards may raise constitutional issues potentially extends far beyond the obscenity context, however. Thus, for example, Justice Marshall's dissent in *Strickland v Washington*, 466 US 668, 708 (1984) noted, with respect to a claim of ineffective assistance of counsel, that "[t]he debilitating ambiguity of an 'objective standard of reasonableness' . . . is illustrated," inter alia, by "the fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly." Marshall asked, "Should the standard of performance mandated by the Sixth Amendment vary by locale?" Id. *Bush v Gore* may give such questions new salience. For further discussion, see Mary Anne Case, *Community Standards and the Margin of Appreciation*, in *Droits de l'Homme et du Citoyen, Grundrechte, Civil Rights* (Norbert Engel, ed) (forthcoming 2003).

62 Wolfe, *Honks and Wonks* at 227 (cited in note 59).