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When is Uniformity of People, Not Counties, Appropriate in Election Administration? The Cases of Early and Sunday Voting

Richard L. Hasen[†]

I. INTRODUCTION

Almost a decade and a half since the Supreme Court's controversial decision in *Bush v. Gore*,¹ no one knows what the case's Equal Protection principle means or if it exists at all. As scholars² and lower courts³ hotly debate the scope of the case that ended the disputed 2000 presidential election, the Supreme Court itself has remained silent. The case garnered a mere single mention at the Court in a 2013 concurring opinion signed only by Justice Thomas, which did not consider Equal Protection issues.⁴

[†] Chancellor's Professor of Law and Political Science, UC Irvine School of Law. Thanks to participants at *The University of Chicago Legal Forum* 2014 Symposium, to David Kimball for his useful comments and suggestions, and to participants in the 2014 APSA panel on the Presidential Commission on Election Administration whose discussion inspired this paper.

¹ 531 U.S. 98 (2000).

² For some of the scholarly commentary on equal protection principles, see generally Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865 (2013) [hereinafter, Hasen, *2012 Voting Wars*]; Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925, 991–98 (2007); Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007, 1026–27 (2007); Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1068–72 (2007); Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1263–65 (2002); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 386–87 (2001) [hereinafter Hasen, *Future of Equal Protection*].

³ See generally Hasen, *2012 Voting Wars*, *supra* note 2; see also Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 9–15 (2007).

⁴ *Arizona v. Inter Tribal Council*, 133 S. Ct. 2247, 2268 n. 2 (2013) (Thomas, J., concurring).

Republican George W. Bush was slightly ahead of Democrat Al Gore in the initial Florida vote count, the state whose Electoral College votes would determine the United States' forty-third President.⁵ Gore demanded a series of ballot recounts, some of which narrowed the lead to a little over 500 votes. He then requested a recount of "undervoted" ballots (ballots not recording a vote for president) in four heavily Democratic Florida counties. Many Florida voters voted using unreliable "punch card" ballots, and vote totals depended upon election officials judging a voter's intent by examining punched-out holes (or chad) in ballot cards. The Florida Supreme Court ordered a recount of "undervoted" ballots across all Florida counties. Bush went to the U.S. Supreme Court to stop further recounting.

Attorneys for Bush put forward an expansive understanding of Equal Protection principles. They argued against the ability of officials and courts to include in vote totals recounted ballots in which the recounts were conducted, or would be conducted, using inconsistent standards both within and between counties for what counted as a valid vote. The Court had never before applied Equal Protection principles to the "nuts and bolts" of elections. Attorneys for Gore argued for a narrow application of Equal Protection principles. The Supreme Court sided with Bush, holding that conducting a recount with inconsistent standards across and within counties violated the Equal Protection Clause.⁶

The jurisprudential positions of the parties in the original *Bush v. Gore* case were somewhat odd given their usual political commitments. Republicans usually argue in election cases for narrow Equal Protection rules and Democrats for broad ones. For example, in *Crawford v. Marion County Election Board*,⁷ the 2008 challenge to Indiana's voter identification law,⁸ democrats argued for a muscular reading of the Equal Protection Clause to block laws requiring a voter to provide certain kinds of

⁵ A full account of the 2000 Florida dispute, from which my account in the next two paragraphs below draws, appears in Richard L. Hasen, *The Voting Wars*, *supra* note 2, at 41–73 (2012).

⁶ See generally Hasen, *Future of Equal Protection*, *supra* note 2 (describing *Bush v. Gore* as the first case to address Equal Protection issues in the "nuts and bolts" of elections).

⁷ 553 U.S. 181 (2008).

⁸ See generally *id.*

photographic identification to be eligible to cast a ballot, contending that such laws discriminated against the poor and others who were unlikely to have the right form of identification.⁹ Republicans, in contrast, argued for a narrower reading of Equal Protection principles, which would allow states to require photo identification to be used.¹⁰ In that challenge, the Supreme Court agreed with the narrower reading of Equal Protection Republicans favored.

Despite the apparent tension between jurisprudence and politics, in the decade and a half since *Bush v. Gore*, Republicans have stuck with their *Bush v. Gore*-type broader call for uniformity in election administration rules across a state. For example, Ohio Secretary of State Jon Husted, a Republican, has consistently insisted upon uniform hours for early voting in the State of Ohio, citing Equal Protection grounds. Reacting to a 2014 ruling challenging his ability to set uniform voting rules, Husted declared:

My overarching principle for Ohio's long-debated voting schedule is that all voters, no matter where they live, should have the same opportunity to vote. That's why I have set uniform voting hours for all 88 counties and why I sent absentee ballot applications to voters statewide, so there would be no disparity in access.¹¹

Georgia Governor Nathan Deal, also a Republican, similarly argued for uniformity in voting days, and rejected the proposition that different counties in Georgia should be allowed to decide whether or not to have Sunday voting in the early voting period before Election Day. He said Sunday voting is "certainly the departure from the norm. And it apparently has a partisan purpose behind—at least they admit it has a partisan purpose behind it of trying to increase the Democratic turnout."¹² He added: "I don't think anything that has to do with

⁹ Initial Brief: Appellant-Petitioner at 49–63, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

¹⁰ Initial Brief: Appellee-Respondent at 21–29, *Crawford v. Marion Cnty Election Bd.*, 553 U.S. 181 (2008).

¹¹ *Statement from Ohio Secretary of State Jon Husted*, Ohio Secretary of State (Sept. 4, 2014), available at <http://www.sos.state.oh.us/SOS/mediaCenter/2014/2014-09-04-a.aspx>, archived at <http://perma.cc/A6FV-LLYW>.

¹² Greg Bluestein, *Nathan Deal Says He's No Fan of DeKalb's Sunday Voting*, POLITICAL INSIDER BLOG, ATLANTA J.-CONST. (Sept. 10, 2014), available at

elections should be tilted one way or the other for partisan purposes.”¹³

At a 2014 panel at the American Political Science Association, prominent Republican attorney (and former Romney for President general counsel) Ben Ginsberg objected when political scientist David Kimball called for local jurisdictions to have more flexibility in voting hours and locations for early voting. Ginsberg saw this as a “partisan” view of election administration and objected, arguing that early voting hours need to be uniform across all jurisdictions in a state.¹⁴

Yet there is a fundamental flaw in the blanket calls for uniformity across counties (or electoral jurisdictions) in the name of equal protection principles based on *Bush v. Gore*—uniformity across counties sometimes undermines the Equal Protection rights of voters because counties have different size populations. In this short Essay, I argue that election administration rules premised on uniformity of counties violate *Bush v. Gore* or other equal protection principles whenever a rule of election administration treats differently populated counties the same, but the relevant rule significantly affects the level of services provided to individual voters.

Indeed, even if *Bush v. Gore* ultimately has no precedential value (or no precedential value outside the narrow confines of a case involving statewide recounts of votes), uniform election law treatment across counties sometimes violates “one person, one vote” principles and is unconstitutional under the Equal Protection Clause. Using this analysis, I conclude that requirements of uniform early voting days and times across counties could well be unconstitutional, but a ban on Sunday voting would likely be constitutional so long as the number of hours offered to voters overall gives voters in different counties roughly the same opportunities to vote. Challengers to a statewide ban on Sunday voting, or to leaving the choice discretionary to counties, would have to raise a different Equal Protection theory.

<http://politics.blogajc.com/2014/09/10/nathan-deal-says-hes-no-fan-of-dekalbs-sunday-voting/>, archived at <http://perma.cc/KX3X-3K52>.

¹³ *Id.*

¹⁴ E-mail from David C. Kimball, Professor of Political Science, University of Missouri-St. Louis, to author (Sept. 12, 2014) (on file with author) (recounting discussion at American Political Science Association meeting).

II. UNIFORMITY OF WHAT?

Arguments that the time and dates of early voting should be uniform across a state have facial appeal. After all, if voters in Democratic urban areas have longer early voting hours than in other parts of the state, or if African-American voters (who overwhelmingly vote Democratic) are especially apt to take advantage of Sunday voting through “Souls to the Polls” events with buses going from church to voting, then extended hours or Sunday voting could appear to give Democrats an unfair advantage.¹⁵ Indeed, some Democrats suspect that the reason Republicans have pushed for uniformity in election administration across states is precisely to deprive Democrats of this advantage. Ohio State Senator Nina Turner, who later ran unsuccessfully for Secretary of State against Husted, said of Husted’s push for uniform voting days that “this is no more than uniform voter suppression, make no mistake about it.”¹⁶ Similarly, some Republicans suspect that the reason Democrats have argued against uniformity is to give Democrats partisan advantage, as evidenced by Georgia Governor Deal’s recent statements opposing Sunday voting in Democratic counties as having a “partisan purpose.”¹⁷

Both of these sentiments could well be true. The parties’ positions on uniformity could well be partially (if subconsciously) motivated by the partisan consequences of the rules. This is inevitable in a system of election administration not conducted behind a veil of ignorance or at least by non-partisan election officials whose allegiance is to the integrity of the process and not to a political party.

I want to step away from this partisan fight and concern over motivations, and instead examine the question of equal protection principles and uniformity. Consider two examples to

¹⁵ *Ohio State Conf. of the NAACP v. Husted*, 43 F. Supp. 3d 808, 839-41 (S.D. Ohio 2014) (describing “Souls to the Polls” in the context of a challenge under Section 2 of the Voting Rights Act and the Equal Protection Clause); *Florida v. United States*, 885 F. Supp. 2d 299, 335–36 (D.D.C. 2012) (describing “Souls to the Polls” in context of Voting Rights Act section 5 retrogression analysis).

¹⁶ Adalia Woodbury, *Ohio’s Former SOS Obliterates Husted’s Uniformity and Fairness Claim*, POLITICUSUSA (Aug. 24, 2012, 12:21 PM), available at <http://www.politicususa.com/2012/08/24/husted-continues-block-vote-ohio.html>, archived at <http://perma.cc/NF8Z-VV48>.

¹⁷ Bluestein, *supra* note 12 (quoting Gov. Deal).

flesh out how uniformity principles should apply in election administration decisions across counties:

1. In the name of uniformity, the chief election official of the state declares that each county in the state shall have the same number of voting machines. The largest county in the state has a population of about 10 million; the smallest county has a population of about 3,000.¹⁸

2. In the name of uniformity, the chief election official of a state declares that each county in the state must follow the same standards for ballot format and typeface and follow the same rules for listing of candidates on the ballot.

The two examples demonstrate that uniformity across counties sometimes is appropriate and sometimes is inappropriate and perhaps unconstitutional. In the first example, involving the number of voting machines, uniformity across counties would be manifestly inappropriate and almost certainly unconstitutional. The problem arises because a uniformity requirement as to the number of voting machines (unless the number is set ridiculously high) is likely to put much greater burdens on voters in large counties than in small ones. Requiring each county to have exactly 30 voting machines, for example, means that there would be one voting machine per 100 people in the smallest county, and one voting machine per 333,333 people in the largest county. The obvious implication of such a dire disparity is that many voters in the larger counties would be effectively disenfranchised.¹⁹ Whether or not *Bush v. Gore* applies to the question of the voting machine per person disparity,²⁰ such a severe burden on voting would likely be unconstitutional both under the line of cases subjecting severe

¹⁸ This describes California in July 2013, according to Census Department figures. Los Angeles County has a population of 10,017,068; Sierra County has a population of 3,047. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2013*, U.S. Census Bureau, Population Division (March 2014), available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>, archived at <http://perma.cc/5KUV-XA3V>.

¹⁹ See Christopher Famighetti, Amanda Melillo, & Myrna Perez, *Election Day Long Lines: Resource Allocation*, BRENNAN CENTER FOR JUSTICE REPORT (Sept. 15, 2014), available at <http://www.brennancenter.org/sites/default/files/publications/ElectionDayLongLines-ResourceAllocation.pdf>, archived at <http://perma.cc/5UA7-RV9J> (finding that voting machine distribution had a significant impact on voter waiting time); Charles Stewart III, *Waiting to Vote in 2012*, 28 J. L. & POL. 439 (2013) (discussing how long wait times for voting can deter voters).

²⁰ For a discussion of whether *Bush v. Gore* is violated when one county uses voting machines with much higher error rates than other counties in a statewide election see generally Hasen, *Future of Equal Protection*, *supra* note 2.

burdens on voters to strict scrutiny (the so-called *Anderson-Burdick* line of cases),²¹ as well as, under the “one person, one vote” cases, making it unconstitutional to more heavily weigh votes in some parts of a state rather than others.²² It cannot be that some voters would have only a small chance of being able to cast a ballot thanks to a lack of voting machines caused by a state edict requiring uniformity in the number of machines.

In contrast, a rule requiring uniformity across counties in setting the standards for ballot formats and the listing of candidates on the ballot is unobjectionable and not even remotely unconstitutional. Indeed, such uniformity can promote fairness and sound election administration, reduce costs, and minimize voter confusion, such as when the state mandates clear ballot formatting that everyone will expect no matter where they vote in the state.²³ No one in bigger or smaller counties is at an advantage or disadvantage under such rules.

Both of the election officials’ orders require uniformity across counties, yet one is unconstitutional and the other is not only constitutional but commendable. What’s the difference? Some election administration choices, such as determining the proper number of voting machines, involve providing services to voters individually to facilitate the voting process. When the election administration rule significantly affects the level of services to voters, the uniformity principle should be tied to the number of voters and not the county unit. Thus, the proper way of proceeding with setting the number of voting machines is for election officials to base it upon the number of voters (*e.g.*, one

²¹ See *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). On the *Anderson-Burdick* sliding scale balancing test, see RICHARD L. HASEN, *LEGISLATION, STATUTORY INTERPRETATION & ELECTION LAW: EXAMPLES AND EXPLANATIONS* 262–63, 307–11 (2014); Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping v. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL OF RIGHTS J. 507 (2008).

²² See generally *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); see also *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (holding government may not discriminate among citizen, resident, adult non-felons’ enfranchisement in school board elections).

²³ Candidates, in advance, may prefer the random rotation of candidate names on the ballot across the state, so that no candidate gets a preferential ballot position. There is some dispute over how much the “ballot order effect” matters, but rotation eliminates any danger of such effect. See generally R. Michael Alvarez, Betsy Sinclair, & Richard L. Hasen, *How Much is Enough? The “Ballot Order” Effect and the Use of Social Science Evidence in Election Law Disputes*, 5 ELECTION L.J. 40 (2006).

voting machine for every 3,000 voters in a jurisdiction) rather than upon the number of counties.

Such a rule is supported by *Bush v. Gore* itself. As the Court described it, the problem with the disparate rules for the counting and recounting of ballots by examining voting “punch cards” was one that existed not only between counties but *within* counties.²⁴ Thus, the problem was inconsistency in the treatment of similar ballots across the state of Florida, and not simply differences from county to county.

Other election administration choices, such as determining the format of the ballot, do not involve providing services to voters individually to facilitate the voting process. Instead, rules election administrators set in formatting ballots, dealing with internal processes, or conducting recounts are permissibly set uniformly across counties when appropriate.²⁵ The proper way of deciding on proper ballot design or the listing of candidates depends in no way upon the number of voters in each county.

For rules involving the provision of services to voters, like those setting the same number of voting machines across counties, imposing uniformity across counties with vastly different population sizes can cause greater burdens on voters in geographically larger counties. For rules which do not involve

²⁴ The want of [uniform recount] rules here has led to unequal evaluation of ballots in various respects. As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

Bush v. Gore, 531 U.S. 98, 106–07 (2000) (internal citations omitted).

²⁵ Uniform recount rules would not be appropriate if jurisdictions used different voting technology for casting ballots. For example, if some counties use DRE (electronic) voting machines and other counties use optically scanned ballots filled in with pencils, the rules for recounts will necessarily be different. Courts have thus far rejected arguments that it is an Equal Protection violation to use DRE machines in some counties which, because of the nature of the technology, are not subject to ordinary recount rules. *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006).

the provision of services to voters, like those setting uniform ballot typeface, the fact that a uniform state rule is administered through county election officials is happenstance, and the choice of uniform rule has no differential effect on voters across counties in a state.

Further, electoral jurisdictions differ drastically in size and the populations they serve. As Kimball, Baybeck, and Deppen found:

[R]oughly 6 percent of the local jurisdictions served a bit more than two-thirds of the voters in the 2012 election. Meanwhile, the thirty most populated jurisdictions serve more than 20 percent of the nation's voters. When casting their ballots, the vast majority of American voters are served by a very small number of heavily populated local jurisdictions.²⁶

Uniformity often makes sense when the rules do not depend upon the level of services provided to voters. In contrast, uniformity across counties that significantly affects the level of services provided to voters is constitutionally suspect.

III. UNIFORM EARLY VOTING DAYS AND HOURS V. UNIFORM BAN ON SUNDAY VOTING

Early voting hours appear to fit into the first category of cases, involving provision of services to voters. Just like the number of voting machines should be calibrated not to the number of counties but to the number of voters per voting machine, the number of hours or days of early voting should not be uniform across counties but should instead be tied to the capacity of polling places to accommodate voters in the jurisdiction. For example, if a state election administrator adopted the Presidential Commission on Election Administration recommendation that voters should have to wait no more than 30 minutes to vote,²⁷ and if the administrator

²⁶ David C. Kimball, Brady Baybeck, & Ray Deppen, *Under the Radar: State Associations and Election Administration*, Paper prepared for presentation at the annual meeting of the Midwest Political Science Association, Chicago, Apr. 4, 2014 (on file with the author).

²⁷ *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION (Jan. 2014 at 14), available at <https://www.supportthevoter.org>.

applied that recommendation to early voting throughout the state, election officials in large counties might need to schedule many more hours of early voting to handle capacity and meet this benchmark than election administrators in sparsely populated counties.

Thus, while Ohio Secretary of State Husted's insistence on uniformity in early voting days and hours at first looks defensible under Equal Protection principles, in fact it can undermine election administration principles if it places significantly greater burdens on voters in larger counties than in smaller counties. Perhaps for this reason, a federal district court in 2014 ordered Husted to allow counties to add additional early voting hours.²⁸

Other early voting practices enacted in the name of uniformity may raise similar issues. If the state requires that counties offer only one polling place for early voting per county, then the location of the polling place could have disparate affects across voters in a geographically dispersed county. Further, a single polling location could mean much longer lines for early voting in high population counties than in small population counties, much like the voting machine hypothetical mentioned earlier.

As a constitutional matter, the difference must be significant enough substantively to warrant court intervention. We cannot have courts policing all minor deviations in voting conditions because this will clog up the courts without providing significant benefits to voters. If rural voters generally wait no more than 5 minutes to vote and urban voters wait 20 minutes to vote, courts should not find a violation even though urban voters wait four times as long as rural voters. Similarly, in Ohio, 28 days of early voting is quite generous, and perhaps the

gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf, archived at <http://perma.cc/8AXC-94LU> ("The Commission has determined that, as a general rule, no voter should have to wait more than half an hour to have an opportunity to vote.") (emphasis omitted).

²⁸ Jackie Borchardt, *Early Voting Schedule Expanded by Secretary of State Jon Husted While Court Decision Under Appeal*, CLEVELAND PLAIN DEALER (Sept. 15, 2014), available at http://www.cleveland.com/open/index.ssf/2014/09/early_voting_schedule_expanded.html, archived at <http://perma.cc/U3X3-LWUF> ("The judge's order also prohibits Husted from preventing local boards from setting hours in addition to the statewide schedule. Husted appealed the decision because he said it is inconsistent with the judge's past decisions, which stated that Ohio could not treat one group of voters differently from another.").

uniformity rule applied there would not be unconstitutional because it did not significantly limit the voting opportunities for voters in more populated areas. Courts will have to use common sense to separate the line between *de minimis* costs and more onerous ones.

The ban on Sunday voting question is more difficult. Like the early voting issue, the ban on Sunday voting involves the provision of services to voters. However, a ban on Sunday voting itself does not necessarily limit the total amount of services provided to voters. Under the principles I have set forth above, a ban on Sunday voting would be constitutional under the uniformity principle so long as the ban did not interfere with local election officials' ability to otherwise set enough hours to comply with a benchmark in terms of voter waiting time.

To argue that a ban on Sunday voting is unconstitutional requires a different type of equal protection argument, such as an argument that the ban constitutes an impermissible form of discrimination. Suppose urban areas contain poorer people who tend to work more hours, and who would have an easier time voting if jurisdictions held voting in these areas on Sundays. Further, suppose African-American churches use "Souls to the Polls" campaigns to get African-American voters to the polls. Is a statewide ban on Sunday voting enacted in the name of uniformity constitutional and acceptable, even if it means that voters in the urban areas on average are inconvenienced more by the voting schedule than voters in other areas?

Under these circumstances, if plaintiffs could show that state officials banned Sunday voting in the name of uniformity as a pretext for discriminating against African-American voters, such conduct is likely unconstitutional. Consider the views of Georgia State Senator Fran Millar, who lamented an increase in African-American voting thanks to Sunday voting days,²⁹ and

²⁹ Daniel Malloy, Jim Galloway, & Greg Bluestein, *David Purdue is Back on the Air, Jean-Jacketed but Baby-less*, POLITICAL INSIDER BLOG, ATLANTA J.-CONST. (Sept. 9, 2014), available at <http://politics.blog.ajc.com/2014/09/09/david-perdue-is-back-on-the-air-jean-jacketed-but-baby-less/>, archived at <http://perma.cc/X2XD-V8TA>.

Now we are to have Sunday voting at South DeKalb Mall just prior to the election. Per Jim Galloway of the AJC, this location is dominated by African American shoppers and it is near several large African American mega churches such as New Birth Missionary Baptist. Galloway also points out the Democratic Party thinks this is a wonderful idea—what a surprise. I'm sure Michelle Nunn and Jason Carter are delighted with this blatantly partisan move in DeKalb.

when pushed, explained that he simply wanted “more educated voters” voting on Election Day.³⁰ Arguably these statements could lead a court to find racially discriminatory intent and hold the ban unconstitutional.

Even without proof of racial discrimination, if election officials imposed a ban on Sunday voting and had no sound election administration reasons (and perhaps solely partisan reasons) for doing so, it is possible a court applying expansive equal protection principles could find this to be a violation. Such a result could be accomplished through an expansion of the *Anderson-Burdick* principles (which impose strict scrutiny only in the case of severe burdens on voters, and not for more minor burdens, such as a ban on Sunday voting) to require election administrators to maximize convenience of voters. Alternatively, a court might expand voting protections for the poor. Finally, a court might hold that once a state offers Sunday voting or other voting conveniences, it may not take those benefits away without good reason (a type of “non-retrogression” principle).³¹ These latter sets of arguments go well beyond my claim about uniformity and election administration and are beyond the scope of this Essay.³²

Although it may be constitutionally permissible for states to ban Sunday voting in the name of uniformity (at least if no other constitutional principle comes into play) such a ban is not necessarily good policy. For those who believe voting should be

Id.

³⁰ Hunter Schwartz, *Georgia State Senator Upset Over Efforts to Increase Voter Turnout in Black, Democratic Area*, GOVBEAT, WASH. POST (Sept. 10, 2014), available at <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/10/georgia-state-senator-upset-over-efforts-to-increase-black-voter-turnout-says-he-wants-more-educated-voters/>, archived at <http://perma.cc/PGA7-D9BJ> (“Later [he said] that he would ‘prefer more educated voters than a greater increase in the number of voters.’”).

³¹ See Edward B. Foley, *Ohio Early Voting Case: A Potential Precedent Setter*, ELECTION LAW @ MORITZ, Sept. 4, 2014, available at <http://moritzlaw.osu.edu/election-law/article/?article=12851>, archived at <http://perma.cc/AP37-GXD3> (discussing the potential expansion of the non-retrogression principle as it appeared to be applied in *Ohio State Conference of the NAACP v. Husted*).

³² For an argument that courts should expand Equal Protection principles and not allow courts to impose more than minor burdens on voters without evidence of a sound election administration reason to do so, see generally Richard L. Hasen, *Race or Party? How Courts Should Think About Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014) (“When a legislature passes an election-administration law discriminating against a party’s voters or otherwise burdening voters, courts should read the Fourteenth Amendment’s Equal Protection Clause to require the legislature to produce real and substantial evidence that it has good reason for burdening voters and that its means are closely connected to achieving those ends.”).

as easy and convenient as possible, Sunday voting has much to commend it. Many people are not working and therefore have more flexible schedules (and a greater ability to wait in line to vote); parents can take children with them to vote, inculcating them with the value of voting; and the more people who can vote during the early voting period, including Sundays, the less likely it is that there will be bottlenecks and problems on Election Day. But for something to be good policy does not mean it is constitutionally mandated.

IV. WHEN IS COUNTY DISCRETION PERMISSIBLE IN SETTING EARLY AND SUNDAY VOTING?

Suppose the state allows counties to decide whether to offer early or Sunday voting or not, and some counties offer early or Sunday voting while others do not. It might be that only urban counties with many poorer and Democratic voters offer early or Sunday voting and rural counties do not. Or perhaps only rural counties offer early or Sunday voting and urban counties with many poorer and Democratic voters do not.

The principles I have set forth so far do not directly answer the question whether such discretion may violate the Equal Protection Clause. I have only set forth the circumstances in which it may be an equal protection violation for a state to *mandate* uniformity in election administration: a state may not mandate uniformity across counties when the question significantly affects the level of services provided to each voter. In contrast, in the case of granting counties discretion to set rules, the state has *allowed local variation* on this question. Is such local discretion permissible?

The constitutional answer is unclear. In *Bush v. Gore*,³³ the Court suggested that variation in election rules to deal with local conditions is not an equal protection violation. The Court declared that “The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”³⁴ Thus, even if *Bush v. Gore* has precedential

³³ 531 U.S. 98 (2000).

³⁴ *Id.* at 108. These sentences of course were controversial on the question whether

value, it may not extend to decisions made in the exercise of local discretion.

On the other hand, if county discretion leads to significantly greater opportunities to vote for voters in some counties rather than others, an equal protection claim seems plausible. If smaller counties have many more early hours than the larger, then that could lead to just as much of a disparity as if the state set a uniform low cap for early voting hours. This would be a variation on the rule discussed above against mandatory uniform early voting hours.

County discretion in Sunday voting seems less problematic from the point of view of voter opportunity, again, so long as the Sunday voting decision of counties does not cause inconsistent treatment in voting opportunities in some counties rather than in others.

Once again, any claims against county choice on Sunday voting would depend upon an expansion beyond Equal Protection uniformity principles. A decision to bar Sunday voting in a county motivated by racial animus would be unconstitutional under the Equal Protection Clause. Discrimination against the poor, against Democrats or Republicans, or a challenge based upon a theory of constitutionally-required convenience voting (such as no fault absentee voting or early voting), or non-retrogression all raise separate, non-uniformity Equal Protection issues.

Even if courts expand Equal Protection doctrine and accept a theory of a right to convenience voting, it is not clear how to measure “convenience.” In Ohio, for example, Secretary of State Husted required county election jurisdictions to send absentee ballot applications to everyone in the state. Husted required this step in the name of uniformity after a few (mostly Democratic) counties were sending such ballot applications to county voters.³⁵

the Court was seeking to deprive this case of any precedential value. See Chad Flanders, *Bush v. Gore and the Uses of “Limiting”*, 116 YALE L.J. 1159 (2007).

³⁵ See *supra* note 11; *Secretary of State Husted Announces Details for 2014 Statewide Absentee Ballot Mailing*, OHIO SECRETARY OF STATE, Aug. 20, 2014, available at <http://www.sos.state.oh.us/SOS/mediaCenter/2014/2014-08-20.aspx>, archived at <http://perma.cc/HA8T-QV7T> (“In past elections, only a few boards of elections sent absentee ballot applications to voters in their counties. This led to a disparity in access and opportunity from county to county, which Secretary Husted has worked to address whether the voter chooses to vote early by mail or in person. Our commitment to treating all voters fair and equally, regardless of where a person lives in the state, gives every

In a recent federal court case involving Ohio's reduction in early voting days, the federal district court rejected the argument that Ohio's practice of sending absentee ballot applications to all Ohio voters was an adequate substitute for expanded early voting. The court found that many African-Americans did not trust the absentee balloting mechanism, preferring to vote in person.³⁶ The court ruled that the reduction from 35 to 28 days of early voting, which included eliminating a Sunday "Souls to the Polls" day and the "Golden Week" in which voters can both register to vote and cast an early ballot at the same time, violated both the Equal Protection Clause and Section 2 of the Voting Rights Act.³⁷

One of the district court's theories for preventing the moderate contraction of early voting appears to be that voting

Ohioan the same access to the ballot.").

³⁶ *Ohio State Conf. of the NAACP v. Husted*, 43 F. Supp. 3d 808, 826–27 (S.D. Ohio 2014). Among the court's factual findings on vote-by-mail:

- Some voters do not trust voting by mail.
- "Some [voters] take pride in going to the booth and pulling the lever" and "for some, as in the African-American community, [voting] is a cultural tradition because it is a right that was fought hard for and they want to experience it in person."
- According to Davis, Senate Bill 205 prohibits prepaid postage for ballots and requires all fields on the ballot envelope to be completed.
- According to Fairchild, "[m]any of the people from lower-income backgrounds that I've worked with do not trust voting by mail. Even organizers do not encourage it because it is a multi-step process where you must find postage, mail-in an absentee ballot request, then find postage again, and mail in the absentee ballot. Lower-income people with less educational attainment are often living chaotic lives and are often unable to understand this process."
- According to Braxton, "Vote-by-Mail' is not a sufficient alternative to [early in person] voting. First, most of the people I interact with regularly do not even pay their bills by mail anymore, so many people overlook traditional mail as a means to cast their vote since it is not a traditional medium for voting. And, second, minority communities I have worked with distrust the vote-by-mail system and want to see their ballots actually processed."

Id.

³⁷ *Id.* at 852–83. After the Sixth Circuit refused to stay the order restoring days of early voting, the Supreme Court, without issuing an opinion, stayed that order. *Ohio State Conf. of NAACP*, 43 F. Supp. 3d at 851-52 (granting preliminary injunction), *stay denied pending appeal*, 769 F.3d 385 (6th Cir. 2014), *aff'd on merits*, 768 F.3d 524 (6th Cir. 2014), *stay granted sub. nom.*, *Husted v. Ohio State Conf. of NAACP*, 135 S. Ct. 42 (2014). On the Supreme Court's silence in this order and related orders issued in the weeks before the November 2014 elections, see Richard L. Hasen, *Reining in the Purcell Principle*, ___ Fla. St. U. L. Rev. (forthcoming 2015), *draft available* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545676.

must be greatly convenient to minority voters in order for a state to comply with Section 2 of the Voting Rights Act, a decision which if upheld could open up a whole new array of voting rights claims.³⁸ The Court also seemed to adopt a non-retrogression theory of early voting: once a jurisdiction offers days of early voting, they cannot be taken away.³⁹ It is not clear how to square such a theory with the Equal Protection rights of voters in states, such as New York, which offers no early voting at all and uniform polling hours throughout busy and less busy counties in New York.⁴⁰

If they stand, these theories go well beyond the uniformity question, and could take Voting Rights Act and constitutional Equal Protection claims in wholly new directions. My proposed understanding of the uniformity principle does not require courts to go this far. It only requires courts to recognize that election administration rules premised on uniformity of counties violate equal protection principles whenever the rule treats differently populated counties the same but the rule significantly affects the level of services provided to individual voters.

V. CONCLUSION

Who could be against uniformity in election administration? The question turns out to be more complicated than it first appears. *Bush v. Gore*,⁴¹ if it means anything, indicates that sometimes lack of uniformity in election administration across counties raises Equal Protection issues.

Uniformity in election administration often makes sense to reduce confusion, enhance efficiency, and assure fairness of the electoral process. But a problem also sometimes arises when election administrators mandate uniformity across counties, and

³⁸ *Ohio State Conf. of NAACP*, 43 F. Supp. 3d at 848–50.

³⁹ *Id.*

⁴⁰ Rick Hasen, *Breaking News and Analysis: Federal Court Grants Injunction Restoring Early Voting in Ohio*, ELECTION LAW BLOG (Sept. 4, 2014), available at <http://electionlawblog.org/?p=64964>, archived at <http://perma.cc/23WX-9RS3> (comparing cutback in early voting in Ohio with the lack of any early voting in New York).

⁴¹ 531 U.S. 98 (2000).

people. In *Jenness v. Fortson*,⁴² the Supreme Court observed, “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”⁴³ When the election administration rule significantly affects the level of services to voters, the equality principle should be tied to the number of voters and not the county unit. Otherwise the laws treat voters in very differently populated counties as though they were exactly alike.

Large counties, especially in urban areas with many new and moving voters, face big election administration challenges that are different from challenges faced by counties with small, relatively unchanging populations. When state election administrators treat large and small counties uniformly, we need to ask whether uniformity across counties creates Equal Protection problems for voters. When uniformity creates these problems, it is appropriate for courts to intervene.

⁴² 403 U.S. 431 (1971).

⁴³ *Id.* at 442.

