Refining the *Bush v. Gore* Taxonomy

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In a scholar's career, few accomplishments are as rewarding as when another scholar, especially a longstanding leader in the field, gives one's work the kind of sustained and thoughtful treatment that Dan Lowenstein has devoted to my taxonomy of potential *Bush v. Gore* claims. I am particularly appreciative of the charitable way in which he describes my work, and I feel fortunate that I can respond in kind because I agree that he has usefully suggested an alternative to the taxonomy I proposed. Considering his suggestions has caused me to modify my original proposal, incorporating a key analytic distinction he advances, while at the same time refining features that he would have replaced. In doing so, I hope that this Response reflects the ideals of academic inquiry in general, as well as of this Symposium specifically: dialogue between scholars and building on one another's insights can advance public understanding of difficult issues in ways that the isolated pursuits of solitary scholars cannot.[1]

I. PRELIMINARY POINTS OF AGREEMENT

To the extent that Lowenstein and I ultimately disagree, I surmise that the scope of disagreement is much narrower than perhaps he believes. For example, he devotes much of his article in this Issue to refuting what he calls a "Janus interpretation" of *Bush v. Gore*,[2] which he describes as one that accentuates (rather than attempts to resolve) the apparent tension between its limiting language and its more expansive Equal Protection rhetoric. Lowenstein is particularly disdainful of those who have claimed that the limiting language was intentionally designed to prevent the decision from having precedential effect. Although in places Lowenstein groups me with others who have made this claim, I had hoped my article was clear in indicating just the contrary. Like Lowenstein, I believe that others are both incorrect and disrespectful insofar as they assert that the *Bush v. Gore* majority intended a single-ticket decision, "good for this day and train

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[1] I am also deeply appreciative of the generally sympathetic reading of my initial article by John Fortier in this Issue of the *Ohio State Law Journal*. *See* John Fortier, *Foley on the Future of* Bush v. Gore, 68 OHIO ST. L.J. 1051 (2007). Because Fortier does not offer an alternative taxonomy to the one I initially presented, his paper does not require the extended response that Lowenstein's article warrants.

[2] Daniel H. Lowenstein, *The Meaning of* Bush v. Gore, 68 OHIO ST. L.J. 1007, 1017 (2007).

only."[3] For example, in my original article, I described the Court's limiting language as its "most-mocked sentence . . . —and *unfairly so*."[4] I specifically said that this limiting language was "*not* an avowal of an unprincipled power grab, but most likely just a caution that the Court's holding may not be as broad as some might wish or think" (a description that accords precisely with Lowenstein's own reading of it).[5]

Lowenstein also devotes much energy to arguing that a proper understanding of the holding in *Bush v. Gore* requires a recognition that this holding applies only in the context of judicially-supervised statewide recounts. I am not prepared to disagree with Lowenstein on this point, especially given his carefully circumscribed definition of a case's *holding* as distinct from the case's precedential force. Lowenstein defines the holding of a decision as the reasoning that determines which future cases are "on all fours" with the decision and thus directly controlled by it.[6] Lowenstein crucially acknowledges that a decision, by virtue of its "analogical influence" on similar—although not identical—cases, may have considerable precedential force well beyond the scope of the narrow set of cases that it directly controls.[7] As a result, there is no need here to quibble whether the *holding* of *Bush v. Gore* is properly understood as being confined to the category of judicially-supervised statewide recounts.

Moreover, before moving on to the range of potential future cases in which *Bush v. Gore* has precedential force (which both Lowenstein and I agree is what counts for taxonomical purposes), I observe briefly that *Bush v. Gore* has significant potential impact even within the narrow scope of its holding as articulated by Lowenstein. One of the initial objectives motivating my taxonomy project was to show that *Bush v. Gore* was not just a "hanging chad" case, but, rather, that it had applicability to other cases of differential treatment concerning the casting and counting of ballots. As my original article describes, and as Lowenstein agrees, it is easy to imagine the differential treatment of provisional ballots in the context of a judicially-supervised statewide recount. The significance of this point is that the precedent of *Bush v. Gore* should apply just as much to this new provisional ballot case as it did to the hanging chads in Florida—a proposition that

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[3] *See* Smith v. Allwright, 321 U.S. 649, 699 (1944) (Roberts, J., dissenting).

[4] Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 OHIO ST. L.J. 925, 932 (2007) (emphasis added).

[5] *Id.* A recent *Yale Law Journal* Comment, which suggests that the majority opinion in *Bush v. Gore* attempted to nullify any precedential effect of its ruling, is an example of the position with which both Lowenstein and I equally disagree. *See* Chad Flanders, Comment, Bush v. Gore *and the Uses of "Limiting"*, 116 YALE L.J. 1159 (2007).

[6] Lowenstein, *supra* note 2, at 1020–21.

[7] *Id.*

Lowenstein wholeheartedly embraces. This example demonstrates that, notwithstanding its limiting language, *Bush v. Gore* cannot be confined to only its own facts (thereby confirming that, like Lowenstein, I do not accept *Bush v. Gore* as unprincipled even if its holding is narrow in scope).[8]

II. THE ADJUDICATION-REGULATION DISTINCTION

Lowenstein's key contribution, for which I am immensely grateful, is the distinction between (1) adjudicatory-type actions in which similar evidence relevant to the casting and counting of ballots is treated differently and (2) regulatory-type actions that allocate electoral resources or opportunities differently, but do not involve the differential treatment of similar pieces of evidence in making specific determinations about whether particular individuals will be permitted to cast a ballot that counts.

Lowenstein sees cases that fall within the first of these two categories as presenting much stronger Equal Protection claims under *Bush v. Gore* than those in the second category. So do I. As Lowenstein puts it, the differential treatment of identical pieces of evidence in equivalent cases offends a "natural" sense of justice. Focusing on this feature of *Bush v. Gore* accords with the Due Process reading of the decision, as Lowenstein also observes, and in my original article I elaborated the reasons for favoring this Due Process reading.

Moreover, in acknowledging that the precedential force of *Bush v. Gore* extends beyond its narrow holding, Lowenstein reasons that the same Due Process principle would apply even where the differential treatment of identical evidence occurs, not in the context of a court-supervised statewide recount, but instead in the context of non-judicial adjudicatory proceedings. Thus, for example, we can imagine a statewide recount conducted without any judicial involvement pursuant to a statutory or regulatory directive, and

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[8] Neither Lowenstein nor I share Rick Hasen's intentionally provocative view that "a little over six years later, *Bush v. Gore* is dead." Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. (forthcoming Oct. 2007). Hasen himself recognizes that this view is somewhat misleading and he would do "better to think of the case as *dormant* as a constitutional precedent." *Id.* Citing my initial contribution to this Symposium, Hasen also acknowledges that the Supreme Court might well find some future Equal Protection claims meritorious based on the precedent of *Bush v. Gore*. But Hasen is less interested than Lowenstein and I are in discerning the law of *Bush v. Gore*—identifying in a principled way what claims should (and should not) be ruled meritorious as a result of that precedent—and focuses instead on *Bush v. Gore* as a potential catalyst of election law reform, whether instigated by courts or legislatures. On that score, Hasen pronounces *Bush v. Gore* deceased. Although I am inclined to consider this pronouncement premature (Congress, for example, is still considering various issues of election law reform), it is beside the point with respect to the taxonomical project with which Lowenstein and I are engaged.

we can hypothesize that, as part of this purely administrative recount, equivalent provisional ballots are treated differently (counted or rejected depending solely on whether the provisional voter's original registration card was examined, rather than relying solely on an examination of the state's computerized registration database). Lowenstein views this hypothetical as presenting a presumptively winning claim under *Bush v. Gore* because, as he explains, an administrative recount is a "quasi-judicial" adjudicatory proceeding, and, therefore, "[t]he analogical force of *Bush v. Gore* would be strong in a case of this sort."[9]

Indeed, even if the differential treatment of identical evidence did not occur within the very same statewide administrative recount, but instead occurred in separate but equivalent administrative proceedings, Lowenstein considers the same Due Process principle applicable. For example, suppose that in one county within a state a valid driver's license without a current address qualifies as acceptable voter identification, whereas in another county it does not. We can imagine this differential treatment occurring in the context of separate adjudicatory-type proceedings: when individuals with these kinds of driver's licenses go to the polls, they are permitted to cast regular (non-provisional) ballots—or not—depending on which county they live in. "Because of the quasi-judicial nature of the[se] determinations . . . and the clear principle of natural justice that like cases should be treated alike," Lowenstein explains, "the influence of *Bush v. Gore* in this situation should be significant."[10]

By contrast, when the exercise of administrative authority over elections is not adjudicatory in nature, *Bush v. Gore* is further afield and thus has less precedential force. Lowenstein cites the example of an election administrator allocating a different number of voting machines to different precincts. I agree, as I indicated in my original article, that this situation presents a significantly weaker Equal Protection claim based on the authority of *Bush v. Gore*.

In developing his alternative taxonomy, Lowenstein does not define this category except in the negative: the absence of "quasi-judicial" decisions that treat identical evidence differently. Building on Lowenstein's discussion, I now suggest going one step further: to characterize this category as involving administrative action of a *regulatory* rather than *adjudicatory* nature. The regulatory-vs.-adjudicatory distinction may not always be clear-cut when applied to some borderline situations, but it is a longstanding and serviceable distinction in administrative law and, in the context of developing a taxonomy of potential *Bush v. Gore* claims, it captures what is perhaps the most salient feature of that precedent. Using the regulatory-vs.-adjudicatory

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[9] Lowenstein, *supra* note 2, at 1029.

[10] Lowenstein, *supra* note 2, at 1030.

terminology to describe this primary taxonomical dichotomy simply fine-tunes what Lowenstein himself was getting at when he contrasted "managerial" decisions with "quasi-judicial" ones.[11] As Lowenstein himself observed, *Bush v. Gore* is less relevant when administrative decisions about elections are "managerial," or I would say "regulatory," in nature.[12]

III. THE LIMITATIONS OF LOWENSTEIN'S CENTRAL-LOCAL DICHOTOMY

In offering his alternative taxonomy, Lowenstein would also draw a sharp dichotomy between electoral inequalities caused directly by the conduct of a single central administrative authority and electoral inequalities that result from separate decisions of multiple decentralized authorities. Lowenstein offers this sharp dichotomy in place of the four-part classification of the relationship between central and local authorities that I proposed in my original taxonomy.

As the reader may recall, I distinguished among the following situations:

(1) local authorities differ in their electoral practices as a result of implementing an insufficiently precise directive from a central authority;

(2) local authorities differ in their electoral practices because one or more of them erroneously implements a directive from a central authority, notwithstanding its sufficient precision;

(3) local authorities differ in their electoral practices because a central authority has expressly and unequivocally given local authorities permission to adopt divergent practices regarding the particular matter;

(4) a central authority itself adopts a policy that imposes localized electoral inequalities.

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[11] Lowenstein, *supra* note 2, at 1031–32.

[12] The adjudication-regulation distinction also accords with a point that John Fortier makes. He observes that, given the reasoning of *Bush v. Gore*, it is easier to prevail on an Equal Protection claim in the context of a post-election recount than it is in a pre-election challenge. *See* Fortier, *supra* note 1, at 1057. A post-election recount is, as we have discussed, a form of adjudication, while a pre-election challenge is likely to concern regulation. My agreement with Lowenstein that *Bush v. Gore* provides much more support for an Equal Protection claim in an adjudicatory context than it does in a regulatory context should also satisfy Fortier's concern that my initial taxonomy did not do enough to limit the range of the precedent's potential applicability.

Lowenstein's sharp dichotomy, in effect, would collapse the first three of these four situations into a single category, doing away with the distinctions between imprecision, mistake, and explicit authorization as the reason for disparate treatment by local officials. Indeed, Lowenstein expressly acknowledges that he would jettison these distinctions: "The question of why the counties act differently from one another—because they interpret state directives differently, or because the state directives leave the matter up to the counties, or even because some counties disobey the state directives—is irrelevant to [his alternative] proposed taxonomy."[13]

Unlike Lowenstein, I would retain these distinctions. He considers them unimportant because he sees an imprecise directive from a central authority as giving local officials implicit permission to vary in their practices, and he further equates this implicit permission as functionally equivalent to explicit permission. But I think there is an important distinction between implicit and explicit permission, one which is potentially relevant to evaluating the merits of future *Bush v. Gore* claims, and therefore one which should be salient in developing the taxonomy of these claims.

When a central authority gives local officials explicit permission to adopt different electoral practices, the central authority necessarily knows that electoral inequalities will ensue if the local officials exercise this permission. By contrast, where local disparities result from the implementation of an insufficiently precise central directive, even if this imprecise directive can be conceived as implicit permission to vary at the local level, it is not necessarily true that the central authority expected this local variation to occur. Instead, the central authority might not have realized the problem of imprecision and, accordingly, might have expected uniform implementation of the single central directive.

Lowenstein considers this expectation unlikely, but I think he is mistaken in this respect. When a state statute says simply that local officials should check "whether a provisional voter is registered," the legislature enacting the statute does not anticipate that some local officials will check original registration forms, while other local officials will examine only the computerized registration database. Likewise, when a state statute instructs local officials that among the various forms of acceptable voter identification are "current utility bills," "a valid driver's license number," or "other government identification," the legislature does not necessarily anticipate that localities will vary in their interpretations of these statutory terms. In neither of these real-world examples did the legislature think it was drafting an imprecise statute, which would cause variation in local implementation. Rather, in both cases, the imprecision—and ensuing variation—surfaced once implementation was underway.

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[13] Lowenstein, *supra* note 2, at 1030.

Moreover, it matters to Equal Protection analysis whether the electoral inequality was anticipated or not. Under longstanding Equal Protection doctrine, electoral inequalities require "strict scrutiny," or at least some form of heightened judicial review, which is significantly more searching than the easily surmounted "rational basis test." (As Lowenstein himself points out for other purposes, this heightened judicial review occurs because of the importance of voting, fundamental to the protection of all other rights and interests.[14]) Heightened judicial review requires the government to demonstrate a strong justification for the electoral inequalities it causes. The government is more likely to be able to justify an electoral inequality that it anticipated and yet nevertheless thought warranted. To be sure, just because the government anticipates an electoral inequality, it does not follow that the government will prevail under heightened judicial review. Nor will the government necessarily fail this review in situations where it did not anticipate the inequality; the government's reasons for doing what it did might be sufficient, notwithstanding its unawareness of the electoral inequality its actions would cause. Still, it is relevant to rigorous judicial scrutiny whether the government was even aware of the electoral inequality caused by its actions.

Indeed, the reasoning of *Bush v. Gore* itself supports this point. It was evidently of concern to the Court that the inequality there was caused by an imprecise standard that easily could have been avoided. The government is much less likely to be able to justify its electoral inequality when it acts so cavalierly. Thus, in developing a taxonomy of potential *Bush v. Gore* claims, it is well worth distinguishing those situations in which the government's conduct is thought out in advance from those circumstances in which the government stumbles into a form of electoral discrimination that it did not plan. Preserving the distinction between explicit permission for local variation, on the one hand, from local variation resulting from imprecise

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[14] There has been considerable confusion and debate over what forms of relatively innocuous electoral inequalities justify more lenient judicial review than "strict scrutiny" and just how lenient this lower level of judicial scrutiny may be. Because *Bush v. Gore* itself did not attempt to expressly calibrate the level of scrutiny it applied, but instead went directly to a resolution of the merits, *Bush v. Gore* does not add much insight to the calibration of judicial scrutiny levels in future voting administration cases. Nonetheless, insofar as the taxonomy I have developed helps to distinguish stronger from weaker Equal Protection claims based on the *Bush v. Gore* precedent, that taxonomy can be used to address what scrutiny levels should be applied to various categories of these claims as well as to resolve their ultimate merits. For a new and extremely useful analysis of the level-of-scrutiny issue, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics, Part I: Explanations and Opportunities*, 156 U. PA. L. REV. (forthcoming Dec. 2007).

central directives, on the other, accords with this effort to be faithful to *Bush v. Gore*.

One way to see this point is to imagine a case identical to *Bush v. Gore* itself except that the local variation in the treatment of hanging chads results, not from the imprecision of Florida's "intent of the voter" standard, but instead from an explicit legislative delegation that "in any manual recount involving ballots designed for the use of punch card machines, each county shall adopt its own standard for determining which ballots contain legal votes uncounted by those machines." As a result of this delegation, we can imagine some counties willing to count dimpled chads, others insisting that chads be punctured in order to count, and still others adopting the so-called "two-corner rule," which requires that two corners of a chad be detached so that it is truly "hanging" in order to count. It is quite possible that the Supreme Court would find that these local differences in the counting of identical chads violate Equal Protection, especially if they occurred in the context of a judicially supervised statewide recount. Even so, all honest lawyers would acknowledge that this variation-from-express-delegation case is not "on all fours with" *Bush v. Gore* itself. Continuing to use Lowenstein's terminology, the variation-from-express-delegation distinction takes this hypothetical outside the narrow *holding* of *Bush v. Gore* and instead requires reliance on its *analogical force* to assess whether the Equal Protection claim should be ruled meritorious.

Moreover, identifying what would be the correct ruling on the merits of this hypothetical is hardly a foregone conclusion. Presumably, the state government would offer an argument along the following lines:

> After extensive public deliberation, we chose to let localities adopt their own standards for determining what sorts of chads should count as legal votes. The reason we did so is that there are important regional differences within our state concerning this issue. Some localities, with higher proportions of elderly or less well-educated citizens, prefer a more lenient standard that would be more likely to count a chad that is not machine-readable. By contrast, other localities with younger or better-educated residents tended to prefer a stricter standard, on the ground that voters should be held more accountable for failing to dislodge chads as instructed. We concluded that our state's electoral system ultimately would be more democratic by honoring these local preferences.

It is by no means obvious that this argument would prevail. But undoubtedly the Supreme Court would give it serious consideration to assess whether it would be sufficient under heightened judicial review to justify the electoral inequalities it causes. Just because this argument would involve a thoroughly deliberated reason for the local variation, the Court would give it more weight in its Equal Protection calculus than it did the local variation

caused by the imprecise "intent of the voter" standard in *Bush v. Gore* itself. Far from viewing the local variation in *Bush v. Gore* as a deliberate policy choice, the Court there saw it simply as the unanticipated consequence of failing to think through the implications when adopting the "intent of the voter" standard without providing additional specific guidance.

The taxonomy of potential Equal Protection claims in the wake of *Bush v. Gore* should reflect that this variation-from-express-delegation hypothetical is a step removed from the holding of *Bush v. Gore* along one factual dimension relevant to that holding. Lowenstein says it is important that the taxonomy of potential future *Bush v. Gore* claims be structured to recognize the significance of the adjudicatory context of the inequality there. He is right. For the same reason, however, the taxonomy should also be structured to distinguish adjudicatory rulings that implement an insufficiently precise statewide standard, as *Bush v. Gore* itself did, from adjudicatory rulings that implement an explicit delegation to local election authorities to promulgate their own standards in accordance with local values. The taxonomy should capture both dimensions of potential factual differences relevant to the reasoning of *Bush v. Gore*.

Likewise, it is important to distinguish the variation-caused-by-mistake scenario from variation-caused-by-imprecision. Local variation resulting from local mistakes in implementing a statewide rule intended to be uniform in implementation would seem a particularly unjustifiable form of inequality and therefore most likely to fail heightened judicial scrutiny. Even so, as I explained in my original article, this circumstance differs from the problem of an insufficiently precise standard. A legislature cannot prevent mistakes simply by instructing local officials not to make them. Rather, it is the very nature of mistakes that they occur despite the legislative instructions provided. A salient feature of *Bush v. Gore* itself, however, was that the imprecision in the "intent of the voter" standard easily could have been avoided by writing a more precise standard in advance.

Whether this factual distinction ultimately should make a difference in the outcome of Equal Protection claims is a matter that the Court would need to consider the first time it confronted a mistake-caused inequality that arguably should be unconstitutional in light of *Bush v. Gore*. But the taxonomy designed to prepare the Court, as well as lower courts and litigators, for the permutations that might arise should at least flag this factual distinction as worthy of consideration. Lowenstein's alternative taxonomy does not. Nor does Lowenstein offer an explanation for omitting it. Variation-caused-by-mistake cannot be viewed even as an implied delegation in the way that variation-caused-by-imprecision can be.

IV. AN OUTLINE OF THE REFINED TAXONOMY

Thus, it is preferable to retain in the taxonomy the three-part distinction between mistake, imprecision, and express delegation. Doing so, while incorporating Lowenstein's valuable insights, enables us to present this refined taxonomy:

1. adjudicatory-type action . . .
    - 1.1. . . . undertaken by local authorities based on . . .
        - 1.1.1. . . . mistaken implementation of clear central directive
        - 1.1.2. . . . variable implementation of imprecise central directive
        - 1.1.3. . . . exercise of explicit delegation from central authority of power to set locally divergent standards
    - 1.2. . . . undertaken directly by central authority
2. regulatory-type action . . .
    - 2.1 . . . undertaken by local authorities based on . . .
        - 2.1.1 . . . mistaken implementation of clear central directive
        - 2.1.2 . . . variable implementation of imprecise central directive
        - 2.1.3 . . . exercise of explicit delegation from central authority of power to set locally divergent standards
    - 2.2 . . . undertaken directly by central authority

Some of the categories created by this refined taxonomy are less likely to occur than others. For example, it seems rather far-fetched that an adjudicatory-type action undertaken by a central authority would discriminate among voters based on locality. To be sure, we can conceptualize the possibility that a state recount board would directly apply one counting standard (whether concerning chads or provisional ballots or voter ID) to ballots cast in some localities within the state while directly applying a different counting standard to ballots cast in other localities. But that scenario seems much less likely than the localities themselves diverging in the counting standards that they apply, whether the divergence results from mistake, imprecision, or express delegation.

Nonetheless, including this category (1.2) within the refined taxonomy adds to our analytical understanding of potential *Bush v. Gore* claims—and even of *Bush v. Gore* itself. Lowenstein would classify the facts of *Bush v. Gore* as within this category. He characterizes the case as involving an adjudicatory recount under the direct auspices of the Florida Supreme Court, a single central authority. I still believe that *Bush v. Gore* is better viewed as

a case involving adjudicatory-type actions undertaken by local authorities based on variable implementation of an imprecise central directive (category 1.1.2 in the refined taxonomy).

In truth, the facts of *Bush v. Gore* are sufficiently messy and complicated to permit classifying the case as within both these categories in the refined taxonomy. *Bush v. Gore* is appropriately seen as an adjudication in which the inequality is imposed directly by the central authority itself insofar as the Florida Supreme Court itself treated some counties differently than others for purposes of conducting the statewide recount. The willingness of the Florida Supreme Court to include partial recounts from some counties, while demanding full recounts from others, might be thought as a fact in the case that especially supports Lowenstein's classification of it. Not surprisingly, Lowenstein emphasizes this fact in his analytical account of the case.

Even so, the core of *Bush v. Gore* remains in my view the divergent treatment of identical ballots by the local counties as a result of their efforts to implement the imprecise statewide "intent of the voter" standard. The key fact is that some counties applied a more lenient (dimpled chad) standard, while other counties used a more rigorous (hanging chad) standard. I consider this fact as presenting the core of the case because it is what the U.S. Supreme Court itself focused on in saying what would be enough to establish an Equal Protection violation. The Court explicitly stated that the variation among counties, and even within counties, in the treatment of chads was "not a process with sufficient guarantees of equal treatment" because it lacked specification of the "intent of the voter" standard.[15] The Court also expressly "conclude[d]" that this absent specification was "necessary" to comply with Equal Protection.[16]

Lowenstein glosses over these passages in the Court's opinion, finding them unnecessary to consider in detail, but I think he is mistaken in this regard. Whatever else may have been constitutionally problematic about the Florida Supreme Court's decision (and I have already acknowledged these other dubious aspects), it is appropriate to focus on the defect that the U.S. Supreme Court isolates as enough to establish a constitutional violation. In endeavoring to consider what other factual situations might also establish Equal Protection violations, one can use the core constitutional deficiency in *Bush v. Gore* as a baseline for comparative purposes. Therefore, it is useful to classify the core facts of *Bush v. Gore* in category 1.1.2 of the refined taxonomy, even if the facts in all their messy complexity can also be classified appropriately in category 1.2.

Placing the core of *Bush v. Gore* in category 1.1.2 does not deny the fact that even this core involved a recount supervised by the state's judiciary. The

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[15] Bush v. Gore, 531 U.S. 98, 107 (2000) (per curiam).

[16] *Id.* at 106.

requirement to implement the imprecise "intent of the voter" standard was imposed by the Florida Supreme Court, after all, as the U.S. Supreme Court expressly observes. Still, the unconstitutional variation in the implementation of this imprecise standard occurred at the county level, not at the hands of the central Florida Supreme Court itself (or even the central trial court in the statewide judicial contest proceedings). It would have been a different case had the Florida Supreme Court ordered one county to use a lenient (dimpled chad) standard to review its ballots while requiring a different county to use a stricter (hanging chad) standard for ballots there. It matters whether the electoral inequality is imposed directly by the central authority or instead imposed by divergent local authorities implementing an imprecise central directive. The refined taxonomy captures this significant distinction, just as it does other important ones.[17]

V. MISTAKE, IMPRECISION, AND EXPRESS DELEGATION: RELEVANT TO BOTH ADJUDICATION AND REGULATION

The three-part distinction between mistake, imprecision, and explicit delegation is also potentially relevant to regulatory-type actions undertaken by local authorities. Consider these three hypotheticals:

> *Mistake* (category 2.1.1). A state's legislature instructs all counties to supply each precinct with a number of ballots equal to 110% of ballots cast in the same precinct in the most recent quadrennial general election that included the presidency. A particular county miscalculates this figure for a particular precinct, supplying too few ballots, with the result that some voters are turned away unable to vote.

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[17] This point also answers the critique Lowenstein makes of the distinction between the third and fourth categories of my original taxonomy. At one point Lowenstein says that there is no real difference between counties adopting different standards pursuant to an express delegation from the state and counties imposing inequalities directly upon more local precincts. Lowenstein claims that I am merely "covering up part of the organization chart" because, for counties to act this way towards their precincts, they must be delegated the authority to do so from the state. Lowenstein, *supra* note 2, at 1014. But the relevant conceptual distinction, as Lowenstein recognizes elsewhere, is whether—in the relationship between a more central and more local authority—inequality is caused by conduct of the more local or more central authority. The fact that a county can serve either as the more local or more central authority, depending on whether its relationship is with the state or with its own precincts, does not negate this conceptual truth. Thus, a direct, county-imposed inequality on precincts is conceptually equivalent to a direct, state-imposed inequality upon counties, as Lowenstein also acknowledges. In addition, I am not sure why in part I of his piece Lowenstein levels this criticism on the distinction between the third and fourth categories of my original taxonomy when, in part III of his piece, he makes the central-local dichotomy a central feature of his own taxonomy.

> *Imprecision* (category 2.1.2). A state's legislature instructs all counties to supply each precinct with an "adequate" number of ballots, but provides no further specificity on how to define adequacy in this regard. Some counties use a more risk-averse approach than others to implement this directive (requiring, say, 120% of benchmark prior turnout rather than 110%). As a result, in an election with an unexpected record-breaking turnout, voters in the more risk-averse counties were all able to cast ballots, while some voters in other counties were turned away because of the local ballot shortages there.
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> *Explicit delegation* (category 2.1.3). A state law provides that "each county, in light of its budget and other local considerations, shall have the authority to determine the number of ballots to supply to each of its precincts." Counties differ in the standards they adopt pursuant to this delegation of authority. As a result, in a high turnout election, some counties suffer ballot shortages while others do not.

It would be possible to articulate an Equal Protection claim based on any of these three hypotheticals, but the merits of the Equal Protection claim in each may differ because of the circumstances in which the locality adopts the practice that causes the inequality. As we saw in the context of adjudicatory-type actions, the strength of the government's justification for the inequality it causes differs depending upon whether the inequality emanates from mistake, imprecision, or explicit delegation. This is true also in the context of regulatory-type action undertaken by local election authorities. A local ballot shortage caused by the locality's mistaken interpretation of a statewide mandate would obviously be much less easy to justify than a local ballot shortage caused by a deliberate, budget-cutting decision pursuant to express legislative authority to make this local policy choice. In any event, the nature of the local decision in relation to state law would undoubtedly be a factor in Equal Protection analysis, and, thus (as in the adjudicatory context), the three-part distinction deserves inclusion in the taxonomy of potential Equal Protection claims.

Moreover, the middle of these hypotheticals is the closest of the three to the core of *Bush v. Gore* and thus is the one in which the analogical force of that precedent is the strongest. Obviously, because this middle hypothetical involves regulatory-type rather than adjudicatory-type action, the analogical force is not as strong and indeed may not be strong enough to establish a meritorious Equal Protection claim. Even so, it makes a difference that the ballot shortage in some counties, but not others, results from differential implementation of the imprecise statewide directive to supply precincts with an "adequate" number of ballots. Here is a situation, as in *Bush v. Gore* itself, where the unequal treatment of voters (in this case causing the outright disenfranchisement of some) could have easily been avoided by a more precise statewide directive.

Lowenstein argues that in any case involving separate regulatory-type action by local election authorities, the precedent of *Bush v. Gore* adds nothing to the Equal Protection principles already articulated in *Reynolds v. Sims*[18] and *Harper v. Virginia Board of Elections*,[19] the two Warren Court cases upon which *Bush v. Gore* itself relies. But Lowenstein is incorrect in this respect. In the middle regulatory-type hypothetical, the precedent of *Bush v. Gore* does add force not supplied by the old Warren Court cases. Because both *Bush v. Gore* and this middle hypothetical involve electoral inequalities resulting from local implementation of insufficiently specific statewide standards, a plaintiff here could rely on *Bush v. Gore* to make a more persuasive claim than relying on the Warren Court precedents without the additional benefit of *Bush v. Gore*.

Of course, if, before such a case arises, the U.S. Supreme Court confines the precedent of *Bush v. Gore* exclusively to adjudicatory-type cases (reasoning that this precedent is rooted in Due Process as much as Equal Protection), then *Bush v. Gore* henceforth would add nothing to any regulatory-type case. But that confinement of the precedent has not yet occurred. Until it does, it is appropriate for the taxonomy of potential *Bush v. Gore* claims to distinguish regulatory-type cases where localities endeavor to implement an imprecise central directive, to indicate the currently greater analogical force of that precedent in this particular context.

VI. CONCLUSION

If towards the end of this Response I have belabored the differences between Lowenstein's approach and mine, my defense is that academics tend to do so rather than emphasizing the extent of their agreement. But I would prefer to close by observing that much more unites than divides Lowenstein and me in our analyses of *Bush v. Gore* and the cases that might follow in its wake. We both think that, notwithstanding its limiting language, *Bush v. Gore* contains a ruling capable of principled explication (and, indeed, was intended by the Court to do so). We both agree that the adjudicatory context of *Bush v. Gore* is a crucial factor in analyzing the potential merits of future claims based on that precedent. We also both believe that a taxonomy of these possible future claims should be structured to reflect the primacy of this crucial factor, giving secondary consideration to whether the administration action causing the allegedly unconstitutional inequality was local or central in nature. We diverge on one modest (but not inconsequential) point: whether locally caused inequalities should be further subdivided taxonomically

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[18] 377 U.S. 533 (1964).

[19] 383 U.S. 663 (1966).

depending on whether the relationship of local variability to central authority was one of mistake, imprecision, or express delegation.

In sum, I present the refined taxonomy as outlined above, incorporating Lowenstein's important contributions while retaining elements of my original proposal that (I continue to believe) deserve inclusion. I have no doubt that this taxonomy will require further refinement in years to come as more actual cases are litigated, thereby bringing new and unanticipated facts to bear on the analysis of potential *Bush v. Gore* claims. I hope that, when this need occurs, future scholarship will be able to build on the exchange of ideas between Lowenstein and me in this Symposium, just as we have built on each other's work. In this spirit, I offer the above-outlined taxonomy as a starting point from which to begin to judge the merits of these future Equal Protection claims.