BUSH V. GORE: TWENTY-FIVE YEARS LATER

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	INTRODUCTION	231
I.	THE SYMPOSIUM PROCEEDINGS	237
	A. Initial Involvement in the Post-Election Disputes	238
	B. Experiencing the 2000 Post-Election Controversies Firsthand	241
	1. Litigating Challenges to the 2000 Election	241
	2. Adjudicating Challenges to the 2000 Election	243
	3. Living Through the Litigation	246
	C. Reflections on the 2000 Election	248
II.	SYMPOSIUM CONTRIBUTIONS	254
III.	THE PATH NOT TAKEN AND THE ROAD AHEAD	260
IV.	CONCLUSION	269

INTRODUCTION

The 2000 presidential election came down to Florida. Shortly before 8:00 P.M. Eastern Time on November 7, 2000, Election Night, NBC and other major networks declared that Al Gore was projected to win Florida.[1] Because much of the Florida Panhandle was in a different time zone, however, polls hadn't closed there yet.[2] At 9:54 P.M., as unofficial results from more Florida precincts became available, CNN withdrew its call and the other networks followed soon thereafter.[3] By 2:15 A.M., the networks started calling Florida for George W. Bush, giving him a majority in the Electoral College.[4] Gore phoned him to concede the election.

As Gore drove to the Nashville War Memorial to deliver a public concession speech at 3:30 A.M., his campaign staff learned that Bush's lead in Florida had shrunk.[5] The results had tightened to the point

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1. Jim Heath Channel, *Election 2000 Florida, Florida, Florida*, YOUTUBE, at 2:48 – 3:10 (Nov. 13, 2011), https://www.youtube.com/watch?v=OOaaUackKFQ; JOAN KONNER ET AL., TELEVISION'S PERFORMANCE ON ELECTION NIGHT 2000: A REPORT FOR CNN 11–12 (Jan. 29, 2001), http://i.cnn.net/cnn/2001/ALLPOLITICS/stories/02/02/cnn.report/cnn.pdf [https://perma.cc/8FQV-GKUC].

2. KONNER, *supra* note 1, at 12.

3. *Id.* at 13; *see also* Jim Heath Channel, *supra* note 1, at 7:26 – 7:58.

4. Jim Heath Channel, *supra* note 1, at 9:04 – 9:28; *see also* KONNER, *supra* note 1, at 15-16.

5. Nancy Gibbs, *Reversal of Fortune*, TIME, Nov. 20, 2000, at 28, 39. The speech was scheduled for around 2:30 A.M. Nashville time (Central). *Id.*

where state law required an automatic recount.[6] The Gore campaign's chief of staff stopped him from going on stage to deliver his speech.[7] Shortly thereafter, Gore called Bush to withdraw his concession.[8] "As you may have noticed," he reportedly told Bush, "things have changed."[9] After a tense exchange, Bush reportedly concluded, "Well, Mr. Vice President, . . . you need to do what you have to do."[10] Shortly thereafter, the networks withdrew their predictions yet again, concluding the election was too close to call.[11]

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The U.S. Supreme Court's ruling in *Bush v. Gore* effectively determined the outcome of the 2000 presidential election.[12] It also helped raise election law to prominence as a distinct academic field,[13] cementing election administration as a key topic within its scope.[14] Ironically, within legal academia, it also appears to be among the most reviled rulings in American history.[15] It has been condemned, among other things, as "outrageous,"[16] a "black eye" of a "lawless character" for the Court,[17] and "a naked affront to the rule of law" which lay "outside the boundaries of acceptable argument."[18] We are told the ruling triggered "the deepest intellectual crisis—at least for people who profess to take the law seriously—in decades."[19] One prominent commentator proclaimed that "*Bush v. Gore* is even worse than the notorious *Plessy* [*v. Ferguson*],"[20] which upheld the constitutionality of racial segregation.[21] Another found himself "ashamed" of the opinion

6. *See* FLA. STAT. § 102.141(4) (2000).

7. Gibbs, *supra* note 5, at 39.

8. *Id*.

9. *Id*.

10. *Id*.

11. Jim Heath Channel, *supra* note 1, at 13:23 – 13:58; *see also* KONNER, *supra* note 1, at 17.

12. 531 U.S. 98 (2000) (per curiam).

13. Heather K. Gerken, *Election Law and Constitutional Law*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 25, 25 (Eugene D. Mazo ed., 2024).

14. Michael J. Pitts, *Introduction: A Symposium on the Law of Democracy*, 44 IND. L. REV. 1, 1 (2010).

15. *See, e.g.*, Mark S. Brodin, Bush v. Gore: *The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563 (2012).

16. Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 811 (2001).

17. Cass R. Sunstein, *Does the Constitution Enact the Republican Party Platform? Beyond* Bush v. Gore, *in BUSH V. GORE:* THE QUESTION OF LEGITIMACY 177, 177 (Bruce Ackerman ed., 2002).

18. Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore?, *in BUSH V. GORE:* THE QUESTION OF LEGITIMACY, *supra* note 17, at 110, 117, 119.

19. Sanford Levinson, *Return of Legal Realism*, NATION, Jan. 8, 2001, at 8.

20. Jed Rubenfeld, *Not as Bad as* Plessy. *Worse*, *in BUSH V. GORE*: THE QUESTION OF LEGITIMACY, *supra* note 17, at 20, 20–21.

21. 163 U.S. 537 (1896).

and "embarrassed" to teach it to law students because it presents a "searing and disorienting vision of a world without law."[22]

The FSU Election Law Center's[23] symposium on the twenty-fifth anniversary of *Bush v. Gore*, which this special issue of the *Florida State University Law Review* memorializes, presented the ideal opportunity to analyze and potentially reassess the controversy over the results of the 2000 presidential election. The conference brought together many of the judges, attorneys, election officials, and others who had been involved in these momentous events, along with many of the nation's leading election law scholars. The participants' firsthand accounts of their experiences lent depth and perspective to the proceedings often lacking in abstract academic analysis. The passage of time since the Court's ruling has not only allowed (some) passions to subside, but also enabled us to judge the Court's actions against subsequent developments. The symposium presented an opportunity to reconsider, six presidential elections later, whether some of the most extreme critiques of the ruling may now appear intemperate, exaggerated, or misguided.

For example, one of the Court's most controversial actions following the 2000 election was its December 9 decision to stay the statewide manual recount of undervotes that the Florida Supreme Court had ordered, pending a ruling on the merits.[24] In the 2026 case *Bost v. Illinois State Board of Elections*,[25] the Court held that candidates have Article III standing to challenge allegedly invalid election rules before the election occurs, without having to prove that those rules will likely place them at a disadvantage.[26] *Bost* declared that "[t]he democratic consequences" of waiting until after votes have been cast or counted to resolve disputes concerning their validity can be "dire."[27] Invoking Justice Scalia's concurrence defending the stay in *Bush v. Gore*, it added, "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance

22. Robert Post, *Sustaining the Premise of Legality: Learning to Live with* Bush v. Gore, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 17, at 96, 97, 100, 109.

23. *See* FLA. STAT. § 1004.421(2)(a)-(b) (2026) (establishing the FSU Election Law Center and charging it to "[c]onduct and promote rigorous, objective, nonpartisan, evidence-based research concerning important constitutional, statutory, and regulatory issues relating to election law" and to "host events to allow students, scholars, legislators, judges, election administrators, attorneys, and members of the public to learn about the electoral process and election law").

24. Bush v. Gore, 531 U.S. 1046 (2000) (per curiam) (order). For critiques of the stay, primarily on the grounds that continuing the count would not irreparably harm Bush, see Radin, *supra* note 18, at 114; Erwin Chemerinsky, *How Should We Think About* Bush v. Gore?, 34 LOY. U. CHI. L.J. 1, 12 (2002); Laurence H. Tribe, eroG v. hsuB: *Through the Looking Glass*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 17, at 39, 60–61.

25. 607 U.S. 71 (2026).

26. *Id.* at 82.

27. *Id.* at 80.

democratic stability requires."[28] *Bost* suggests that, where reasonably possible, courts should resolve substantial election-related controversies under circumstances that avoid the potential need to reject votes already cast, accepted as valid, or counted—much less to change the election's apparent result. The *Bush* stay promoted those critical goals.

Critics have likewise assailed the Court's decision to terminate the statewide manual recount after it ruled on the merits that the lack of consistent counting standards violated the Equal Protection Clause. They contend that the Court instead should have remanded the case so the Florida Supreme Court could decide whether state law would allow a new recount, conducted according to constitutionally adequate standards, to extend past the federal "safe harbor" deadline.[29] Though the U.S. Supreme Court's authority to make that determination was legitimately debatable,[30] any error may well have been harmless.[31] After *Bush*, the Florida Supreme Court itself suggested that it would not have unilaterally crafted the vote-counting standards required for conducting a new, constitutionally valid recount. It explained, "[U]pon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature."[32]

Moreover, it appears that the Legislature at the time wished to secure safe harbor status for Florida's electoral votes. On December 12, the Florida House approved a concurrent resolution to appoint the Republican slate of presidential electors, in part due to the "reasonable risk" that Congress "may not count" Florida's electoral votes because of the ongoing legal disputes.[33] The Florida Senate was poised to adopt the resolution, as well, but *Bush v. Gore* mooted the issue. Though not officially adopted, this resolution suggests the Court's decision to prioritize safe harbor status over continued ballot counting was consistent with the will of the then-current Legislature.

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28. *Id.* (quoting *Bush*, 531 U.S. at 1047 (Scalia, J., concurring)).

29. *See, e.g.*, Ronald Dworkin, *Early Responses*, *in* A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY 57, 66 (Ronald Dworkin ed., 2002).

30. *See* Dorchy v. Kansas, 264 U.S. 286, 291 (1924) (holding that, after the U.S. Supreme Court resolves a federal constitutional question, it has discretion over whether to adjudicate state-law issues that arise in crafting the appropriate remedy or instead remand to the state courts).

31. *Cf.* Fladell v. Elections Canvassing Comm'n, No. CL 00-10965 AB, 2000 WL 35531402 (Fla. 15th Cir. Ct. Nov. 20, 2000) (concluding the state's election contest law did not permit relief to extend beyond the federal safe harbor deadline), *aff'd on other grounds*, Fladell v. Palm Beach Cnty. Canvassing Bd., 772 So. 2d 1240, 1242 (Fla. 2000) (per curiam).

32. Gore v. Harris, 773 So. 2d 524, 526 (Fla. 2000) (per curiam).

33. H.R. Con. Res. 1-A, 2000A Leg., Spec. Sess. (Fla. 2000) [https://perma.cc/8FKV-3A62].

Additionally, the 2020 election presents a stark reminder of both the dangers of allowing controversies over a presidential election's results to fester and the potential risks of relying on Congress to resolve them. And that was not the only election in which delays and uncertainty triggered a risk of violence. In the Election of 1800, for example, when Thomas Jefferson and Aaron Burr tied in the Electoral College and the U.S. House of Representatives proved repeatedly unable to choose between them for President, "Republicans spoke seriously about taking arms against the Federalists if they withheld the presidency from Jefferson. . . . [T]he Republican governors of Pennsylvania and Virginia put their state militias on alert in case Jefferson should not be chosen."[34] Historian Sean Wilentz relates that "rival groups of unofficial Republican and Federalist militia had reportedly begun to drill, in preparation for a possible civil war."[35]

Similarly, following the Hayes-Tilden Election of 1876, disputes over competing slates of electors from several states dragged on for months in the shadow of a Congress where each chamber was controlled by a different political party. "The gravest danger was the possibility that, when [Inauguration Day] arrived, there would be two separate inaugurations and thus two competing claims to the office of the presidency . . . . Some generals in the army were prepared to side with Tilden, and there were state militias that could be mobilized to support the Democrats."[36] Critics of the *Bush* Court's efforts to bring the 2000 election to a decisive close may have been taking the stability of our political system too much for granted.

Furthermore, as it was, the 36-day delay in ascertaining the President-Elect also jeopardized national security by impeding the presidential transition. The 9/11 Commission which studied the deadly terrorist attacks on the World Trade Center and Pentagon in September 2001 would later conclude, "[T]his loss of time hampered the new administration in identifying, recruiting, clearing, and obtaining Senate confirmation of key appointees."[37] Allowing the contest to drag on past December 12 would have exacerbated these delays and hindered the transition even further.

Part I of this Article shares symposium participants' stories about how they came to be involved in the dispute over the 2000 election,

34. Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1987 n.115, 1988 (1999); *see also* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 25 (2020).

35. SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 93 (2005).

36. Edward B. Foley, *Virtue Over Party: Samuel Randall's Electoral Heroism and Its Continuing Importance*, 3 U.C. IRVINE L. REV. 475, 492 (2013); *see also* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 248 (2005).

37. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, § 6.4, at 198 (July 22, 2004).

anecdotes that arose in the course of that historic event, and personal reflections on the controversy. The discussion ranged from preparing for oral arguments in the U.S. Supreme Court to the challenges of finding barber shops on short notice in Tallahassee. The speakers shared their experiences with Florida courts rushing to adjudicate election-related cases with extraordinary speed, pausing only for the FSU-UF football game in Tallahassee. While many of the speakers continued to disagree on the underlying legal issues, they consistently complimented the good faith and professionalism of everyone involved, political ally and opponent alike.

Part II presents an overview of the articles being published in this issue in conjunction with the symposium. Part III turns to parallel federal litigation concerning the 2000 presidential election—*Siegel v. LePore*[38] and *Touchston v. McDermott*[39]—which presented the opportunity for Florida voters to have the best of both worlds: manual recounts conducted according to uniform, objective, constitutionally valid standards, as well as safe harbor status for the state's electoral votes. The U.S. Court of Appeals for the Eleventh Circuit declined to reach the merits of the plaintiffs' constitutional challenges, however, reasoning that state courts could adjudicate the validity of the manual recounts upon their completion.

The Eleventh Circuit's approach is in tension with the *Bost* Court's recognition that requiring a candidate to participate in an allegedly illegal electoral process is judicially cognizable harm.[40] Its ruling also seems inconsistent with the judiciary's application of laches principles in election cases.[41] Laches generally channels disputes to pre-election proceedings in order to avoid putting courts in the position of setting aside votes that were apparently legal at the time they were cast or changing an election's apparent results. By granting the Bush campaign's request for interim relief in mid-November based on the very Equal Protection issues at the heart of *Bush v. Gore*,[42] the Eleventh Circuit could have ensured that the countywide manual recounts were conducted properly prior to certification. Such a ruling also could have led to the adoption of consistent ballot-counting rules to govern any later statewide recount, allowing it to be finished by December 12.

The FSU Election Law Center's symposium on *Bush v. Gore*'s twenty-fifth anniversary offered the rare opportunity to hear firsthand from participants in the disputes surrounding the 2000 election. It is hoped that the proceedings, as reflected in both the videos and this

38. 234 F.3d 1163 (11th Cir. 2000) (en banc).

39. 234 F.3d 1133 (11th Cir. 2000) (en banc).

40. Bost v. Ill. State Bd. of Elections, 607 U.S. 71, 77 (2026).

41. *See infra* notes 280–81 and accompanying text.

42. *Cf.* Touchston v. McDermott, 234 F.3d 1130 (11th Cir. 2000) (en banc) (per curiam); Siegel v. LePore, 234 F.3d 1162 (11th Cir. 2000) (en banc) (mem.).

Article's distillation of them, provide new depth to the historical record and, potentially, shed a more positive light on the events.

I. THE SYMPOSIUM PROCEEDINGS

The FSU Election Law Center's symposium on the twenty-fifth anniversary of *Bush v. Gore* was a unique chance to hear firsthand about the personal experiences of many of the key players in the controversy over the 2000 presidential election. Videos of the presentations are available on the Center's website[43] and YouTube.[44]

The joint keynote address was one of the symposium's highlights. The attorneys who argued *Bush v. Gore* in the U.S. Supreme Court, Theodore B. Olson and David Boies, were scheduled to serve as keynote speakers. Olson tragically passed away a few months before the conference, however. The Bush campaign's national counsel, Ben Ginsberg, graciously agreed to join Boies. Ginsberg described Olson as "a profound influence . . . as a friend, as a mentor, as a role model," noting that Olson "was the first person we called when we started to form a legal team . . . in the days after the election."[45]

The symposium also featured a lunchtime presentation from Florida Secretary of State Cord Byrd who explained how, in the years after *Bush v. Gore*, Florida became "the gold standard in election administration."[46] Secretary Byrd mentioned his "very small role" in the 2000 election as a "young lawyer" serving as a poll watcher in Palm Beach County.[47] He recalled, "On Election Day in 2000, I spent twelve hours at a polling place watching people vote."[48]

This Part begins by recounting participants' stories of how they first came to be involved in the disputes over the 2000 election, focusing on how the campaigns assembled their respective legal teams. It next discusses the participants' personal experiences throughout the post-election controversies as election administrators, litigators, and even

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43. *Election Law Center Conference: 25th Anniversary of Bush v. Gore*, FLA. ST. U. (Feb. 11, 2025), https://law.fsu.edu/academics/election-law-center/election-law-center-recent-upcoming-events [https://perma.cc/3UAB-ZTPX].

44. FSU College of Law, Bush v. Gore *Conference*, YOUTUBE, https://www.youtube.com/playlist?list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k.

45. FSU College of Law, Bush v. Gore – *Keynote Address from David Boies and Ben Ginsberg*, YOUTUBE, at 23:46 – 24:10 (July 10, 2025) [hereinafter *Keynote Address*] (statement of Benjamin Ginsberg), https://www.youtube.com/watch?v=IWffN888vRU&list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k&index=5.

46. FSU College of Law, Bush v. Gore – *Lunch and Remarks by Florida Secretary of State Cord Byrd*, YOUTUBE, at 5:22 – 5:24 (July 10, 2025) [hereinafter *Byrd Presentation*] (statement of Fla. Sec'y of State Cord Byrd), https://www.youtube.com/watch?v=hxZvGRgpW6w&list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k&index=8.

47. *Id.* at 1:19 – 1:34.

48. *Id.* at 1:34 – 1:48.

judges. It recounts both amusing anecdotes and the disturbing threats of violence suffered by many of the people involved. This Part concludes by canvassing the speakers' more general perceptions about the integrity and professionalism of everyone involved in the process, the ongoing significance of *Bush v. Gore*, and the case's importance as an example of the peaceful transfer of power in American democracy.

A. Initial Involvement in the Post-Election Disputes

Many of the symposium's participants discussed how they first learned about, or came to be involved with, the controversies, recounts, and litigation which ultimately culminated in *Bush v. Gore*. Mitch Berger, senior counsel and advisor to the Gore campaign, explained that he started Election Day "in Fort Lauderdale with a phone call from Les Alexander, who owned the [Houston Rockets] . . . . A very intelligent man worth several hundreds of millions of dollars, probably billions, who told me he just voted for Pat Buchanan."[49] At 6:50 P.M. that evening, Berger flew to Nashville because Gore's Chief of Staff had told him Gore was going to win.[50] Upon landing, he learned that Gore had not, in fact, clinched the Presidency. Berger returned to Florida "on a private plane given to us by a donor," landing "in Broward County by four o'clock [the next] morning."[51]

Florida Governor Jeb Bush's Chief of Staff, Sally Bradshaw, recounted that she "literally was barefoot and pregnant" in her pajamas on Election Night when the Governor called her about the media's decision to declare that Gore had won Florida even though polls remained open in the Panhandle.[52] A few hours later, at one o'clock in the morning, the Governor called again to ask where Florida Secretary of State Katherine Harris was. Bradshaw related that, after making inquiries, she "called Governor Bush back and said, '[T]he Secretary of State's asleep.' I won't tell you the expletives that came over the phone, but the gist of what he said to me was that somebody needs to wake her up."[53] Bradshaw had planned to start her maternity leave on the Friday after the election; "obviously that was off the table when we found out" about the initial results.[54]

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49. FSU College of Law, Bush v. Gore – *State Litigation Panel*, YOUTUBE, at 3:06 – 3:32 (July 10, 2025) [hereinafter *State Litigation Panel*] (statement of Mitchell W. Berger), https://www.youtube.com/watch?v=k-mqx5gPP2k&list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k&index=3.

50. *Id*. at 4:00 – 4:54.

51. *Id*.

52. FSU College of Law, Bush v. Gore – *State and County Officials Panel*, YOUTUBE, at 23:27 – 24:02 (July 10, 2025) [hereinafter *State and County Officials Panel*] (statement of Sally Bradshaw), https://www.youtube.com/watch?v=pEjbmhqhGkw&list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k&index=2.

53. *Id*. at 24:44 – 25:35.

54. *Id.* at 24:28 – 24:39.

Florida Deputy Attorney General Paul Hancock had planned to return to his home state of Ohio the day after the election.[55] He recounted, "My wife woke me I guess very early . . . and said 'You better get over to [Attorney General] Butterworth's house. The media is all there. They're in the backyard. They're all interviewing him and he's saying something about a recount. There's going to be some type of recount, and everybody's confused.' "[56]

Deborah Kearney, General Counsel of the Florida Department of State, recalled it was "quite a shock" when her husband showed her the newspaper that morning.[57] He said, "I think you probably need to get up."[58] When Kearney arrived at her office, the Director of the Division of Elections, L. Clayton "Clay" Roberts, handed her a large pile of phone messages from media outlets around the world.[59] Florida Supreme Court Justice Major Best Harding similarly said that when he retrieved his morning paper, his neighbor held up her own newspaper, saying, "It looks like you're going to be determining who the next President of the United States is."[60] He replied, "Oh, no, we're not going to be involved in that."[61]

Both campaigns immediately expanded their legal teams, recognizing that local experience and relationships with judges were just as important as substantive legal knowledge. Bradshaw noted that the Bush campaign focused on finding lawyers "who locally would be known by judges" to "supplement" their team.[62] She explained,

> Both sides were smart enough to realize we can't just bring in attorneys . . . at the federal level from out of state who may be constitutional law experts. So much of this is relationship-driven, and so having people who knew local judges, who knew the process, who could navigate that process, was really important.[63]

Bradshaw also discussed the contingencies that can affect who is chosen to participate in such momentous litigation:

> I remember saying, you know, I've had one deposition in my life, it was in an election case, in Governor Bush's '98 campaign and Barry Richard was my attorney. And he seemed to know a little bit about election law . . . . Maybe Barry would be good to do that. He made me feel much

55. *Id.* at 15:04 – 15:17 (statement of Deputy Att'y Gen. Paul Hancock).

56. *Id.* at 15:22 – 15:37.

57. *Id.* at 9:02 – 9:15 (statement of Deborah Kearney).

58. *Id.*

59. *Id.* at 9:25 – 9:50.

60. *State Litigation Panel*, *supra* note 49, at 15:35 – 16:04 (statement of Justice Major Best Harding).

61. *Id.*

62. *State and County Officials Panel*, *supra* note 52, at 1:09:44 – 1:10:10 (statement of Sally Bradshaw).

63. *Id.* at 1:10:39 – 1:11:01.

> more comfortable in my deposition. And Barry Richard got a call the next day. And the rest was sort of history.[64]

The Bush recount team would ultimately include "one-third of the current Supreme Court, future cabinet officials, Senators," and many others who have gone on to successful legal careers.[65]

Berger likewise focused on hiring attorneys with local connections for Gore's legal team. "It is important you know people when you're trying these cases because we went into Sander Sauls' courtroom [for the election contest litigation], we went back to his chambers, he wasn't going to try the case until January. We then hired Dino Kitchens and we got a trial over the weekend."[66] Between the two campaigns, "[l]awyers from all over the country came to Tallahassee."[67]

David Boies, national counsel for the Gore campaign, explained that "early on," there was "some pressure not just from the other side, but from the public . . . to stop" contesting the election results.[68] He recounted,

> A day or two after the election, there was a *New York Times* editorial urging Gore to abandon it. I think that once we actually started litigation and started telling our story, there was more of a willingness to let it play out. . . . [T]he pressure to end it actually declined from where it was.[69]

Once the case reached the U.S. Supreme Court, Hancock advised Attorney General Butterworth to hire a Supreme Court litigator to represent the Attorney General's office.[70] Hancock asked former U.S. Solicitor General Drew S. Days III for advice on whom to retain. Days responded that, especially due to the limited timeframe for a decision, the Court "doesn't need lawyers from tall buildings to tell them what the Constitution means. They need to know what's going on in Florida . . . [Y]ou would be the best person . . . ."[71] And so rather than hiring an outside Supreme Court specialist, Hancock argued *Bush v. Palm Beach County Canvassing Board*[72] for the Attorney General and served as his counsel of record in *Bush v. Gore*.[73]

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64. *Id.* at 1:10:12 – 1:10:38.

65. *Keynote Address*, *supra* note 45, at 27:58 – 28:25 (statement of Benjamin Ginsberg).

66. *State Litigation Panel*, *supra* note 49, at 35:10 – 35:29 (statement of Mitchell W. Berger).

67. *State and County Officials Panel*, *supra* note 52, at 28:57 – 29:12 (statement of Fla. House of Representatives Speaker John Thrasher).

68. *Keynote Address*, *supra* note 45, at 59:37 – 1:00:23 (statement of David Boies).

69. *Id.*

70. *Id.* at 1:07:32 – 1:09:32 (statement of Deputy Att'y Gen. Paul Hancock).

71. *Id.*

72. 531 U.S. 70 (2000) (per curiam).

73. 531 U.S. 98 (2000) (per curiam).

B. Experiencing the 2000 Post-Election Controversies Firsthand

1. Litigating Challenges to the 2000 Election

Several of the speakers emphasized the rapid pace at which events unfolded between Election Day and the Supreme Court's final ruling on December 12. Florida House Speaker John Thrasher, whose term ended two weeks after Election Day, explained, "[I]t was uncharted territory. . . . [I]t was a day-to-day event. Everything changed just about every other day. Or every day, some days."[74] Deputy Attorney General Paul Hancock added,

> It's very difficult . . . that we had to do so much . . . in such a short period of time . . . . These were monumental issues, they were difficult issues, and we had to not only decide ourselves what our position was, but then we had to teach courts what we thought the right outcome was. . . . And we didn't have much time to do it, and we didn't have many pages to do it.[75]

Speaker Thrasher was one of the only symposium participants to have actually witnessed ballots being recounted in several counties. He commented, "Whether they were accurately being counted or not, it was very, very hard to tell."[76] Speaker Thrasher elaborated:

> I went to Palm Beach and it was crazy. . . . People all in this big room and they were all looking at their ballots. . . . If you see that, you really wondered then, how in the world can we ever count or not count some of those ballots. That, to me, was the impression I came away with, and obviously we had different standards for different counties and that was a real problem.[77]

Litigators on all sides emphasized "just how crazy it was to work in this situation."[78] Kearney, for example, explained that the Department of State's Office of General Counsel consisted of only four people including an administrative assistant, yet was involved in fifty-six post-election cases.[79] In many of those cases, procedural requirements like service of process "just went out the window."[80] Courts would e-mail her office to notify her that it was "involved in a case."[81] Other times, "We found out about hearings from the TV that was on in the conference room. 'Oh my God there's a hearing across the street' and

74. *State and County Officials Panel*, *supra* note 52, at 30:41 – 31:00 (statement of Fla. House of Representatives Speaker John Thrasher).

75. *Id.* at 1:12:48 – 1:13:17 (statement of Deputy Att'y Gen. Paul Hancock).

76. *Id.* at 4:56 – 5:10, 5:15 – 5:24 (statement of Fla. House of Representatives Speaker John Thrasher).

77. *Id.* at 1:02:15 – 1:02:44.

78. *Id.* at 55:31 – 55:37 (statement of Deborah Kearney).

79. *Id.* at 10:00 – 10:25.

80. *Id.* at 10:25 – 10:32.

81. *Id.* at 10:34 – 10:55.

we went running over."[82] At one point, the office had briefs due in four different courts on the same day.[83] Kearney focused on ensuring the Department's filings were consistent with each other and accurately reflected the Department's policy.[84]

The experiences of Palm Beach County Supervisor of Elections Theresa LePore were similar to Kearney's. LePore recounted, "We were watching CNN to see what lawsuits were being filed because by the time we got the paperwork there was already a hearing. So [we] were watching TV to see who was doing what."[85] Her office was sued over fifty times concerning the election and won every case.[86]

Ginsberg joked that the Bush recount team "set the highest average age for lawyers pulling all-nighters and doing their own cite checks in jurisprudential history."[87] The team's overall strategic leader, former U.S. Secretary of State James A. Baker III, "threw the tightest Nerf football in all of our indoor games."[88] Ginsberg observed that, over the course of the controversy, "both sides took some positions that were in the best interests of their clients, but perhaps contrary to their parties' traditional responses."[89]

Boies explained that, throughout the initial protest phase before election results were certified, the Gore campaign neither sued nor intervened in litigation to seek the exclusion of any ballots.[90] Berger elaborated that he "tried to tackle lawyers at the courthouse step not to file" a challenge to the Palm Beach County butterfly ballot while the Gore campaign was pursuing manual recounts in four counties.[91] "I had Warren Christopher on the phone with local lawyers in Palm Beach County begging them not to file that case."[92] Boies mentioned that attorneys acting independently of the campaign challenged absentee ballots in Seminole County, which skewed Republican, because the Supervisor of Elections had allowed Republican Party personnel to add missing information to numerous incomplete absentee ballot application forms.[93] Gore "felt very strongly as a matter of principle that he was not prepared to argue against the intent of the

82. *Id.* at 55:41 – 55:51.

83. *Id.* at 56:23 – 56:28.

84. *Id.* at 56:31 – 56:44.

85. *Id.* at 1:05:42 – 1:05:55 (statement of Palm Beach Cnty. Supervisor of Elections Theresa LePore).

86. *Id.* at 37:14 – 37:22.

87. *Keynote Address*, *supra* note 45, at 26:00 – 26:10 (statement of Benjamin Ginsberg).

88. *Id.* at 27:23 – 27:28.

89. *Id.* at 30:12 – 30:24.

90. *Id.* at 50:31 – 52:12 (statement of David Boies).

91. *State Litigation Panel*, *supra* note 49, at 45:35 – 46:00 (statement of Mitchell W. Berger).

92. *Id.*

93. *Keynote Address*, *supra* note 45, at 50:37 – 52:16 (statement of David Boies).

voter" by challenging technically questionable ballots where the voter's intent was clear.[94] While the case had been filed by "rogue lawyers in one sense," Boies commented, "some of us were rooting for them."[95]

2. Adjudicating Challenges to the 2000 Election

Judge John Antoon II had been a federal district judge in the Middle District of Florida for "just a few months" when, at 3:51 P.M. on November 13, he was assigned *Touchston v. McDermott*.[96] Republican voters were challenging the initial hand recounts Gore had requested in four counties.[97] Only two hours earlier,[98] Judge Donald M. Middlebrooks of the Southern District of Florida had denied preliminary relief in an almost identical case, *Siegel v. LePore*, filed by the Bush campaign.[99] Judge Antoon was "shocked" by the lawsuit and "knew right away that [he] had to do something quickly," though whatever he did "would be scrutinized by the appellate court."[100] He recounted, "I don't remember what time we went home, but it was well after midnight. We had ordered pizza for the clerks, pizza and black coffee. I still have that taste in my mouth. It wasn't good."[101]

Judge Antoon denied the plaintiffs' motion for a temporary restraining order and preliminary injunction to suspend the initial manual recounts. Much of his opinion focused on the lack of evidence the plaintiffs provided to prove that counties were applying inconsistent counting standards. However, he explained that, even if the plaintiffs had submitted sworn declarations or videos proving that inconsistencies existed, he still would have reached the same result because his "focus really was on the general principle of federalism, that [federal] courts shouldn't get involved with state elections unless it's the last resort. So there was this 'hands off' attitude . . . . There was

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94. *Id.*; *see also State Litigation Panel*, *supra* note 49, at 48:35 – 48:41, 48:51 – 48:57 (statement of Mitchell W. Berger) ("[The Gore legal team was] under strict orders not to start any litigation or intervene in anything. . . . The only time we sued was in the contest after the election was certified.").

95. *Keynote Address*, *supra* note 45, at 50:37 – 52:16 (statement of David Boies).

96. FSU College of Law, *Parallel Federal Litigation Panel*, YOUTUBE, at 5:38 – 5:52 (July 10, 2025) [hereinafter *Parallel Federal Litigation Panel*] (statement of Judge John Antoon II) (citing *Touchston v. McDermott*, 120 F. Supp. 2d 1055 (M.D. Fla. 2000), *aff'd*, 234 F.3d 1133 (11th Cir. 2000) (en banc)), https://www.youtube.com/watch?v=FRUM5ASLhqQ&list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k&index=4.

97. *Id.*

98. *Id.* at 9:01 – 9:33.

99. 120 F. Supp. 2d 1041 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000) (en banc).

100. *Parallel Federal Litigation Panel*, *supra* note 96, at 5:53 – 6:09 (statement of Judge John Antoon II).

101. *Id.* at 44:09 – 44:24.

the idea that, 'how could counting dilute a vote rather than strengthen the right to vote.' "[102]

Siegel and *Touchston* made their way to the U.S. Court of Appeals for the Eleventh Circuit while the circuit's judicial conference was occurring at the Ritz-Carlton on Amelia Island, Florida.[103] Professor Samuel Issacharoff of NYU Law School, who was scheduled to speak at the conference recalled:

> I'm introduced. I walk to the podium. As soon as I get to the podium, every circuit judge in the room stands up and walks out, leaving the district judges, the bankruptcy judges, the magistrate judges . . . . I say, "Usually people don't walk out until I start to speak." What was going on? They were going into the meeting next door to meet en banc to decide whether to issue [a] stay. Nobody in the room had any idea what was going on.[104]

When Judge Joel Dubina of the Eleventh Circuit read the complaints in *Siegel* and *Touchston*, he concluded, "These two cases can decide who the next President of the United States is."[105] He recommended to the Chief Judge, R. Lanier Anderson III, that the court proceed directly to an en banc hearing rather than allowing three-judge panels to hear the appeals.[106]

> The clock is ticking and the American people have been very patient up to this point. But we need to get these cases decided, and if we go the regular three-judge route where we sit in panels of three, somebody's going to hold the mandate and these cases are going to end up going en banc. . . . We took a vote the next morning, and it was unanimous to take these two cases en banc.[107]

He recalled that, the night before the en banc oral argument, Judge Gerald Bard Tjoflat told him over dinner, " '[T]omorrow night at this time, you're gonna find out who on this court you want in a foxhole with you.' And you know what, he was right."[108]

Judge Tjoflat shared his concerns about the counties' manual recounts. The "unbridled discretion" which county election officials possessed to determine whether particular ballots constituted valid

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102. *Id*. at 45:49 – 46:38.

103. FSU College of Law, Bush v. Gore – *Remedies in Election Cases / Constitutional Questions Concerning the Electoral College*, YOUTUBE, at 31:27 – 31:54 (Sept. 21, 2026) [hereinafter *Remedies and Electoral College Panel*] (statement of Prof. Samuel Issacharoff), https://www.youtube.com/watch?v=qvl-7vbn4Gk&list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k&index=9; *see also Parallel Federal Litigation Panel*, *supra* note 96, at 24:49 – 25:17 (statement of Judge Gerald Bard Tjoflat).

104. *Remedies and Electoral College Panel*, *supra* note 103, at 33:43 – 34:29 (statement of Prof. Samuel Issacharoff).

105. *Parallel Federal Litigation Panel*, *supra* note 96, at 15:43 – 15:50 (statement of Judge Joel Dubina); *see also id*. at 1:24:24 – 1:24:42.

106. *Id.* at 16:18 – 16:34.

107. *Id*. at 16:56 – 17:17, 17:58 – 18:04.

108. *Id*. at 1:18:21 – 1:19:06.

votes brought to mind laws from the 1960s which had been held unconstitutional because they gave local officials complete and standardless discretion to decide whether to issue permits for marches or protests.[109] He further explained that allowing local officials to count votes which had been cast improperly "depreciated the votes of those who voted properly . . . lessen[ing] the value" of such properly cast votes.[110] As Judge Dubina added, Eleventh Circuit precedent established that "you can't change the rules in the middle of the game, because [doing so] disenfranchise[s] all of those people who voted by the rules. And that's what I saw in these two cases that we took en banc."[111]

Though Judge Tjoflat could not bring a majority of the Eleventh Circuit around to his side, he recognized why the Supreme Court did not grant certiorari. "If they took us first and decided our case, they're sending a message to Florida you can't handle this."[112] Judge Antoon believed it "would have been cleaner and caused less disruption and been a better result, a better approach from the perspective of the principles of federalism" for the Supreme Court to adjudicate the Equal Protection issue in the context of the federal cases, rather than waiting until December and granting certiorari in *Bush v. Gore*.[113]

In the state litigation, Circuit Judge Terry P. Lewis had presided over both the initial challenge to Secretary Harris's refusal to accept counties' manual recount results after the statutory deadline, and the statewide recount later ordered by the Florida Supreme Court. He had rejected Secretary Harris's interpretation of the deadline because "it's an abdication of your discretion to say what you're going to do ahead of time, which she did."[114] He later noted that, had he developed a uniform standard for counting ballots, "I would've used my wife's suggestion, her Johnnie Cochran moment was, 'If in doubt, toss it out.' "[115]

Florida Supreme Court Justice Harry Lee Anstead recalled the Justices would have been interested in additional evidence from "the company that made these [voting] machines" concerning their views on the proper way to count rejected ballots.[116] He also offered additional insight into the majority's decision to order a statewide recount:

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109. *Id*. at 26:33 – 28:39 (statement of Judge Gerald Bard Tjoflat).

110. *Id*. at 29:18 – 29:48, 30:01 – 30:32.

111. *Id*. at 21:40 – 22:02 (statement of Judge Joel Dubina).

112. *Id*. at 1:01:42 – 1:01:51 (statement of Judge Gerald Bard Tjoflat).

113. *Id*. at 1:05:50 – 1:06:15 (statement of Judge John Antoon II).

114. *State Litigation Panel*, *supra* note 49, at 31:47 – 31:59 (statement of Judge Terry P. Lewis).

115. *Id.* at 54:44 – 54:57.

116. *Id.* at 33:04 – 33:35, 34:09 – 34:55 (statement of Justice Harry Lee Anstead).

> If you really can demonstrate or have demonstrated this serious flaw in this kind of voting, the machine-card voting, would it really be fair for us to only order a limited recount to the counties that you're asking us to order recounts in. Because if this is a generic issue with this manner of voting, why wouldn't it mean that we would order recounts for all these machines?[117]

The U.S. Supreme Court's stay sent a strong message to both the litigators who would be appearing before it two days later to argue the case and the Florida Supreme Court Justices whose ruling was being reviewed. Justice Anstead related, "I think probably all of us were stunned" by the stay.[118] It "had a reverberating effect on the court in terms of . . . [t]he Supreme Court has told us it's all over. We know where we are in the pecking order."[119]

Boies added,

> Once the stay came down, it was pretty clear we were behind. . . . We obviously had to change somebody's mind . . . in a context where it would have been extremely embarrassing to have stopped the recount, taken it beyond the safe harbor, and then say "never mind . . . ." I think the realistic assessment was that we had an uphill battle.[120]

3. Living Through the Litigation

Many of the participants' memories were humorous and even heartwarming. As General Counsel Kearney described, the lobby outside the Secretary of State's office "was just deluged with flowers and teddy bears and stuffed animals. You couldn't walk through the lobby. Every evening, some staff would go to nursing homes and assisted living places and deliver flowers, and the next day it would fill up again."[121] One evening, Secretary Harris assisted with those deliveries. A nurse at the assisted living facility told Harris's staff, "We just got a call from one of the residents' sons. He said, 'Someone needs to go check on my mother. I was just on the phone with her, and she told me that Katherine Harris just delivered some flowers to her.' "[122]

At one point during the controversy, someone gave Secretary Harris a goldfish. She named it Chad.[123] Secretary Harris fed Chad and spoke to him every morning. One morning when the staff arrived, however,

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117. *Id.* at 56:22 – 57:04.

118. *Id.* at 44:05 – 45:12.

119. *Id.* at 44:40 – 44:56.

120. *Keynote Address*, *supra* note 45, at 1:11:38 – 1:12:27 (statement of David Boies).

121. *State and County Officials Panel*, *supra* note 52, at 32:29 – 32:49 (statement of Deborah Kearney).

122. *Id.* at 32:50 – 33:30.

123. *Id.* at 33:30 – 34:20.

Chad was "belly up."[124] They flushed him down the toilet and replaced him; the Secretary "never knew the difference."[125]

The breakneck pace of the dispute also posed unique challenges. For example, Justice Harding recounted that the Florida Supreme Court's clerk, Tom Hall, had to send the case record for *Bush v. Gore* to the U.S. Supreme Court for oral arguments the following day. "[H]e could not find a FedEx or anyone to take the record as he would normally do. So finally he got on a state plane and flew to Washington, gave the record to the clerk there, and then flew back to Tallahassee."[126]

Throughout this time, the only thing in Tallahassee as important as the election was football. Deputy Attorney General Hancock explained:

> There was one interlude there that was kind of an interruption of the whole controversy about who was going to be the leader of the free world because Florida State and Florida had a football game scheduled in Tallahassee that Saturday. I don't know if it was a coincidence or not, but the Supreme Court set a briefing schedule providing that the briefs were all filed before kickoff.[127]

Hancock added that, because most of Tallahassee's hotels were fully booked for the game, many of the participants in the election controversy had to "leave their room[s] and find a place to stay for the weekend, and then come back on Sunday night so we could resume the fight to see who would be the leader of the free world."[128] Speaker Thrasher agreed, "In Tallahassee, FSU-Florida football, I don't care what the heck's going on, it's the most important thing going on at that particular weekend. And we did kick the Gators' butts that weekend."[129]

Secretary Baker contacted Bradshaw to complain that he couldn't find a hotel room in Tallahassee. She commented, "I can look in the mirror with no guilt for having helped Jim Baker find a hotel room."[130] After the election, she had to reimburse the State of Florida $14.25 for calls she had made relating to the election on state phones.[131]

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124. *Id.*

125. *Id.*

126. *State Litigation Panel*, *supra* note 49, at 16:57 – 17:31 (statement of Justice Major Best Harding).

127. *State and County Officials Panel*, *supra* note 52, at 20:13 – 20:34 (statement of Deputy Att'y Gen. Paul Hancock).

128. *Id.* at 20:43 – 21:04.

129. *Id.* at 29:12 – 29:26 (statement of Fla. House of Representatives Speaker John Thrasher).

130. *Id.* at 2:50 – 3:04 (statement of Sally Bradshaw).

131. *Id.* at 2:29 – 2:48.

Not all aspects of the experience were positive, however. Bradshaw explained that the Governor's office received approximately 11,000 phone calls over a month "that Jeb Bush was a horrible person and that he was trying to steal the election. The amount of time it took just to field those calls, respond to those calls, work on those calls was very challenging . . . ."[132] Justice Harding recounted that the Florida Supreme Court "had to get new telephone connections between the Justices' offices and the clerk's office because [the clerk's] phones were being constantly . . . taken" by outside callers.[133]

One harrowing theme running through many participants' accounts was the constant threat of violence that neither the public nor academic commentators may have fully recognized. Ginsberg recalled, "We had our share of death threats, harassment, [and] denial of service on phones."[134] Berger echoed this sentiment, revealing, "Personally I had over a hundred death threats. My kids had to have people watch them go to school. . . . David [Boies] and I had to have armed guards take us to court."[135]

Palm Beach County Supervisor of Elections Theresa LePore candidly admitted that she had "not thought about the 2000 election over the last twenty-five years until somebody brings it up. It was my time in hell."[136] The day after the election, the county sheriff visited Supervisor LePore to warn her that his office had intercepted death threats against her.[137] Sheriff's deputies escorted her back and forth to work and guarded her home around the clock.[138] Due to the huge crowds of protestors at her office, "you could hardly move. . . . I don't even remember walking on the floor. [The sheriffs] just kind of moved me into my office."[139] Snipers were stationed atop nearby buildings and the windows of her office, which was located on the first floor, were covered in brown paper because people kept pounding on them.[140]

C. Reflections on the 2000 Election

Another common theme running through most of the participants' presentations was the good faith of everyone involved. Boies, for example, remarked, "One of the things that I will always appreciate

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132. *Id.* at 51:53 – 52:37.

133. *State Litigation Panel*, *supra* note 49, at 18:36 – 18:58 (statement of Justice Major Best Harding).

134. *Keynote Address*, *supra* note 45, at 44:05 – 44:15 (statement of Benjamin Ginsberg).

135. *State Litigation Panel*, *supra* note 49, at 1:11:09 – 1:11:15, 1:11:22 – 1:11:26 (statement of Mitchell W. Berger).

136. *State and County Officials Panel*, *supra* note 52, at 12:45 – 13:00 (statement of Supervisor Theresa LePore).

137. *Id.* at 34:35 – 35:41.

138. *Id.*

139. *Id.* at 35:58 – 36:24.

140. *Id.* at 36:25 – 36:43.

about *Bush v. Gore* is the professionalism and integrity that each side exhibited."[141]

Bradshaw acknowledged it was "awkward" for her boss to serve as Governor during the recount when his "brother just happen[ed] to be one of the contenders for the presidency."[142] Noting that the press accused the Governor's office of colluding in the recount,[143] she said that his staff had "walled [them]selves off from the day-to-day legal strategy, political strategy," though "it was impossible . . . to be unaware . . . or for the Governor to not want to speak to his brother who he loved to say 'Hang in there.' "[144] Some staff who "could not make that separation" between political and government work "went off the state payroll and went to the state party."[145]

Kearney explained that, unlike the candidates and political parties, the Department of State's "purpose . . . was to help effectuate as good [of an] election as was possible. . . . We tried to interpret the statutes and have as good [of an] election with all the statutory guidelines as we could."[146] The office "was as nonpartisan as we could be" and had both Democratic and Republican employees.[147] "Katherine [Harris] said from the very beginning . . . 'I want to be able to sleep with myself and wake up every morning and know we did the right thing.' "[148] The Department's legal opinions construing counties' authority to conduct manual recounts and the deadline for such recounts[149] were drafted and issued by the Division of Elections, not the Secretary of State herself.[150] The Division had its own lawyers who did not answer to Kearney.[151]

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141. *Keynote Address*, *supra* note 45, at 21:41 – 21:54 (statement of David Boies).

142. *State and County Officials Panel*, *supra* note 52, at 1:41 – 1:52 (statement of Sally Bradshaw).

143. *Id.* at 2:24 – 2:28.

144. *Id.* at 1:53 – 2:14.

145. *Id.* at 53:02 – 53:11.

146. *Id.* at 7:47 – 8:26 (statement of Deborah Kearney).

147. *Id.* at 39:04 – 39:26.

148. *Id.* at 39:35 – 39:46.

149. Fla. Dep't of State, Div. of Elections, *Deadline for Certification on County Results*, D.E. Adv. Op. 00-10, at 1 (Nov. 13, 2000) [https://perma.cc/BN4T-Y5KJ]; *see also* Fla. Dep't of State, Div. of Elections, *Definitions of Errors in Vote Tabulation*, D.E. Adv. Op. 00-11, at 1 (Nov. 13, 2000) [https://perma.cc/N293-2KHD]; Fla. Dep't of State, Div. of Elections, *Manual Recount Procedures*, D.E. Adv. Op. 00-12, at 1 (Nov. 13, 2000) [https://perma.cc/78VD-HTLY]; Fla. Dep't of State, Div. of Elections, *Manual Recount Procedures and Partial Certification of County Returns*, D.E. Adv. Op. 00-13, at 1 (Nov. 13, 2000), https://opinions.dos.state.fl.us/searchable/pdf/2000/de0013.pdf [https://perma.cc/MC7A-U5PR].

150. *State and County Officials Panel*, *supra* note 52, at 39:59 – 40:34 (statement of Deborah Kearney).

151. *Id.*

Deputy Attorney General Hancock similarly emphasized his office's neutrality in the election:

> People were looking for any sign of favoritism as we went through this. One thing that some people picked up on—when I argued the case before the Florida Supreme Court, I wore a brown suit. And some people wrote that that indicated support for Gore because Gore was known for wearing brown. The truth was when I went to Tallahassee on November 13th, that was the only suit I brought. . . . I never went home, so it was the only thing I had to wear.[152]

Supervisor LePore echoed these comments, stating, "Myself and my staff were nonpartisan. We didn't care who won. We just wanted to get it over with."[153] Her discussion of Palm Beach County's controversial ballot design offered an intriguingly different perspective that seems to have been largely omitted from most public commentary. She explained that the media had coined the label "butterfly ballot";[154] election officials called it the "facing-page ballot."[155] That ballot design was not an unexpected innovation for the 2000 election; Palm Beach County had "used [it] many, many times before."[156] Noting the county's "very high population of senior citizens,"[157] she elaborated:

> My thought process and my office's thought process was to try to make the print as big as possible. . . . [W]e had an unusual amount of candidates for President that year—if we put them all on one page, the type would have had to [be] at least eight-point type. And we knew that we'd get complaints from people not able to read it. So we decided to do the facing-page ballot, which we had used many times before in the past and nobody said a word about it.[158]

Supervisor LePore emphasized that her office had done everything it could to ensure voters were prepared to use the ballot:

> We had a very aggressive voter outreach program. We would take demonstrator ballots and the machine itself out to all the condo meetings . . . and have [the residents themselves] do it. . . . [W]ith reference to the November 2000 ballot, before it was ever printed, it was sent to everybody that we needed to send it to in the state . . . and everybody who wanted it. Nobody had a comment that they had a problem with it. We mailed ballots out to everybody in the county, all the registered voters. It was in the newspaper, we blanketed it.[159]

152. *Id.* at 38:09 – 38:38 (statement of Deputy Att'y Gen. Paul Hancock).
153. *Id.* at 36:49 – 37:00 (statement of Supervisor Theresa LePore).
154. *Id.* at 11:36 – 11:42.
155. *Id.* at 11:43 – 11:46.
156. *Id.* at 11:47 – 11:56.
157. *Id.*
158. *Id.* at 12:04 – 12:33.
159. *Id.* at 1:01:12 – 1:01:57.

She ruefully predicted that the phrase "No good deed goes unpunished" would "be on [her] tombstone."[160]

One aspect of the post-election dispute that received relatively little attention at the time was the Florida Legislature's preparation to appoint the Republican slate of presidential electors if the statewide manual recount or a court order caused the certified election results for Bush to be set aside.[161] The U.S. Constitution specifies each State shall appoint its presidential electors "in such Manner as the Legislature thereof may direct."[162] On Tuesday, December 12, 2000[163]—the same day the U.S. Supreme Court handed down its ruling in *Bush v. Gore*[164]—the Florida House passed Concurrent Resolution HCR 1-A.[165] The resolution stated that the Florida Legislature "hereby appoints" twenty-five named electors—the Republican slate which the state Elections Canvassing Commission had previously certified as the winners.[166] The vote was seventy-nine to forty-one, with two Democrats joining the Republican majority.[167] Because the Court stopped the recount, the Florida Senate did not vote on the measure.

Ginsberg said that the Bush campaign viewed the possibility of direct legislative appointment of electors as "useful to keep time pressure on to get things done."[168] Due to the Supreme Court's ruling, however, the campaign never wound up having to "weigh in" on "all the constitutional issues."[169] He commented that it "was a compelling argument to say if . . . the election's not certified and it's not done, then you have the possibility of disenfranchising the entire State of Florida from the electoral college."[170]

Boies, in contrast, believed the alternate slate of electors "was not going to go anywhere."[171] He noted the Constitution grants Congress the power to determine the "Time" when states must appoint their electors.[172] "And Congress had determined Election Day. I think our

160. *Id.* at 11:20 – 11:28.

161. *Id.* at 1:15:47 – 1:16:03, 1:16:16 – 1:16:32 (statement of Fla. House of Representatives Speaker John Thrasher) (citing U.S. CONST. art. II, § 1, cl. 2).

162. U.S. CONST. art. II, § 1, cl. 2.

163. Carter M. Yang, *Fla. House Votes to Approve Bush Electors*, ABC NEWS (Dec. 12, 2000), https://abcnews.com/Politics/story?id=122243 [https://perma.cc/MT24-4ZHR].

164. 531 U.S. 98 (2000) (per curiam).

165. H.R. Con. Res. 1-A, 2000A Leg., Spec. Sess. (Fla. 2000) [https://perma.cc/8FKV-3A62].

166. *Id.*

167. Yang, *supra* note 163.

168. *Keynote Address*, *supra* note 45, at 1:19:32 – 1:20:31 (statement of Benjamin Ginsberg).

169. *Id.*

170. *Id.*

171. *Id.* at 1:18:33 – 1:19:22 (statement of David Boies).

172. *Id.* (citing U.S. CONST. art. II, § 1, cl. 4).

argument would've been that you can't change the rules after Election Day."[173] Berger added that, in his view, direct legislative appointment of electors "would've been violative of state law . . . and the Florida Constitution."[174]

Justice Anstead was complimentary of his colleagues on the Florida Supreme Court in both the majority and the dissent. He explained, "[T]he members of the court got along extremely well. We may have had contrary views of issues, but that collegiality held in there very well."[175] The court, he believed, faced two separate pressures in *Gore v. Harris*: "get it right," which was the majority's emphasis, and "get it over," which the dissenters prioritized.[176]

Judge Dubina likewise shared that the controversy made him

> proud to be a member of the third branch of our government. And I say the same thing very fondly and respectfully of our state court judges who touched this case. I don't question anybody's motives. We all tried to get the right answer. We all tried to do our duty. We all tried, as we do in every case, to get it right. . . . What I do know for sure is, we saw the Constitution work.[177]

He noted that the Eleventh Circuit judges' votes in *Siegel* and *Touchston* did not necessarily line up with their presumed partisan preferences. Three "very conservative colleagues," for example, "went with the majority" in rejecting the Republicans' equal protection challenges due to "federalism."[178] One conservative judge declared during the court's conference, "This is Florida's mess, let Florida clean it up."[179]

Demonstrating the court's collegiality even in the wake of those contentious en banc appeals, Judge Dubina added:

> After all the opinions were filed and we were all tired and all wanted to go home, Judge Anderson said, "I'm not gonna let any of you go home, let's all spend one more night in Atlanta." And Rosemary Barkett, one of my colleagues who was in the majority, came up to me and said, "Joel, could I go to dinner with all of the dissenters tonight?" And I said, "Not only can you go to dinner, this looks like a two-martini night to me."[180]

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173. *Id.*

174. *State Litigation Panel*, *supra* note 49, at 1:03:20 – 1:03:30 (statement of Mitchell W. Berger).

175. *Id.* at 6:16 – 6:31 (statement of Justice Harry Lee Anstead).

176. *Id.* at 9:57 – 10:08 (citing Gore v. Harris, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam)).

177. *Parallel Federal Litigation Panel*, *supra* note 96, at 1:25:21 – 1:26:10 (statement of Judge Joel Dubina).

178. *Id.* at 23:13 – 23:19.

179. *Id.* at 23:25 – 23:37.

180. *Id.* at 22:24 – 22:53.

The court "stayed together, we all remained friends, we respected each other's views, and we all did what we thought was right."[181]

Perhaps one of the most surprising and inspiring aspects of the conference was hearing about the degree of professionalism and even friendliness which existed between the Bush and Gore legal teams. Ginsberg recalled that he and Boies:

> ran into each other in the middle of one particularly contentious day up on Adams Street, and we were going back and forth on the campaigns, and what did we talk about? Geez, where do you get dry cleaning done in Tallahassee? And, also, where's a barber shop, which was a greater concern maybe twenty-five years ago than today.[182]

Boies echoed these sentiments:

> The press had the same problem trying to understand how Ted Olson and I became friends. What people didn't realize and, unfortunately, what more and more people don't realize today, is that lawyers aren't supposed to be enemies of each other. . . . We are both playing an important role of advocate in an adversarial system. . . .[183]

Several commentators offered positive assessments of *Bush v. Gore*'s consequences beyond its immediate resolution of the 2000 election. Dean Dan Tokaji of the University of Wisconsin Law School declared, "[W]hat *Bush v. Gore* did was open up the courthouse doors to election administration litigation. And I think that has actually been a really favorable change."[184] Law Professor Justin Levitt added, "The Court's decision in *Bush v. Gore* . . . helped show that, in black swan events, when things go seriously awry, when institutions are at risk of multiple failure . . . it might well be better than the alternative for courts to actually have the final word."[185]

Speaker Thrasher noted *Bush v. Gore* led to "more uniform procedures" and a greater focus on "the integrity of the systems."[186] Secretary Byrd elaborated that Florida "now ha[s] statewide review of the elections infrastructure, minimum security standards for all elections-related systems, and local and statewide partnerships. . . .

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181. *Id*. at 23:00 – 23:09.

182. *Keynote Address*, *supra* note 45, at 41:20 – 41:47 (statement of Benjamin Ginsberg).

183. *Id*. at 19:43 – 20:30 (statement of David Boies).

184. FSU College of Law, Bush v. Gore – *Congressional v. Judicial Power Over Elections and the Political Question Doctrine*, YOUTUBE, at 53:11 – 53:25 (July 10, 2025) (statement of Dean Daniel Tokaji), https://www.youtube.com/watch?v=Werw7tOPN3w&list=PLdefWHNzEySB7DQqinFl4Gj-L3Tprii4k&index=7; *see also Remedies and Electoral College Panel*, *supra* note 103, at 40:43 – 40:58 (statement of Prof. Samuel Issacharoff).

185. *Remedies and Electoral College Panel*, *supra* note 103, at 29:55 – 30:14 (statement of Prof. Justin Levitt).

186. *State and County Officials Panel*, *supra* note 52, at 5:55 – 6:10 (statement of Fla. House of Representatives Speaker Thrasher).

[N]ow all voting systems . . . that can be used by the counties, have to first be certified by the Division of Elections."[187] Byrd also commented that the narrow 537-vote margin in the 2000 election confirms the importance of combating voter fraud, even if it occurs rarely.[188] He noted that, as Florida bolstered its election integrity measures in the years after *Bush v. Gore*, voter turnout increased concomitantly.[189]

More broadly, Speaker Thrasher opined, "[A] lot of good things came out of [the 2000 post-election controversy]. . . . about the strength of America, the strength of its Constitution, and the strength of the good people who were involved in this on both sides."[190] He affirmed, "I'm very proud of what we did. I think we did it with integrity."[191] Yet perhaps no one better captured the consensus sentiment than Ginsberg in declaring, "[T]here were no tanks in the streets, there was no storming of the Capitol after January 20th, 2001. . . . [W]e should look back on the Florida recount and how it showed that our guardrails were respected and upheld."[192]

II. SYMPOSIUM CONTRIBUTIONS

The FSU Election Law Center and *Florida State University Law Review* are privileged to have received articles from many of the nation's leading election law scholars to be published in this special issue memorializing the Center's symposium. Unsurprisingly, these pieces offer a broad range of sharply differing perspectives on the disputes surrounding the 2000 election and the modern legacy of *Bush v. Gore*.

Former Florida Supreme Court Justice Barbara J. Pariente, who joined in the ruling overturned in *Bush v. Gore*,[193] offers a perspective arising from her personal experience in her contribution *Democracy on the Docket: Reflections on* Bush v. Gore *After 25 Years*.[194] She remains "troubl[ed]" by what she perceives as the *Bush* Court's "implication, if not the outright assumption, that the Florida Supreme Court acted out of political motivation."[195] She emphasizes "that each justice

187. *Byrd Presentation*, *supra* note 46, at 7:18 – 7:27, 7:40 – 7:48 (statement of Fla. Sec'y of State Cord Byrd).

188. *Id.* at 14:20 – 15:07.

189. *Id.* at 15:38 – 15:59.

190. *State and County Officials Panel*, *supra* note 52, at 55:10 – 55:24 (statement of Fla. House of Representatives Speaker Thrasher).

191. *Id.* at 31:24 – 31:35.

192. *Keynote Address*, *supra* note 45, at 44:15 – 44:35 (statement of Benjamin Ginsberg).

193. Gore v. Harris, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

194. Justice Barbara J. Pariente, *Democracy on the Docket: Reflections on* Bush v. Gore *After 25 Years*, 53 FLA. ST. U. L. REV. 271 (2026).

195. *Id.* at 273 n.7.

approached [the] decisions with gravity, independence, and deep respect for the law."[196]

Justice Pariente contends the Florida Supreme Court had tailored its approach to avoid the very Equal Protection problems which led the U.S. Supreme Court to stop the statewide recount. Her court had ordered a statewide recount, rather than allowing the manual recounts to remain limited to "selectively cherry-picked . . . counties deemed solidly Democratic," to ensure that all voters whose ballots were rejected as undervotes had another chance for them to be counted.[197] Moreover, "tasking a single trial judge with overseeing the statewide recount" provided a mechanism for imposing a degree of uniformity among the counties.[198]

Several other pieces present a similarly dim view of *Bush v. Gore* and its impact over the years that followed. Professor Richard L. Hasen argues in Bush v. Gore's *Ironic Legacy* that neither the Court itself nor lower courts have taken *Bush*'s Equal Protection holding seriously.[199] He maintains that the case's primary doctrinal significance stems instead from Chief Justice Rehnquist's concurrence.[200] The 2023 case *Moore v. Harper* endorsed the *Bush* concurrence's view that federal courts may review state courts' interpretations of state laws governing federal elections to ensure that they do not unconstitutionally "exceed the ordinary bounds of judicial review."[201] Such ostensibly impermissible interpretations would intrude upon state legislatures' authority under the Article I Elections Clause[202] and, by extension, the Article II Presidential Electors Clause[203] to regulate the "Manner" in which federal elections are held.[204] Professor Hasen contends that the Constitution's Due Process and Equal Protection Clauses provide more objective and defensible limits against unfair state-court rulings impacting elections.[205] He concludes by arguing that the Constitution should be amended to include "an affirmative right to vote."[206]

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196. *Id*. at 276.

197. *Id*. at 278.

198. *Id*. at 281–83.

199. Richard L. Hasen, Bush v. Gore's *Ironic Legacy*, 53 FLA. ST. U. L. REV. 313, 319–22 (2026).

200. *Id*. at 323–24.

201. 600 U.S. 1, 37 (2023).

202. U.S. CONST., art. I, § 4, cl. 1.

203. *Id*. art. II, § 1, cl. 2.

204. *Moore*, 600 U.S. at 37.

205. Hasen, *supra* note 199, at 326–27.

206. *Id*. at 330 (citing RICHARD L. HASEN, A REAL RIGHT TO VOTE: HOW A CONSTITUTIONAL AMENDMENT CAN SAFEGUARD AMERICAN DEMOCRACY 21-40 (2024)).

In *Three Truths and a Lie About the Legacy of* Bush v. Gore, Professor Joshua A. Douglas contends that the case has bolstered the willingness of losing candidates to seek recounts and pursue post-election litigation—not only when an election is close, but also sometimes when they lack a plausible avenue for winning.[207] He further maintains that *Moore v. Harper*'s ruling allowing federal courts to reject certain state-court interpretations of state election laws stands in stark tension with the deference the Court otherwise usually affords a state's prerogative to adopt electoral rules.[208] Citing data showing that the Court's rulings in election cases have increasingly broken down along partisan lines in recent years, he observes that some voting rights advocates have responded by pursuing claims under state constitutions in state courts.[209] Professor Douglas concludes on a somewhat different note by emphasizing a point about bipartisanship which is often overlooked in public discussions of *Bush v. Gore*: the Court's Equal Protection holding was 7-2, rather than being divided 5-4 along partisan lines.[210]

Professor Robert J. Pushaw, Jr.'s article, Bush v. Gore's *Legacy: Manipulating Justiciability Doctrines in Election Cases*, contends the Court should not have gotten involved in the controversy over the 2000 election at all.[211] He argues that the Constitution "commits almost all election disputes for resolution by political officials who have superior institutional competence to do so and can be held directly responsible."[212] In Professor Pushaw's view, by failing to treat *Bush v. Gore* as a non-justiciable political question, the Court was continuing down the misguided path set decades earlier in *Baker v. Carr*.[213] Long before the 2000 election, *Baker* had "transform[ed] formerly political questions into legal issues, including every constitutional challenge to laws governing democracy."[214] Professor Pushaw calls for the Court to return to an originalist conception of the political question doctrine by declining jurisdiction over election challenges.[215]

Other pieces offer a more positive assessment of at least certain aspects of the Supreme Court's ruling in *Bush v. Gore*. In *The Vindication of* Bush v. Gore, Professor Derek T. Muller sweepingly argues that the Court's actions in that case "have been widely accepted

207. Joshua A. Douglas, *Three Truths and a Lie About the Legacy of* Bush v. Gore, 53 FLA. ST. U. L. REV. 289, 291–94 (2026).

208. *Id*. at 300 (citing 600 U.S. 1 (2023)).

209. *Id*. at 305–07.

210. *Id*. at 308–10.

211. Robert J. Pushaw, Jr., Bush v. Gore*'s Legacy: Manipulating Justiciability Doctrines in Election Cases*, 53 FLA. ST. U. L. REV. 485 (2026).

212. *Id*. at 489.

213. *Id*. at 515–16 (citing 369 U.S. 186 (1962)).

214. *Id*. at 516.

215. *Id*. at 567–68.

in law" over the past quarter-century.[216] He explains that, even though few Equal Protection challenges to election rules in the years since *Bush* have been successful, the Court's Equal Protection holding nevertheless plays an important role in reducing "disparities in election administration."[217] Likewise, he notes that *Moore v. Harper* "elevated" the *Bush* concurrence's interpretation of the Presidential Electors Clause "to a majority Supreme Court holding," extending it "to both presidential and congressional elections."[218]

Likewise, in adopting the Electoral Count Reform Act ("ECRA") of 2022, Congress endorsed the *Bush* Court's conclusion that disputes concerning presidential electors should be resolved before electors convene to cast their votes,[219] and that courts should be primarily responsible for resolving such controversies.[220] Professor Muller concludes by explaining that the Court's decision to stay the statewide recount ordered by the Florida Supreme Court has proven consistent with the Court's approach to interim relief over the quarter century that followed.[221] Thus, in Professor Muller's view, to the extent the majority and concurring opinions in *Bush v. Gore* were not dictated by existing law at the time they were handed down, they have since become integrated into the legal firmament.

Professor Samuel Issacharoff's article, *When Presidential Elections Go Bad*, focuses more specifically on the institutional choice questions that the dispute over the 2000 election presented.[222] Professor Issacharoff explores how our nation evolved from relying primarily on political processes to resolve controversies concerning presidential elections to trusting courts.[223] He explains how, following Congress's adoption of the Electoral Count Act ("ECA") in 1887, "federal courts steered mostly clear of presidential elections, guided by a longstanding view that such disputes were political questions beyond the bounds of justiciability."[224] Following the 2000 election, however, both the Florida Supreme Court and U.S. Supreme Court "abandoned settled institutional pathways in favor of direct judicial management of the fraught election dispute."[225] The nation's later experience with the 2020 election "vindicated the confidence of the *Bush v. Gore* Court that,

216. Derek T. Muller, *The Vindication of* Bush v. Gore, 53 FLA. ST. U. L. REV. 419 (2026).

217. *Id*. at 429.

218. *Id*. at 436.

219. *Id*. at 441–43.

220. *Id*. at 447–49.

221. *See id*. at 452–54.

222. Samuel Issacharoff, *When Presidential Elections Go Bad*, 53 FLA. ST. U. L. REV. 333 (2026).

223. *See id.* at 337–48.

224. *Id*. at 344.

225. *Id*. at 345.

when push comes to shove, the judiciary was not only necessary but capable of handling even the most controversial election controversies," particularly given Congress's "current and persistent state of . . . dysfunction."[226]

Professor Justin Levitt contends in *The Misshapen Shadows of the 2000 Election* that we have not yet fixed most of the real problems which arose in that election.[227] He argues that, although we have replaced punchcard ballots with more reliable forms of voting technology, other issues that impacted the election's results such as felon disenfranchisement, problematic voter list maintenance, and disputes over absentee ballots persist.[228]

Professor Levitt goes on to offer sympathetic perspectives on the majority rulings of both the Florida Supreme Court and U.S. Supreme Court in the 2000 election contest. He refutes critics who suggest the Florida Supreme Court may have acted out of partisan bias for Gore by pointing out that the court had actually rejected several of Gore's lawsuits and claims which could have decisively swung the election toward him.[229] In Professor Levitt's view, none of that court's rulings exceeded the permissible bounds of ordinary judicial interpretation.[230]

He similarly rejects charges of partisanship against the U.S. Supreme Court. The majority reasonably might have doubted whether a recount completed within a workable timeframe would have reached a more accurate conclusion than the results which the State of Florida had already certified.[231] Moreover, Professor Levitt suggests that the 2022 Electoral Count Reform Act may be "a sort of strange vindication" for the *Bush* Court's decision to effectively resolve the 2000 election itself rather than leaving it to Congress to choose among competing slates of electors.[232] Finally, memorably warning against what he terms "electoral process porn," Professor Levitt concludes by emphasizing that neither Democrats nor Republicans should view courts as a mechanism for routinely changing election results through esoteric machinations.[233]

The remaining contributions to this symposium consider various issues from an empirical perspective. Professors Christopher N. Krewson and Ryan J. Owens, joined by their undergraduate co-authors, discuss the results of a national survey of over 2,000 adults

226. *Id*. at 347, 349.

227. Justin Levitt, *The Misshapen Shadows of the 2000 Election*, 53 FLA. ST. U. L. REV. 355 (2026).

228. *Id*. at 372–75.

229. *Id*. at 380.

230. *Id*. at 385.

231. *Id*. at 400–01.

232. *Id.* at 401 (citing Electoral Count Reform Act of 2022, Pub. L. No. 117-328, div. P, tit. I, 136 Stat. 4459, 5233–41 (2022) (codified in scattered sections of 3 U.S.C.)).

233. *Id.* at 411–16.

to assess whether rulings such as *Bush v. Gore* may undermine public support for the Court.[234] They find that such support is driven by two main factors: whether people agree with the Court's substantive rulings[235] and whether they perceive the process the Court uses to adjudicate particular cases as fair.[236] In particular, public support for Court rulings drops when the Court "invok[es] its emergency powers to resolve a case quickly" or breaks with "past decisions."[237]

Finally, Professor Christopher B. Seaman's piece, *Voting Rights and Private Rights of Action: An Empirical Study of Litigation Under Section 2 of the Voting Rights Act, 1982 – 2024*, arises from a recent holding of the U.S. Court of Appeals for the Eighth Circuit that Section 2 of the Voting Rights Act ("VRA")[238] does not give rise to a private right of action.[239] His article seeks to "assess the potential impact of a nationwide decision holding that private plaintiffs cannot bring Section 2 claims" based on his empirical survey of over 1,500 federal cases involving that provision.[240]

Professor Seaman's survey reveals several fascinating results. Over one-third of Section 2 cases since 1982 have been brought in only two states: Texas and Alabama.[241] Most of the lawsuits in those states were successful challenges to at-large municipal voting structures.[242] Over two-thirds of Section 2 cases were brought in jurisdictions which had been covered by Section 5 of the VRA.[243]

Most saliently, approximately 91% of Section 2 cases since 1982 have been litigated exclusively by private plaintiffs.[244] Across all cases, plaintiffs prevailed more than two-thirds of the time (though this percentage omits voluntary dismissals); the win rate dropped from a high of 88% in the 1980s to only 27% in the 2010s.[245] Based on this data, Professor Seaman concludes "[i]t is highly unlikely that the

234. Christopher N. Krewson et al., *Supreme Court Support and the Legacy of* Bush v. Gore, 53 FLA. ST. U. L. REV. 457 (2026).

235. *Id*. at 473–75.

236. *Id*. at 472–73.

237. *Id*.

238. 52 U.S.C. § 10301.

239. Christopher B. Seaman, *Voting Rights and Private Rights of Action: An Empirical Study of Litigation Under Section 2 of the Voting Rights Act, 1982–2024*, 53 FLA. ST. U. L. REV. 569 (2026) (citing Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1207 (8th Cir. 2023), *reh'g en banc denied*, 91 F.4th 967 (8th Cir. 2024)).

240. *Id*. at 572.

241. *Id*. at 606–07.

242. *Id*. at 611–12.

243. *Id*. at 610.

244. *Id*. at 614.

245. *Id.* at 617 & n.282.

Justice Department, acting alone, could fill the gap if private plaintiffs are prohibited from bringing Section 2 claims."[246]

III. THE PATH NOT TAKEN AND THE ROAD AHEAD

Bush v. Gore was not the only federal case in which equal protection challenges were raised to manual recounts in the 2000 presidential election. As early as November 11, the Bush campaign filed *Siegel v. LePore* in the Southern District of Florida to block the manual recounts Gore had sought in Broward, Miami-Dade, Palm Beach, and Volusia Counties.[247] Bush argued that the state's recount provisions violated Due Process and Equal Protection principles by allowing manual recounts to occur only in certain counties and failing to adopt specific standards to ensure consistent treatment of ballots.

The district court declined to issue an *ex parte* temporary restraining order ("TRO") on the grounds that giving the defendants an opportunity to respond would not cause "immediate and irreparable injury, loss or damage" to the plaintiffs.[248] Two days later, after a hearing, the district court refused to issue a preliminary injunction, as well.[249] Although the plaintiffs had raised "serious arguments," in the context of a presidential election they should be considered by state courts in the first instance.[250] The court further concluded that the state's manual recount procedure was part of a " 'generally-applicable and evenhanded' electoral scheme designed to 'protect the integrity and reliability of the electoral process itself.' "[251] While the recount process was "discretionary," it was not "wholly standardless."[252]

The court dismissed concerns about inconsistent treatment of materially identical ballots as both unproven and irrelevant. On the one hand, it was "speculative" whether counties were actually treating comparable ballots differently.[253] At the time, the plaintiffs had not introduced hard evidence to show that various officials were assessing ballots inconsistently or that the recounts were generating inaccurate results.[254] Rather, their evidence consisted mostly of "media broadcasts and other unsubstantiated forms."[255] In any event, disparate treatment of comparable ballots was "unavoidable given the

246. *Id*. at 617.

247. *See* Siegel v. LePore, 120 F. Supp. 2d 1041, 1044 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000) (en banc).

248. *See id*. at 1047 n.2 (quoting FED. R. CIV. P. 65(b)).

249. *Id*. at 1054.

250. *Id*. at 1044.

251. *Id*. at 1050 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)).

252. *Id*. at 1050.

253. *Siegel*, 120 F. Supp. 2d at 1052.

254. *Id*. at 1053 ("Plaintiffs have failed to demonstrate that manual recounts are so unreliable that their use rises to the level of a constitutional injury.").

255. *Id*. at 1053.

inherent decentralization involved in state electoral and state recount procedures."[256]

That same day, three Bush voters from Brevard County, where no recount had been requested, brought a similar suit, *Touchston v. McDermott*, in the Middle District of Florida.[257] Within a day, Judge John Antoon II held a hearing and denied their request for emergency relief.[258] Noting that Judge Middlebrooks in the Southern District had recently rejected the same arguments, Judge Antoon "adopt[ed] the reasoning contained in Judge Middlebrooks's Order."[259] He also emphasized that the plaintiffs had not presented evidence showing that county canvassing boards were actually treating materially identical ballots differently.[260]

On November 14, both sets of plaintiffs took interlocutory appeals to the Eleventh Circuit.[261] The court immediately decided to hear the cases en banc in the first instance, rather than allowing three-judge panels to adjudicate them. On November 17, the court unanimously declined to enjoin the county canvassing boards from either completing their countywide manual recounts or certifying their counties' results based on those recounts while the appeals were pending.[262] The court noted that both the Constitution[263] and the Electoral Count Act[264] gave states "primary authority to . . . resolve most controversies concerning the appointment of electors" and Florida state courts, including the Florida Supreme Court, were in the process of adjudicating federal constitutional challenges to the recounts.[265] Thus, the court concluded

256. *Id.* at 1052. The court added that the plaintiffs were not entitled to injunctive relief in any event because they had an adequate remedy at law: they could challenge the recount's results through an election contest in state court. *Id.* at 1053 (citing FLA. STAT. § 102.168 (2000)).

257. *See* Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief, Touchston v. McDermott, No. 6:00-CV-1510, ECF No. 1 (M.D. Fla. Nov. 13, 2000).

258. Touchston v. McDermott, 120 F. Supp. 2d 1055 (M.D. Fla. 2000), *aff'd*, 234 F.3d 1133 (11th Cir. 2000) (en banc). He likewise denied a motion for an injunction pending appeal without issuing a separate opinion. Order, Touchston v. McDermott, No. 6:00-cv-1510, ECF No. 19 (M.D. Fla. Nov. 15, 2000).

259. *Touchston*, 120 F. Supp. 2d at 1058.

260. *See id.* at 1059 ("Plaintiffs have failed to establish that the canvassing board's exercise of its discretion has been carried out in a discriminatory or fraudulent manner."). Judge Antoon also pointed out that state remedies existed for challenging the conduct or outcome of the recount. *Id.* at 1060.

261. Notice of Emergency Appeal, Siegel v. LePore, No. 9:00-cv-9009, ECF No. 38 (S.D. Fla. Nov. 14, 2000); Notice of Appeal, Touchston v. McDermott, No. 6:00-cv-1510, ECF No. 14 (M.D. Fla. Nov. 14, 2000).

262. Touchston v. McDermott, 234 F.3d 1130 (11th Cir. 2000) (en banc) (per curiam); *see also* Siegel v. LePore, 234 F.3d 1162 (11th Cir. 2000) (en banc) (mem.).

263. U.S. CONST. art. II, § 1, cl. 2.

264. 3 U.S.C. § 5 (2000).

265. *Touchston*, 234 F.3d at 1132–33.

that none of the plaintiffs faced irreparable harm in the absence of immediate injunctive relief.[266]

Approximately three weeks later, on December 6, a divided Eleventh Circuit went on to affirm the district courts' denials of preliminary injunctions by a vote of eight to four.[267] Again, rather than basing its ruling on the merits,[268] the Eleventh Circuit emphasized the lack of irreparable injury the plaintiffs faced at that particular moment.[269] The plaintiffs had originally sued in mid-November while manual recounts were occurring in the four counties the Gore campaign had selected. The Eleventh Circuit's December 6 ruling came at a very different point in the proceedings, however. That first round of recounts was over, Bush had been certified as the election's winner, a Leon County trial court had just rejected Gore's election contest (which remained on direct appeal),[270] and the Florida Supreme Court had not yet ordered a statewide recount. The majority concluded that since no recounts were then ongoing, the results of past recounts had already been "widely publicized," and the occurrence of any future recounts in the election was, at that point, purely speculative, none of the plaintiffs faced "a threat of continuing irreparable harm."[271]

Of course, barely two days later the Florida Supreme Court would order a statewide recount of undervotes without imposing more specific standards for counties to follow.[272] The Eleventh Circuit nevertheless denied rehearing in *Siegel* the following day, again by a vote of eight to four.[273] In any event, as Judge Tjoflat explained in his dissent to the Eleventh Circuit's December 6 ruling, if the

266. *Id.* at 1133.

267. Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000) (en banc) (per curiam); *see also* Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000) (en banc) (per curiam).

268. Chief Judge Anderson's concurrence, in contrast, rejected plaintiffs' constitutional arguments on the merits. *Siegel*, 234 F.3d at 1179 (Anderson, C.J., concurring). He concluded that limiting recounts only to certain counties, as well as any disparities in ballot-counting rules across counties, gave rise to only " 'garden variety' dispute[s]" and did not "severely burden[] any voters' rights." *Id.* at 1181–82, 1185–87, 1189. Moreover, the state's rules were "reasonable" and "justified by . . . [its] important regulatory interests in ensuring accurate and complete election results" and administering elections efficiently. *Id.* at 1184–85. Manually recounting only certain votes does not "grant[] . . . greater weight" to those voters' choices, but rather "merely verifies the count." *Id.* at 1185.

269. *Id.* at 1177 (maj. op.).

270. *See Siegel*, 234 F.3d at 1177; *see also Contest Hearing Decision by Judge N. Sander Sauls* (Dec. 4, 2000), https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/documents-related-the-2000-election-dispute-35 [https://perma.cc/APA5-28WG].

271. *Siegel*, 234 F.3d at 1177.

272. Gore v. Harris, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

273. Siegel v. LePore, 234 F.3d 1218 (11th Cir. 2000) (en banc) (mem.). The plaintiffs voluntarily dismissed their complaint after Congress finished counting electoral votes. Notice of Voluntary Dismissal and Stipulation, Siegel v. LePore, No. 9:00-cv-9009, ECF No. 77 (S.D. Fla. Jan. 8, 2001). The *Touchston* Plaintiffs sought certiorari, but the Court denied their petition on January 5, 2001. 531 U.S. 1061 (2001).

constitutional objections to the state's recount provisions were valid, then including the manual recounts' results in the certified statewide totals constituted legally cognizable injury both to voters in counties that did not conduct recounts, and to voters whose ballots had been subjected to more stringent recount standards than those applied in other counties, regardless of whether the recounts affected which candidate won.[274]

The benefit of hindsight helps in identifying other concerns about the Eleventh Circuit's reasoning. As the Supreme Court would hold a quarter century later in *Bost v. Illinois State Board of Elections*, candidates have a legally cognizable interest in ensuring that the elections in which they participate do not "depart[] from the law."[275] Perceived public legitimacy is delicate, yet essential to both a prevailing candidate and the stability of a democratic government.

> The counting of unlawful votes—or discarding of lawful ones—erodes public confidence that the election results reflect the people's will. And when public confidence in the election results falters, public confidence in the elected representative follows. . . . [T]hat loss of legitimacy—or its diminution—is a concrete harm.[276]

To be sure, *Bost* involved identifying a candidate's injury for Article III purposes, rather than irreparable injury for purposes of injunctive relief. The Court's reasoning suggests, however, that merely setting aside the results of an unconstitutionally or otherwise improperly conducted election or vote count will often be insufficient to rectify the harm such proceedings inflict on the ultimately prevailing candidate. Doubts about the election's "true" results, charges that the ultimately prevailing candidate has "stolen" an election, and claims that people have been disenfranchised by the rejection of previously tallied votes can all be enhanced, rather than ameliorated, by a judicial ruling which changes an election's apparent outcome. Modern presidential elections occur in a heated, emotional, hyperpolarized environment driven by social media and 24-hour cable news, with the persistent threat of interference from foreign governments sowing discord and division within the electorate.[277] As

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274. Judge Tjoflat explained the grounds for his dissent in *Touchston v. McDermott*, 234 F.3d 1133, 1155–56 (11th Cir. 2000) (en banc) (Tjoflat, J., dissenting), rather than in *Siegel* itself.

275. 607 U.S. 71, 77 (2026); *see also id*. at 79 ("Departures from the preordained rules cause [candidates] particularized and concrete harm.").

276. *Id*. at 78.

277. *See, e.g.*, 2 S. SELECT COMM. ON INTEL., REPORT ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION: RUSSIA'S USE OF SOCIAL MEDIA WITH ADDITIONAL VIEWS, 116th Cong., 1st Sess. (Oct. 8, 2019), https://www.intelligence.senate.gov/wp-content/uploads/2024/08/sites-default-files-documents-report-volume2.pdf [https://perma.cc/NPN3-PHXA]; *Joint ODNI, FBI, and CISA*

Justice Scalia's concurrence supporting the stay in *Bush* declared, "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires."[278]

Additionally, following the 2020 presidential election, courts aggressively employed laches principles to prevent attempts to challenge the election's rules after they had already been applied.[279] Laches generally precludes a candidate from waiting to see how an election turns out before challenging a potentially illegal or unconstitutional electoral practice of which he or she is aware.[280] Such delay prejudices the rights of the voters who participated in the election; the election officials who spent substantial time, effort, and money conducting it; and the general public, which has an interest in certainty and finality of electoral results. A candidate should be neither required nor permitted to wait until after votes have been cast or tallied to challenge the validity of an election's rules—asking a court to reject ballots that have been accepted and counted as legal votes—when such claims could have been brought in advance.[281] *Siegel*'s approach to irreparable harm, in contrast, impedes pre-election and pre-tally challenges on the grounds a court could later change or set aside the election's apparent results if necessary.

Parenthetically, laches principles place calls to set aside the election's results and conduct a re-vote in Palm Beach County based on the "butterfly ballot" in a different light.[282] The county had used the butterfly ballot in several previous elections.[283] Sample ballots had

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Statement (Sept. 18, 2024), https://www.fbi.gov/news/press-releases/joint-odni-fbi-and-cisa-statement-091824 [https://perma.cc/K5Y6-6FXX].

278. *Bost*, 607 U.S. at 80 (quoting Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in grant of stay)).

279. *See, e.g.*, Trump v. Wis. Elections Comm'n, 983 F.3d 919, 925–26 (7th Cir. 2020) (permitting a losing candidate to raise challenges after the state has "tallied the votes and certified the election outcome" would harm both the state and its voters, "many of whom cast ballots in reliance on the guidance, procedures, and practices" being challenged); Trump v. Biden, 951 N.W.2d 568, 577 (Wis. 2020) (rejecting claims due to laches where "[t]he Campaign waited until after the election to raise selective challenges that could have been raised long before the election"); Kelly v. Commonwealth, 240 A.3d 1255, 1255 (Pa. 2020) (per curiam).

280. *See* Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1180–81 (9th Cir. 1988) ("[T]he courts have been wary lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs."); Hendon v. N.C. State Bd. of Elections, 710 F.2d 177, 182–83 (4th Cir. 1983) ("[F]ailure to require pre-election adjudication would 'permit, if not encourage parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.' " (quoting Toney v. White, 488 F.2d 310, 314 (5th Cir. 1973))).

281. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 991, 998 (2005).

282. *See, e.g.*, Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 390-91 n.73 (2001).

283. *See supra* notes 154–59 and accompanying text (explanation of Palm Beach County Supervisor of Elections Theresa LePore).

been mailed to all registered voters and were otherwise available for review to all political parties and candidates.[284] Any alleged defects in the ballot's design or the arrangement of candidate names, as well as the potential for voter confusion, were facially apparent and could have been litigated before the election was conducted.[285] Enforcing the alleged rights of up to 3,411 Buchanan voters in Palm Beach County by conducting a re-vote would have required nullifying the votes of 422,683 Bush and Gore voters.[286] Of course, on the merits the Florida Supreme Court would ultimately conclude that the ballot did "not constitute substantial noncompliance with the statutory requirements mandating the voiding of the election."[287]

Setting aside the results of the countywide manual recounts Gore had requested only after their completion would similarly have required election officials to reject votes previously accepted as valid, conduct the recounts anew, and potentially change the election's apparent winner. The Eleventh Circuit might have been better served by instead temporarily pausing the recounts to determine the constitutionality of both the geographic limitations and the voter-intent standard being applied. Had the court addressed vote-counting disparities at that early stage, there would have been more than enough time to complete the selected countywide recounts—and probably any subsequent statewide recount which may have ordered—well in advance of the federal safe harbor deadline.[288]

Judge Tjoflat's dissent also provides valuable insight into the due process right to vote. He explained that the Florida Supreme Court had adopted the Attorney General's model for determining what constitutes a legally valid vote under Florida law.[289] As Judge Tjoflat explained the Attorney General's view, "a vote is valid if it demonstrates the voter's intent in any ascertainable manner, whether read by the machine or not."[290] Judge Tjoflat pointed out that Florida

284. *See* Palm Beach Cnty., Fla., *Official Ballot, General Election* (Nov. 7, 2000), https://www.historyonthenet.com/authentichistory/1993-2000/3-2000election/3-dispute/Palm_Beach_County_FL_2000_Election_Sample_Ballot_view04.jpg [https://perma.cc/ELY3-T6JX].

285. *But see* Wadhams v. Bd. of Cnty. Comm'rs, 567 So. 2d 414, 417 (Fla. 1990) (applying laches narrowly and permitting post-election challenges which some plaintiffs could have filed earlier).

286. *See* Fla. Dep't of State, Div. of Elections, November 7, 2000 General Election Official Results, https://results.elections.myflorida.com/DetailRpt.Asp?ELECTIONDATE=11/7/2000&RACE=PRE&PARTY=&DIST=&GRP=&DATAMODE= [https://perma.cc/T7B7-NERH].

287. Fladell v. Palm Beach Cnty. Canvassing Bd., 772 So. 2d 1240, 1242 (Fla. 2000).

288. *See* 3 U.S.C. § 5 (2000).

289. Touchston v McDermott, 234 F.3d 1133, 1141 (11th Cir. 2000) (en banc) (Tjoflat, J., dissenting).

290. *Id.*; *see* Att'y Gen. Robert A. Butterworth, *Manual Recount of Ballots, Error in Voter Tabulation*, Fla. AG Op. 2000-65 (Nov. 14, 2000) [https://perma.cc/5QVK-QYC5].

law, however, guaranteed only machine review of ballots. Both the initial tally and the automatic recount relied upon automated tabulation machines which, especially in counties using punchcard ballots, were known to be incapable of identifying a substantial number of ballots that the Attorney General deemed legally valid.[291] A voter could not request a manual recount of either their county as a whole or their individual ballot. Rather, only a candidate, ballot issue committee, or political party could request a recount for a particular county and, as the 2000 election itself demonstrated, they tended to do so only for counties where their supporters were located.[292]

Supreme Court and Eleventh Circuit precedent confirmed that the right to vote includes the right of an eligible elector not only to cast a ballot, but to have a properly cast ballot counted.[293] Yet in counties where neither a candidate nor a political party requested a recount, there was no guaranteed mechanism for identifying ballots containing legally valid votes which the tabulation machine was incapable of detecting before results were certified.[294] Moreover, the law empowered a canvassing board to order a countywide manual recount only where an initial recount of a few selected precincts suggested "an error in the vote tabulation which could affect the outcome of the election."[295] It is difficult to see how the candidate in the lead could satisfy that standard. Rather than changing the election's outcome, the addition of more votes for that candidate "would only serve to increase that candidate's margin of victory."[296] Thus, ballots in counties which predominantly supported the leading candidate were unlikely to be manually reviewed.

Judge Tjoflat concluded this system violated the substantive due process right to vote.[297] If the Attorney General were correct and a

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291. *See* Siegel v. LePore, 234 F.3d 1163, 1196 (11th Cir. 2000) (en banc) (Carnes, J., dissenting).

292. *Touchston*, 234 F.3d at 1136 (Tjoflat, J., dissenting) (citing FLA. STAT. § 102.166(4)(a) (2000)).

293. *Id.* at 1151 (citing Duncan v. Poythress, 657 F.2d 691, 700 (5th Cir. Unit B 1981) (citing, in turn, *Ex parte* Yarbrough, 110 U.S. 651 (1884), and United States v. Mosley, 238 U.S. 383 (1915))).

294. *Id.* at 1143.

295. *Id.* at 1144 (citing FLA. STAT. § 102.166(5) (2000)).

296. *Id.*

297. He further concluded that the Florida Supreme Court's decision to adopt the Attorney General's model also violated due process in another respect, by changing the rules of the election mid-stream. Judge Tjoflat maintained that the state's practice in previous elections had been to "certify the machine tabulation of votes as the county's official vote count." *Id.* at 1148. By switching to the Attorney General's model during the tabulation process and including manual recount results, as well, the Florida Supreme Court violated due process. *Id.* (citing Roe v. Alabama, 43 F.3d 574, 580–82 (11th Cir. 1995)). For its part, however, the Florida Supreme Court took a different view of prior state practice. *See, e.g.*, Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1228-29 (Fla.), *vacated and remanded sub nom.* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000) (per curiam).

legally valid vote could be either machine-readable or non-machine-readable, then due process required the state to apply a procedure for identifying both types of valid votes to all ballots. Voters whose ballots were only processed through tabulation machines and subsequently rejected with no further review were unconstitutionally disenfranchised, because the state did not guarantee them a procedure to determine if their ballot fell within the second category (i.e., non-machine-readable) of legally valid votes.[298] Thus, Judge Tjoflat recognized that the constitutional right to vote requires that a state's definition of a legally valid vote and the ballot-counting procedures the state applies to all voters be consistent and coextensive with each other.

In Judge Tjoflat's view, the Attorney General's model also violated equal protection by giving only voters in certain counties access to a different, additional (and generally more permissive) ballot-counting

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A federal due process claim based on mid/post-election changes in a state's election rules raises interesting implications that require further consideration in later work. For example, assume that after an election is conducted, the state supreme court decides that one of the rules applied by election officials violates state law. From a formalist doctrinal perspective, such rulings are ordinarily understood to be statements about what the law has always been (even if previous courts erroneously failed to recognize it as such), rather than changes in the law. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the court giving rise to that construction.").

The sort of due process claim Judge Tjoflat invoked, in contrast, takes a much more pragmatic view of the law by assessing whether a court's ruling changes previously accepted practices or the prior *understanding* of the law. *See Roe*, 43 F.3d at 580-82; *cf.* Rogers v. Tennessee, 532 U.S. 451, 461-62 (2001). From this pragmatic perspective, a state court changes the law in the constitutionally relevant sense by deeming a practice that was applied in the course of an election to be illegal or unconstitutional. If such a ruling is treated as a change in the law raising federal due process issues, however, it is unclear what the proper remedy would be. On the one hand, retroactively applying the state supreme court's new conclusion would, at least in some cases—particularly where voters had detrimentally relied on the previous practice or interpretation—violate federal due process. *See*, *e.g.*, Griffin v. N.C. State Bd. of Elections, 781 F. Supp. 3d 411, 435-44 (E.D.N.C. 2025). But on the other hand, declining to apply that new holding to the election would require state courts to endorse the use of an illegal procedure, potentially even requiring either the illegal rejection of valid votes or illegal acceptance of invalid votes. It seems odd that the federal due process clause would require a state to apply an illegal process in an election. Setting aside the election's results is a potential third alternative, but such extreme relief may implicate the voting rights of the vast majority of participants in the election who cast legally valid ballots. For other discussions of this issue, see Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 737 n.331 (2017); Michael S. Kang, *Electoral Due Process*, 120 NW. U. L. REV. 925 (2026); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001).

298. *Touchston*, 234 F.3d at 1154 (Tjoflat, J., dissenting) ("By deciding that dimples were valid votes, but that those votes would be counted only in counties selected by the candidates, the Florida Supreme Court's decision disenfranchised dimple voters in the remaining counties . . . .").

procedure—manual review rather than just machine tabulation—based on the county in which they lived.[299]

Of course, the Florida Supreme Court's subsequent order for a statewide manual recount ameliorated many of Judge Tjoflat's concerns.[300] But it left unaddressed his other core Equal Protection critique—the one that lay at the heart of *Bush v. Gore*. Presaging the Supreme Court, Judge Tjoflat recognized that each county canvassing board was afforded "unfettered discretion to set its own standards" for whether a particular ballot amounted to a legally valid vote.[301] He cautioned that "a mark on a punch card ballot that is deemed a sufficient showing of intent to be counted as a vote in one county might be deemed a non-vote by another county."[302] Even as late as December 6, had the Eleventh Circuit majority joined in Judge Tjoflat's prescient Equal Protection analysis, the Florida Supreme Court may well have crafted uniform ballot-counting rules when it ordered the statewide recount two days later.[303]

Moving forward, courts must ensure that their doctrines governing Article III standing, ripeness, irreparable injury, and laches are mutually consistent concerning the proper timing of election-related challenges. To the extent possible, these jurisdictional and procedural doctrines should facilitate early resolution of election-related disputes, minimizing the extent to which candidates are relegated to post-election challenges, asking courts to set aside already-cast ballots, already-completed vote tallies, or already-certified election results. Similarly, a state's ballot-counting procedures should require reasonable review of each ballot to determine whether it constitutes a legally valid vote in any respect the law recognizes.

Finally, courts should ensure that, under *Bush v. Gore*'s core Equal Protection holding—call it the Uniformity Principle—a state's election system provides all eligible voters seeking to participate in a particular election "substantially equal opportunities to cast votes and have them

299. *Id.* at 1151 (noting that this "vote counting model . . . works to deprive voters of their right to vote based on their county of residence and thereby denies them equal protection of the laws"). He further concluded that the system violated the First Amendment right of political association for voters in counties not selected for manual recounts. By delegating authority to candidates and political parties to request recounts, the system "encourage[d] candidates to discriminate between groups of voters—organized in county units—based on the predominant party affiliation of each county's voters." *Id.* Judge Tjoflat concluded this system violated the associational rights of voters in areas that opposed the candidate seeking the recount by reducing the chances their votes would be counted, thereby diluting their collective ability to "associate with other [like-minded] voters" throughout the state to "demonstrat[e] their true electoral impact." *Id.* at 1154.

300. *See* Gore v. Harris, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

301. *Touchston*, 234 F.3d at 1142 (Tjoflat, J., dissenting).

302. *Id.*

303. *See Gore*, 772 So. 2d at 1261–62. *But see supra* note 32 and accompanying text.

be counted."[304] This principle follows naturally from the equality and fairness norms underlying "one person, one vote." Moreover, variations in rules or inconsistent application of vague standards—like Florida's "intent of the voter" standard for manually counting ballots—whether on a regional, partisan, arbitrary, or some other basis, can distort electoral outcomes in unintended and unjustified ways. Consistent rules can also enhance public confidence in an election's legitimacy. Thus, despite the *Bush* Court's caution that its "consideration [was] limited to the present circumstances,"[305] courts should recognize and enforce its Uniformity Principle as an important component of the constitutional right to vote.[306]

IV. CONCLUSION

It is one thing to read about the events leading up to *Bush v. Gore* in the pages of the U.S. Reports. It is something quite different to hear about them directly from election officials who oversaw the process, lawyers who litigated virtually every aspect of the dispute, and judges who played key roles in adjudicating those issues. The respect and professionalism opposing counsel exhibited toward each other throughout what was likely to be the most important case of their lives—one that quite literally impacted the course of American history—is an inspirational model for future disputed elections.

The violence and chaos that accompanied Congress's count of electoral votes following the 2020 election confirm the wisdom of the *Bush* Court's decision to bring the controversy over the 2000 election to an end, rather than allowing it to drag on into the new year for potential congressional resolution. Modern standing and laches doctrines have come to encourage early resolution of election-related disputes, channeling candidates toward pre-election and pre-tally challenges when possible. Courts should apply a similar approach to doctrines such as irreparable injury and ripeness to avoid subjecting voters and candidates to allegedly illegal election processes and relegating them to post-election challenges which may require courts to set aside ballots, tallies, or even election results after the fact, thereby likely undermining public confidence in the prevailing candidate's legitimacy.

The FSU Election Law Center was privileged that so many of the people involved in the controversies surrounding the 2000 election

304. Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 299 (2020); *see also* Michael T. Morley, Bush v. Gore's *Uniformity Principle and the 2020 Election*, 58 WAKE FOREST L. REV. 179 (2023).

305. Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam).

306. Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2066–67 (2018) (discussing "Voter Equality Rights" as one aspect of the constitutional right to vote).

participated in its symposium. We hope the articles in this issue not only deepen understanding of election law, but bolster faith in our democratic system.