THREE TRUTHS AND A LIE ABOUT THE LEGACY OF *BUSH V. GORE*

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I'll never forget that late night and early morning in November 2000. I was a junior at the George Washington University in Washington, DC, majoring in political science. I had just voted in my first presidential election. So, of course, I was glued to my television as the presidential election results trickled in. First the networks called the race for Democrat Al Gore.[1] Then they said that Republican George W. Bush had won.[2] Finally, the media backtracked and declared the race "too close to call."[3] I distinctly remember Tom Brokaw on NBC saying, "We don't just have egg on our face . . . [w]e have an omelet."[4] I stumbled into my English class on that Wednesday morning, groggy from not sleeping the night before, and my professor expressed surprise that I had made it to class that morning, knowing that I was deeply interested in politics and would be following the race intensely. The thirty-six days between Election Day and the Supreme Court's decision in *Bush v. Gore*[5] were riveting, especially for a political science major living in DC.

Twenty-five years later, I am now a law professor focused on election law and voting rights. *Bush v. Gore*, which essentially decided the 2000 presidential election, may be the reason why. The case catalyzed the field of election law, which was then in its infancy.[6] In 2000, few

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1. Peter Marks, *The 2000 Elections: The Media; A Flawed Call Adds to High Drama*, N.Y. TIMES (Nov. 8, 2000), https://www.nytimes.com/2000/11/08/us/the-2000-elections-the-media-a-flawed-call-adds-to-high-drama.html [https://perma.cc/276B-RSVZ].

2. Joanne Ostrow, *Networks Get It Wrong 1st, 2nd Time*, DENV. POST (Nov. 9, 2000), https://extras.denverpost.com/news/election/pol1109r.htm [https://perma.cc/T9CC-57R2].

3. Marks, *supra* note 1.

4. Ostrow, *supra* note 2.

5. *See* Bush v. Gore, 531 U.S. 98, 110-11 (2000).

6. *See* Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 7 (2010) ("Election law is a young field. It was not formally declared its own field of study until 1999, though its roots date back earlier. While there were a handful of scholars writing systematically about the subject before 1990, the field

law schools had a course on Election Law or a professor who specialized in the field. Now many schools do. Back then there was one casebook on the "law of democracy," first published in 1998.[7] Now there are numerous casebooks.[8] *Bush v. Gore* was also at the forefront of my initial study of voting rights in law school in the mid-2000s. It continues to influence my scholarship today.

Bush v. Gore, of course, ended the 2000 presidential election controversy.[9] Florida certified Republican George W. Bush as the winner of the state by 537 votes and Democrat Al Gore sought a recount to challenge the result.[10] The election exposed terms such as "hanging chads" and "undervotes" as the candidates sought to recount (or not) certain parts of the state thought more favorable to their side.[11] Ultimately, the U.S. Supreme Court declared that the Florida Supreme Court's decision to continue a recount violated the Equal Protection Clause and also might have violated Article II of the U.S. Constitution by taking power away from the state legislature.[12] The majority further determined that there was no time left for the state to complete a recount before the federal "safe-harbor" deadline that would guarantee that Congress would include Florida's submission in the final electoral count.[13]

In this symposium Essay, I offer three reflections on the legacy of the case, highlighting how it has impacted some of the major issues of election law and therefore my own approach to both teaching and writing about this field. Others have sufficiently summarized the case; readers who are unfamiliar should consult those sources or the chapter about it in my book, *The Court v. The Voters*.[14] The ideas here are not meant to be holistic, as the implications of the case are wide and

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came into its own during the early 1990s as a group of dynamic young scholars entered the field and made a name for themselves.").

7. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (1st ed. 1998).

8. *See, e.g.*, SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, NATHANIEL PERSILY & FRANITA TOLSON, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (6th ed. 2022); DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS O. STEPHANOPOULOS, ELECTION LAW: CASES AND MATERIALS (7th ed. 2022); JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM (3d ed. 2023); MICHAEL R. DIMINO, SR., BRADLEY A. SMITH & MICHAEL E. SOLIMINE, VOTING RIGHTS AND ELECTION LAW: CASES, EXPLANATORY NOTES, AND PROBLEMS (3d ed. 2021); EDWARD B. FOLEY, MICHAEL J. PITTS & JOSHUA A. DOUGLAS, ELECTION LAW AND LITIGATION: THE JUDICIAL REGULATION OF POLITICS (2d ed. 2021).

9. *Bush*, 531 U.S. at 110-11.

10. *See* James Gormly, *Hanging by a Chad—or Not: The 2000 Presidential Election*, GILDER LEHRMAN INST. AM. HIST.: HIST. NOW: THE J., https://www.gilderlehrman.org/history-resources/essays/hanging-chad-or-not-2000-presidential-election [https://perma.cc/S6UE-JZNX] (last visited Sept. 28, 2025).

11. *Id.*

12. *Bush*, 531 U.S. at 105.

13. *See id.* at 110-11.

14. JOSHUA A. DOUGLAS, THE COURT V. THE VOTERS: THE TROUBLING STORY OF HOW THE SUPREME COURT HAS UNDERMINED VOTING RIGHTS 88-103 (2024).

varied. Given that many of today's law students do not have their own memory of the 2000 presidential election and its aftermath, these reflections can offer some context to the case. And because most people have heard of the decision but probably have never actually read it, I also debunk one commonly misunderstood aspect of the ruling. Call it three truths and a lie.

Here are the three truths: First, *Bush v. Gore* has created a mindset that an election is never really over on Election Day, as there is always the possibility of post-election litigation if the results are close. To be sure, disputed elections occurred prior to *Bush v. Gore*, but preparing for post-election litigation is now a routine part of campaign strategy. Second, the decision catalyzed the Supreme Court to embark on two projects that might seem contradictory but in reality go hand-in-hand: The Court has simultaneously deferred to state legislatures in their election rules and aggrandized power to itself. Third, ever since *Bush v. Gore,* the Court has been more ideological in its election law decisions, which has caused some voting rights advocates to shift their focus to state constitutions and state courts. Here is the lie (or, at least, a misunderstanding about the case): The Court simply declared George W. Bush the winner of the 2000 presidential election by a 5–4 vote along ideological lines. To the contrary, the result was, truly, too close to call.[15]

I. NO ELECTION IS REALLY OVER

Disputed elections and post-election litigation existed well before *Bush v. Gore*. The 1876 presidential election, known as the Hayes-Tilden dispute, led Congress to enact the Electoral Count Act of 1887.[16] The 1960 presidential election was close and allies of Richard Nixon, who lost, sought recounts in numerous states.[17] In 1998, a state

15. Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding* Vote, N.Y. TIMES, Nov. 12, 2001, at A1; *Media Recount: Bush Won the 2000 Election*, PBS: NEWS HOUR (Apr. 3, 2001, 09:34 AM), https://www.pbs.org/newshour/nation/media-jan-june01-recount_04-03 [https://perma.cc/KXW2-3YYN].

16. Scott Bomboy, *Looking Back: The Electoral Commission of 1877*, NAT'L. CONST. CTR.: CONST. DAILY BLOG (Jan. 4, 2021), https://constitutioncenter.org/blog/looking-back-the-electoral-commission-of-1877 [https://perma.cc/R6RF-DYBA]; Electoral Count Act of 1887, Pub. L. No. 49-90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 5, 6, 15).

17. David Greenberg, *Was Nixon Robbed?*, SLATE (Oct. 16, 2000, 9:30 PM), https://slate.com/news-and-politics/2000/10/was-nixon-robbed.html [https://perma.cc/LQS7-859T].

court invalidated a 1997 Miami mayoral election due to evidence of absentee balloting fraud.[18] Professor Ned Foley's excellent book, *Ballot Battles*, chronicles many of these disputed elections.[19]

But *Bush v. Gore* created a new cottage industry of lawyers willing to take election cases. The decision was truly a catalyst for the field. These days, planning for post-election litigation is a routine campaign strategy. And every election cycle since 2000 has seen courts mired in election controversies after Election Day.

Indeed, post-election litigation is now fairly common in the weeks and months after an election. 2004 saw a disputed election for Governor in Washington State, which the courts ultimately resolved in 2005.[20] In 2008, the U.S. Senate race in Minnesota was not resolved until June 2009 after a decision from the Minnesota Supreme Court.[21] The 2010 U.S. Senate race in Alaska also went to the courts over a dispute involving write-in ballots.[22] In 2012, a congressional candidate sought a recount and then filed suit to contest the result.[23] 2016 saw lawsuits and a request for a recount in Wisconsin from third-party candidate Jill Stein, which Democratic nominee Hillary Clinton joined.[24] 2020, of course, was the most infamous example, when Donald Trump challenged the results with many spurious lawsuits, culminating in the insurrection at the U.S. Capitol.[25] And after the 2024 election, the North Carolina courts were faced with a lawsuit involving an election for a seat on the North Carolina Supreme Court.[26]

The litigation stemming from the 2024 North Carolina Supreme Court election is particularly concerning because the losing candidate sought to throw out thousands of ballots to change the results.[27] Out of

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18. *In re* Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998) (affirming trial court order regarding fraud involving absentee ballots but reversing and remanding to apply a remedy of vacating only absentee ballots instead of holding an entirely new election).

19. EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES (2016).

20. Oral Decision, Borders *et al.* v. King County *et al.*, No. 05-2-00027-3, SEATTLE WKLY. (Oct. 9, 2006, 12:00 AM), https://www.seattleweekly.com/news/borders-et-al-v-king-county-et-al/ [https://perma.cc/8LRT-KPB8].

21. Sheehan v. Franken (*In re* Contest of Gen. Election), 767 N.W. 2d 453 (Minn. 2009).

22. Miller v. Treadwell, 245 P.3d 867, 877-78 (Alaska 2010).

23. Stein v. Cortés, 223 F. Supp. 3d 423 (E.D. Pa. 2016).

24. Associated Press, *Judge Allows Clinton to Join Stein's Recount Lawsuit for Wisconsin*, NBC26 (Nov. 29, 2016, 6:41 PM), https://www.nbc26.com/news/hillary-clinton-to-join-jill-stein-in-recount-lawsuit [https://perma.cc/SEJ5-KXP8].

25. *See* Max Witynski, *The Lasting Impact of Trump's Attempts to Challenge the 2020 Election Results*, UCHICAGO NEWS (Jan. 7, 2021), https://news.uchicago.edu/story/lasting-impact-trumps-attempts-challenge-2020-election-results [https://perma.cc/RRE2-VT34].

26. Steve Harrison, *A Republican Court Candidate in North Carolina Wants to Toss Out Thousands of Votes*, NPR (Jan. 27, 2025, 5:00 AM), https://www.npr.org/2025/01/27/nx-s1-5269775/north-carolina-supreme-court-challenged-ballots [https://perma.cc/Q3P2-33SJ].

27. *Id.*

over 5.5 million ballots cast, the margin between the two candidates was just 734 votes.[28] The candidate down in the count, Republican Jefferson Griffith, brought suit seeking to invalidate over 65,000 ballots.[29] As the Brennan Center explained,

> The crux of Griffin's argument is a claim that the state board of elections has been breaking state election law for decades by following an incorrect process for registering voters, including failing to require voters to provide a driver's license or social security information and wrongfully allowing certain overseas and absentee ballots to be submitted without photo identification.[30]

Essentially, Griffin sought to change the rules of the election after the fact—rules that the bipartisan North Carolina Board of Elections had approved and that the North Carolina Rules Review Commission had accepted unanimously.[31] Some judges expressed openness to his claims and even delayed the certification of the election results,[32] which will only embolden future candidates to challenge ballots after the fact if they lose a close race. But once a federal court found that the litigation's aims would violate the federal due process rights of voters who had followed state directives, Griffin conceded the race.[33]

Part of the reason for the flurry of post-election lawsuits, of course, is simply that the electorate is polarized and split evenly in many states, meaning that election results are razor thin. No one should be surprised that disputes arise when the margin between two candidates is 734 votes out of millions cast. Election officials often hope that a race will be outside of the "margin of litigation," meaning that the results are one-sided enough that there is no reason for a lawsuit.[34] *Bush v. Gore* opened the door for candidates to believe that when the race is super close, the courts may be amenable to their claims.

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28. *Id.*

29. *Id.*

30. Alicia Bannon, *In North Carolina, an Attempt to Overturn a State Supreme Court Election*, BRENNAN CTR. FOR JUST. (Feb. 27, 2025), https://www.brennancenter.org/our-work/analysis-opinion/north-carolina-attempt-overturn-state-supreme-court-election [https://perma.cc/WCE8-6NM3].

31. Harrison, *supra* note 26.

32. Doug Bock Clark, *North Carolina Supreme Court Blocked Certification of a Justice's Win. Activists Fear It's "Dangerous for Democracy."*, PROPUBLICA (May 5, 2025), https://www.propublica.org/article/north-carolina-supreme-court-election-certification-blocked [https://perma.cc/A92F-D8H8].

33. Griffin v. N.C. State Bd. of Elections, No. 5:24-CV-00731, 2025 WL 1292530, at *35 (E.D.N.C. May 5, 2025); Gary D. Robinson, *Jefferson Griffin Concedes North Carolina Supreme Court Race*, WCNC CHARLOTTE (May 7, 2025, 11:22 AM), https://www.wcnc.com/article/news/politics/north-carolina-politics/jefferson-griffin-concedes-north-carolina-supreme-court-race/275-28c53d27-f72b-4397-b317-d5e2a7d59608 [https://perma.cc/7NL7-T773].

34. Rick Hasen, *"Voting System is Haunted by Democratic Meltdown"*, ELECTION L. BLOG (Jan. 21, 2008, 3:20 PM) https://electionlawblog.org/?p=9174 [https://perma.cc/B2H2-XPSH] ("[W]e put our faith in the law of numbers. We should all utter the US election administrator's prayer: 'Lord, let this election not be close.' ").

These challenges are occurring, however, even when the result is not close. A decisive loss did not stop Trump from filing dozens of lawsuits in 2020.[35] And it hasn't prevented recount requests even in lopsided elections. In 2021, a candidate in Kentucky sought a recanvass of the vote tally even though they lost by twenty points, causing the legislature to amend the law to say that a candidate cannot request a recanvass unless the margin between the candidates is less than one percent of the total votes cast for that office.[36] The legislature also lowered the threshold for a more intensive automatic recount to a margin of 0.5% of the total vote.[37] But under Kentucky law, candidates can still request a recount (as opposed to a recanvass of the machines) no matter the margin of loss if they pay for the process.[38] In 2022, several candidates in Kentucky requested recounts despite losing their primaries by huge amounts.[39] For example, Republican candidate for Congress Gerardo Serrano sought a recount in his primary against incumbent Hal Rogers even though he lost 82% to 5%, or by more than 71,000 votes.[40] He said he was pursuing the recount after others suggested to him that elections were "rigged."[41] Another Kentucky candidate claimed that they sought a recount even though they had lost by a large amount to "check the tech" and "look under the hood" for fraud.[42] The candidates had to post a bond to pay for the recounts, but the process still took time and resources away from election officials as they were preparing for the general election.[43] The frivolous recount petitions caused Secretary of State Michael Adams to seek further changes to the law to "stop recount abuse," but the legislature has not acted on his request.[44]

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35. *See* Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More Than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, BUS. INSIDER (Feb. 22, 2021, 5:03 PM), https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11 [https://perma.cc/JT6D-J4Q6].

36. Joe Sonka, *Kentucky Secretary of State Will Push Bill to Stop 'Frivolous' Vote Recount Petitions*, COURIER J. (June 7, 2022, 5:05 AM) https://www.courier-journal.com/story/news/politics/2022/06/03/michael-adams-calls-bill-stop-frivolous-vote-recount-petitions/7481436001/ [https://perma.cc/G9ZL-4322]; KY. REV. STAT. ANN. §117.305(1) (West 2021).

37. KY. REV. STAT. ANN. § 120.157(1) (West 2021).

38. KY. REV. STAT. ANN. § 120.185 (West 2021); *see also* Sonka, *supra* note 36.

39. Joe Sonka, *'Put an End to This Madness': Kentucky Elections Board Certifies Winners in Recount Races*, COURIER J. (Aug. 17, 2022, 4:37 PM), https://www.courier-journal.com/story/news/politics/2022/08/17/kentucky-elections-board-certifies-winners-for-ballot-in-recount-races/65400161007/ [https://perma.cc/XQE6-BY8Y].

40. Joe Sonka, *If Kentucky 'Liberty' Candidates Want Recounts, Judges Say They Will Have to Pay – a Lot*, COURIER J. (June 16, 2022, 3:00 PM), https://www.courier-journal.com/story/news/politics/2022/06/14/kentucky-liberty-candidates-seeking-vote-recounts-face-high-price-tags/7558018001/ [https://perma.cc/S58J-3GM6].

41. *Id.*

42. *Id.*

43. *See id.*

44. *Adams Offers More Proposals for Election Reform: Before the General Assembly Legislative Oversight and Investigations Committee*, (Nov. 10, 2022), https://www.kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=453 [https://perma.cc/5X7P-GVBR] (statement of Michael Adams, Sec'y of State of Ky.).

Other states also have seen recount petitions even though the elections were decisive. In 2022, a Nevada Republican candidate for Governor lost the primary by over 11%, or just over 26,000 votes, yet still asked for a recount.[45] Similarly, Tina Peters lost the 2022 Republican primary for Secretary of State in Colorado by over 88,000 votes but still sought a recount based on unsupported allegations that the result was fraudulent.[46] Many of these claims stem from Donald Trump's never-ending attempt to undermine the results of the 2020 election, as his followers continued to peddle the fraud theme to challenge their 2022 losses. But *Bush v. Gore* is at the origin of the idea that post-election dispute processes might change outcomes.

Even if the challenges lack merit and courts ultimately dismiss them, they can create a public dialogue that undermines people's confidence in the election. That was the entire point of Donald Trump's lawsuits after the 2020 election. Because of the challenges, along with Trump's rhetoric, millions of people still think the 2020 election was fraudulent despite a lack of any evidence that would call the result into question.[47] *Bush v. Gore* created the notion that candidates can go to the courts to seek redress, and Trump exploited the idea for his political advantage.

Indeed, the reality of looming post-election litigation is perhaps one of the most detrimental aspects of *Bush v. Gore*'s aftermath. It means that candidates never think the election is over if it is close. It undermines one of the most important pillars of a democracy: That losing candidates readily accept defeat, ready to try again in the next election.[48] Moreover, post-election litigation wreaks havoc for election administrators, who often must process these challenges or provide evidence to courts, all while preparing for the next election.[49]

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45. Gabe Stern, *Nevada GOP Governor Candidate to Pay for Statewide Recount*, ASSOCIATED PRESS (June 29, 2022, 10:30 PM), https://apnews.com/article/2022-midterm-elections-nevada-election-recounts-reno-dc9f17635f7933b1efd44eb6347614f1 [https://perma.cc/WVX3-VHP8]; *see also* Results of 2022 Nevada Statewide Primary Elections, NEV. SEC'Y OF STATE, https://www.nvsos.gov/silverstate2022pri/NVOther/index.shtml [https://perma.cc/TS4M-Z368] (last visited Nov. 22, 2025).

46. Bente Birkeland, *Tina Peters' Quarter-Million-Dollar Recount Gains Her 13 Votes*, CPR NEWS (Aug. 4, 2022, 4:10 PM), https://www.cpr.org/2022/08/04/tina-peters-recount-results/ [https://perma.cc/9R22-MPG3].

47. Sarah Fortinsky, *One-Third of Adults in New Poll Say Biden's Election Was Illegitimate*, THE HILL (Jan. 2, 2024, 8:54 AM), https://thehill.com/homenews/campaign/4384619-one-third-of-americans-say-biden-election-illegitimate/ [https://perma.cc/VK2K-5YDR].

48. Uri Friedman, *Democracy Depends on the Consent of the Losers*, THE ATL. (Oct. 17, 2016), https://www.theatlantic.com/international/archive/2016/10/trump-election-rigged-democracy/504338/ [https://perma.cc/KH8C-YEZP].

49. *See* Michael T. Morley, *The Scope of Election Litigation*, 81 WASH. & LEE L. REV. 1153, 1180 (2024).

The biggest legacy of *Bush v. G*ore, then, may not be that George W. Bush became president instead of Al Gore. It is that we are still fighting post-election battles, in every election cycle, spurred by that 2000 decision.

II. THE DEFERENCE/AGGRANDIZEMENT DICHOTOMY

A second legacy of *Bush v. Gore* is that the case served as a catalyst for the Court's overall approach in election law cases to unduly defer to state legislatures in their voting rules, even if those rules harm voters.[50] At the same time, the Court has retained power for itself to decide significant election issues.[51] These two ideas—deference to states and aggrandizement of power to the Court—may seem contradictory, as the first suggests that the Court is staying out of these fights in favor of state legislatures' power while the second says that the Court is retaining power for itself. Yet they both animate the way the Court considers election law disputes. Put differently, the Court has indicated that it will defer to state legislatures while it still retains ultimate oversight authority.

More specifically, the Court has deferred to state election rules when plaintiffs challenge those rules under the U.S. Constitution. It has also deferred to states by using procedural mechanisms to prevent these cases from moving forward too close to an election.[52] But in challenges to federal statutes, such as the Voting Rights Act—which sets out rules that states must follow—the Court has curtailed Congress's oversight and the reach of that federal law, which has the dual effect of aggrandizing the Court's power as compared to Congress while also giving states broader leeway to regulate elections as they see fit.[53]

First, the Court has deferred to state legislatures in constitutional challenges to their election rules. This deference to states began before *Bush v. Gore* in cases such as *Anderson v. Celebrezze* from 1983 and *Burdick v. Takushi* from 1992.[54] In those cases, the Court adopted watered-down judicial scrutiny by creating a balancing test that weighs the burdens on voters with the state's interest in promulgating the election rule in question.[55] That test allows states to justify their election rules with generic rationales such as improving election administration or rooting out fraud, even if the state has no evidence that fraud actually exists.

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50. Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 82 (2021).

51. *See* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 636 (2023).

52. Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam).

53. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021).

54. *See generally* Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992).

55. *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434.

The majority's decision in *Bush v. Gore* also deferred to the state legislature, touting adherence to the Florida Legislature's wishes as a key part of its analysis. After finding an equal protection violation in the recount process, the per curiam majority explained that remanding the case to the Florida Supreme Court for the implementation of uniform standards for a recount would violate the state legislature's desire to "participat[e] fully in the federal electoral process."[56] Further state judicial involvement, the Supreme Court held, would result in the final resolution over Florida's electoral votes to come beyond the so-called "safe-harbor" deadline in federal law, which provided that Congress must deem a state's submission of its election certificate as conclusive if all disputes are resolved by a certain date.[57] Therefore, instead of ordering a remedy to the equal protection violation that the Court had identified, the majority cut off any further recounts because of the purported desire of the state legislature to ensure Congress would count Florida's electoral votes (despite any indication that Congress would not include Florida if the state did not complete its count until after the safe-harbor deadline).[58]

Chief Justice Rehnquist's concurring opinion was even more forceful on this point, writing that the Court must reverse the Florida Supreme Court's decision, which had ordered the recount, to "respect the [state] legislature's Article II powers."[59] Chief Justice Rehnquist suggested that the Florida Supreme Court was essentially acting as a legislature by altering deadlines within the state election code and ordering a further recount, which would take away the power that Article II of the U.S. Constitution gives to the "legislature" to determine the manner of appointing presidential electors.[60] He therefore claimed that the majority's decision "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."[61] Thus, the primacy of the state legislature in regulating the election was a key aspect of Chief Justice Rehnquist's analysis, which rejected the Florida Supreme Court's interpretation of state law.

The Court's cases since *Bush v. Gore* underscore the idea that, in constitutional challenges to state election rules, the default approach is deference to state legislatures in their election administration. In *Crawford v. Marion County Election Board*, the Court deferred to the Indiana Legislature's adoption of a new voter ID requirement, despite

56. *Bush*, 531 U.S. at 110 (alteration in original) (quoting Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273, 1289 (Fla. 2000)).

57. *Id.* at 113 (Rehnquist, C.J., concurring). Congress has since updated the Electoral Count Act. *See* Pub. L. No. 117-328, 136 Stat. 5233 (codified as amended at 3 U.S.C. § 1).

58. *See Bush*, 531 U.S. at 110.

59. *Id.* at 113 (Rehnquist, C.J., concurring).

60. *Id.* at 114.

61. *Id.* at 115.

the fact that Indiana could not point to any instances of in-person voter fraud that could justify the regulation.[62] As Justice Scalia put it in his opinion concurring in the judgment, "It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class."[63] The Court's redistricting cases have generally (though not exclusively) deferred to state legislatures in how they draw the lines.[64] For example, the Court declared that it must approach redistricting lawsuits with a "presumption of legislative good faith," despite the numerous examples of state legislatures engaging in extreme partisan gerrymandering.[65] This is not an exhaustive list; there are many examples of the Court's deference to state legislatures in their election rules.[66]

None of these cases cited *Bush v. Gore*. In fact, the Court has not cited that opinion very much in the last twenty-five years.[67] But the cases exhibit the same underlying premise: The Court generally should not question state legislatures in their administration of elections. *Bush v. Gore* did not begin that trend, but the Court's analysis in that case furthered the idea in the most high-profile case possible.

Second, the Court has used procedural mechanisms to provide less oversight to state voting rules through the so-called *Purcell* Principle.[68] In *Purcell*, which involved a lawsuit in the weeks leading up to an election, the Court explained that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."[69] Therefore, "the Court of Appeals [should have given] deference to the discretion of the District Court."[70] Yet the Court more recently clarified that the principle is that "federal courts ordinarily should not alter state election laws in the period close to an election."[71] That is, courts should defer

62. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188-89, 194-96, (2008).

63. *Id.* at 208 (Scalia, J., concurring).

64. *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 718 (2019) (holding that partisan gerrymandering claims are nonjusticiable); Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 38-39 (2024) (narrowing test for racial gerrymandering claim). *But see* Allen v. Milligan, 599 U.S. 1, 23-24 (2023) (refusing argument to narrow the scope of Section 2 of the Voting Rights Act as applied to redistricting challenge).

65. Abbott v. Perez, 585 U.S. 579, 603 (2018).

66. *See* Douglas, *supra* note 50, at 64-72 (citing numerous examples of judicial deference to state election rules during the 2020 COVID election).

67. *See* Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 3 (2007); Adam Liptak, *As Supreme Court Weighs Election Cases, a New Life for* Bush v. Gore, N.Y. TIMES, https://www.nytimes.com/2020/10/28/us/supreme-court-bush-gore-kavanaugh.html [https://perma.cc/RPR8-JFHY] (Nov. 5, 2020).

68. *See* Harry B. Dodsworth, *The Positive and Negative* Purcell *Principle*, 2022 UTAH L. REV. 1081, 1097-98 (2022).

69. *Purcell*, 549 U.S. at 3-5.

70. *Id.* at 5.

71. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring).

to state election rules as an election approaches. Faced with scores of lawsuits during the COVID election of 2020, the Court consistently deferred to states in how they administered the election, in spite of evidence that many voters would have a more difficult time casting a ballot because of the pandemic.[72] Justice Gorsuch summed up the point in one of these cases: "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."[73] He failed to recognize that there are decades of precedent that counsel in favor of the judiciary ensuring that state legislatures do not infringe upon the constitutional right to vote when it sets those election rules.[74]

Finally, the Court has deferred to states by curtailing the reach of federal voting laws, while also retaining power to itself as compared to Congress. In *Shelby County v. Holder*, the Court gutted a key portion of the federal Voting Rights Act that required certain jurisdictions with a history of racial discrimination to gain preapproval of their voting rules before they go into effect.[75] The upshot of the holding was to allow states to implement their voting rules without federal oversight, even if the state has a history of discrimination.[76] Another blockbuster Voting Rights Act case, *Brnovich v. DNC*, crafted a new test for Section 2 of the Act that makes it more difficult for plaintiffs to show that a voting rule discriminates against minority voters.[77] Limiting the ability of plaintiffs to win these cases effectively defers the regulation of elections to the states, as there is less judicial oversight. Indeed, a Bloomberg study found that lawsuits citing Section 2 had dropped dramatically after *Brnovich*, demonstrating how the case made these claims much harder to bring.[78] The Court is poised to further limit the reach of Section 2 in redistricting cases during its 2025-26 term, which will likely harm representation for racial minorities.[79] Similarly, the Court narrowly construed the federal National Voter Registration Act to uphold Ohio's program of removing people from the voter rolls.[80] In

72. Douglas, *supra* note 50, at 64-72.

73. *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring).

74. *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 737-38 (2001).

75. *Shelby Cnty.*, 570 U.S. at 534-35, 556-57.

76. *Id.*

77. 594 U.S. 647, 692 (2021) (Kagan, J., dissenting).

78. Diana Dombrowski, Alex Ebert & Kimberly Robinson, *Voting Rights Claims Plunge in Wake of Supreme Court Decision*, BLOOMBERG (Feb. 12, 2025, 5:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/business-and-practice/BNA%2000000194-8fa2-d938-a1fe-affae6e70001 [https://perma.cc/RLT3-RHYU].

79. *See* Louisiana v. Callais, 145 S. Ct. 2608 (2025); Richard L. Hasen, *The Supreme Court Just Signaled Something Deeply Disturbing About the Next Term*, SLATE, (Aug 4, 2025, 5:59 AM), https://slate.com/news-and-politics/2025/08/supreme-court-voting-rights-act-clarence-thomas-message.html [https://perma.cc/CRZ5-3ACJ].

80. Husted v. A. Philip Randolph Inst., 584 U.S. 756, 766-67 (2018).

curbing the reach of federal laws, the Court is giving itself greater authority to dictate election law doctrine so that state legislatures have less oversight from the federal government.

This aggrandizement of power has its seeds in *Bush v. Gore*. After all, the Court was not required to take the case, and some scholars at the time thought the Court would stay out of the dispute, which involved a state court interpretation of state law.[81] By issuing a stay of the Florida Supreme Court's decision and granting certiorari, the Court was declaring itself to be the final arbiter of the state law analysis.[82] As Justice Stevens wrote in dissent, "When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers."[83] Instead, the Court explicitly overrode the Florida Supreme Court's interpretation of Florida law, thereby giving itself the ultimate power to decide the issue.

The Court has also more explicitly aggrandized power to itself in the election setting. In *Moore v. Harper*, the Court said that state courts have the power of judicial review to determine the constitutionality of state election rules under state constitutions as those rules apply to federal elections, but that the U.S. Supreme Court could step in if it wants.[84] The Court held that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[85] Justice Kavanaugh, concurring, agreed that "a state court's interpretation of state law in a case implicating the Elections Clause is subject to federal court review,"[86] citing Chief Justice Rehnquist's concurrence in *Bush v. Gore*.[87] Who would decide whether state courts have "transgress[ed] the ordinary bounds of judicial review"?[88] The

81. *See* David A. Strauss, Bush v. Gore*: Were They Thinking?*, 68 U. CHI. L. REV. 737, 746 (2001) (noting that "[t]he Court's decision to grant certiorari was very surprising to most observers"); E. Tammy Kim, *The Ghost of* Bush v. Gore *Haunts the Supreme Court's Colorado Case*, NEW YORKER (Feb. 7, 2024), https://www.newyorker.com/news/news-desk/the-ghost-of-bush-v-gore-haunts-the-supreme-courts-colorado-case [https://perma.cc/2V4N-SJ33] (" 'This is a question about who won Florida. Elections are always decided by the state Supreme Court. Why would the U.S. Supreme Court get involved? They don't have jurisdiction,' [Gerard] Magliocca recalled. 'That all turned out to be wrong.' "). *But see* Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 50 (arguing that if the Supreme Court had not taken the case, the dispute would have spilled into January, creating a situation the Constitution does not address).

82. *Bush*, 531 U.S. at 100.

83. *Id.* at 123 (Stevens, J., dissenting).

84. Moore v. Harper, 600 U.S. 1, 36-37 (2023).

85. *Id.* at 36.

86. *Id.* at 38 (Kavanaugh, J., concurring).

87. *See id.* ("Federal court review of a state court's interpretation of state law in a federal election case 'does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.' " (quoting Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring))).

88. *Id.* at 36 (majority opinion).

U.S. Supreme Court. Thus, even in cases that involve solely state law and state constitutions, the Court gave itself final oversight authority. Moreover, in reversing a state court's invalidation of a state election rule, the Court would be deferring to the state legislature, demonstrating how the approaches are intertwined.

The Court's more subtle actions in these cases also send the signal that it believes it has the paramount authority to change judicial doctrine as it desires, often with the effect of further deference to state rules. In *Allen v. Milligan*, Justice Kavanaugh provided the crucial fifth vote to reject Alabama's attempt to overturn precedent on Section 2 of the Voting Rights Act while also opining that "the authority to conduct race-based redistricting cannot extend indefinitely into the future."[89] Two years later the Court signaled, through a supplemental briefing order in August 2025, that it is poised to rule Section 2 unconstitutional or severely curtail its reach in a blockbuster case out of Louisiana.[90] If this argument prevails, states will face much less Section 2 litigation, which will result in increased deference to their election laws. Similarly, Justice Gorsuch mused in a concurrence in *Brnovich v. DNC* that perhaps the Voting Rights Act does not include a private right of action for plaintiffs to bring suit.[91] That wholly unsupported statement caused several lower court judges to hold that the VRA in fact does not allow private plaintiffs to bring suit—resulting in deference to state legislatures because they will face fewer lawsuits over their voting practices if only the DOJ can file these cases.[92]

The Court's accumulation of power goes beyond its election law doctrine. As Professor Josh Chafetz notes, "the John Roberts-helmed judiciary has deployed this concealment of its institutional situatedness in the service of systematically empowering its own institution at the expense of others."[93] In addition to election law, this power grab is a feature of administrative law and separation of powers doctrine, among other areas. In *Loper Bright Enterprises v. Raimondo*, the Court overturned the *Chevron* doctrine and said that courts should not defer to agency interpretations of ambiguous statutes.[94] In doing so, the Court gave itself the authority to supplant an agency's interpretation of its own expertise. The Court's separation of powers cases also exhibit judicial aggrandizement, as Professor Chafetz explains: "[E]very time, the courts have empowered themselves, primarily by

89. Allen v. Milligan, 599 U.S. 1, 42, 45 (2023) (Kavanaugh, J., concurring).

90. Order Directing Parties to File Supplemental Briefs, Louisiana v. Callais, 145 S. Ct. 2608 (Aug. 1, 2025) (No. 24-109).

91. *See Brnovich*, 594 U.S. at 690 (Gorsuch, J., concurring).

92. *See, e.g.*, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893 (E.D. Ark. 2022), *aff'd*, 86 F.4th 1204, 1206-07 (8th Cir. 2023); Macin Graber & Joshua A. Douglas, *A Major Wrong on a Private Right of Action Under the Voting Rights Act*, 81 WASH. & LEE L. REV. 1127, 1147-49 (2024).

93. Chafetz, *supra* note 51, at 636.

94. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

denigrating Congress in the process of denying it timely access to the information it needs."[95] Thus, the Court's overall approach has been to aggrandize power to itself; its election law cases are but one prominent example—one that goes to the very foundation of democracy itself.[96]

In sum, the Court has taken two general approaches to its election law jurisprudence since *Bush v. Gore*—and both were part of the decision in *Bush v. Gore* itself. The Court's primary mode in election cases is to defer to state legislatures, particularly in constitutional challenges to state election laws and through procedural mechanisms. The Court has also asserted its own power as the final arbiter of the scope of election law doctrine, which often results in further deference to state legislatures. Sometimes these approaches are incompatible: In *Rucho v. Common Cause*, for example, the Court deferred to state legislatures in their redistricting maps and correspondingly took itself out of the business of deciding partisan gerrymandering claims.[97] In other cases, however, the Court has both deferred to state legislatures while also aggrandizing power to itself. In *Brnovich v. DNC*, for example, the Court curtailed the ability of plaintiffs to bring claims under Section 2 of the Voting Rights Act by creating a new test for plaintiffs to satisfy—which resulted in more deference to state laws—while simultaneously (through Justice Gorsuch's musings on the lack of a private right of action) suggesting another path for the Court to limit VRA claims even further.[98]

The Court famously said in *Bush v. Gore* that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[99] That oft-criticized sentence suggested that the opinion was good for one day only. The Court did not cite the decision for over two decades.[100] But the underlying principles of the case—deference to state legislatures in their election rules and aggrandizement of power to the Court to decide these disputes—have animated the Court's election law jurisprudence ever since.

95. Chafetz, *supra* note 51, at 641.

96. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) ("The common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court.").

97. *Rucho*, 588 U.S. at 718.

98. *Brnovich*, 594 U.S. at 665-72; *id.* at 690 (Gorsuch, J., concurring).

99. *Bush*, 531 U.S. at 109.

100. *See* Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 4 (2022).

III. AN IDEOLOGICAL COURT

The third legacy of *Bush v. Gore* is that the Court has been particularly partisan and ideological in its election law cases since that decision. A corresponding consequence is that state courts have become even more important for voting rights plaintiffs seeking to vindicate their rights.

Professor Tony Gaughan surveyed the Court's election law jurisprudence over the 20th century and found a remarkable shift that began with *Bush v. Gore*.[101] There was "little evidence of partisan influence in Supreme Court election law cases in the 20th century," Professor Gaughan writes.[102] "[J]ustices in the 20th century rarely polarized along partisan lines in election law cases," at least as measured by the party of the president who nominated each justice.[103] But "[i]n the decades since the 2000 *Bush v. Gore* decision, election law cases have divided the justices along partisan lines to an unprecedented degree."[104] This trend, Professor Gaughan shows, became even more pronounced after 2011[105]:

> In effect, for the first time in modern history, the votes of each Republican-appointed justice in the most important election law cases often mirror the position of the Republican Party, and the votes of each Democratic-appointed justice often mirror the position of the Democratic Party. This partisan alignment on key election law cases represents a stark and troubling break with more than a century of past precedent.[106]

Bush v. Gore is surely one reason (among several) for why the Court has become much more partisan in election law cases than it was previously. Professor Gaughan points to *Bush v. Gore* as the "historic turning point"[107]:

> In the 20th century, only 12.5% of cases saw majorities and concurrences made up of only Republican appointees or only Democratic

101. Anthony J. Gaughan, *The Influence of Partisanship on Supreme Court Election Law Rulings*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 553, 564 (2022).

102. *Id.* at 553.

103. *Id.* at 557.

104. *Id.* at 554 (footnote omitted).

105. *Id.* at 569.

106. Gaughan, *supra* note 101, at 554. There are measures of the Court's ideology other than the party of the president who nominated the Justice, such as the Martin-Quinn score of ideology. *See Martin-Quinn Scores*, WASH. UNIV. ST. LOUIS, http://mqscores.wustl.edu/measures.php [https://perma.cc/U4TK-A4U5] (last visited Oct. 9, 2025); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 136 (2002). After all, at the time of *Bush v. Gore*, Republican presidents had appointed seven of the nine Justices, yet Justices Stevens and Souter, both Republican nominees, aligned more closely with the Democratic appointees based on their Martin-Quinn scores. *Id.* at 146.

107. Gaughan, *supra* note 101, at 566.

> appointees. But from *Bush v. Gore* in 2000 to *Citizens United v. Federal Election Commission* in 2010, the percentage of cases involving majorities and concurrences consisting exclusively of appointees of one party shot up to 35%.[108]

Though some prior cases may have fallen along partisan lines,[109] *Bush v. Gore* marked a turning point for the trend of ideological decision making and also caused further partisan splits on the Court through its dual effect: It showed how courts might impact election outcomes and it encouraged presidents to nominate more ideologically pure justices. Professor Gaughan notes that "[a]s election law rulings soared in importance, and as presidential candidates committed to basing their judicial appointments on ideology, the justices' partisan affiliations became disconcertingly accurate predictors of their positions in the most important election law cases."[110] That trend became even more stark in the 2010s and early 2020s as ideologies on the Court hardened.[111]

Adding to the significance of the partisanship these cases exhibit, the amount of election litigation has skyrocketed in recent years.[112] As Professor Rick Hasen found, election litigation has continued to grow and is now "triple the rate since before *Bush v. Gore* . . . with a 14.3 percent increase in 2024 election season litigation compared to the 2020 season."[113] Professor Hasen suspects that "ongoing conflict surrounding the 2020 election created political incentives for Trump and his allies to file suits alleging the potential for fraud an[d] irregularities in connection to the 2024 elections."[114] Further, as Professor Derek Muller has shown, increased campaign donations for litigation funds have helped candidates such as Trump easily fund these lawsuits.[115] In particular, Professor Muller points to the Supreme Court's 2014 decision in *McCutcheon v. FEC*, which struck down the total contribution limit to all candidates, as well as Congress's enactment of an omnibus spending bill in 2014 that increased the amount a person can give to

108. *Id.* at 564.

109. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

110. Gaughan, *supra* note 101, at 555.

111. *Id.* at 568-69 ("The 2010s and early 2020s would see the Court's polarization reach new and unprecedented levels of intensity in election law cases.").

112. *See* Richard L. Hasen, Bush v. Gore*'s Ironic Legacy*, 53 FLA. ST. U. L. REV. 313, 318–19 (2026).

113. *Id.* at 4.

114. *Id.* at 9.

115. *See* Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 562-63 (2021).

political parties for litigation expenses, as contributing to the rise in election litigation.[116] Both parties have taken advantage of this additional funding, with total election-related legal expenses in 2016 doubling the 2012 total.[117]

Sometimes election litigation is good for democracy when it helps to vindicate the individual right to vote. Courts must act when legislatures enact restrictive voting rules. The rise in election legislation has also contributed to the increase in election litigation.[118] But sometimes losing candidates use the courts to try to make a political point, as Trump did after the 2020 election.

Of course, partisanship and politics do not explain every case. There are certainly examples of Republican-appointed justices and Democratic-appointed justices joining together in a ruling.[119] But the surprise among the legal academy and the media when that happens demonstrates the unfortunate truth that we now simply expect the Court to rule along ideological lines in election cases, even though that did not occur with regularity before *Bush v. Gore*.[120] Moreover, as Professor Gaughan notes, most of the cases where the Court's decisions did not fall neatly along partisan lines were not "cases with the greatest potential to affect the parties' competitive standing on Election Day."[121] The upshot is that Democrats have known since *Bush v. Gore* that they have an uphill battle at the Court, just as Republicans have known that the majority of justices are more amenable to their arguments.

That reality has helped to create a further legacy: The prevalence of state courts and state constitutions in voting rights disputes.[122] As the U.S. Supreme Court has curtailed protection for the right to vote and issued narrow rulings that defer to state legislative enactments, voting rights litigants have turned to state courts. Although state courts heard many election law disputes early in the

116. *Id.* at 563-65 (citing McCutcheon v. FEC, 572 U.S. 185 (2014) and Pub. L. No. 113-235, 128 Stat. 2132 (codified as amended in scattered sections of the U.S.C.)).

117. *Id.* at 566.

118. *See, e.g.*, *Voting Laws Roundup: 2024 in Review*, BRENNAN CTR. FOR JUST. (Jan. 15, 2025), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2024-review [https://perma.cc/K7P7-ULB8] (finding that "states enacted more restrictive voting laws in 2024 than in any year in the last decade except for 2021.").

119. *See, e.g.*, Allen v. Milligan, 599 U.S. 1, (2023).

120. *See, e.g.*, Nina Totenberg, *Supreme Court Unexpectedly Upholds Provision Prohibiting Racial Gerrymandering*, NPR (Jun. 28, 2023, 8:58 PM), https://www.npr.org/2023/06/08/1181002182/supreme-court-voting-rights [https://perma.cc/S22E-YL6X].

121. Gaughan, *supra* note 101, at 569.

122. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104-05 (2014).

country's history,[123] the U.S. Supreme Court's decision in *Baker v. Carr*[124] in 1962 opened the Court's doors to the "political thicket" of election law. The Court decided many salient election law cases between *Baker v. Carr* and *Bush v. Gore* on issues of redistricting, ballot access, election administration, and more.[125] But since *Bush v. Gore*—and particularly in the last decade—state courts have taken on new prominence.

Liberal-minded plaintiffs have brought cases in state courts knowing that they have a better chance of success there than in federal court. For example, after the Supreme Court refused to invalidate Indiana's voter ID law in *Crawford v. Marion County Election Board*[126] in 2008, litigants went to state courts and convinced some state judges to strike down similar laws under state constitutions.[127] Similarly, after the Court closed its doors to partisan gerrymandering claims in *Rucho v. Common Cause*[128] in 2019, voting rights advocates turned to state courts, again garnering some wins.[129]

There is good reason for voting rights advocates to go to state courts. Not only have federal courts been less amenable to their claims since *Bush v. Gore*, but state courts can draw upon the more explicit protections for voters within state constitutions.[130] For example, the Montana Supreme Court ruled that, unlike the safeguards within the U.S. Constitution, "[t]he right to vote is a clear and unequivocal fundamental right under the Montana Constitution."[131] The court

123. *See* Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1066-70 (1958).

124. *See* Baker v. Carr, 369 U.S. 186, 209 (1962).

125. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 34-42 (1986) (holding that a North Carolina redistricting plan diluted the voting strength of Black voters in violation of the Voting Rights Act); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down poll taxes as an unconstitutional voting qualification); Anderson v. Celebrezze, 460 U.S. 780, 782-86 (1983) (holding that Ohio's early filing deadline was unconstitutional).

126. Crawford v. Marion Cnty. Election Bd., 553 U.S. at 181, 185-89 (2008).

127. *See, e.g.*, Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553, at *1 (Wis. Cir. Ct. Mar. 6, 2012), *rev'd*, 851 N.W.2d 262 (Wis. 2014); Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *1 (Pa. Commw. Ct. Jan. 17, 2014). *But see* League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 767 (Ind. 2010); Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 74-75 (Ga. 2011).

128. *Rucho*, 588 U.S. at 718.

129. *See, e.g.*, League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379, 399, 414 (Ohio 2022) (holding that the court had the authority to review districting plans and declaring the map invalid); *In re* 2021 Redistricting Cases, 528 P.3d 40, 92 (Alaska 2023) (holding that partisan gerrymandering is unconstitutional); Szeliga v. Lamone, No. C-02-CV-21-001816, 2022 WL 2132194, at *45-46 (Md. Cir. Ct. Mar. 25, 2022) (finding that the Maryland map violated the state constitution). *But see* Rivera v. Schwab, 512 P.3d 168, 187 (Kan. 2022) (holding that partisan gerrymandering is nonjusticiable); Brown v. Sec'y of State, 313 A.3d 760, 763 (N.H. 2023) (holding the same); Harper v. Hall, 886 S.E.2d 393, 448-49 (N.C. 2023) (holding the same); Graham v. Adams, 684 S.W.3d 663, 682-83, 693 (Ky. 2023) (holding that partisan gerrymandering claims are justiciable under the state constitution but upholding the specific maps in question).

130. *See* Joshua A. Douglas, *The Power of the Electorate Under State Constitutions*, 76 FLA. L. REV. 1679, 1690 (2024).

131. Mont. Democratic Party v. Jacobson, 545 P.3d 1074, 1084 (Mont. 2024).

explicitly refused to follow federal precedent for the state constitutional right to vote.[132] It then struck down, under the state constitution, new restrictions involving voter registration and absentee balloting.[133] Similarly, the Alaska Supreme Court ruled that partisan gerrymandering claims are cognizable under the state constitution,[134] refusing to follow the U.S. Supreme Court's lead in *Rucho* on the justiciability of partisan gerrymandering claims under the U.S. Constitution.[135] The Montana Supreme Court and Alaska Supreme Court decisions are just two examples of a broader trend, even in so-called red states, to invoke state constitutions to vindicate the right to vote in the face of the federal courts' narrow rulings. Although each state is different, it appears that at least some state supreme courts are not as predictably ideological as the U.S. Supreme Court on election law issues—though there are of course exceptions (with the North Carolina Supreme Court perhaps the most prominent example).[136] Put differently, it is a lot easier to predict how the U.S. Supreme Court will rule on an election law case these days than it is to predict, at least in many states, how the state judiciary will rule.

In sum, a legacy of *Bush v. Gore* is the increased ideological decision making of the U.S. Supreme Court in election law cases, which has produced a downstream effect of litigants going to state courts and invoking state constitutions. That fact is perhaps ironic given that *Bush v. Gore* involved a case that began in state court and was only about state law. In light of the trajectory of federal jurisprudence, voting rights plaintiffs would be smart to draft their complaints carefully to invoke only the state constitution to avoid U.S. Supreme Court review if possible.

IV. THE LIE

The Supreme Court's decision in *Bush v. Gore* was immediately controversial. A survey taken soon after the ruling found that fifty-four

132. *Id.* at 1090.

133. *Id.* at 1093-1107.

134. *In re 2021 Redistricting Cases*, 528 P.3d at 92.

135. *Rucho*, 588 U.S. at 718.

136. *See* Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1411 (2016); *see also* Joshua A. Douglas, *Once Again, Voting Rights Are Under Siege in North Carolina*, WASH. MONTHLY (May 5, 2023), https://washingtonmonthly.com/2023/05/05/once-again-voting-rights-and-democracy-are-under-siege-in-north-carolina/ [https://perma.cc/2WTB-PUXN] (citing the election of two Republican justices to the North Carolina Supreme Court as causing an immediate reversal on the justiciability of partisan gerrymandering claims under the state constitution); *see also* Alicia Bannon, *In North Carolina, an Attempt to Overturn a Supreme Court Election*, STATE CT. REP. (Apr. 13, 2025), https://statecourtreport.org/our-work/analysis-opinion/north-carolina-attempt-overturn-supreme-court-election [https://perma.cc/SZ2Y-SUW8] (discussing whether the North Carolina Supreme Court might have been open to the losing Republican candidate's attempt to invalidate more than 60,000 votes to reverse his loss).

percent of respondents thought the decision was fair, forty percent thought it was unfair, and five percent did not know.[137] Ten years later, respondents in another survey were still split, though a much larger percentage did not express an opinion: 33.7% said the Court decided the case fairly, 35.2% said the decision was unfair, and 28.4% said they did not know.[138] The youngest group, of people eighteen to twenty-nine-years-old, demonstrated less awareness of the decision, with forty-two percent saying they did not know if it was fair or not.[139] In 2022, 26.43% of respondents selected *Bush v. Gore* among a list of high-profile cases as the "most harmful" for American democracy.[140]

Twenty-five years after the decision, *Bush v. Gore* is a fact of history for many people, not a lived experience. As Professor Michael Morley noted at the twentieth anniversary of the decision,

> [f]or an entire generation of younger Americans . . . *Bush v. Gore* is a purely historical event whose outcome is already known, as much an artifact of the past as the Apollo 11 moon landing or the Korean War. The Court issued its ruling before the college students, law students, and other young adults of today were born or while they were too young to understand. To them, *Bush v. Gore* is part of the pre-existing firmament of American history and law.[141]

Today's students might also misunderstand what exactly the Court held or the breakdown of the vote in the case. Although my sense is based on purely anecdotal evidence, many of my own law students come into class believing that (1) the Supreme Court simply declared George W. Bush the winner of the 2000 election or otherwise threw the election to him and that (2) the decision was a 5-4 ruling on ideological lines. Both are wrong—or at least do not tell the entire story.

First, the Court did not simply declare Bush the winner of the presidential election. That sentiment suggests that the Court made a political determination untethered from law. But—regardless of whether one agrees with the Court's reasoning—the decision was grounded in legal analysis. The Court found that the Florida Supreme Court's ruling, to continue a recount without precise standards, would violate the Equal Protection Clause.[142] "The problem," the Court found with the recount procedures, "inheres in the absence of specific

137. NAES CS24, asked December 13, 2000-January 19, 2001 (cited in Amy Semet, Nathaniel Persily & Stephen Ansolabehere, Bush v. Gore *in the American Mind: Reflections and Survey Results on the Tenth Anniversary of the Decision Ending the 2000 Election Controversy*, *in* ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER BUSH V. GORE 48, 53 (R. Michael Alvarez & Bernard Grofman eds., Cambridge Univ. Press 2014)).

138. Semet, Persily & Ansolabehere, *supra* note 137 at 56.

139. *Id.* at 57.

140. DOUGLAS, *supra* note 14, at 180.

141. Michael T. Morley, Bush v. Gore *in Historical Perspective*, HIST. REV. 8, 9 (Fall/Winter 2020), https://supremecourt.flcourts.gov/News-Media/Court-News/Historical-Review-Magazine-highlights-Bush-v.-Gore-20-years-later [https://perma.cc/GC2B-EE5Z].

142. *Bush*, 531 U.S. at 105-06.

standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary."[143] Whether one agrees or not, this was a legal decision that analyzed traditional equal protection principles. Of course, the practical impact of the decision was that Bush won Florida's electoral votes and therefore the presidential election. The day after the decision, Al Gore conceded the race.[144] But Gore could have continued to dispute the election in Congress on January 6, 2001, when Congress met to tally the results. The Court's decision effectively resolved the dispute, but nowhere did the Court declare that Bush must become the next president. In addition, even if the Court had allowed the recount to proceed as Gore had wanted, by counting undervotes (ballots that did not indicate any selection for president), it is likely he still would have lost Florida. A media consortium counted every ballot that the machines had rejected for not clearly indicating a vote for president and found that, under the standard Gore had advocated, Bush would have increased his margin in the state.[145] That said, a fuller count that also included all overvotes—those ballots that the machines rejected for potentially having two votes for president—might have given Gore the victory, but he did not ask for a recount of overvotes.[146]

Second, the ruling was not solely a 5-4 decision on ideological lines, which again might surprise today's students. On the equal protection issue—which was perhaps the most significant legal holding of the case—the Court was essentially 7-2. Both Justices Souter and Breyer recognized that there might be an equal protection problem with the Florida Supreme Court's treatment of the recount.[147] Justice Souter

143. *Id.* at 106.

144. Albert Gore, Jr., *Address Conceding the 2000 Presidential Election*, U.C. SANTA BARBARA: THE AM. PRESIDENCY PROJECT (Dec. 13, 2000), https://www.presidency.ucsb.edu/documents/address-conceding-the-2000-presidential-election [https://perma.cc/DJ8S-KVV6].

145. Fessenden & Broder, *supra* note 15, at A1.

146. *Id.*

147. *Bush*, 531 U.S. at 111 ("Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See *id.*, at 134 (SOUTER, J., dissenting); *id.*, at 145-146 (BREYER, J., dissenting)."). Justice Souter explained that:

> [E]vidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as 'hanging' or 'dimpled' chads).

Id. at 134 (Souter, J., dissenting). He said that the Court should:

> [R]emand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical

noted that Bush had raised a meritorious argument that "unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts."[148] He suggested that the Court remand to the Florida Supreme Court for the adoption of uniform standards. Justice Breyer also agreed that the lack of a uniform recount standard "implicate[d] principles of fundamental fairness" and said that the Florida courts should fix the issue.[149] Thus, the remedy for the potential equal protection violation was the rub. The Court split 5-4 on the remedy, with the five conservative justices in the majority declaring that Florida could not proceed with a recount because of the "safe-harbor" deadline in federal law for resolving disputes, as doing so might thwart the desire of the Florida legislature to ensure that Congress would accept its electoral vote submission.[150] By contrast, each of the four liberal justices disagreed and explained why they thought the recount could proceed even beyond the safe-harbor deadline, as Florida could still finish its count within a few days or a week and, in any event, there was no indication that Congress would refuse Florida's submission.[151]

These two facts are well-known to anyone who has studied the case. But I've found that many students new to the field are surprised, as public sentiment suggests that the Court declared that Bush would be the next president by a party-line 5-4 vote. Even the Wikipedia page for the case has it wrong, stating that "[f]ive justices agreed that there was an Equal Protection Clause violation in using differing standards of determining a valid vote in different counties."[152] Seven justices indicated some agreement with that part of the holding.[153]

There are lots of reasons to criticize the Court's ruling, both in its decision to take the case at all and for its refusal to order a remedy to the constitutional violation that it identified.[154] But that criticism should be grounded in fact and the public should understand precisely what the Court did. The Court resolved a traditional legal dispute, and

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ballots in any further recounting (or successive recounting) that the courts might order.

Id. at 134-35. Justice Breyer agreed that "in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem." *Bush*, 531 U.S. at 145-46 (Breyer, J., dissenting).

148. *Id.* at 134 (Souter, J., dissenting).

149. *Id.* at 145 (Breyer, J., dissenting).

150. *Id.* at 111 (majority opinion).

151. *Id.* at 127 (Stevens, J., dissenting); *id.* at 130, 134-35 (Souter, J., dissenting); *id.* at 143-44 (Ginsburg, J., dissenting); *id.* at 155 (Breyer, J., dissenting).

152. *Bush v. Gore*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bush_v._Gore [https://perma.cc/Z7ZE-CTDE] (last visited Oct. 11, 2025).

153. *Bush*, 531 U.S. at 111.

154. Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1111 (2001).

on the key holding regarding the Equal Protection Clause, the Court was divided 7-2, not 5-4.[155]

CONCLUSION

When asked about *Bush v. Gore* several years later, Justice Antonin Scalia famously responded that people should "get over it."[156] He likely meant that the ruling was done, George W. Bush was the president, and it made little sense to keep harping on the decision. Twenty-five years later, the fact that a law review hosted an entire symposium on the case shows that we should not forget the ruling or its legacy. It does matter—not only to understand how the Court resolved the 2000 presidential election dispute but also to recognize the changes in U.S. Supreme Court jurisprudence that the decision wrought. There are at least three lasting legacies from the decision beyond its political ramifications: an increase in post-election litigation, deference to state legislatures in their election rules with a corresponding aggrandizement of power to the justices, and predicable ideological decision making in voting rights cases, which has caused litigants to turn to state courts. There are surely other legacies as well.[157] The case represented a turning point for election law doctrine, at once vastly expanding the field and setting it on its current path. The question remains whether, twenty-five years from now, we will still talk about *Bush v. Gore* in the same way.

155. *Bush*, 531 U.S. at 111.

156. Debra Cassens Weiss, *Scalia on Bush v. Gore: 'Get Over It'*, ABA J. (Mar. 10, 2008, 11:02 AM), https://www.abajournal.com/news/article/scalia_on_bush_v_gore_get_over_it [https://perma.cc/TF8X-5K3T].

157. For example, three of Bush's lawyers in that case—John Roberts, Brett Kavanaugh, and Amy Coney Barrett—are now justices on the Supreme Court. *See* Joan Biskupic, *Supreme Court Is About to Have 3 Bush v. Gore Alumni Sitting on the Bench*, CNN: POL. (Oct. 17, 2020, 8:07 AM), https://www.cnn.com/2020/10/17/politics/bush-v-gore-barrett-kavanaugh-roberts-supreme-court [https://perma.cc/KYX3-BZXR].