BUSH V. GORE'S IRONIC LEGACY

RICHARD L. HASEN*

	INTRODUCTION	313
I.	*BUSH*'S VOTER PROTECTION DEAD END	313
II.	THE EMERGENCE OF THE ANTI-VOTER INDEPENDENT STATE LEGISLATURE THEORY AS *BUSH*'S TRUE LEGACY	322
III.	*BUSH* SHOWS WHY WE NEED A REAL RIGHT TO VOTE	330

INTRODUCTION

The Supreme Court framed its holding in *Bush v. Gore*[1] as fulfilling its "unsought responsibility"[2] to protect voters' equal protection rights by stopping a potentially outcome-determinative recounting of Florida ballots in the disputed 2000 presidential election.[3] Citing two Warren Court precedents establishing voting as a fundamental right under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,[4] the *Bush* Court held that Florida counties' inconsistent and shifting standards for determining whether ballots cast by some voters using antiquated technology contained a valid vote for a particular presidential candidate would impermissibly "value one person's vote over that of another."[5] With the time expiring for states to submit their Electoral College votes to Congress under a so-called "safe harbor" provision of federal law[6] that would insulate those votes from congressional challenge, the Court ordered the recount to stop,[7] leaving the state to certify the vote for Republican George W. Bush. He was ahead by a mere 537 votes over Democrat Al Gore out of millions of ballots cast, resulting in Bush's election as President.[8]

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* Gary T. Schwarz Endowed Chair in Law and Professor of Political Science, UCLA School of Law. The original version of this Essay was prepared for delivery at "*Bush v. Gore* 25th Anniversary Conference," February 28 and March 1, at Florida State University. A revised version was also prepared for delivery at the American Political Science Association 2025 annual meeting in Vancouver. Thanks to conference participants, and especially Josh Douglas, for useful comments and suggestions, and to Sam Hall and Sherry Leysen for excellent research and library assistance.

1. 531 U.S. 98 (2000).

2. *Id.* at 111.

3. *Id.* at 107-10.

4. *Id.* at 105 (first citing Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); then citing Reynolds v. Sims, 377 U.S. 533 (1964)).

5. *Id.* at 104-05.

6. 3 U.S.C. § 5.

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

8. For a fuller description of the controversy and saga, *see* Richard L. Hasen, The Voting Wars: From Florida 2000 to the Next Election Meltdown 11-40 (2012) [hereinafter Hasen, Voting Wars]. *See also* Ron Elving, *The Florida Recount of 2000: A Nightmare That*

In the wake of the conservative *Bush v. Gore* majority's surprisingly expansive reading of equal protection jurisprudence,[9] some suggested that the case would be an opportunity to make "lemonade from lemons,"[10] fostering an era in which courts more aggressively policed poor and discriminatory election administration practices to expand voting rights in a voter-protective way.

It didn't take long to prove these optimists wrong. By 2007, I had declared the "untimely death" of *Bush v. Gore*,[11] with the case not ushering in judicially mandated voting rights expansion. Things did not improve after 2007 either: the Supreme Court to this day has not relied upon the case's equal protection holding as precedent, and most lower courts have not applied its equal protection holding seriously either.[12] These developments gave some force to the critics' cynical suggestion that the case was a one-day-only ticket to help install Republican candidate Bush into the White House and not to establish any general jurisprudential principles as Supreme Court cases usually do.[13]

Now, with twenty-five years of distance since *Bush*, we can say that the cynics were not cynical enough. In 2023, a Supreme Court majority finally cited *Bush* as a worthy precedent to apply in future cases. It turned out the ticket was good for a different train: the conservative Supreme Court majority in *Moore v. Harper*[14] embraced not *Bush*'s equal protection holding as contained in its *per curiam* majority opinion, but instead an Article II-based claim in Chief Justice William Rehnquist's concurrence.[15] Rehnquist's argument, joined by Justices Antonin Scalia and Clarence Thomas, has come to be known as

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Goes on Haunting, NPR (Nov. 12, 2018, at 05:00 ET), https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting [https://perma.cc/CLV2-M7Z2] ("Ultimately, it came down to just 537 votes out of six million cast.").

9 Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 379, 390-92 (2001).

10. *See, e.g.*, Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert* Bush v. Gore *into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL'Y 357 (2002); Samuel Issacharoff, Opinion, *The Court's Legacy for Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39; Cass R. Sunstein, *The Equal Chance to Have One's Vote Count*, 21 L. & PHIL. 121, 133 (2002); HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 198 (2001) ("[T]hose who remain resentful [about *Bush v. Gore*] . . . . are the most likely to feel tempted into supporting the equal protection rationale of the decision. In a classic example of making political lemonade out of lemons . . . .").

11. Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1 (2007).

12. *See id.* at 6-15. For a different view, *see* Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229 (2020). *See also infra* note 34 (discussing Morley's research).

13. *See, e.g.,* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001).

14. 600 U.S. 1, 37 (2023). .

15. *Id.* at 38 (first citing *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); then citing *id.*, at 133 (Souter, J., dissenting)).

the "independent state legislature theory" ("ISLT").[16] Chief Justice Rehnquist's theory contended that the problem with the recount was judicial usurpation of the power of the Florida legislature to set recount rules for the presidential election.

Bush v. Gore's ironic legacy is that a decision dressed up as one protecting voters' equal protection rights instead has advanced a bogus legal theory for federal courts to potentially use to subvert popular will. ISLT reserves for the Supreme Court (and potentially other federal courts) a license to overturn democratically conducted presidential and congressional elections by second-guessing state court interpretations of state constitutional provisions protecting the right to vote and state statutes governing the electoral process. It empowers legislatures over voters in choosing the President. Unless the Supreme Court overturns or limits *Moore*, ISLT will hang like a Sword of Damocles over the heads of state courts as they contemplate whether to read their state constitutions in voter-protective ways and to apply voter protective methods of statutory interpretation.

This Essay proceeds in three parts. Part I briefly describes how—despite advances in voting technology and increased voting opportunities since 2000—*Bush v. Gore*'s equal protection holding has mostly been a dead end, and federal courts more generally have retreated from protecting voting rights in the last quarter century. It includes an empirical analysis showing election litigation continuing to grow, triple the rate since before *Bush v.* Gore and with a 14.3 percent increase in 2024 election season litigation compared to the 2020 season. Part II shows how the resurrection of Rehnquist's *Bush* ISLT concurrence in *Moore* is anti-voter and anti-democratic. It is already deterring state court protection of voting rights, turning the supposed voter-protective holding of *Bush* on its head. Part III argues that *Bush* demonstrates that an advanced democracy should not rely upon the whims of the United States Supreme Court or optimistic readings of snippets of constitutional text to protect voters' rights. What is needed is an affirmative right to vote in the U.S. Constitution, which would be a more fitting legacy to a case that exposed fundamental flaws with American election administration and purported to find in the Constitution protection for voters' equal rights.

I. *BUSH*'S VOTER PROTECTION DEAD END

"*Bush v. Gore*" has come to stand for two very different things: the case itself as decided by the United States Supreme Court that ended the recounting of ballots in Florida in the 2000 presidential election

16. *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 140 n.14 (2022) (defining theory and alternative "independent state legislature doctrine" terminology).

and the broader controversy surrounding the administration and results of the 2020 election in Florida. This latter understanding of *Bush v. Gore* featured unclear laws and rules, outdated and inaccurate voting technology, administrative turf wars, multiple lawsuits, investigations into myriad problems of election administration, and political hardball.[17]

Thought of in its broader sense, some of *Bush*'s legacy has been undeniably positive. As Charles Stewart explained,[18] public attention to the problems with American election administration led to changes in voting technology and rules that saved millions of voters' votes. The 2002 Help America Vote Act that Congress passed in the wake of the Florida debacle helped with both election integrity, such as by mandating the creation of more accurate centralized state voter registration databases, and voter access, such as by guaranteeing voters the right to cast a provisional ballot when there appeared to be problems with their eligibility.[19] Florida, whose election administration had been the laughingstock of the world, now boasts among the most efficient set of rules and technology across the United States.[20] Many red and blue states have expanded the use of early voting, either in person, by mail, or both,[21] and a majority of states have adopted online voter registration,[22] which is more efficient and more accurate, in addition to being convenient for voters. For many people in many places in the United States, voting has never been easier.

The overall broader picture, however, is far from rosy. The disputed 2000 election exposed the United States system of election administration as hyper decentralized and partially run by partisans who sometimes place the interests of their party over principles of sound election

17. For this story, *see* HASEN, VOTING WARS, *supra* note 8.

18. Charles Stewart III, *Residual Vote in the 2004 Election*, CALTECH/MIT VOTING TECH. PROJECT (2008), https://vote.caltech.edu/working-papers/25 [https://perma.cc/3AX8-EQ8D].

19. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified as amended in scattered sections of 42 U.S.C.); *see generally* MARTHA KROPF & DAVID C. KIMBALL, HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM (2013).

20. Eric Boehm, *How Florida Fixed Its Vote-Counting Problem After the 2000 Election*, REASON (Jan. 2024), https://reason.com/2023/12/17/how-florida-fixed-its-vote-counting-problem-after-the-2000-election/ [https://perma.cc/N58Y-XC77].

21. Kyle Yoder, April Tan & Stefan Martinez-Ruiz, *The Expansion of Voting Before Election Day, 2000-2024*, CTR. FOR ELECTION INNOVATION & RSCH. (2024), https://electioninnovation.org/wp-content/uploads/CEIR_Expansion-of-VBED-Report_July-2024-Update.pdf [https://perma.cc/9GFY-YBM6].

22. *Online Voter Registration*, NAT'L. CONF. OF STATE LEGISLATURES. (Jan. 23, 2025), https://www.ncsl.org/elections-and-campaigns/online-voter-registration [https://perma.cc/3698-BA9Y] (noting forty-two states making online voter registration available).

administration.[23] No states reacted to the 2000 controversy by adopting nonpartisan election administration[24] and one state, Wisconsin, abandoned its more nonpartisan approach.[25]

The close election in Florida presaged the emergence of deep political polarization in the United States and ushered in a set of disputes over close elections not only for President but for other important state and federal offices. Political operatives learned that in close elections the rules of the game matter, leading to manipulation of rules and pushback in what I have termed "the voting wars."[26] Public trust in elections has declined and is volatile.

Thanks to increased partisan-driven legislation and rulemaking governing the conduct of elections, voting is getting harder, not easier, for some voters—and it stands to get harder still as states enact new means of suppressing the vote, such as requiring documentary proof of citizenship to register to vote. In Arizona today, whether a voter is allowed to register to vote in all elections, just federal elections, or no elections at all depends on which piece of paper they use to fill out their registration form and if they have easy access to a birth certificate, a naturalization certificate, and, in cases of people who changed their names upon marriage, a marriage certificate.[27]

The latest manifestation of the voting wars has been especially dangerous: the use of false claims of voter fraud to justify attempts to subvert the results of democratically conducted elections. Before 2020, there was not much concern about peaceful transitions of power; in the 2024 elections, this was a major source of anxiety and fear.[28] The voting wars also brought a significant increase in litigation. The rate of election litigation has tripled since *Bush v. Gore* compared to before it and remains consistently high, including through the 2023–2024 election season.[29] See Figure 1.

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23. *See generally* HASEN, VOTING WARS, *supra* note 8; *see generally* RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY (2020).

24. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974 (2005).

25. Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575 (2013); Shawn Johnson, *Once a Symbol of Bipartisanship, Government Accountability Board Targeted for Overhaul*, WIS. PUB. RADIO (Oct. 13, 2015), https://www.wpr.org/politics/once-symbol-bipartisanship-government-accountability-board-targeted-overhaul [https://perma.cc/WBF9-3A8S].

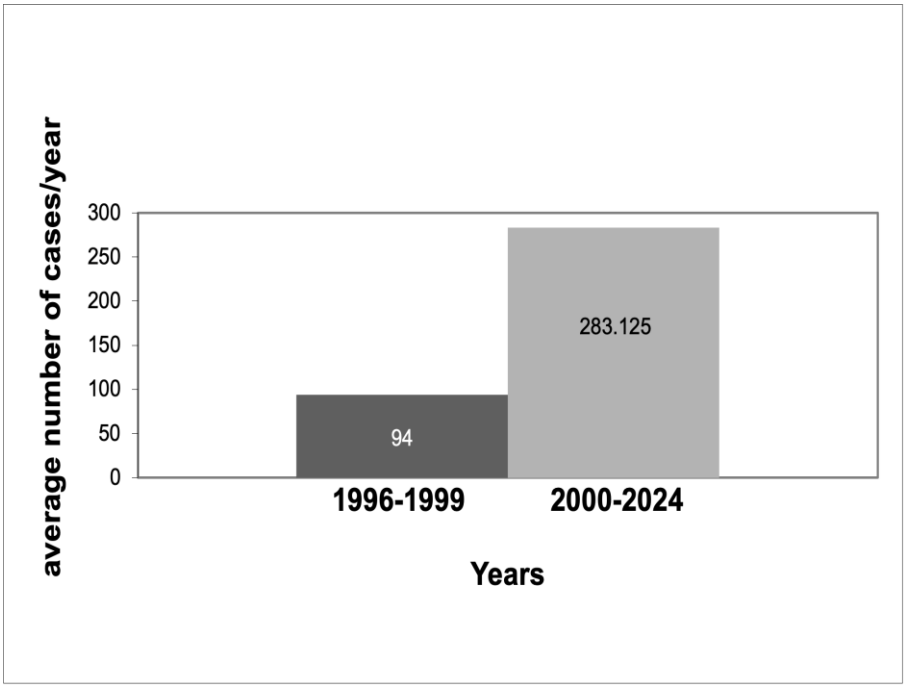
26. *See generally* HASEN, VOTING WARS, *supra* note 8.

27. For a description, *see* Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 YALE L.J. 1673, 1677-78 (2025) [hereinafter Hasen, *Stagnation*].

28. Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022).

29. Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J. 150 (2022). *See id.* at 150

Figure 1. Sample of Election Litigation Cases Per Year, Before and After *Bush v. Gore*



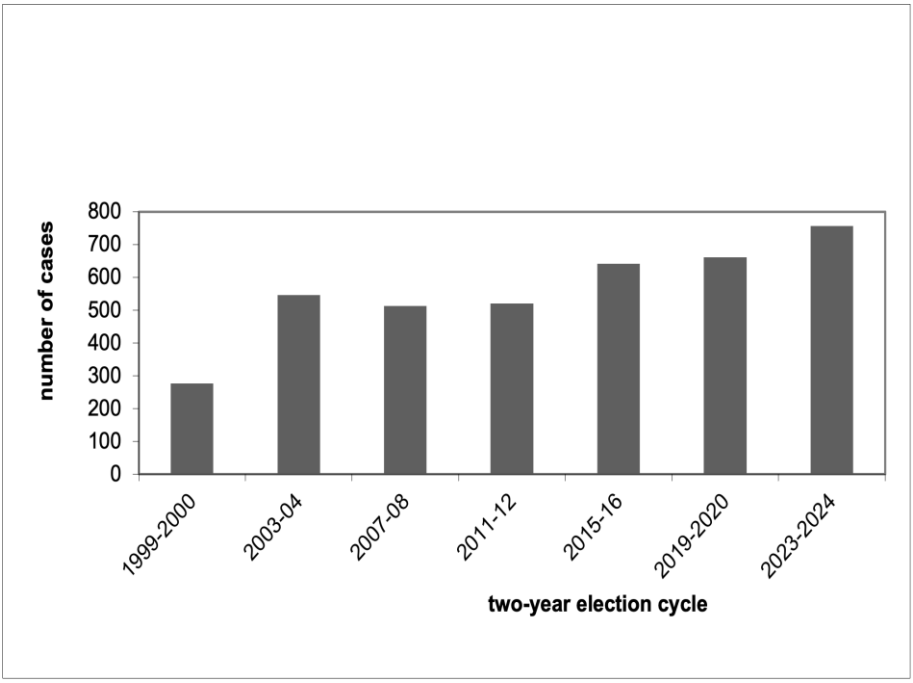
Source: Hasen Election Litigation Database, 1996-2024, https://electionlawblog.org/wp-content/uploads/Hasen-Election-Litigation-1996-2024.xlsx

The 2020 election, conducted in the midst of the Covid pandemic and with Donald Trump (unsuccessfully) challenging his presidential loss to Joe Biden in multiple lawsuits, led to what was then a record amount of election litigation in a single year (2020),[30] but the 2023-2024 election season saw a 14.3 percent increase over the 2019-2020 election season: There were 661 cases in the 2019 and 2020 election years in my sample (which does not cover all election litigation brought in those years), compared to 756 cases in the 2023 and 2024 election years. See Figure 2. It is remarkable that election litigation was even higher in the election after the pandemic than in the period during the pandemic when so many rules were changed and challenged. My suspicion is that ongoing conflict surrounding the 2020 election created political incentives for Trump and his allies to file suits alleging the potential for fraud an irregularities in connection to the 2024 elections.

n.1 for a discussion of the methodology used in that study and in this one. My most recent database, which includes data on the 2023 and 2024 election years, is posted at: https://electionlawblog.org/wp-content/uploads/Hasen-Election-Litigation-1996-2024.xlsx.

30. *Id.* at 151. In 2020, there were 424 cases in my sample, a record for any year. *Id.* By my latest calculations contained in the most recent version of the database, there were 361 cases in the 2023 sample and 395 in the 2024 sample. See the database at: https://electionlawblog.org/wp-content/uploads/Hasen-Election-Litigation-1996-2024.xlsx.

Figure 2. Sample of Election Litigation Cases Per Two-Year Presidential Election Cycle, 2000 Election Season-2024 Election Season



Source: Hasen Election Litigation Database, 1996-2024, https://electionlawblog.org/wp-content/uploads/Hasen-Election-Litigation-1996-2024.xlsx

While *Bush v. Gore* in its broader sense has been at best a mixed bag, *Bush v. Gore* in the narrower sense of the case has been worse than a bust. The Supreme Court's opinion and equal protection holding could have done something to deal at least partially with the litigation explosion and the inconsistent protection of voting rights in the United States. Had it been possible to make lemonade from lemons, federal courts could have played a far more supportive role in assuring that all eligible voters and only eligible voters would have an equal chance to cast a ballot that would be fairly and accurately counted.

Courts taking *Bush*'s equal protection holding seriously could have found violations when, for example, jurisdictions favored rural voters in election administration over urban voters by allowing one early voting site or one drop box per county as opposed to allocating them on a per capita basis.[31] And courts could have held that the use of old, inaccurate voting technology in one part of the state in the midst of a statewide election were violating those voters rights, as happened

31. Richard L. Hasen, *When is Uniformity of People, Not Counties, Appropriate in Election Administration? The Cases of Early and Sunday Voting*, 2015 U. CHI. L. F. 193, 202 (2015).

when California held a gubernatorial recall election in 2003 in which Los Angeles voters were over ten times more likely to cast a ballot that voting technology would fail to accurately record than Alameda County voters using newer technology.[32]

Perhaps most lower courts have not read *Bush* in voter-protective ways because *Bush* itself contained language cautioning against the applicability of its holding to other cases[33] and because the Supreme Court has never cited the case's equal protection holding, much less used the holding to find an aspect of state election administration to be unconstitutional. Only in the United States Court of Appeals for the Sixth Circuit has *Bush*'s equal protection holding been read in a full-throated way,[34] and there's no telling how long that application will last.

That is not to say that *Bush* never gets applied as relevant precedent; as discussed below,[35] a federal court recently relied upon the case in an important decision stopping attempted subversion of the election results in a 2024 race for a seat on the North Carolina Supreme Court. But *Bush*'s overall role has been modest in protecting voting rights or fostering election reform.

The Supreme Court's equal protection failure extends far beyond its decision to ignore *Bush*'s direct holding. Its recent record on voting rights has been abysmal. In the 2008 case, *Crawford v. Marion County Election Board*,[36] the Court for the first time applied a doctrine known as "*Anderson-Burdick* balancing" to questions of election administration.[37] *Crawford* concerned Indiana's adoption of a strict photographic voter identification law, which the state adopted despite the lack of any evidence than anyone in Indiana had ever even tried to impersonate another voter.[38]

The *Anderson-Burdick* test that the Court applied to judge the voter identification law's constitutionality under the Equal Protection Clause puts a huge thumb on the scale in favor of state voting rules

32. HASEN, VOTING WARS, *supra* note 8, at 14; Richard L. Hasen, *The California Recall Punch Card Litigation: Why* Bush v. Gore *Does Not "Suck," in* CLICKER POLITICS: ESSAYS ON THE CALIFORNIA RECALL 170, 178-79 (Shaun Bowler & Bruce E. Cain eds., 2006).

33. *Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); *id.* ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."); *see also* Chad Flanders, Comment, Bush v. Gore *and the Uses of "Limiting,"* 116 YALE L.J. 1159 (2007).

34. For a discussion of these Sixth Circuit cases, and for a more charitable reading of *Bush v. Gore*'s uniformity principle as set forth in the lower courts, *see* Morley, *supra* note 12. The cases Morley describes as falling under the principle, *see id.* at 290-92, are generally those that are relatively minor or would have come out the same way had *Bush* never been decided, such as those involving the unequal weighting of votes.

35. *See infra* notes 71-78 and accompanying text.

36. 553 U.S. 181 (2008).

37. *Id.* at 190-91.

38. *Id.* at 195 n.11.

that may burden voters' constitutional rights, requiring voters to come forward with evidence of significant burdens, but lets the state simply posit state interests in fraud prevention or bolstering of voter confidence to justify its law.[39] Since *Crawford*, it has been quite difficult for plaintiffs to win suits challenging restrictive voting rules enacted by states.[40]

The Supreme Court's post-2000 hostility to voting rights and a jurisprudence favoring states over voters extends broadly. In the 2013 *Shelby County* case, the Court struck down a key part of the Voting Rights Act requiring states with a history of racial discrimination in voting to get permission from the federal government before making potentially retrogressive voting changes.[41] The Court has read Section 2 of the Act in ever narrower ways,[42] and the 2021 *Brnovich* case[43] rendered Section 2 essentially useless in attacking the kind of restrictive state voting rules like those that were under constitutional challenge in *Crawford*.[44] The Court has made a number of technical changes to the applicable standards in Section 2 redistricting cases that make it harder for plaintiffs to win, such as requiring courts to presume that legislators are acting in good faith when they pass redistricting plans (often on party line votes and over the objections of minority voters).[45] Some of the Justices would go further, holding that Section 2 is unconstitutional or should be read in very narrow ways to render it completely ineffective.[46]

The Court has done much more that could be called anti-voter, including its holding that challenges to partisan gerrymanders are non-justiciable[47] and its inconsistent application of "the *Purcell* Principle," a litigation timing doctrine that allows some states the ability to engage in unconstitutional or illegal conduct for at least one election cycle before a federal court may impose a remedy.[48] Taken together, federal constitutional and statutory voting rights protections have at best stagnated and in some respects have retrogressed between 2000

39. For an extended discussion, *see* Hasen, *Stagnation*, *supra* note 27, at 1689-91.

40. Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 672-74 (2009); *see also* Katie Eyer, *As-Applied Equal Protection*, 59 HARV. C.R.-C.L. L. REV. 49, 53 (2024) (emphasizing the difficulty of facial challenges brought under the Equal Protection Clause).

41. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (striking down the coverage formula used for VRA preclearance).

42. Hasen, *Stagnation*, *supra* note 27, at 1684-89.

43. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 653-55 (2021).

44. Hasen, *Stagnation*, *supra* note 27, at 1685-89.

45. *Id*. at 1685 n.58 (first citing Abbott v. Perez, 585 U.S. 579, 603-04 (2018); then citing Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 9-10 (2024)).

46. Hasen, *Stagnation*, *supra* note 27, at 1686-87 & nn.63-68.

47. Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

48. Hasen, *Stagnation*, *supra* note 27, at 1694-95.

and 2025. The equal protection promise of *Bush* was wishful thinking at best.

II. THE EMERGENCE OF THE ANTI-VOTER INDEPENDENT STATE LEGISLATURE THEORY AS *BUSH*'S TRUE LEGACY

It would be bad enough if *Bush* proved to be only a one-day ticket that resolved an essentially tied election by favoring the candidate preferred by the majority, with reasoning never intended by the majority to be taken seriously. But it turns out that *Bush* was a ticket for a ride away from democratic elections and popular will.

Many have noted the incongruity of the most conservative justices—Rehnquist, Scalia and Thomas—embracing an expansive equal protection holding in *Bush*, while two of the Court's most liberal Justices, Ginsburg and Stevens, rejecting the theory in dissent.[49] But the reasons for the concurrence's one-sentence embrace of the majority per curiam opinion[50] before turning to the alternative ISLT theory was entirely pragmatic: had the Rehnquist group rejected the equal protection theory, there would not have been a majority to accept any one theory to justify stopping the recount and favoring *Bush*. Justice Scalia did not hide his disdain for the equal protection holding saying it "was, 'as we say in Brooklyn, a piece of shit.'"[51]

ISLT, unfortunately, smelled no better. The theory finds its roots in parallel portions of Article I and Article II of the Constitution giving states, "in such Manner as the Legislature thereof may direct,"[52] the ability to set rules for the conduct of congressional and presidential elections. (In the congressional Article I version of ISLT, but not the presidential Article II version, state-rules are subject to congressional override).[53]

The claim appeared in two slightly different forms during the post-election Florida dispute. First, when the Florida Supreme Court extended some deadlines for Gore to file an election "protest" (the first of

49. *See* Joshua A. Douglas, *Three Truths and a Lie About the Legacy of* Bush v. Gore, 53 FLA. ST. U. L. REV. 289, 386–10 (2026) (noting that seven Justices agreed that there was a constitutional problem with the Florida recount with only Justices Ginsburg and Stevens dissenting, while the Court divided 5-4 on the appropriate remedy).

50. *Bush*, 531 U.S. at 111 (Rehnquist, C.J., concurring) ("We join the *per curiam* opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.").

51. EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR 332 (2019) ("Somewhat amazingly, O'Connor persuaded the three conservatives—Scalia, Rehnquist, and Thomas—to sign on to the equal protection rationale (even though Scalia privately scoffed that it was, 'as we say in Brooklyn, a piece of shit'). Using the Fourteenth Amendment had the advantage of allowing the Court to say that seven of the nine Justices agreed on the reasoning—even if only five agreed on the result.").

52. U.S. CONST. art. I, § 4; *id.* art. II, § 1.

53. U.S. CONST. art. I, § 4; *id.* art. II, § 1.

two potential phases for disagreeing with election results under the Florida statutes), the state court relied on voting rights protections contained in the Florida Constitution.[54] State constitutional rights ordinarily would trump a state statute, but Bush argued in *Bush v. Palm Beach County Canvassing Board* that Article II prevented state constitutions from trumping state statutes in the context of a presidential election.[55] The idea that the legislature would have the power set rules for federal elections independently of state courts and the state constitution explains the name "independent state legislature" theory. In a unanimous opinion in *Palm Beach County Canvassing Board*, the Supreme Court punted, raising but not resolving whether the state supreme court decision violated Article II and asking for more information on the basis for judicial extension of Gore's deadline.[56]

The ISLT issue was slightly different in *Bush v. Gore*. When the Florida Supreme Court ordered a statewide recount of a subset of ballots in Florida, it did not do so in reliance on a state constitutional right to vote. Instead, the Article II argument in *Bush v. Gore*, embraced by the Rehnquist concurrence, was that the state supreme court had so mangled the set of rules for recounts set forth in Florida statutes that it was not engaged in the usual act of interpreting a state statute but instead creating new law for the recount separately from the legislative scheme.[57]

State courts routinely interpret both state constitutional provisions and state statutes, and determining the meaning of state law is ordinarily a matter for state courts to definitively resolve, not to be second guessed by federal courts. But Rehnquist's version of ISLT would give the United States Supreme Court the opportunity to look over the shoulders of state courts whenever a litigant in a federal election dispute argues that the state court impinged too much on the power of a state legislature.

Rehnquist's concurrence laid dormant for over twenty years, not discussed in a Supreme Court majority opinion. That changed in the 2023 *Moore v. Harper* case.[58] The facts are complex and raised serious questions of mootness,[59] but to simplify a bit, *Moore* arose after the United States Supreme Court in the 2019 *Rucho* case had rejected as

54. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 77 (2000).

55. *Id.* at 77-78.

56. *Id.* at 78.

57. *Bush,* 531 U.S. at 112-22 (Rehnquist, C.J., concurring). For early critiques, *see* Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493 (2001); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

58. 600 U.S. at 37.

59. *See id.* at 41-55 (Thomas, J., dissenting) (setting forth argument as to how claim in *Moore* became moot when the North Carolina Supreme Court reversed its view that the state constitution prohibited partisan gerrymandering.).

nonjusticiable under the U.S. Constitution a partisan gerrymandering challenge to North Carolina's congressional redistricting plan.[60] Challengers to the redistricting plan then went to state court arguing that partisan gerrymandering violated the state constitution.[61] The state supreme court agreed, striking down North Carolina's redistricting plan as violating the state constitution.[62] Republicans in the North Carolina General Assembly sought review in the United States Supreme Court, raising an extreme version of the ISLT theory.[63] They argued that, assuming the state supreme court had accurately interpreted the meaning of the state constitution to bar partisan gerrymandering, the court violated the General Assembly's Article I rights by allowing the state constitution to trump a state statute regulating congressional elections.[64]

Only two Justices in dissent in *Moore*, Justices Gorsuch and Thomas, agreed with this version of ISLT, viewing state legislatures as having free-floating powers in federal elections unconstrained by other state actors or even a state's constitution.[65] Six Justices rejected this theory,[66] but they embraced their own version of ISLT.[67] Under this version, state legislatures do not have such free-floating powers and must be understood as making laws even in federal elections under their normal lawmaking powers and subject to normal judicial review. But when it comes to federal elections, "[w]e hold only 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."[68] Its authority for such a holding? Chief Justice Rehnquist's concurring opinion in *Bush* along with a citation to Justice Souter's *Bush* dissent.[69] Finally *Bush* was being applied as a precedent, but it was not *Bush*'s majority opinion, and it was not on equal protection grounds.

The *Moore* majority never opined on how far is too far to count as "arrogation," and the Court did not need to reach the issue given that the challengers conceded that the state court had properly applied the

60. This history is recounted in *id.* at 10-14.

61. *Id.* at 11.

62. *Id.* at 11-12.

63. *Moore*, 600 U.S. at 26.

64. *Id.*

65. *Id.* at 55-65 (Thomas, J., dissenting).

66. *Id.* at 19-34 (rejecting legislators' argument). Justice Alito was the only Justice who did not weigh in on the merits, signing onto only that portion of Justice Thomas's dissent addressing mootness. *See id.* at 40-55 (Thomas, J., dissenting).

67. *Id.* at 34 ("Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein.").

68. *Moore*, 600 U.S. at 36.

69. *Id.*

state constitutional provision.[70] Commentators are already dividing over what the opinion means and how it is to be applied.[71]

Justice Kavanaugh, speaking only for himself in a separate concurring opinion, opined a great deal on the meaning of the anti-arrogation principle, both in cases in which a state court reads a state constitutional provision as trumping a state statute in a federal election case and in which a challenger claims that a state constitutional provision goes too far.[72] Parsing the various opinions in *Bush v. Gore*, Kavanaugh settled on Rehnquist's concurrence as setting the proper standard for determining ISLT arrogation.[73]

ISLT is antidemocratic. Every state through its state constitution protects its voters' rights more broadly than the protection offered by the United States Constitution,[74] which contains no affirmative right to vote.[75] Further, many states have followed the Democracy Canon,[76] reading ambiguous statutes in ways that maximize the enfranchisement of voters and fair elections. When a state court's interpretative methods favor voting rights, that helps voters. ISLT in certain circumstances in federal elections can reverse voters' rights by rejecting these interpretations. ISLT evinces an arrogance that the federal courts are in a better position than state courts to determine the meaning of state law, and a distrust that state court judges will act with integrity in resolving election-related cases (and of course assuming that the federal courts will do so).

A federal court should step in to intervene in a state court determination of its election law only in the rare cases in which a state court so deviates from normal judicial decisionmaking as to constitute a due process violation or treats voters so disparately that it constitutes an equal protection violation—rules that apply to both federal elections

70. *Id.* at 36-37.

71. Manoj Mate, *New Hurdles to Redistricting Reform: State Evasion,* Moore*, and Partisan Gerrymandering*, 56 CONN. L. REV. 839, 857-62, 893-99 (2024); Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of* Bush v. Gore*: How* Moore v. Harper *Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 WAKE FOREST L. REV. 61, 108-29 (2024); Carolyn Shapiro, *State Law and Federal Elections After* Moore v. Harper, 99 N.Y.U. L. REV. 2049, 2072-73 (2024); Leah M. Litman & Katherine Shaw*, The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J. F. 881, 893-95, 904 (2024); Michael Weingartner, *Second-Guessing State Courts in Election Cases: Arrogation and Evasion Under* Moore v. Harper, 56 ARIZ. ST. L.J. 1971, 1981-87 (2024), ; Anna K. Jessurun, David H. Gans & Brianne J. Gorod, Moore v. Harper, *Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. REV. 1295 1296, 1297-301 (2025).

72. *Moore*, 600 U.S. at 38-40 (Kavanaugh, J., concurring).

73. *Id.* at 39.

74. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95-101 (2014).

75. *See infra* Part III; *see also* Douglas, *supra* note 74.

76. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

and state elections (unlike ISLT, which applies only to federal elections).[77]

Consider the protracted dispute over an extremely close election in 2024 for a seat on the North Carolina Supreme Court, between incumbent Justice Alison Riggs and Judge Jefferson Griffin.[78] In an election in which over 5.5 million votes were cast, Riggs led Griffin by just 734 votes at the end of the canvassing period (a margin of 50.01% to 49.99%).[79] Judge Griffin challenged the counting of thousands of absentee ballots on various grounds, resulting in multiple lawsuits in both state and federal courts that took several months to resolve. One of Judge Griffin's arguments was a challenge to the counting of absentee ballots cast by overseas voters who did not provide photo ID in a few Democratic-leaning, but not most, North Carolina counties.[80] State officials did not require these voters to provide a copy of the ID in order to cast a ballot, but Griffin argued after the election that they should have.[81] Judge Griffin also challenged ballots cast by children of overseas North Carolinians, who indicated they had not previously lived in the U.S.[82] Again, these voters had followed the rules for registration and voting as set forth by state election officials, but Griffin argued those rules were wrong.[83]

North Carolina state courts, including the state supreme court (on which Griffin or Riggs would sit), ruled in Judge Griffin's favor on some of these claims, concluding that both categories of ballots should be rejected, but a federal district court ultimately determined that reconsidering the validity of these ballot would violate the Fourteenth Amendment's rights to equal protection and due process of law.[84]

Relying primarily on *Bush v. Gore*, the district court concluded that imposing different requirements for accepting ballots in different counties would violate equal protection:

> North Carolina has 100 counties. Judge Griffin challenged the absentee ballots cast by overseas military and civilian voters in no more than 6 of those 100 counties. Per the court order from North Carolina's Court of Appeals and Supreme Court, those targeted voters must, in

77. *See id.* at 120-23 (discussing the *Roe v. Alabama* controversy).

78. The next few paragraphs draws from the 2025 Supplement to DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS (7th ed. 2022) at 35-36, *available at*:https://cap-press.com/pdf/LowensteinElectionLaw7e2025SuppWM.pdf [https://perma.cc/L3UQ-K9VK].

79. Griffin v. N.C. State Bd. of Elections, 781 F. Supp. 3d 411, 416 (E.D.N.C. May 5, 2025).

80. *Id.* at 421.

81. *Id.*

82. *Id.* at 417.

83. *Id.*

84. *Griffin*, 781 F. Supp. 3d at 418.

> short order, provide a copy of their driver's licenses or a completed declaration of reasonable impediment to the State Board or their votes will be discarded.
>
> As a consequence, overseas military and civilian voters who cast a ballot in Guilford County are required to undertake additional efforts in order to have their votes counted. Their neighbors in Randolph, Alamance, and Rockingham Counties need not. That disparate treatment between similarly situated voters, based solely on their casting of ballots in "different counties," amounts to "a constitutional violation" of the Equal Protection Clause [citing *Bush*]. . . .
>
> The court's conclusion here is solely that, when the underlying basis for a protest is a rule that applies statewide, a geographically selective protest raises equal protection concerns and the specter of post-election mischief. But those concerns only come to fruition and manifest as an equal protection violation when a state adopts the litigant's selectivity and retroactively applies newly announced rules to a discrete subset of citizens, and not all similarly situated voters. That is the arbitrary and disparate treatment that the Supreme Court cautioned against in *Bush v. Gore*, and that guidance operates with full force here.[85]

The district court also concluded that it would violate due process to reject ballots cast in accordance with the rules that existed at the time they were cast. To reject those ballots based on subsequently announced requirements, the court held, would "change[] the rules half way through the game."[86] Accordingly, the retroactive invalidation of ballots violated their due process rights.[87]

Following its conclusion that the state court's rulings would result in federal equal protection and due process violations, the district court ordered the election certified.[88] Judge Griffin did not appeal the district court's decision but instead conceded the election to Justice Riggs—more than six months after Election Day.[89]

The federal district court performed admirably in rejecting the state court's greenlighting of election subversion, and it was right to rely especially upon the due process violations of retroactively changing the rules for casting ballots after the election was completed.[90] There was ample precedent for this holding, even aside from *Bush v. Gore*.

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85. *Id.* at 430-32.

86. *Id.* at 439 (quoting Scheer v. City of Miami, 15 F. Supp. 2d 1338, 1344 (S.D. Fla. 1998)).

87. *Id.* at 443.

88. *Id.* at 453.

89. Erin Geiger Smith, *Griffin Concedes to Riggs, Ending Six-Month Dispute Over North Carolina Supreme Court Election*, STATE CT. REP. (May 8, 2025), https://statecourtreport.org/our-work/analysis-opinion/griffin-concedes-riggs-ending-six-month-dispute-over-north-carolina [https://perma.cc/DHG3-AXQ8].

90. Richard L. Hasen, *America Needs More Judges Like Judge Myers*, THE ATL. (May 7, 2025), https://www.theatlantic.com/politics/archive/2025/05/north-carolina-supreme-court/682731/ [https://perma.cc/8L5J-AWDB].

Compared to clear due process and equal protection standards that the *Griffin* court applied, the lack of a clear standard for "arrogation" in ISLT means that it is uncertain when a state court has gone too far in encroaching on legislative power. If the Griffin-Riggs race had been a federal, rather than state, election, how would a federal district court have decided under ISLT if the state Supreme Court "arrogated" the power of the North Carolina General Assembly? Would the novelty of the court's holding have been dispositive? The retroactivity problem? The question of the fidelity to earlier state court precedents? This uncertainty means it is possible that ISLT could be used selectively and in politically motivated ways.

Despite uncertainties over many first principles of ISLT, the Supreme Court has passed on the opportunity to clarify the anti-arrogation version of ISLT. In one case, the Montana Supreme Court had held that two laws passed by the Montana legislature—one eliminating same-day voter registration and another banning paid absentee ballot collection—violated the Montana Constitution.[91] Montana's Secretary of State sought Supreme Court review,[92] arguing that the Montana Supreme Court "exceed[ed] the ordinary bounds of judicial review" under *Moore* in applying these rules to congressional elections.[93] The Supreme Court without comment declined to take the case.[94] The Court declined again months later, rejecting a petition from Republican Party petitioners arguing that the Pennsylvania Supreme Court violated the ISLT by ordering the counting of provisional ballots cast by individuals whose mail ballots were timely received but were defective for some other reason.[95]

The very uncertainty about the scope of the ISLT anti-arrogation principle will have an *in terrorem* effect on state courts.[96] Consider, for example, recent disputes in Pennsylvania courts over voting rights under that state's constitution's "free and equal" provision.[97] In the 2020 election, the state supreme court, amid a pandemic that severely slowed mail delivery, relied on that constitutional language to order a three-day extension for the receipt of mailed ballots.[98] It was the subject of an ISLT challenge that made it to the Supreme Court on an emergency basis that was never resolved because the ballots at issue

91. Mont. Democratic Party v. Jacobsen, 545 P.3d 1074 (Mont. 2024).

92. Petition for Writ of Certiorari, Jacobsen v. Mont. Democratic Party, No. 24-220 (U.S. filed Aug. 26, 2024), available at: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-220.html.

93. *Id.* at i (questions presented).

94. Jacobsen v. Mont. Democratic Party, 145 S. Ct. 1145 (2025).

95. *E.g.*, Republican Nat'l Comm. v. Genser, 145 S. Ct. 2778 (2025) (denying cert. on petition No. 24-786).

96. Part of this paragraph draws from Hasen, *Stagnation*, *supra* note 27, at 1693.

97. PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

98. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371 (Pa. 2020).

were not outcome determinative for the 2020 U.S. presidential election results in either Pennsylvania or the Electoral College.[99]

In the 2024 election, a state court in Pennsylvania held that the same state constitutional provision required election officials to accept mail-in ballots that were received on time but were misdated or undated.[100] The state supreme court later reversed that holding on technical grounds.[101] It then rebuffed on timing grounds additional attempts to count such ballots cast during the 2024 elections, ruling that "[t]his Court will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election."[102] The state supreme court did not address the merits of the issue, but after the 2024 election passed, it finally agreed to decide the question on the merits.[103]

The Pennsylvania Supreme Court's reluctance to protect the state's voters from inadvertent disenfranchisement by using the state constitution's voting rights protections may have been driven in part by legitimate concerns about making changes in voting rules close to the election. But the decision avoiding the issue during the presidential election likely was also partially driven by concern about reversal from the Supreme Court.

Was there enough precedent on which the state court could draw to determine that voters had the right not to be disenfranchised for an immaterial error on ballot materials? And more to the point: would the United States Supreme Court agree that there was enough of a basis in state law to protect voters, or would it reverse, adding more potential chaos to an already stressful election period in a swing state? Even asking the question of whether there was enough precedent so that the state supreme court would be seen as doing "ordinary" judicial review and not arrogation is to put a thumb on the scale against novel,[104] voter-protective interpretations of state constitutional provisions and state statutes.

Sway too far from what the Supreme Court determines is the state court's lane, and an election result can be tossed out. That, of course, is one way to describe what happened in *Bush v. Gore* itself.

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99. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (denying certiorari).

100. Black Pol. Empowerment Project v. Schmidt, No. 283 M.D. 2024, 2024 WL 4002321, at *1 (Pa. Commw. Ct. Aug. 30, 2024), *vacated* (lack of subject matter jurisdiction).

101. Black Pol. Empowerment Project v. Schmidt, 322 A.3d 221, 222 (Pa. 2024) (vacating the lower court's decision due to lack of subject matter jurisdiction).

102. Republican Nat'l Comm. v. All 67 Cnty. Bds. of Elections, 326 A.3d 402, 403 (Pa. 2024) (per curiam) (quoting New PA Project Educ. Fund v. Schmidt, 327 A.3d 188, 189 (Pa. 2024) (per curiam)).

103. Baxter v. Phil. Bd. of Elections, No. 395 EAL 2024, No. 396 EAL 2024, 2025 WL 224388 (Pa. Commw. Ct. Jan. 17, 2025). As of this writing, the matter remains pending.

104 Litman & Shaw, *supra* note 71, at 910 (discussing anti-novelty bias of ISLT).

III. *BUSH* SHOWS WHY WE NEED A REAL RIGHT TO VOTE

In a part of *Bush v. Gore* that does not get nearly enough attention, the Supreme Court explained that the "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."[105] Although "[h]istory has now favored the voter"[106] as states have given voters the right to vote for President, the "State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors"[107] for any future election.

It is quite astounding that in a twenty-first century advanced democracy, citizens do not have a constitutional right to vote for the nation's chief executive. Even worse, as the first two parts of this Essay demonstrate, the right as given to voters by states is legally precarious after *Bush*. The Equal Protection Clause allows a state to value one voter's vote over that of another in certain ways, under certain circumstances. And, when some state courts seek to expand protections for voters through state constitutions or through voter-friendly interpretations of state statutes, the Supreme Court may claw the results back using the ISLT theory of the Rehnquist *Bush* concurrence and *Moore*. ISLT allows the Supreme Court to potentially overturn the results of democratically-conducted elections based on an amorphous anti-arrogation theory.

It does not have to be this way. Many other advanced democracies more directly protect the right to vote within their national constitutions,[108] rather than having weak protections such as in the U.S. Constitution that mostly frames voting rights in the negative: *if* you are going to hold an election, don't discriminate on the basis of race,[109] or sex,[110] or age of at least 18.[111]

It was perhaps too much to hope that a hastily crafted judicial decision with some loose language about the importance of equal voting rights would lead to a true voting rights revolution, especially in the hands of courts that have not shown themselves to be too interested in the protection of voting rights. But expanded voting rights in the

105. *Bush*, 531 U.S. at 104.

106. *Id.*

107. *Id.*

108. RICHARD L. HASEN, A REAL RIGHT TO VOTE: HOW A CONSTITUTIONAL AMENDMENT CAN SAFEGUARD AMERICAN DEMOCRACY 26-27 (2024) (citing German and Canadian constitutional provisions affirmatively guaranteeing the right to vote) [hereinafter HASEN, REAL RIGHT TO VOTE].

109. U.S. CONST. amend. XV, § 1.

110. U.S. CONST. amend. XIX.

111. U.S. CONST. amend. XXVI, § 1.

United States generally have not come through courts. Only during the Warren Court era did the Court build muscular protection of voting rights via the Equal Protection Clause though a set of precedents that might not survive originalist revisionism.[112]

In my book *A Real Right to Vote*, I make the case for adding an affirmative right to vote to the United States Constitution. Among six provisions, the amendment would provide that "all citizen, adult, resident, nonfelons shall have the right to cast a ballot in all elections, including for president and vice president, and to have that ballot fairly and accurately counted"[113] and that "states must provide equal and not unduly burdensome voting opportunities for all voters, measured by ease of voting, and must have substantial reasons, backed by real and significant evidence, for imposing necessary restrictions on, or placing impediments to, casting a ballot."[114]

I argue that such an amendment can promote political equality,[115] deescalate the voting wars,[116] and make election subversion less likely.[117] I also consider whether the amendment should be broad or narrow, for example by expanding voting rights to American citizens living in territories and to citizens who had completed their term of incarceration after felony convictions.[118] The amendment would also reform election administration by coupling national voter identification with universal voter registration.[119]

I am under no illusions that in the current political atmosphere the adoption of such an amendment is imminent. But the changing coalitions of the political parties may soon create an opening for a broader discussion about voting rights.[120] And in the meantime, states can strengthen their protections for voting rights through state constitutional law, such as Nevada's strong protections[121]—and hope the U.S. Supreme Court does not use the anti-arrogation principle to pare back the protections.

Even though a constitutional amendment is not happening any time soon, putting a proposed amendment out for public discussion could focus discussion on *Bush*'s unfulfilled equal protection promise and what it would mean to take a true pro-voter approach to U.S. elections and election law more generally.[122] Twenty-five years after the

112. HASEN, REAL RIGHT TO VOTE, *supra* note 108, at 21-40.
113. *Id.* at 56.
114. *Id.* at 57.
115. *Id.* at 41-66.
116. *Id.* at 91-111.
117. HASEN, REAL RIGHT TO VOTE, *supra* note 108, at 112-31.
118. *Id.* at 67-90.
119. *Id.* at 60-61.
120. Hasen, *Stagnation*, *supra* note 27, at 1745-47.
121. *See* NEV. CONST. art. 2, §§ 1, 1A.
122. *See* Hasen, *Stagnation*, *supra* note 27, at 1733-59.

Supreme Court decided *Bush*, we can safely assume the decision is not giving us lemonade. But we can plant a lemon seed now so that future generations might be able to enjoy its bounty.