THE MISSHAPEN SHADOWS OF THE 2000 ELECTION

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ABSTRACT

The election of 2000 catalyzed an entire field. A quarter-century on, with the benefit of a bit of time and distance, the anniversary presents an opportunity to see whether we understand the landscape of 2000, including its precursors and our responses, in a way that puts us in position to advance the healthier, "thicker" democracy we deserve.

The news is not great.

This Essay describes and discusses three stubbornly persistent misconceptions of the 2000 contest that continue to cloud our vision with respect to contemporary election law and practice. Part I confronts lessons for election administration. It contends that only an impoverished view of the 2000 contest holds that the election turned on the now-obsolete disposition of hanging chads—and not only rejects the notion that we have corrected the problems that led to the dispute, but also contends that we will remain beset until we adjust our conception of the goals we seek to achieve. Part II confronts jurisprudence and our understanding of the constitutional bounds of the judicial process. It contends that only an impoverished view of the 2000 contest holds that either the Florida Supreme Court or the United States Supreme Court reflected naked tribal partisanship or judging beyond the constitutional pale—and not only rejects the notion that the theory of jurisprudence embodied in Bush v. Gore's "independent state legislature" discussion has much continuing vitality, but also locates the Electoral Count Reform Act's new provisions in a more hopeful view of the courts. Part III confronts the sociology of the dispute. It contends that only an impoverished view of the 2000 contest allows the Supreme Court's extraordinary black-swan intervention to slip beyond the facts at hand—and rejects the notion that courts, not voters, determine the outcomes of our elections. The Essay develops these arguments in the hopes that a clearer understanding of our electoral history may help us better approach the present.

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A national electoral trauma turns 25 this year.

The election of 2000 was such a deep cut that it catalyzed an entire field. Election law took off as both an arena of serious study[1] and a battleground of litigation[2] after the 2000 contest presented the stakes of electoral infrastructure in unmistakably stark relief. A quarter-century on, with the benefit of a bit of time and distance, we have an opportunity to reflect on the rebooted origin story for this font of scholarship and contestation.[3] The anniversary presents an opportunity to see whether we understand the landscape of 2000, including its precursors and our responses, in a way that puts us in a position to advance the healthier, "thicker" democracy we deserve.

1. In 1999, following the recent publication of the first two modern casebooks dedicated entirely to election law and in a symposium dedicated to "Election Law as Its Own Field of Study," Professor Rick Hasen notably placed election law as an academic discipline "at puberty." Richard L. Hasen, *Introduction: Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1095 (1999). The growth spurt didn't take long.

2. *See* Richard L. Hasen, Bush v. Gore's *Ironic Legacy*, 53 FLA. ST. U. L. REV. 313, 317–18 (2026).

3. And even 25 years may be too few. *See* Sanford Levinson, Bush v. Gore *and the French Revolution: A Tentative List of Some Early Lessons*, 65 L. & CONTEMP. PROBS. 7, 7-9 (2002).

The news isn't great.

This Essay describes and discusses three stubbornly persistent misconceptions of the 2000 contest that continue to cloud our vision with respect to contemporary election law and practice. Part I confronts lessons for election administration. It contends that only an impoverished view of the 2000 contest holds that the election turned on the now-obsolete disposition of hanging chads—and not only rejects the notion that we have corrected the problems that led to the dispute, but also contends that we will remain beset until we adjust our conception of the goals we seek to achieve. Part II confronts jurisprudence and our understanding of the constitutional bounds of the judicial process. It contends that only an impoverished view of the 2000 contest holds that either the Florida Supreme Court or the United States Supreme Court reflected naked tribal partisanship or judging beyond the constitutional pale—and not only rejects the notion that the theory of jurisprudence embodied in *Bush v. Gore*'s "independent state legislature" discussion has much continuing vitality, but also locates the Electoral Count Reform Act's new provisions in a more hopeful view of the courts. Part III confronts the sociology of the dispute. It contends that only an impoverished view of the 2000 contest allows the Supreme Court's extraordinary black-swan intervention to slip beyond the facts at hand—and rejects the notion that courts, not voters, determine the outcomes of our elections. The Essay develops these arguments in the hopes that a clearer understanding of our electoral history may help us better approach the present.

INTRODUCTION

Bush v. Gore is both the name of the case in which the Supreme Court effectively decided the 2000 election[4] and the shorthand we use for describing the entirety of the 2000 election controversy. Shortly after Election Day, three things had become clear. Vice President Al Gore appeared to have won the popular vote in states yielding 267 electoral votes.[5] Governor George Bush appeared to have won the popular vote in states yielding 246 electoral votes.[6] And the race was too close to call accurately in Florida, with its 25 electoral votes that would determine the victor.[7] Indeed, on election night itself, several networks

4. Bush v. Gore, 531 U.S. 98 (2000).

5. *See* Chaka Ferguson, *Gore Wins New Mexico by 481 Votes*, PHILA. INQUIRER, Nov. 18, 2000, at A05. As the nation would soon learn, of course, the fact that a state is "called" by the press involves a projected estimate, which does not purport to be a final answer.

6. Dave Leip, *2000 Events Timeline – Post Election*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, https://uselectionatlas.org/INFORMATION/ARTICLES/pe2000timeline.php [https://perma.cc/6JM9-57S3] (last visited Dec. 26, 2025).

7. *Id.*

had called Florida for Gore, then for Bush, and then finally retracted any projection.[8] The morning after the election, Gov. Bush was reported to be in the lead by 1784 votes, out of approximately 6 million ballots cast in the state: a margin of 0.03%.[9]

A series of recounts and legal challenges ensued. Four counties—Palm Beach, Broward, Miami-Dade, and Volusia—began manual recounts,[10] but litigation made the deadlines for completing the count a moving target,[11] and the specific standards by which ambiguously marked ballots were to be counted differed from county to county and sometimes from day to day within the counties.[12] In early December, the Florida Supreme Court ordered totals from the four recounting counties to be included in the final tally—and also ordered a statewide manual recount, to be completed at extreme speed, to determine whether ballots on which scanning machines had indicated no vote for President would in fact reveal votes for President when examined manually.[13]

December 12, 2000, was the default date set by federal statute for the resolution of post-election controversies over the identity of presidential electors.[14] And on that date, the Supreme Court handed down its opinion in a case styled *Bush v. Gore*.[15] The Court held, by a 7-2 vote, that the procedures that had been deployed by the Florida courts to manually recount ballots were unconstitutional.[16] More controversially, the Court held by a narrower 5-4 vote that Florida would have preferred to stop proceedings in line with the default federal deadline than take additional steps to continue the recount.[17] And so the Court

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8. *Id.*

9. Dan Balz, *Nation Braces for a Long Count*, WASH. POST (Nov. 8, 2000), https://www.washingtonpost.com/archive/politics/2000/11/09/nation-braces-for-a-long-count/2c456fc4-dd79-4906-b82b-ba4e8392c069/ [https://perma.cc/G7WZ-NT7G].

10. *CONTESTING THE VOTE*; *Ruling by the Supreme Court on the Bush Campaign's Appeal of Recounts*, N.Y. TIMES (Dec. 5, 2000), https://www.nytimes.com/2000/12/05/us/contesting-vote-ruling-supreme-court-bush-campaign-s-appeal-recounts.html [https://perma.cc/5U3D-VJMN].

11. *See, e.g.*, Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273, 1279-81 (Fla. 2000).

12. *See, e.g.*, *Bush*, 531 U.S. at 106-07.

13. Gore v. Harris, 772 So. 2d 1243, 1260-62, n.22 (Fla. 2000) (ordering totals from Palm Beach and Miami-Dade to be included, and ordering a statewide manual recount for undervotes); Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1226, 1240 (Fla. 2000) (noting four counties explaining the rationale for submitting late returns, and requiring amended certifications submitted by late November to be counted); *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d at 1288-90 (reaffirming that ruling).

14. 3 U.S.C. §§ 5, 7 (2000).

15. 531 U.S. 98 (2000).

16. *Id.* at 106-09; *id.* at 133-35 (Souter, J., dissenting); *id.* at 145-46, 158 (Breyer, J., dissenting).

17. *Id.* at 110-11.

effectively ordered an end to continuing efforts to further ascertain the winner.[18]

The final official margin shrank threefold from the morning-after tally: 537 votes, and 0.01% of the total, separated Bush from Gore.[19] It remains the closest Presidential election in American history.[20]

Though Al Gore accepted the Court's decision, issuing a concession speech the next day, the Court's role in bringing the election to a close was deeply, bitterly controversial.[21]

In 2008, Justice Scalia famously admonished that the country should just "get over it."[22] There is a fair amount of ambiguity packed into those three words. It has never been clear what he thought objectors should make peace with: the ultimate result, the fact that some institution had to make a decision, the notion that the Supreme Court should be that institution, the ideological divide of the 5-4 decision, or the rationale for the decision itself. Just [waves hands] "get over it."

It has been 17 years since Justice Scalia's quip. We still haven't gotten over it—not by a long shot.

Indeed, the shadows of *Bush v. Gore* haunt us still. That is in part because the case and the controversies at its heart have been frequently misunderstood. Taking a fresh look at a twenty-five-year-old scar may help us recalibrate, better understanding the democracy we have in order to better demand the democracy we deserve.

I. ELECTION ADMINISTRATION CONTROVERSIES ARE PERSISTENT (AND WITHOUT A CHANGE IN MINDSET, ENDEMIC)

The first significant misconception addressed in this Essay is a misconception about election administration: that the election of 2000 was decided by "hanging chads." The election of 2000 was decided by an abundance of irregularities, most of which linger on, masked by electoral margins. If we want to correct the real problems revealed in 2000,

18. *Id*. at 110.

19. *Gore v. Harris*, 772 So. 2d at 1247.

20. At least, Florida's totals were the closest by percentage, and the closest in a decisive presidential state. The 2000 margin in New Mexico was 0.06% (and so larger by percentage than Florida) and won by Gore (so it would not have been determinative had the election come out in Bush's favor), but just 366 votes separated Gore from Bush. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 12 (2001), https://www.fec.gov/resources/cms-content/documents/federalelections00.pdf [https://perma.cc/58X8-H7N4] [hereinafter FEDERAL ELECTIONS 2000].

21. Albert Gore, Jr., *Address Conceding the 2000 Presidential Election*, THE AM. PRESIDENCY PROJECT (Dec. 13, 2000) https://www.presidency.ucsb.edu/documents/address-conceding-the-2000-presidential-election [https://perma.cc/7KV2-LFEV].

22. Lesley Stahl, *Justice Scalia On the Record*, 60 MINUTES (Apr. 24, 2008 10:03 A.M.), https://www.cbsnews.com/news/justice-scalia-on-the-record/ [https://perma.cc/E3QY-FBMD].

it will take a change in mindset that's more fundamental than a change in discrete policy.

"Hanging chad," as a phrase, entered the popular lexicon in late 2000.[23] "Chads" were the small, perforated squares on punch-card ballots, and the residue when a voter poked through the ballot cardstock with a metal stylus to remove the perforated chad and thereby indicate their choice on the ballot. Some voters did not punch cleanly through to remove the chad in its entirety, leaving the chad "hanging" on the rest of the ballot by a corner or two or three.[24] And then there were "dimpled" or "pregnant" chads, which were indented rather than detached either in full or in part, leaving some ambiguity about whether they represented voters' selections at all.[25]

In the heat of the 2000 recounts, election judges spent hours staring at chads clinging to ballot cardstock in varying degrees, to determine whether they represented votes or happenstance. The judges fought frustration and fatigue amidst swiftly shifting rules and conditions, in a swirl of unsought publicity. The recount proceedings themselves weren't particularly television-friendly, but the drama of a hair's-breadth presidential battle certainly was. And many vividly remember photos of the recount judges, eyeballs distorted through the magnifying glasses they were straining to use to review each potentially decisive ballot—a carnival-house grotesque reflecting the queasy mood of the country.[26] In a relatively consolidated media environment, those photos, and the chads in the foreground, were seared into the collective consciousness.

And in a national election of 105 million votes determined by a state election of 6 million votes determined by a margin of 537 votes, of course, the election really wasn't about those chads at all.[27]

A. The 2000 Election Was Never Just A Voting Technology Dispute

1. It Wasn't (Just) About Hanging Chads

In truth, the 2000 election was massively overdetermined. Dozens of lawsuits contested at least 15 distinct legal issues in the month after

23. GOOGLE BOOKS NGRAM VIEWER, "hanging chad," https://books.google.com/ngrams/graph?content=hanging+chad&year_start=1900&year_end=2022&corpus=en&smoothing=3 [https://perma.cc/7Y4P-9EED] (last visited Mar. 30, 2026). It mostly left as suddenly as it arrived, now serving an afterlife as a political scientist's dad-joke Halloween costume.

24. *See, e.g.*, *Bush*, 531 U.S. at 105.

25. *Id.*; Jennifer Harper, *"Chad" Now Punched in American Vernacular*, WASH. TIMES, Nov. 14, 2000, at A9.

26. *See, e.g.*, Robert Rosenberg, *That's Me in the Picture: 'I Had to Examine Every Disputed Ballot': George W Bush v Al Gore, Florida, 2000*, THE GUARDIAN (July 1, 2016 10:59 A.M.), https://www.theguardian.com/artanddesign/2016/jul/01/disputed-ballot-george-w-bush-al-gore-florida-recount-2000 [https://perma.cc/FSZ5-88QW].

27. FEDERAL ELECTIONS 2000, *supra* note 20, at 12.

Election Day in Florida alone.[28] The margin of malfeasance or error for each likely independently exceeded the ultimate margin of determined victory. Moreover, that roster of litigation, more than ample on its own to change the identity of the winner, ignores the multitude of issues revealed in the election for which litigation could provide little meaningful relief for Florida voters,[29] much less the multitude of issues beyond Florida.[30]

It wasn't just that "hanging chads" happened. Everything happened. And with a final margin as small as just 537 votes for a nationwide presidential election, everything mattered. The election was effectively a statistical tie, and that meant that every anomaly affected the outcome. A butterfly ballot flapped its wings in Palm Beach and the impact was felt in Anchorage.[31]

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28. *See, e.g.*, Johnson v. Bush, 405 F.3d 1214, 1216 (11th Cir. 2005) (en banc) (challenging Florida's felony disenfranchisement law); Fladell v. Palm Beach Cnty. Canvassing Bd., 772 So. 2d 1240, 1242 (Fla. 2000) (challenging a Palm Beach "butterfly" ballot); Complaint to Contest Election at 5, Brown v. Stafford, No. 00-2878 (Fla. 2d Cir. Ct. Dec. 5, 2000), https://perma.cc/LP87-5PLN (challenging a Duval County "vote all pages" ballot); Bush v. Hillsborough Cnty. Canvassing Bd., 123 F. Supp. 2d 1305, 1306 (N.D. Fla. 2000) (challenging the rejection of military ballots); Harris v. Fla. Elections Comm'n, 235 F.3d 578, 579 (11th Cir. 2000) (challenging the counting of ballots received after election day); Jacobs v. Seminole Cnty. Canvassing Bd., 773 So. 2d 519, 521 (Fla. 2000) (challenging the belated addition of identification numbers to absentee ballot applications); Complaint at 5, McCauley v. Nolen, No. 00-2810 (Fla. 14th Cir. Ct. Nov. 16, 2000), https://perma.cc/MR65-CPV7 (challenging improprieties in mail ballot solicitation and return); Verified Emergency Petition to Disqualify and Complaint of Unethical Conduct; Petition to Declare Florida Election Unconstitutional at 3, Fox v. Harris, No. SC00-2347 (Fla. Nov. 16, 2000), https://perma.cc/9L77-DX3E (challenging an official's conflict of interest); *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d at 1281 (seeking clarity on the statutory trigger for permission to conduct a manual recount); Petition for Declaratory Judgment at 3, Butler v. Harris, No. 00-2745 (Fla. 2d Cir. Ct. Nov. 17, 2000), https://perma.cc/9BGB-FTNX (challenging the selective request of counties for manual recounts); Order, McDermott v. Harris, No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000), 2000 WL 1693713, at *1, *rev'd sub nom.*, *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d 1273 (challenging the preclusion of late manual recount tallies in certified totals); Fla. Dem. Party v. Palm Beach Cnty. Canvassing Bd., No. CL-00-11078 AB, 2000 WL 1728721, at *1 (Fla. 15th Cir. Ct. Nov. 22, 2000) (challenging standards for counting a vote); *Gore v. Harris*, 772 So. 2d at 1247, *rev'd sub nom.*, *Bush*, 531 U.S. 98 (challenging incomplete manual recount tallies); Siegel v. LePore, 234 F.3d 1163, 1168 (11th Cir. 2000) (challenging proceeding with manual recount); Petition for Quo Warranto at 2, Gore v. Miami-Dade Cnty. Canvassing Bd., No. SC00-2346 (Fla. Nov. 21, 2000), https://perma.cc/8TGX-ZG6F (challenging cessation of manual recount). Stanford Law maintains a helpful collection of 2000 litigation at https://guides.law.stanford.edu/c.php?g=991108&p=7217687 [https://perma.cc/3JX5-3ZAW].

29. *See generally*, *e.g.*, U.S. COMM'N ON C.R., VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (June 2001), https://www.usccr.gov/files/historical/2001/01-021.pdf [https://perma.cc/4MHP-G285] [hereinafter *Voting Irregularities*].

30. *See generally, e.g.*, DEMOCRATIC INVESTIGATIVE STAFF, H. COMM. ON THE JUDICIARY, HOW TO MAKE OVER ONE MILLION VOTES DISAPPEAR: ELECTORAL SLEIGHT OF HAND IN THE 2000 PRESIDENTIAL ELECTION (Aug. 20, 2001), https://perma.cc/ZN2J-DMMF [hereinafter *One Million Votes*].

31. The "butterfly ballot" is the name given to the ballot used in Palm Beach County for the 2000 general election, in which candidates were listed on both the inside left and inside right of a folded ballot sheet in order to avoid the need to turn the page to see all presidential candidates. Democratic candidate Al Gore was the second listed candidate on the left side of the page, but voters wishing to select Gore would have to punch the third ballot hole from the top of the page; the second ballot hole from the top was the choice corresponding to

In 2000, registration forms were processed too slowly or held in a pending status; voters arrived at the polls to find their names were not in the books.[32] Motor vehicle agencies failed to live up to their registration obligations under federal law.[33] Eligible citizens were subject to unwarranted purges.[34] Ballots were designed in a manner predictably likely to confuse.[35] Absentee ballots that were requested never arrived, and some voters who never requested absentee ballots were told at the polls that they had already voted.[36] Language access was insufficient.[37] So was access for people with disabilities.[38] Poll sites were moved or closed without adequate notice or substitute.[39] Voting equipment failed.[40] Resources were inadequate and inequitably distributed.[41] Poll workers made mistakes, in part due to inadequate training or poll site procedures.[42] Communication did not meet the need.[43] Lines stretched for hours.[44] Official errors jeopardized the counting of legitimate absentee votes, and facilitated the counting of absentee votes which might not have been legitimate.[45] Partisan officials made decisions benefiting their own favored candidates.[46]

Thinking of the election of 2000 as the "hanging chads" election allows us to let us off the hook too easily—because we think we fixed

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Reform candidate Pat Buchanan. Voters asserted that they were confused by the layout and mistakenly chose the wrong candidate, and studies demonstrated that Buchanan's totals in Palm Beach represented a stark anomaly on multiple dimensions, indicating that the ballot design likely had a significant effect. *See, e.g.*, Nate Cohn, *Revisiting Florida 2000 and the Butterfly Effect*, N.Y. TIMES (Mar. 30, 2024), https://www.nytimes.com/2024/03/30/upshot/florida-2000-gore-ballot.html [https://perma.cc/AL5E-3W9E]; Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793 (2001); Robert C. Sinclair et al., *An Electoral Butterfly Effect*, 408 NATURE 665 (2000); Complaint for Declaratory Relief, Fladell v. Palm Beach Cnty. Canvassing Bd., No. CL-00-10965 (Fla. Cir. Ct., Palm Beach Cnty. Nov. 8, 2000), https://perma.cc/PBB9-WMPC.

32. *See Voting Irregularities*, *supra* note 29, at 25, 30-32.

33. *See id*. at 29-31.

34. *See* Complaint, NAACP v. Harris, No. 1:01-cv-00120 (S.D. Fla. Jan. 10, 2001); *see also Voting Irregularities*, *supra* note 29, at 23-24, 61-62, 64-65, 70-76.

35. *See* sources cited *supra* note 31; *see also* Voting Irregularities, *supra* note 29, at 95-97.

36. *See Voting Irregularities*, *supra* note 29, at 32.

37. *See id*. at 7, 81-83.

38. *See id*. at 79-81.

39. *See id*. at 28-29.

40. *See id*. at 92-94.

41. *See id*. at 49-55.

42. *See Voting Irregularities*, *supra* note 29, at 54, 81-82.

43. *See id*. at 25-28, 54-55.

44. *See id*. at 54, n.83; Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19 (2010).

45. *See Jacobs*, 773 So.2d at 524.

46. *See* Verified Emergency Petition to Disqualify and Complaint of Unethical Conduct, Fox v. Harris, No. SC00-2347 (Fla. Nov. 16, 2000).

that.[47] In 2002, Congress passed legislation that, *inter alia*, encouraged jurisdictions to phase out punchcard ballots and eliminate the chads.[48] Even more important, in 2003, Congress provided real, meaningful implementation money, an appropriation of more than $1.5 billion to actually accomplish that objective.[49] Congress followed up with another $1.5 billion the next year to ensure adequate resources to finish the job. [50] And now, hanging chads are a thing of the past.[51]

2. We Haven't Even Resolved Voting Technology Disputes

But if we broaden the lens slightly beyond "hanging chads"—if we think of the most salient problem in 2000 not as "hanging chads" but as "voting system technology"—we most definitely have not even "fixed that." There are still raging controversies over the technology that we use to receive, mark, cast, and count ballots. Local jurisdictions purchase their own voting systems subject to state and federal threshold standards,[52] leading to a range of options and an even larger range of disputes concerning those options. In Alpine County, California (pop. 1,204), elections are conducted entirely by mail;[53] in Los Angeles County, California (pop. 10,014,009), voters may vote by mail, but they may also use a ballot-marking device (an electronic interface that produces a paper record) custom-designed by the county itself through a first-of-its-kind 10-year investment in civic infrastructure.[54] In Limestone County, Texas, voters use the iVotronic electronic touchscreen machine, while next door in Falls County, voters use paper ballots marked by hand or by a Hart InterCivic ballot-marking device and tallied via optical scanner; active duty military in a combat zone may vote

47. *Cf. generally* Justin Levitt, *"Fixing That": Lines at the Polling Place*, 28 J. L. & POL. 465, 465 (2013) (noting President Obama's call to "fix" long lines at the polls, which are really just symptoms of other election administration difficulties upstream).

48. Help America Vote Act of 2002, Pub. L. No. 107-252, § 102, 116 Stat. 1666, 1670-72 (codified at 52 U.S.C. § 20902).

49. Miscellaneous Appropriations Act, 2003, Pub. L. No. 108-7, Div. N, 117 Stat. 537-38.

50. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Title IV, and § 259, 118 Stat. 327, 451.

51. *See Verified Voting*, VOTING EQUIPMENT, https://verifiedvoting.org/votingequipment/ [https://perma.cc/5MVL-E97U] (last visited July 27, 2025).

52. *See, e.g.*, 52 U.S.C. § 21081 (establishing minimum federal standards).

53. U.S. Census Bureau, *Alpine County, California*, https://data.census.gov/profile/Alpine_County,_California?g=050XX00US06003 [https://perma.cc/Q8K6-P8YE]; *Election*, ALPINE CNTY., CA., https://www.alpinecountyca.gov/388/Election [https://perma.cc/J7HK-MNJT] (last visited Mar. 30, 2026.

54. U.S. Census Bureau, *Los Angeles County, California*, https://data.census.gov/profile/Alpine_County,_California?g=050XX00US06003 [https://perma.cc/9WHW-FYRY]; *see generally* Los Angeles Registrar-Recorder/County Clerk, *Voting Solutions for All People Final Report*, https://www.lavote.gov/vsap/home [https://perma.cc/2YUS-WFPD]. Full disclosure: the author served on the advisory committee for the Los Angeles VSAP project.

by fax, and those Texans joining the election from space use an Internet voting system developed by NASA.[55]

In adopting voting systems, local jurisdictions must consider a substantial number of factors. For example, jurisdictions must consider ease of use. Without clear ballots that are easy to navigate, we still have a "hanging chad" problem, in that ballots might not reflect the true desire of the voter who marked (or attempted to mark) them.[56] Local jurisdictions must also consider accessibility, not only to adequately support both voters with disabilities and facility in languages other than English,[57] but also heeding the maxim that user interface improvements designed for accessibility end up helping the public across the board. (Curb cuts benefit every sidewalk user.[58] The same is true with human-centered design in voting systems.) Local jurisdictions must consider system reliability, setup, calibration, and repair, so that pollworkers can readily deploy (and, if need be, techs can readily correct) the systems we use. Local jurisdictions must consider the accuracy and speed with which different systems produce results at scale,[59] and the extent to which systems are secure against intrusion or attack in real-world conditions, and allow confirmation of that security.[60] Consistency, privacy, transparency, cost are all on the menu.[61]

Achieving most of these goals involve tradeoffs with others to some degree, and different assessments of—and tolerance for—different sorts of risk. Consider, for example, the desire for online voting. It may seem like an anomaly that Americans can pay bills online and bank online but generally can't vote online. For many citizens,[62] the opportunity to vote online would offer exceptional accessibility. And for some individuals with disabilities, it would provide access and autonomy

55. *The Verifier—Voting Equipment in Limestone County, Texas—November 2026*, VERIFIED VOTING, https://verifiedvoting.org/verifier/#mode/navigate/map/voteEquip/mapType/ppEquip/year/2026/state/48/county/293 [https://perma.cc/XNX2-48AM] (last visited (May 12, 2026); *The Verifier—Voting Equipment in Falls County, Texas—November 2026*, VERIFIED VOTING, https://verifiedvoting.org/verifier/#mode/navigate/map/voteEquip/mapType/ppEquip/year/2026/state/48/county/145 [https://perma.cc/CFD6-YECL] (last visited May 12, 2026).

56. *See* U.S. ELECTION ASSISTANCE COMM'N, VOLUNTARY VOTING SYSTEM GUIDELINES VVSG 2.0 at 23 (Principle 7) (2021). https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf [https://perma.cc/9XDB-X325].

57. *See id*. at 23 (Principle 8).

58. *See, e.g.*, Angela Glover Blackwell, *The Curb-Cut Effect*, STAN. SOC. INNOVATION REV., Winter 2017, at 28, https://ssir.org/pdf/Winter_17_The_Curb_Cut_Effect.pdf [https://perma.cc/LM63-884Q].

59. *See* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 56. at 21, 23, 25 (Principles 1, 2, 9, 14).

60. *See id*. at 23-25 (Principles 9, 10, 11, 12, 13, 14, 15).

61. *See id*. at 21-24 (Principles 1, 3, 5, 6, 10).

62. This discussion leaves aside the idea of online voting as an exclusive means of casting a ballot, and the inequities of the digital divide that would result if at least some physical locations for casting a ballot were not provided. Instead, the discussion here concerns only online voting as one of several options.

that is simply unavailable through other voting methods. At the same time, online voting systems present real and very serious security risks. Online banking and bill payment, it turns out, are beset by consistent low-grade levels of fraud;[63] it's just that the value of the convenience commerce makes it worthwhile for financial institutions to absorb the impact of that fraud as a cost of doing business. In a zero-sum electoral environment, no similar institution exists to "absorb" the fraud in the system.

Moreover, online banking depends on identity verification, and a firm tie between each transaction and a particular identified user. But we vote via a secret ballot—and even for younger, terminally online generations with a very different conception of personal privacy than their older counterparts, the recent American turn to authoritarian governance styles offers some caution about the wisdom of discarding ballot secrecy. Secret ballots require severing the casting of a ballot itself from the process of identity and eligibility verification.[64] In person, once a voter has been checked in and given the appropriate ballot style, there should be no means to tie that ballot back to that individual; by mail, once a ballot envelope has been reviewed for eligibility and the envelope has been opened and separated from the ballot itself, there should be no means to tie that ballot back to that individual.[65] Online, that moment of severance provides opportunity for mischief, and for potential fraud to enter the picture at scale.

As a result, American jurisdictions do not generally offer all of their citizens the opportunity to return a completed ballot online.[66] But in calculating the tradeoffs, many jurisdictions have decided to allow online voting by voters facing distinct access challenges. For example, consistent with congressional approval for limited pilot programs, in 2013, Nevada allowed deployed military and overseas citizens to cast

63. *See, e.g.*, David Jefferson, *If I Can Shop and Bank Online, Why Can't I Vote Online?*, VERIFIED VOTING FOUND. (2014), https://verifiedvoting.org/publication/if-i-can-shop-and-bank-online-why-cant-i-vote-online/ [https://perma.cc/C3J3-VDVE].

64. *See id.*

65. North Carolina appears to be an exception to this general rule. In North Carolina, ballots cast by mail (or during an early vote period, which are treated the same) are marked with an identifying number to make them "retrievable" in the event of a later challenge. N.C. GEN. STAT. §§ 163-82.6B, 163-166.45; *Fact: In NC, if an Election Worker Writes on Your Ballot, It Does Not Invalidate It*, N.C. STATE BD. OF ELECTIONS (Aug. 2, 2024), https://www.ncsbe.gov/news/press-releases/2024/08/02/fact-nc-if-election-worker-writes-your-ballot-it-does-not-invalidate-it [https://perma.cc/ZE4D-HNBZ].

66. In contrast to online ballot return, online delivery of a blank ballot to the voter presents less opportunity for malfeasance and is increasingly common. Indeed, federal law requires states to develop the means to deliver blank ballots to deployed members of the military and voters overseas. 52 U.S.C. § 20302(f)(1). When individuals receive blank ballots online, without legal dispensation for electronic return, they must usually find ways to mark the ballot, print a physical copy, and return that physical copy offline.

their ballots online.[67] In 2021, Nevada expanded the program to voters with disabilities.[68] In 2023, the state's system was expanded again to Native American voters on Tribal lands.[69] Other states have made similar systems available to some similar populations.[70] There may be further expansion at the municipal level: for example, Anchorage, Alaska, offers all voters the opportunity for electronic ballot return—though relatively few voters seem to avail themselves of the opportunity.[71]

These decisions have not been free of controversy, any more than the technology disputes of 2000.[72] When members of the community disagree with a jurisdiction's resolution of the relevant tradeoffs—sometimes in circumstances where neither party has a monopoly on legitimate concerns—litigation may swiftly follow. Advocates for voters with print disabilities have sued Alabama and California to gain access to the same systems of online ballot return currently used for

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67. *See* 52 U.S.C. § 20311; NEV. STAT. 2013 ch. 8 (AB 175) §§ 13, 15 (codified at NEV. REV. STAT. §§ 293D.130, 293D.200(2)). As a technical matter, the system prepares voted ballots for email return.

68. NEV. STAT. 2021 ch. 315 (AB 121) (codified at NEV. REV. STAT. § 293.269951).

69. NEV. STAT. 2023 ch. 244 (SB 216) (codified at NEV. REV. STAT. § 293.269951).

70. Eight states and some counties in two others now allow ballot return for military and overseas voters through an online portal; 25 states and Washington, DC, allow military and overseas voters to return ballots via email. *Electronic Ballot Return*, NAT'L CONF. OF STATE LEGISLATURES (May 9, 2024), https://www.ncsl.org/elections-and-campaigns/electronic-ballot-return-internet-voting [https://perma.cc/8JTQ-74EQ]. Thirty-one states and Washington, DC, allow ballot return for these voters via fax, which may involve some of the same issues. *Id.*

Twelve states beyond Nevada allow electronic return for voters with disabilities. *See id.*

Colorado and Hawaii also make electronic return available to some voters in emergency conditions; West Virginia allows first responders in emergency conditions to return ballots electronically. COLO. REV. STAT. § 1-7.5-115; HAW. REV. STAT. § 15-5; W.VA. CODE § 3-3-1.

71. *See* Anchorage Ordinance 2004-21 (Jan. 20, 2004) (authorizing electronic return), https://www.muni.org/Departments/Assembly/legislation/2004%20Ordinances/ao2004-021.pdf [https://perma.cc/52NC-44KN]; Anchorage Ordinance 2024-109(S) (Dec. 3, 2024) (expanding the system from fax and email to include a secure document portal), https://library.municode.com/ak/anchorage/ordinances/code_of_ordinances?nodeId=1334141 [https://perma.cc/RFV2-5X5B]; Anchorage Code § 28.60.060. Anchorage Elections reported that they "implemented the Secure Document Portal in the 2025 Regular Election after the Anchorage Assembly approved it and amended Municipal Code in . . . 2024. Out of 60,455 votes cast, 136 voters used this voting method." *Voting by Secure Document Portal*, MUNICIPALITY OF ANCHORAGE, https://www.muni.org/Departments/Assembly/Clerk/Elections/Pages/SecureDocumentPortal.aspx [https://perma.cc/G9KP-84EC] (last visited May 12, 2026).

72. A New York Times report in November 2025 describing the Anchorage system drew swift responses from both the city and from technology experts. *See* Nick Corasaniti, *Will People Trust Voting by Phone? Alaska Is Going to Find Out.*, N.Y. TIMES (Nov. 13, 2025), https://www.nytimes.com/2025/11/13/us/politics/alaska-phone-voting-anchorage.html [https://perma.cc/CSQ3-KNY9]; Jamie Heinz, Press Release, *Clerk Issues Statement in Response to New York Times Elections Coverage*, MUNICIPALITY OF ANCHORAGE (Nov. 13, 2025), https://mailchi.mp/anchorageak/elections-18147412?e=3d0325a3fa [https://perma.cc/G2LR-EMVA]; Rick Hasen, *Voting Technology Experts Respond to New York Times Article on Anchorage "Vote by Phone" Experiment*, ELECTION L. BLOG (Nov. 26, 2025 9:50 A.M.), https://electionlawblog.org/?p=153263 [https://perma.cc/4898-S5C8].

overseas military voters from each state.[73] Advocates for the security of voting technology have been locked in a lawsuit with Georgia for eight years now; what began as a fight over electronic voting systems with no paper trail has spread to a fight over a new generation of new voting systems procured by the state, and the pollbook system used to check voters in.[74]

3. "Full" Resolution of Voting Technology Disputes May Not Be Possible

And all of those are legitimate contestable grievances, well before we enter the zone of conspiracy theories. For those with an unshakeable faith in the universality of their own preferences, voting systems offer a ready scapegoat for what would otherwise be inconvenient truths about the depth of shared popular support. (Voting systems are hardly the only available scapegoat: to the motivated conspiracist, any system with more than one moving part will do.) And so it is that Italian defense contractors and senior CIA officials were alleged to have used military satellites to—somehow—flip votes from Trump to Biden, or that Elon Musk was alleged to have used Starlink to—somehow—flip votes from Harris to Trump.[75] These claims are, of course, patent nonsense. But space-age satellite technology isn't necessary to fuel the fires.

Maricopa County, Arizona, uses paper ballots read by an optical scanner system; the optical scanning machines have been subject to an audit, and the results are later verified in a distinct hand audit designed to make sure that the scanner totals are accurate.[76] In 2020, responding to supply-chain difficulties with paper supply, Maricopa election officials used 80-pound paper for their ballots—a bit lighter and thinner than the 100-pound paper they had been accustomed to

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73. *See, e.g.*, Rissling v. Bobo, No. 7:23-cv-01326, 2026 WL 797138 (N.D. Ala. Mar. 20, 2026), *on appeal*, No. 26-11310 (11th Cir.); Complaint, Cal. Council of the Blind v. Weber, No. 3:24-cv-01447 (N.D. Cal. Mar. 8, 2024).

74. *See* Complaint, Curling v. Kemp, No. 2017CV292233 (Ga. Super. Ct., Fulton Cnty. July 3, 2017); Curling v. Raffensperger, 776 F. Supp. 3d 1191 (N.D. Ga. 2025), *on appeal*, No. 25-11320 (11th Cir.).

75. Jacqueline Alemany et al., *Rep. Scott Perry Played Key Role in Promoting False Claims of Fraud*, WASH. POST (June 23, 2022), https://www.washingtonpost.com/national-security/2022/06/23/scott-perry/ [https://perma.cc/EQ9D-XWEM]; David Gilbert, *The Conspiracy Theory That Elon Musk Stole the Election Using Starlink Is Everywhere Now*, WIRED (Nov. 14, 2024 11:59 A.M.), https://www.wired.com/story/elon-musk-starlink-election-fraud-claims-blue-anon/ [https://perma.cc/YUL3-FURG].

76. Verified Voting, *The Verifier—Voting Equipment in Maricopa County, Arizona—November 2020*, https://verifiedvoting.org/verifier/#mode/navigate/map/voteEquip/mapType/ppEquip/year/2020/state/4/county/13 [https://perma.cc/292S-7S6W]; *Auditing Elections Equipment in Maricopa County*, MARICOPA CNTY. https://www.maricopa.gov/5681/Elections-Equipment-Audit [https://perma.cc/2CLY-7T39] (last visited May 12, 2026); *Maricopa County Election Facts: Voting Equipment & Accuracy*, MARICOPA CNTY. https://www.maricopa.gov/5539/Voting-Equipment-Facts [https://perma.cc/32H4-EPXV] (last visited May 12, 2026).

using.[77] And ballot pages in Maricopa have enough contests that they are often printed on both sides. So when voters marked in the ballot bubbles using Sharpie permanent markers, those markings sometimes bled through from one side of the page to the other.[78] The bubbles were offset—they weren't in the same position on opposing sides of the page—and so none of the markings from one side of the page would have been tallied inaccurately as markings on the other.[79] But when some of the results from Maricopa didn't align with some voters' expectations/desires, conspiracists complained that the markings must have been responsible for disenfranchisement.[80] And thus was "Sharpiegate" born.[81]

In 2022, Maricopa moved back to the heavier 100-pound paper, and added an inch to the length of their ballots.[82] That particular combination, at general election volume, required many of the ballot printers to "perform at the very edge of or past their capability," producing ballots that could be filled in by voters but not reliably read by tabulators at the voting sites.[83] About 17,000 voters whose ballots could not be read on site deposited their ballots in secure storage containers, all of which were counted later (and without incident) at the county's central site.[84] But confusion at the voting sites and voters' deep suspicion of any procedure that did not meet their expectations of the norm likely contributed to voters getting upset, which contributed to long lines,

77. Ruth V. McGregor, *Maricopa County 2022 General Election Ballot-on-Demand Printer Investigation* 9, MARICOPA CNTY. (April 10, 2023), https://www.maricopa.gov/DocumentCenter/View/82599/Maricopa-Election-Report-and-Attachments [https://perma.cc/32H4-EPXV]. Pound weights for paper are based on the weight of 500 sheets of a "standard sheet size" of the paper in question (which is usually much larger than an 8½ x 11 page of paper). *See Paper 101 – Paper Weight Guide*, CARDSTOCK WAREHOUSE PAPER CO., https://www.cardstock-warehouse.com/pages/cardstock-paper-basis-weight-chart [https://perma.cc/P8MA-T5GR] (last visited May 12, 2026).

78. McGregor, *supra* note 77, at 9-10.

79. *Id.*

80. *See* Complaint, Donald J. Trump for President v. Hobbs, No. CV2020-014248 (Ariz. Super. Ct. Maricopa Cnty. Nov. 7, 2020), https://the2020election.org/wp-content/uploads/ElectionLawsuits/Arizona/AZ-Trump-014248-Complaint.pdf [https://perma.cc/V5JV-WQHB].

81. Or reborn. Madeleine Carlisle, *Newly-Released NOAA Emails Show Anger and Confusion Around Trump's 'Doctored' Hurricane Dorian Map*, TIME (Feb. 1, 2020 3:54 P.M.), https://time.com/5775953/trump-dorian-alabama-sharpiegate-noaa/ [https://perma.cc/9DXC-M22Y].

82. McGregor, *supra* note 77, at 10.

83. McGregor, *supra* note 77, at 2, 11-12, 23-24.

84. Jen Fifield, *To Big of a Job: Why Maricopa County's Ballot Printers Failed on Election Day*, VOTEBEAT (Dec. 8, 2022), https://www.votebeat.org/arizona/2022/12/8/23500457/maricopa-county-ballot-printer-tabulator-voting-problems-phoenix/ [https://perma.cc/Y93R-X3A9]; Jen Fifield, *How the 17,000 ballots cast in "door 3" will be counted after Maricopa County printer problems*, VOTEBEAT (Nov. 9, 2022), https://www.votebeat.org/arizona/2022/11/9/23450215/door-3-ballots-voting-problems-maricopa-county-phoenix/ [https://perma.cc/Y93R-X3A9].

which contributed to conspiracy-laden allegations of intentional disenfranchisement.[85]

Indeed, fights over the system mechanics of casting ballots can serve as breeding grounds for conspiracy even before tech gets involved. When paper ballots are cast, a few are sometimes lightly damaged in transit or storage: maybe they're slightly bent, maybe they get rained on, maybe one gets slightly torn by a sorting device. When the damage might interfere with a scanner's ability to read the ballot, teams of election officials—subject to bipartisan observation teams—manually transcribe the choices on the damaged ballot to a ballot that can be read more easily by the scanner.[86] (Both the damaged ballots and the "remade" ones are kept for audit trails.) The relevant technology in the transcription process is a pen and a piece of paper. In Delaware County, Pennsylvania, during the 2020 election, about 0.5% of the damaged ballots had to be remade.[87] In the interests of transparency, the county livestreamed the process. But in the hands of conspiracy theorists, a cropped version of the video was promoted as evidence that election officials were filling out ballots on their own, stuffing the ballot box.[88]

All of these are fights about voting system technology, in good faith and bad.[89] The point is not that there is an obvious, ready solution that meets all parties' concerns. The point is that if we think we've "gotten over" the problem of hanging chads, that's only because we've insufficiently attended to the true scope of the issue.

Moreover, even if it were possible to settle on a single technological fix, it is not clear that the fix would be available. Most local

85. *See* Fifield, *Too Big of a Job*, *supra* note 84; Caitlin Sievers, *Maricopa County election investigation: Ballots were too long, paper too heavy for printers*, AZ MIRROR (Apr. 10, 2023 2:45 P.M.), https://azmirror.com/2023/04/10/maricopa-county-election-investigation-ballots-were-too-long-paper-too-heavy-for-printers/ [https://perma.cc/8BC5-Y3TU].

86. *See* Wendy Underhill, *Elections Defined: The Process of Ballot Duplication*, NAT'L CONF. OF STATE LEGISLATURES (June 20, 2024), https://www.ncsl.org/state-legislatures-news/details/elections-defined-the-process-of-ballot-duplication [https://perma.cc/NHM2-7GX7].

87. Angelo Fichera, *Viral Video Doesn't Show Fraud by Election Workers in PA*, FACTCHECK.ORG (Nov. 6, 2020), https://www.factcheck.org/2020/11/viral-video-doesnt-show-fraud-by-election-workers-in-pa/ [https://perma.cc/W2FU-PW4X].

88. *Id.*

89. The controversy du jour appears to involve ballot marking devices that print paper ballots with machine-readable barcodes or QR codes to facilitate tallying, even if the ballots with those barcodes also include full-text selections voters can verify, and where the translation of voter-verifiable result to barcode can be audited to spot unanticipated anomalies. President Trump has even waded into the controversy, unlawfully purporting to direct the federal Election Assistance Commission to amend guidance to preclude the use of such barcodes and QR codes and to rescind the certifications of machines contrary to that guidance. *See* Preserving and Protecting the Integrity of American Elections § 4(b), Exec. Order 14248, 90 Fed. Reg. 14005, 14007-08 (2025); Justin Levitt, *Protecting the Future of American Democracy: Fighting a Surge in Voter Suppression: Testimony Before the Spotlight Forum of the Sen. Rules Comm. & Sen. Jud. Comm* 8-9 (July 30, 2025), https://www.padilla.senate.gov/wp-content/uploads/20250730-Levitt-testimony.pdf [https://perma.cc/WV9X-W35E].

jurisdictions—counties in most of the country, and towns in New England and the upper Midwest—make their own (often individualized) purchasing decisions, but the market for American voting systems is remarkably consolidated. Three legacy companies (Dominion, ES&S, and Hart Intercivic) currently control about 90% of the U.S. voting technology market.[90] There are a few nonprofits seeking to shoulder their way in, with meaningful success still on the horizon. The most populous county in the country went shopping for new voting systems and found the market for suitable voting machinery sufficiently wanting that the county built its own system from scratch.[91] It's a success story for both civic tech and local government, requiring a decade of foresight and patience, but it's not clear how replicable that may be.

Nor is it clear that we would be able to afford the fix, whether custom-built or off the shelf. In 2003 and 2004, in the wake of the 2000 election, Congress appropriated a total of $3 billion to help spur a systems upgrade.[92] But 2004 was the last time, regrettably, that Congress seriously invested to any significant degree in the nation's elections infrastructure. There have been appropriations since, but they have been sporadic and inadequate:[93] a grudging portion of a downpayment for a would-be homeowner—who can't use the money to buy a house because he has no capacity to meet the continuing mortgage. The absence of more reliable federal assistance[94]—the sort of steady and sustained support that permits long-term planning and capital investment[95]—may be one part of the reason that the existing stock of voting systems deployed by election officials is effectively hanging on by duct tape. At least as of November 2024, the principal voting systems in 12 states are so old that the systems have been discontinued

90. Spenser Mestel, *How Open Source Voting Machines Could Boost Trust in US Elections*, MIT TECH. REV. (Mar. 7, 2024), https://www.technologyreview.com/2024/03/07/1089524/open-source-voting-machines-us-elections/ [https://perma.cc/8CH4-YWFR].

91. *Voting Solutions for All People Final Report*, LOS ANGELES CNTY. REGISTRAR-RECORDER/COUNTY CLERK 1-2, 8, https://content.lavote.gov/docs/rrcc/vsap/vsap-report_final.pdf [https://perma.cc/PXK3-564R]; *see also supra* note 54 and accompanying text.

92. Miscellaneous Appropriations Act, 2003, Pub. L. No. 108-7, Div. N, 117 Stat. 537, 537-38; Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Title IV, and § 259, 118 Stat. 3, 327, 451.

93. Those include temporary crisis-driven infusions in 2018 and 2020, before and after the onset of COVID. KAREN SHANTON, CONG. RSCH. SERV., R46646, ELECTION ADMINISTRATION: FEDERAL GRANT FUNDING FOR STATES AND LOCALITIES 5-7 (2025).

94. *See* Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079, 1082, 1088 (2021); *see also id*. at 1101, 1117-19 (noting "surprisingly low" levels of local spending, perhaps as a partial result).

95. *See id*. at 1087; *see generally* EDWARD M. KENNEDY INST. & ROBERT J. DOLE INST. OF POL., BOLSTERING FUNDING AND PRACTICES FOR RESILIENT ELECTIONS (2025), https://emkinstitute.org/wp-content/uploads/2025/06/Bolstering-Funding-and-Practices-for-Resilient-Elections.pdf [https://perma.cc/67U6-QAYL].

by the manufacturer; more than 44 million voters live in jurisdictions where the primary systems are more than ten years old.[96]

Dissatisfaction with the current state of voting systems technology has even spawned an ostensible "back to basics" movement, advocating for a voting system based exclusively on pre-printed paper ballots marked only by hand and counted only by hand. This is perhaps the worst of all possible options. Limiting technology on the front end would forsake decades of improvements in accessibility that facilitate voting by people with disabilities and citizens more comfortable with languages other than English.[97]

And limiting technology on the back end—not as an emergency measure, but as a policy for normal conditions—is a sure path to increasing cost while degrading accuracy. It is considered best practice for jurisdictions to count ballots with technology and conduct risk-limited audits by hand: selecting a small but statistically meaningful sample of ballots to double-check a machine count, confirming (or raising appropriate flags for) scanned results. But full hand-counts of all ballots are a very different proposition. Studies—and a few foolish attempts to count ballots by hand—have repeatedly demonstrated that full hand counts at scale are remarkably slow, expensive, and error-prone.[98] For example, Esmeralda County, Nevada, flirted with a hand count parallel to its scanner-count operation in June 2022, and found that it took seven hours to hand-count 317 total ballots, nearly missing the deadline to certify the results.[99] Neighboring Nye County had a similar experience, with an error rate around 25% on the first day of hand counting.[100]

By this standard, the *Bush v. Gore* recount of hanging chads might be seen as a model of efficiency and accuracy.

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96. Ruby Edlin et al., *Costs for Replacing Voting Equipment in 2024*, BRENNAN CTR. FOR JUST. (Feb. 7, 2024), https://www.brennancenter.org/our-work/analysis-opinion/costs-replacing-voting-equipment-2024 [https://perma.cc/A4G2-X4P9].

97. These gains are particularly important for jurisdictions where the ballot includes initiatives and referenda, which are already difficult for voters with ample English proficiency to understand.

98. *See generally* CATHY DARLING ALLEN, ANALYSIS OF MANUAL TALLY OPTIONS FOR SHASTA COUNTY (Shasta County Elections Department, 2023), https://www.shastacounty.gov/media/17631 [https://perma.cc/9HCB-FWQC]; STATES UNITED DEMOCRACY CENTER & THE ELECTIONS GROUP, THE REALITY OF FULL HAND COUNTS: A GUIDE FOR ELECTION OFFICIALS (States United Democracy Center & The Elections Group, 2023), https://statesunited.org/wp-content/uploads/2023/11/The-Reality-of-Full-Hand-Counts.pdf [https://perma.cc/F7ED-44LR]; Stephen Ansolabehere et al., *Learning from Recounts*, 17 ELECTION L.J. 100 (2018).

99. Ken Ritter et al., *Last Nevada County Approves Primary Results After Hand Count*, AP (June 25, 2022 3:41 A.M.), https://apnews.com/article/2022-midterm-elections-new-mexico-nevada-voting-presidential-652df50bc2b535d2303ddd4c5fda6ea5 [https://perma.cc/V3MR-AZN3].

100. Brett Forrest, *Nye County Clerk Tempers Hand Count Expectations, Calls it a 'Test'*, KSNV (Nov. 12, 2022 2:24 P.M.), https://news3lv.com/news/local/nye-county-clerk-tempers-hand-count-expectations-calls-it-a-test [https://perma.cc/M8GB-WV8M].

B. The Modern Shadows of the 2000 Election: Election Administration

1. The Issues That Linger

Broadening the lens farther still, beyond voting systems technology, it is clear that each and every one of the issues that independently proved outcome-determinative in the 2000 election remains very much live. And then some: the list of administration issues deciding 21st-century elections has only gotten larger. Consider how familiar the issues from 25 years ago feel:

Ballot design? Check. In 2000, Palm Beach aimed to serve its senior voters through a ballot design that increased the font size; because there were so many presidential candidates, the registrar printed the contenders on facing pages, around a central spine for punching out voters' choices. Confronting this "butterfly ballot," many voters seemed to believe that the choice second from the top corresponded to a vote for Al Gore, when in fact it represented a vote for Pat Buchanan.[101] Controversies over ballot design remain decidedly top of mind.[102] Litigation in 2024, for example, forced New Jersey to change a primary ballot design that preferentially listed candidates endorsed by party bosses.[103] And in 2020, facing the need to resolve font and ballot size limitations reminiscent of the conditions that spurred the butterfly ballot, Los Angeles was sued over the design of an electronic ballot interface that presented on an initial screen only the first four candidates for any race.[104]

Disenfranchisement based on the criminal justice system? Check. In 2000, Florida used a vendor to match the voter rolls to lists of people ostensibly disenfranchised by conviction, but both the seed lists and the matching process were flawed.[105] As a result, eligible voters—

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101. Complaint for Declaratory Judgment, Elkin v. LePore, No. CL-0010988-AE (Fla. Cir. Ct., Palm Beach Cnty.); Complaint, Rogers v. Elections Canvassing Comm'n, No. CL-0010992-AF (Fla. Cir. Ct., Palm Beach Cnty.); Fladell v. Palm Beach Cnty. Canvassing Bd., 772 So.2d 1240 (Fla. 2000).

102. *See* Andrea Córdova McCadney et al., *Common Ballot Design Flaws and How to Fix Them*, BRENNAN CTR. FOR JUST. (Feb. 3, 2020), https://www.brennancenter.org/our-work/research-reports/common-ballot-design-flaws-and-how-fix-them [https://perma.cc/N22N-GA6T].

103. Kim v. Hanlon, 99 F.4th 140 (3d Cir. 2024).

104. *See* Petition for Writ of Mandate, Beverly Hills v. Logan, No. 20STCP00292 (Cal. Super. Ct., Los Angeles Cnty. Jan. 22, 2020). The suit was voluntarily dismissed a few months later. Request for Dismissal, Beverly Hills v. Logan, No. 20STCP00292 (Cal. Super. Ct., Los Angeles Cnty. May 27, 2020).

105. *See Voting Irregularities*, *supra* note 29, at 22-24, 61-77; Robert E. Pierre, *Botched Name Purge Denied Some the Right to Vote*, WASH. POST (May 30, 2001), https://www.washingtonpost.com/archive/politics/2001/05/31/botched-name-purge-denied-some-the-right-to-vote/22c12051-cf1e-4dbd-a735-37cfe9f2b11e/ [https://perma.cc/29X9-UR8D]; Scott Hiaasen et al., *Felon Purge Sacrificed Innocent Voters*, THE PALM BEACH POST (May 27, 2001); Lisa Getter, *Florida Net Too Wide in Purge of Voter Rolls*, L.A. TIMES (May

disproportionately racial and ethnic minorities—were kicked off of the rolls and unable to cast valid ballots.[106] Today, Florida is still engaged in a street fight over the enfranchisement of justice-involved citizens. Florida voters in 2018 passed a state constitutional amendment to restore voting rights to citizens who have served their sentences.[107] The legislature responded by disenfranchising citizens with convictions who have been released from custody but have not yet paid court fees associated with the conviction, even when the state is unable to tell those citizens how much they may still owe.[108] And a new unit of state election police have targeted individuals who mistakenly believe that their rights have been restored, with the publicity for the high-profile arrests deterring participation more broadly.[109] Indeed, the damage extends beyond citizens disenfranchised by felonies: Florida incarcerates at least 350,000 people in jails every year, before conviction or for non-disenfranchising misdemeanors.[110] There is ample reason to believe that those eligible citizens do not have the practical access to the ballot they need to cast valid votes.[111]

Errant list maintenance? Check. In 2000, as mentioned above, a sloppy last-minute hunt for ineligible voters on the rolls led to eligible voters being purged.[112] To prevent disenfranchisement based on similar errors, federal law includes a "pencils down" provision precluding systematic list maintenance within 90 days of an election.[113] Enforcement of that provision is pragmatically difficult, though: first, advocates need to discover a late systematic purge, then they need to find willing plaintiffs on the list whose registrations have been improperly cancelled, and then they need to secure judicial relief on a necessarily abbreviated timeline. Today, relief is still difficult to come by. When Virginia executed a systematic purge of the registration rolls for ostensible noncitizens in late 2024—mistakenly ensnaring eligible voters in

21, 2001), https://www.latimes.com/archives/la-xpm-2001-may-21-mn-620-story.html [https://perma.cc/QU42-7B3C].

106. *See* sources cited *supra* note 105.

107. *See Voting Restoration Amendment 14-01*, FLA. DIV. OF ELECTIONS, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1 [https://perma.cc/7YF7-EABU].

108. Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020) (en banc).

109. Lawrence Mower, *Police Cameras Show Confusion, Anger Over DeSantis' Voter Fraud Arrests*, TAMPA BAY TIMES (Oct. 18, 2022), https://www.tampabay.com/news/florida-politics/2022/10/18/body-camera-video-police-voter-fraud-desantis-arrests/ [https://perma.cc/94LU-LHC3].

110. ALL VOTING IS LOCAL & ACLU OF FLORIDA, ENSURING THAT ELIGIBLE VOTERS IN FLORIDA JAILS HAVE ACCESS TO THE BALLOT 3 (2022), https://allvotingislocal.org/wp-content/uploads/2022/03/2022-FL-Jail-Based-Voting-Report-03-17-22.pdf [https://perma.cc/3RQU-EY8J].

111. *Compare id. with* Alex Burness, *Jail Voting Soars in Colorado After State Mandates Polling Places in County Lockups*, BOLTS (Mar. 4, 2025), https://boltsmag.org/jail-voting-soars-in-colorado/ [https://perma.cc/JT8Q-P8MG].

112. *See supra* notes 105-106 and accompanying text.

113. 52 U.S.C. § 20507(c)(2).

the process[114]—a trial court blocked the action on October 25, but that order was itself stayed by the U.S. Supreme Court, without a decision explaining its reasoning, just five days later.[115]

Irrelevant technicalities in the mail ballot process? Check. In 2000, Florida law purported to require voters requesting a mail ballot to include their voter registration number on the request. In Seminole County, several thousand Republican voters included enough information on their requests to identify themselves (and allow review of their eligibility), but did not include that registration number, so party operatives later filled in the relevant information on the voters' behalf.[116] Today, minor mistakes on mail ballots are still cause for controversy. In Pennsylvania, for example, a dispute arose over thousands of votes in 2020 and 2022 for which voters did not correctly date the outside envelope of a returned mail ballot, even though those dates are not used for any election administration purpose.[117] The litigation remains ongoing.[118]

Contested ballots arriving after Election Day? Check. In Florida in 2000, ballots arrived from overseas, after Election Day—including some without indications of when they were cast, but others with ample evidence (e.g., postmarks or signed and dated affirmations) that

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114. Jude Joffe-Block, *U.S. Citizens Are Among the Voters Removed in Virginia's Controversial Purge*, NPR, (Oct. 30, 2024 11:25 A.M.), https://www.npr.org/2024/10/29/nx-s1-5169204/virginia-noncitizen-voter-purge [https://perma.cc/JZD5-7BGM].

115. Va. Coal. for Immigrant Rts. v. Beals, Nos. 1:24-cv-01778, 1:24-cv-01807, 2024 WL 4577983 (E.D. Va. Oct. 25, 2024), *stayed*, No. 24A407, 2024 WL 4608863 (S. Ct. Oct. 30, 2024). A similar (and similarly sloppy) last-minute list maintenance effort in Alabama was successfully blocked by court order. *See* Safiyah Riddle, *A Federal Judge Halts an Alabama Program that Purged Thousands of Legal Voters*, AP (Oct. 16, 2024, 4:16 P.M.), https://apnews.com/article/alabama-voter-purge-allen-secretary-state-judge-6cec74a5bc2afef14beae6827d4cf971 [https://perma.cc/LU6H-RZ25]; Ala. Coal. for Immigrant Just. v. Allen, Nos. 2:24-cv-01254, 2:24-cv-01329, 2024 WL 4510476 (N.D. Ala. Oct. 16, 2024).

116. *Jacobs*, 773 So. 2d at 521; Taylor v. Martin Cnty. Canvassing Bd., 773 So. 2d 517, 518 (Fla. 2000). Democratic campaign personnel had apparently either highlighted a space for voters to include their registration number on preprinted absentee ballot request forms, or included the number in the preprinted forms directly, but the preprinted form prepared by Republicans did not include either the number or a space for it. *Jacobs*, 773 So.2d at 521.

117. Eakin v. Adams Cnty. Bd. of Elections, 149 F.4th 291 (3d Cir. 2025), *cert. petitions filed*, Nos. 25-962, 25-967 (S. Ct. Feb. 11, 2026); Baxter v. Phila. Bd. of Elections, 329 A.3d 483 (Pa. Commonw. Ct. 2024), *stayed*, 325 A.3d 645 (Pa. 2024), *appeal granted in part*, 332 A.3d 1183 (Pa. 2025); Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa., 97 F.4th 120 (3d Cir. 2024); Ball v. Chapman, 289 A.3d 1 (Pa. 2023).

118. *Eakin*, 149 F.4th 291 (3d Cir. 2025), *cert. petitions filed*, Nos. 25-962, 25-967 (S. Ct. Feb. 11, 2026); *Baxter*, Nos. 1-EAP-2025, 2-EAP-2025 (Pa.), https://www.pacourts.us/election-2025/1-and-2-eap-2025 [https://perma.cc/P9VX-UWYT]. In August 2025, the Third Circuit determined that the burden on voters of a mandatory date requirement that served no meaningful election administration purpose outweighed the justification for a rule disenfranchising voters for mistakes in completing that date, and was therefore unconstitutional. *See* Eakin, 149 F.4th at 317-18 (3d Cir. 2025).

they were cast before Election Day.[119] Litigation over these ballots ran until the day the recount stopped.[120] Today, courts and legislatures remain critical forums for disputes over ballots arriving after Election Day from various sources, with and without legible postmarks.[121] Indeed, in 2024, just eleven days before Election Day, a federal appellate court invalidated Mississippi's state law allowing ballots postmarked by Election Day to be received up to five days later.[122] And President Trump has purported to authorize official action against states with similar laws.[123]

These are just a few examples for illustrative purposes: the full list would run for pages more. Dozens of contested election administration practices—some contrary to federal or state law, some permissible but highly controversial—each almost certainly affected more than 537 ballots in 2000. Each of these issues, and many of more recent vintage, remain hotly contested today, 25 years later.

2. Learning from the Expanded Field of View

Several lessons emerge when we recognize that the election of 2000 was not just about hanging chads.

First, the 2000 election experience in Florida wasn't an anomaly for *what* went wrong—the oddity was not the nature of the irregularities, nor even that they happened simultaneously. The vast majority of the issues in Florida affected elections in other states in 2000 and have continued to affect elections since.[124] Florida 2000 wasn't even an

119. Bush v. Hillsborough Cnty. Canvassing Bd., 123 F. Supp. 2d 1305, 1306 (N.D. Fla. 2000); Harris v. Fla. Elections Comm'n, 235 F.3d 578, 578 (11th Cir. 2000).

120. Temp. Restraining Order, Bush v. Hillsborough Cnty. Canvassing Bd., No. 3:00-cv-00533 (N.D. Fla. Dec. 12, 2000).

121. Republican Nat'l Comm. v. Aguilar, No. 89149, 2024 WL 4601602, at *1 (Nev. Oct. 28, 2024); Republican Nat'l Comm. v. Burgess, No. 3:24-cv-00198, 2024 WL 3445254, at *1 (D. Nev. July 17, 2024), *on appeal*, Case No. 24-5071 (9th Cir.); Complaint at 4-7, Issa v. Weber, No. 3:25-cv-00598, 2025 WL 822845 (S.D. Cal. Mar. 13, 2025).

122. Republican Nat'l Comm. v. Wetzel, 120 F.4th 200, 203-05 (5th Cir. 2024), *cert. granted*, 146 S. Ct. 355 (2025).

123. *See* Exec. Order 14248, *Preserving and Protecting the Integrity of American Elections*, 90 Fed. Reg. 14005, 14005, 14009 (Mar. 25, 2025). The President claimed that these ballot receipt statutes are inconsistent with federal statutes directing a uniform "Election Day"; he directed the Attorney General to "enforce" the federal statutes against states and directed the Election Assistance Commission to withhold funding from states accepting ballots after Election Day. The Attorney General, however, has no statutory authority to "enforce" the Election Day statutes, and the President has no authority to direct the (independent) Election Assistance Commission, which has no authority to withhold funding based on these statutes. This portion of the President's Executive Order has been enjoined, at least as against 15 states. Cal. v. Trump, 786 F. Supp. 3d 359, 385-95 (D. Mass. 2025), *on appeal*, No. 25-1726 (1st Cir.); Wash. v. Trump, 814 F. Supp. 3d 1173, 1221-26, 2026 WL 73866 (W.D. Wash. 2026).

124. *See* One Million Votes, *supra* note 30, at 4.

anomaly for the fact that the errors were outcome-determinative. Elections are decided by handfuls of votes all the time, every year.[125]

That said, it's quite rare for statewide elections to be decided by a handful of votes, and even rarer for statewide elections in states that decide the outcome of a presidential race to be decided by a handful of votes. And that context magnifies the salience of the issues we might otherwise be prone to ignore. When we allow ourselves to understand the full scope of the errors in 2000, we recognize that we know about the full scope of the errors *because* the election came down to 537 votes in a 105-million-vote contest. The statistical tie in a decisive contest with immediate national consequences is what exposed the process issues that have become easier to ignore when they haven't been quite so nationally pivotal. The concerns of the election of 2000 have not been resolved. They have merely faded from view. Which means that they lie in wait.

Second, it is only possible to work to correct and improve the process issues that linger still when we attend to the task with vigor and focus. Though that assessment may seem trite, it is not a trivial task. Republican democracy is one of the essential ways that we build the world we want to live in, together. Americans interested in jobs, or the environment, or national security, or health care, or education, or justice, or international affairs, or privacy—citizens interested in collective action to fix these issues, or collective action to leave them alone—are interested in democracy. Democracy is the infrastructure of infrastructure.

Most Americans only notice infrastructure when it breaks. It is hard to prioritize maintenance and improvement on the things we just expect to work, under the surface, when so many other pressing issues are (rightly) screaming for attention. The short-term triage is rational, in the short term. But process issues left to fester without resolution can yield much bigger long-term costs.

In correcting and improving these process issues, legislative advocacy has an important role. Some suboptimal practices are codified and need adjusting, and some best practices are not codified but should be. Litigation has an important role as well. The judicial process can expose the flawed logic or factual premises of other government actors,

125. *See, e.g.*, Ethan Stein & Scott Sutton, *Andy Thomson Declared Winner of Boca Raton Mayoral Race by 5 Votes After Recount*, WPTV (Mar. 13, 2026 3:21 P.M.), https://www.wptv.com/news/political/elections-local/palm-beach-county-recounts-3-races-after-razor-thin-margins [https://perma.cc/5CJB-P5XX]; Rebecca Mears and Zachary Geiger, *The Power of One Vote*, CTR. FOR AM. PROGRESS (Sept. 16, 2024), https://www.americanprogress.org/article/the-power-of-one-vote/ [https://perma.cc/L5R6-Z6CR]; Guy Marzorati, *These Bay Area Elections Were Decided by a Handful of Votes*, KQED (Oct. 29, 2024 12:01 P.M.), https://www.kqed.org/news/11977769/feel-like-your-vote-doesnt-matter-check-out-these-close-election-results [https://perma.cc/85GD-NF4D]; Domenico Montanaro, *Why Every Vote Matters—The Elections Decided By A Single Vote (Or A Little More)*, NPR (Nov. 3, 2018 7:05 A.M.), https://www.npr.org/2018/11/03/663709392/why-every-vote-matters-the-elections-decided-by-a-single-vote-or-a-little-more [https://perma.cc/UC3D-GQ8A].

and can help ensure that procedures abide by statutory and constitutional mandates.

A simple underlying shift in orientation may bolster the utility of both legislative and litigative paths to reform. Deeply embedded American myth lionizes individual initiative.[126] And consistent with that overriding sociological ethos, American election law places much of the burden of effectuating electoral activity on the individual.[127] The election codes demand proactivity from individual would-be voters—or private entities assisting them—at most every turn. Information about the electoral process and the contestants; voter registration and updates to that registration; application for a mail ballot; the process of voting in person, including navigating lines, providing documentation, and other potential polling place obstacles; confronting and resolving errors in any of the above as those errors arise: in most locations, successful navigation of the process depends on a voter's own initiative or on private assistance. And while some exemplary statutory regimes or practices or jurisdictions seek instead to affirmatively meet voters where they are, that degree of customer service is not yet the American electoral norm.[128]

It could be. More to the point, it should be, with a budgetary commitment to match (which would require a shift in mindset at least as large). And until that degree of affirmative customer service—orienting the default around outbound service to each eligible elector rather than (at best) accommodating those electors who successfully find their way inbound—is the expectation rather than the anomaly, we should expect the infrastructure failures of 2000 to recur, whether the margin of victory is sufficiently large to paper over the problems or not.

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126. *See generally*, ALEX ZAKARIAS, THE ROOTS OF AMERICAN INDIVIDUALISM: POLITICAL MYTH IN THE AGE OF JACKSON (2022); HEIKE PAUL, *Expressive Individualism and the Myth of the Self-Made Man*, *in* THE MYTHS THAT MADE AMERICA (2014).

127. *See, e.g.*, Justin Levitt, *What Voting in Long-Term Care Can Teach the Rest of Us*, 103 B.U. L. REV. 1083, 1090 (2023).

128. There are two federal statutory structures that begin to approximate a shift in outlook to meaningful customer service, for two discrete groups of voters. The first is the Uniformed and Overseas Citizens Absentee Voting Act, with special procedures for deployed servicemembers, their families, and overseas citizens. *See generally* 52 U.S.C. §§ 20301-20307. The second is the combination of provisions in the National Voter Registration Act, the Americans with Disabilities Act, and the Nursing Home Reform Act for supporting voters with disabilities—including most notably the mandate in the Nursing Home Reform Act not just to remove barriers but to actively support and facilitate voting by residents of long-term care facilities. 52 U.S.C. § 20506(a)(2)(B); 42 U.S.C. §§ 12132, 12182; 42 C.F.R. § 483.10(b)(2), (f)(3), (g)(7); 28 C.F.R. §§ 35.130, 35.150, 35.160, 36.201-.202, 36.301-.303; CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., COMPLIANCE WITH RESIDENTS' RIGHTS REQUIREMENT RELATED TO NURSING HOME RESIDENTS' RIGHT TO VOTE 1-3 (2020), https://www.cms.gov/files/document/qso-21-02-nh.pdf [https://perma.cc/NF2A-ULV3]; *see also* Levitt, *supra* note 127, at 1091-92; Nina A. Kohn & Casey Smith, *Defending Voting Rights in Long-Term Care Institutions*, 103 B.U. L. REV. 1025, 1048-64 (2023).

Third, the margin of 2000 and the breadth of outcome-determinative errors in that year counsels that we continue to strive for perfection in the electoral process. But—and this may seem counterintuitive—it is destructive to expect it. Elections will not be perfect, as long as imperfect humans are running them.[129] Our national charter instructs that it exists not in order to build a perfect union, but in order to build a more perfect one:[130] both the effort and the inevitable inability to achieve the final goal are baked into the process. Aspiration and humility are the twinned values of the constitutional preamble. That translates to the electoral sphere as well: even as we strive for excellence across the board, the appropriate measure of an election is not whether there will be errors, but rather the robustness of the system for responding to and addressing errors as they occur.

This recalibration suggests a dose of humility for observers of the electoral process: it is possible to critique and correct lapses without castigating a lack of perfect foresight. It suggests a dollop of grace for election officials: it is not naïve to recognize that the vast majority of local election officials, elected or appointed, wearing a partisan label or not, are seeking to serve their constituents as best they are able. It suggests a presumption of the good faith of a bona fide dispute resolution process, administrative or judicial, that attempts to address and reconcile claims of error when the results are contested. Perhaps just as important, it suggests recognizing and rejecting bad-faith appeals to perfection that serve as outrage veneers for partisan advantage or grift. Our electoral institutions are too important to let every perceived fleck become the successful raw material for a fundraising appeal.

II. THE JUDICIARY NORMALLY DOES JUDGING

The second significant misconception addressed in this Essay is a misconception about jurisprudence: that the election of 2000 was determined by a judicial process that amounted at its core to raw partisanship. In truth, both state courts and federal courts did better than that. And appreciation—neither blind nor naïve nor total, but clear-eyed and pragmatic—for the judicious work of judicial actors in electoral contexts persists twenty-five years on, in both recent doctrine and recent legislative design.

The posture of *Bush v. Gore* presents an intriguing Rorschach test. Observers with Republican priors may tend to believe that the lawless Democratic Florida Supreme Court was manipulating the judicial

129. *See, e.g.*, Lisa Manheim, *Problems of Compliance in Election Law*, 2025 WISC. L. REV. 1321, 1321-22 (2025); Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 323-24 (2007). This is not a paean for greater mechanization. Automated systems will also be imperfect as long as imperfect humans are engineering or training them, or engineering or training the systems that train them, all the way down.

130. U.S. CONST., pmbl.

process to ensure a Gore victory.[131] Observers with Democratic priors may tend to believe that the lawless Republican U.S. Supreme Court was doing much the same for Bush.[132] There is reason for skepticism on both fronts—and perhaps a lesson for further systemic design involving judicial interpretation of election regulation and resolution of closely contested elections.

A. The Florida Supreme Court's Decisionmaking

In the 2000 election, the actions of the Florida Supreme Court quickly became exceedingly controversial. At the time, all seven of the Justices had been appointed by Democratic Governors.[133] And when the Court required—as Democratic nominee Al Gore requested—that recount totals completed beyond an apparent statutory deadline be included in the certification count,[134] and authorized—again, at Gore's request—the continued effectuation of a recount process with shifting standards,[135] these decisions were met with howls of protest.

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131. *See, e.g.*, Levinson, *supra* note 3, at 11-12 (attributing this view to James Baker). *But see* Transcript of Oral Argument at 18, Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836) ("I don't mean to suggest . . . that there was a lack of integrity or any dishonesty by the Florida Supreme Court.").

132. *See, e.g.*, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 4 (2001); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408-09, 1442-43 (2001) (distinguishing "between the 'high' politics of political principle and the 'low' politics of partisan advantage," and speculating that the Court was guided by the latter); Law Professors for the Rule of Law, *554 Law Professors Say: By Stopping the Vote Count in Florida, the U.S. Supreme Court Used Its Power to Act as Political Partisans, Not Judges of a Court of Law*, N.Y. TIMES, Jan. 13, 2001, at A7, https://www.amarkfoundation.org/pdf/law-professors-nyt-ad.pdf [https://perma.cc/MW97-UHGV]. *See also* Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1800-01 (2014).

133. Richard A. Oppel Jr., *Counting the Vote: The Supreme Court Justices; In Florida's State Government, Court Is a Democratic Enclave*, N.Y. TIMES, Nov. 17, 2000, at A27, https://www.nytimes.com/2000/11/17/us/counting-vote-supreme-court-justices-florida-s-state-government-court-democratic.html [https://perma.cc/3X8K-ZWUK]. The 1998 commission of Justice Peggy Quince was signed by two names purporting to be "Governor of Florida": Democrat Buddy Mackay and Republican Jeb Bush. *See* Governor's Response in Opposition to Petition of Quo Warranto at Appendix at 8, LWV Florida v. Scott, No. SC17-1122 (Fla. July 19, 2017), https://efactssc-public.flcourts.org/CaseDocuments/2017/1122/2017-1122_Response_48800.pdf. The term of the new Justice was to begin at the same time that Governor-elect Jeb Bush's term was to start, and in order to avoid a fight over the appointment authority, Governor Lawton Chiles and Governor-elect Jeb Bush agreed to a "joint" appointment. When Chiles suddenly passed away four days later, his successor Buddy Mackay honored the agreement, and invited Bush to co-sign the commission. *What made Justice Quince's appointment to the Florida Supreme Court doubly and triply historic?*, FLA. S. CT. (Dec. 8, 2019), https://supremecourt.flcourts.gov/News-Media/Court-News/What-made-Justice-Quince-s-appointment-to-the-Florida-Supreme-Court-doubly-and-triply-historic [https://perma.cc/E32M-FNX7].

134. *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d 1220.

135. *Gore v. Harris*, 772 So. 2d at 1258-62.

1. Context for the Most Controversial Decisions

However, several of the Court's decisions in the same period seem significantly at odds with the caricature of a single-minded partisan agenda. On December 1, 2000, the Florida Supreme Court voted—unanimously—to reject claims for a new vote, or statistical reallocation of the existing vote, based on the butterfly ballot in Palm Beach.[136] A week later, the same Court voted—unanimously on this point—to reject Gore's assertion that Palm Beach improperly discarded 3,300 ballots where the county found no reliable vote but where Gore claimed the intent of the voter was apparent.[137] Shortly thereafter, the Court voted—again, unanimously, with one recusal—to reject an attempt to throw out thousands of Republican mail ballots in Seminole County and hundreds of Republican mail ballots in Martin County.[138] Each of those decisions involved more ballots than the 537 vote margin of victory. Each decision, in practice, favored Bush and his narrow lead. And each decision is quite difficult to explain given the premise that the primary operative principle was merely a raw desire to see the Democratic candidate win.

There is a more logical explanation at hand. The Florida Supreme Court's decisions may instead reflect a court grappling with the profound difficulties of a post-election process that was not adequately calibrated to smoothly resolve a presidential election dispute decided by 537 votes. And that's in part because the process could not possibly have been adequately calibrated to smoothly resolve a presidential election dispute decided by 537 votes.

Had the runway been longer, it might have been possible. Minnesota's Coleman-Franken 2008 Senatorial election led to a recount—the ultimate conclusion was that Franken won the election by 312 votes, but the process took over seven months, and results were not finalized until June 30 of the following year.[139] In 2024, a North Carolina Supreme Court election was decided by 734 votes; the litigation remained unresolved until six months after Election Day.[140] Extended decision processes like these may be acceptable for resolving contested single seats in multimember bodies, but that timing is untenable for a Presidential inauguration in January.

Had the margin been wider, it might have been possible. Elections contests are decided under state law standards that often permit challenges only to the extent that challengers can show by clear and convincing evidence that a different candidate would instead have won the race, or at least rendered uncertain the identity of the true

136. Fladell v. Palm Beach Cnty. Canvassing Bd., 772 So. 2d 1240, 1242-43 (Fla. 2000).

137. *Gore v. Harris*, 772 So. 2d at 1259-60.

138. *Jacobs*, 773 So. 2d at 523-24; *Taylor*, 773 So. 2d at 518-19.

139. *In re* Contest of General Election, 767 N.W.2d 453, 456 (Minn. 2009).

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

victor.[141] With a wider margin, it might have become apparent that the result was not in doubt, allowing the dispute resolution process to taper off without an outcome-dispositive dispute to resolve.

Had the particular nature of the post-election dispute been different, it might have been possible. Challenges based on the resolution of a single legal standard could have been resolved through a well-reasoned judicial opinion, unassailable because it is necessarily final rather than final because it is necessarily unassailable.[142] Challenges based on the resolution of a different set of discrete factual issues—like the validity of a set of provisional ballots hinging on the eligibility of particular sets of voters—could have been resolved by double-checking a small number of names and data in a roster. But the particular challenges facing the Florida Supreme Court in 2000 depended on managing the painstaking visual evaluation of the particular demarcations on individual ballots, page by page, and line by line. And there was no way to ease that task.

2. Recounts and the Intent of the Voter

Much of the critique fostering complaints about the perceived partisanship of the Florida Supreme Court revolved around two particular aspects of its rulings in the 2000 recount.[143] One was the decision to allow the recount to progress without setting more specific standards for adjudicating whether a ballot was marked for Bush or for Gore.[144]

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141. *See, e.g.*, Huefner, *supra* note 129, at 313-14.

142. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.").

143. The Florida Supreme Court issued three primary decisions on the merits of the primary issue of which ballots should be tallied when during the recount. Florida statutes provided for an initial certification of county results, followed by a procedure for contesting those certified results as unlawful. On November 21, *in Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000), the Florida Supreme Court ruled that the Florida Secretary of State had to include recount results produced by November 26 in the initial certification. That decision was vacated by the U.S. Supreme Court and remanded for more fulsome explanation; the opinion on remand was issued on December 11. Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000).

Separately, on December 8, in Gore v. Harris, 772 So.2d 1243 (Fla. 2000), the Florida Supreme Court ruled on the proceeding contesting the certified results, and ordering a further recount as a remedy. That decision was ultimately overturned in *Bush v. Gore*, 531 U.S. 98 (2000).

144. *Gore v. Harris*, 772 So.2d at 1256-57, 1262. *Cf.* Fla. Democratic Party v. Palm Beach Cnty. Canvassing Bd., No. CL-00-11078-AB, 2000 WL 1728721, at *3-4 (Fla. Cir. Ct., Nov. 22, 2000) (ruling that "the canvassing board . . . cannot have a policy in place of per se exclusion of any ballot; each ballot must be considered in light of the totality of the circumstances. Where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.")

The second was its treatment of the state's deadlines for resolving post-election disputes.[145]

Consider first the conduct of a recount without a concrete and detailed set of statewide rules governing which ballots should count. It is unquestionably true that the substantial variation in standards from county to county and day to day posed a problem.[146] But that was a problem with no particularly optimal solution.

At the time, Florida statutes provided that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the [county] canvassing board."[147] That standard had been repeatedly validated by the Florida courts well before 2000, as a standard designed to protect voters from unnecessary disenfranchisement when their intentions were abundantly clear.[148]

In the intervening years, various counties had adopted differing standards for channeling the discretion inherent in conducting their recounts: count chads hanging by one corner but not others, or count chads hanging by one corner or two but not others, or count chads that were dimpled as well as those hanging by one corner or more. Indeed, in 2000, at least one county had changed its standard mid-count: Palm Beach

> began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal.[149]

Given the status quo, any judicial path forward in late November of 2000 was fraught with legal risk.

One option for the Florida Supreme Court would have been to strike the counties' existing decision rules and direct the counties to proceed expressly without more particularized guidance. If one voter's chads for the Presidential race were hanging by one corner and chads for other races looked similar, count the ballot; if another voter's chads were hanging by two corners and chads for other races looked similar, count the ballot. Let each ballot come in for individualized scrutiny to determine whether the intent of the voter was clear according to the

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145. *Palm Beach Cnty. Canvassing Bd.*, 772 So.2d at 1239-40 (Fla. 2000). A third, related, locus of critique was the state Supreme Court's decision to order a statewide manual recount of *undervotes* (ballots for which machine tabulators had recorded no vote for President but which might reveal a clear preference on manual inspection), but to order the inclusion of *overvotes* (ballots for which machine tabulators had recorded multiple votes for President but which might reveal a clear preference on manual inspection) in only a few counties. *Gore*, 772 So.2d at 1260, 1262.

146. *Bush*, 531 U.S. at 106-07 (Rehnquist, C.J., concurring).

147. Fla. Stat. § 101.5614(5)-(6) (2000); Fla. Stat. § 102.166(7)(b) (2000).

148. *Gore v. Harris*, 772 So. 2d at 1256-57.

149. *Bush*, 531 U.S. at 106-07 (Rehnquist, C.J., concurring) (emphasis omitted).

context for each individual ballot. That's the closest position to the legislative command focusing on the "intent of the voter," but also inevitably risks inconsistency from individual reviewer to individual reviewer.

Another option would have been to leave the counties' more particularized, but differing, guidance in place. If Palm Beach decided to count one-corner chads, and Miami-Dade decided to count two-corner chads, so be it. That's the closest position to the legislative command focusing on "the intent of the voter *as determined by the [county] canvassing board*."[150] However, such an approach is guaranteed to provide inconsistency from county to county, even if not individual reviewer to individual reviewer.

And still another option would have been to impose more particularized guidance statewide: any ballot with a one-corner chad should be counted, but not others. Or, perhaps: any ballot in which the disposition of the chad for the Presidential race is similar to the disposition of the chad for 80% of the other races on that ballot should be counted, but not others. As with many bright-line rules, these have the virtue of clarity—but the downside of both arbitrariness and deviation from the statutory text, with respect to both the substance of the decision rule (the intent of the voter) and the legislatively-identified decisionmaker (the county canvassing board). Is a ballot really not to be counted if it hangs by two corners, and it's abundantly clear to all county observers in light of the rest of the ballot that that represented the voter's choice, just because it fell below an arbitrary judicially invented rule?

The three options above are merely exemplary variations of the overly familiar debate over the comparative merits and drawbacks of rules and standards.[151] But that debate is normally presented in the context of the design choices of a legislature or common law court in the first instance. Here, the Florida legislature had already spoken, offering a standard that in particular implementation seemed to engender inconsistency. It seems that most critics of the Florida Supreme Court would have preferred option three of the above, which may be least faithful to the statutory text. In directing the trial court on how the recount should proceed, the Florida Supreme Court ultimately seemed to choose option one.[152] That is, the Court opted to simply reiterate the statutory text without further specificity.

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150. Fla. Stat. §§ 101.5614(5)-(6), 102.166(7)(b) (2000) (emphasis added).

151. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-62 (1992) (exploring the distinction and collecting sources discussing the debate).

152. The relevant portion of this decision reads, in its entirety:

> In tabulating the ballots and in making a determination of what is a "legal" vote, the standard to be employed is that established by the Legislature in our Election Code

For purposes of assessing the Florida Supreme Court's jurisprudential performance, the point here is not that the Court's decision was obviously right, or that it was obviously wrong. The point is that each path was fraught. Some options valued accuracy at the expense of order, some valued order at the expense of accuracy, some privileged the autonomy of some decisionmakers over alternatives. No option was so obviously correct to preclude the others.

3. Recounts and the Disposition of Deadlines

A similar dynamic afflicted the second decision of the Florida Supreme Court that attracted particularly strong criticism: its treatment of the state's deadlines for resolving post-election disputes. As in many states, the Florida legislature laid out a process for certifying results, which in most instances involves merely a ministerial tally of precinct reports. (Of course, when the choices on individual ballots are not clear, the ministerial nature of that tally becomes more complicated, and legal proceedings may be necessary to clarify precinct returns.[153]) In 2000, the counties' statutory deadline to certify results to the Secretary of State was November 14, seven days after Election Day.[154]

The legislature also provided for a recount process: first, a manual recount of a sample of ballots to test if something might be amiss more broadly, and then a countywide manual recount if necessary.[155] That recount process could begin, under statute, at any time before certification.[156]

Finally, the legislature provided for a subsequent judicial challenge of the certification tally—a "contest"—in the event of a more substantial eligibility problem with the ballots counted (or uncounted) in a certification process that was designed in most instances to involve only simple addition.[157] And of particular relevance to the Presidential election, in order to function as intended, the contest process had to unfold on a timeline conducive to the orderly selection of presidential electors. Federal law put a definitive stamp of approval on the outcome of a state's dispute resolution process for presidential election results if it yielded a final answer in 2000 on December 12, six days before the actual members of the Electoral College cast their votes for president.[158] Results submitted after December 12—a "safe harbor" date in

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which is that the vote shall be counted as a "legal" vote if there is "clear indication of the intent of the voter." § 101.5614(5), Fla. Stat. (2000).

Gore v. Harris, 772 So. 2d at 1262.

153. Fla. Stat. § 102.166 (2000).

154. Fla. Stat. §§ 102.111, 102.112 (2000).

155. Fla. Stat. §§ 102.141(4), 102.166(4)-(7) (2000).

156. Fla. Stat. § 102.166(4)(b) (2000).

157. Fla. Stat. § 102.168 (2000).

158. 3 U.S.C. § 5.

federal law—got significantly less assurance that they would be counted as intended by Congress.

This structure was built for normal times. The election of 2000 was decidedly not normal times.

And so, when the Florida Supreme Court examined the initial certification deadline, it recognized that the legislature's certification process and recount process were at odds with each other. A recount that candidates had the right to request as late as the morning of November 14[159] could not possibly be completed by the evening of November 14.[160]

One option would have been to prioritize the legislature's command that results be in by a date certain over the legislature's command to permit recounts and count ballots if the voter's intent could be determined. Another would have been to prioritize the legislature's command that ballots be counted if possible over the legislature's date-certain deadline. A third option would have attempted to resolve the two by modifying each.

The Florida Supreme Court ultimately seemed to choose the second option. That is, it recognized the certification deadline, but also acknowledged the possibility of amended returns; on November 21, it allowed the counties in which manual recounts were proceeding to continue those recounts and directed the Secretary of State to include in certification results any recount results submitted by November 26.[161] Once the certification was complete on November 26, and the contest proceedings had begun, the Florida Supreme Court found that the certified count failed to include an assessment of all appropriate ballots and ordered additional manual recounts statewide of ballots where the scanners had not detected a valid presidential vote.[162] That decision, rendered on December 8, recognized the need for urgent action but set no particular deadline of its own.[163]

As above, the point here is not that the Florida Supreme Court's decision was obviously right or obviously wrong. The point is that each path was fraught. Some options valued (perceived) accuracy at the expense of finality, some valued finality at the expense of (perceived) accuracy. No option was so obviously correct to preclude the others.

4. The "Independent State Legislature Theory" in 2000

When the Supreme Court in *Bush v. Gore* reviewed the Florida Supreme Court's decisions, three Supreme Court Justices seemed to

159. Fla. Stat. § 102.166(4)(b) (2000).

160. Fla. Stat. §§ 102.111, 102.112 (2000).

161. *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d at 1231-40.

162. *Gore v. Harris*, 772 So. 2d at 1260-62.

163. The decision to set a final end date for the contest proceedings was the U.S. Supreme Court's decision alone. *Bush*, 531 U.S. at 110-11.

disagree with the propositions above. They found the Florida Supreme Court's decisions not only wrong—as a matter of Florida law—but obviously so.[164]

It is quite unusual for the U.S. Supreme Court to opine on matters of state law when a state court's own reading of state law is available. The Court repeatedly reminds us that matters of state law are matters for state courts to decide.[165] But even with a hands-off approach, the federal constitution does put outer limits on what purports to be legal analysis, in the guise of due process.[166] It would likely not be consistent with the Fourteenth Amendment for a state court to say that it was properly "doing law" but then decide a controversy with a coin flip or Magic 8-Ball. And in *Bush v. Gore*, three Justices seemed to think that the Florida Supreme Court was similarly out of bounds. Though they did not expressly attribute Florida's perceived boundary transgression to partisanship, that implication lies not far beneath the surface.[167]

In the *Bush v. Gore* concurrence, the three Justices did not ground their decision in partisanship, nor in due process. Instead, they identified as the constitutional source of their decision the Electors Clause: specifically, the provision in Article II that provides that "each State

164. *See Bush*, 531 U.S. at 118-21 (Rehnquist, C.J., concurring).

165. Riley v. Kennedy, 553 U.S. 406, 425 (2008); Mullaney v. Wilbur, 421 U.S. 684, 690-91 (1975); Garner v. La., 368 U.S. 157, 169 (1961) ("We are aware that the Louisiana courts have the final authority to interpret and, where they see fit, to reinterpret that State's legislation."); *id.* at 174 (Frankfurter, J., concurring) ("Whether state statutes are to be construed one way or another is a question of state law, final decision of which rests, of course, with the courts of the State."); *id.* at 186-87 (Harlan, J., concurring) ("[I]t goes without saying that we are not at liberty to determine for ourselves the scope of this Louisiana statute. That was a function belonging exclusively to the state courts, and their interpretation is binding on us."); Fidelity Union Trust Co. v. Field, 311 U.S. 169, 178 (1940) ("The federal court was not at liberty to undertake the determination of [the construction and effect of a state statute] on its own reasoning independent of the construction and effect which the State itself accorded to its statute."); Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 626 (1874) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."); Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291, 292, 296-98 (1832) (noting that "the construction of the highest judicial tribunal of a state forms a part of the statute law, as much as an enactment by the legislature" and collecting cases). *Cf.* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (noting, in a case turning on state sovereign immunity, that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

166. *See Garner*, 368 U.S. at 173-74 (deferring to Louisiana's legal definition of "disturbing the peace," but finding a violation of due process in convicting Black civil rights activists under that definition, for simply sitting peacefully at a lunch counter).

167. In one aside, the three-justice concurrence stated that "the Florida Supreme Court ordered the Circuit Court to include in the certified vote totals those votes identified for Vice President Gore in Palm Beach County and Miami–Dade County." *Bush*, 531 U.S. at 118 n.3 (Rehnquist, C.J., concurring). That is not what the Florida Supreme Court ordered. The Florida Supreme Court ordered the circuit court to include in the certified vote totals the results known at the time in Palm Beach, Miami-Dade, and Nassau—which included 215 net votes for Gore in Palm Beach, 168 net votes for Gore in Miami, and 51 net votes for Bush in Nassau … and necessarily included votes for both Gore and Bush in those net totals. *Gore v. Harris*, 772 So.2d at 1247-48.

shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President.[168] This clause has an analog for congressional elections: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," except as Congress may alter those defaults.[169] Both provisions expressly name the "Legislature" of the state as the relevant actor—while other portions of the Constitution may, for example, designate the State as a whole—and the three Justices found significance in that fact.[170]

The notion that these constitutional provisions guarantee special solicitude for state legislatures in regulating federal elections is often called the "independent state legislature theory."[171] Professor Leah Litman has called it the "independent state legislature thingy," which may be a more apt moniker.[172] There is no question that the Framers chose the word "Legislature" and not "State." But it's quite difficult to locate an operative theory for why that choice should reflect a substantive preference for state legislatures extracted from the rest of their state constitutional infrastructure.

There are different versions of the independent state legislature idea, in stronger and weaker forms.[173] Some suggest that the idea makes the legislature procedurally distinct, and that a state's normal lawmaking process—like the possibility of citizen's initiatives or of governor's vetoes—does not apply.[174] Some suggest that the idea

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168. U.S. CONST. art. II, § 1, cl. 2.

169. U.S. CONST. art. I, § 4. While the provision of article II is often known as the "Electors Clause," this provision is best known as the "Elections Clause." Because the provisions are so closely textually parallel with respect to the role of the "Legislature," precedent with respect to the role of the "Legislature" in one is presumed to apply to the other.

170. *Bush*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring).

171. *See* Andrew Marantz, *How a Fringe Legal Theory Became a Threat to Democracy*, NEW YORKER 49 (June 12, 2023), https://www.newyorker.com/magazine/2023/06/12/how-a-fringe-legal-theory-became-a-threat-to-democracy [https://perma.cc/EDA8-GJXA]; *cf.* Strict Scrutiny, *Debunking the Independent State Legislature Fantasy* (Sept. 5, 2022), https://crooked.com/podcast/debunking-the-independent-state-legislature-fantasy/ [https://perma.cc/ZU6E-CE9R] (placing the "theory" portion of the label in appropriately skeptical air quotes).

172. *Id*.

173. *See* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1056-60 (2021) (reviewing some of these versions); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. STATE U. L. REV. 731, 734 (2001) (same).

174. *See* Brief for Appellant, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) (No. 13-1314), 2014 WL 6845686, at *25-30; *but see* Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (rejecting this view); Smiley v. Holm, 285 U.S. 355, 365-73 (1932) (rejecting this view); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813-24 (2015) (rejecting this view).

The procedural version of the independent state legislature idea faces several profoundly challenging practical difficulties. As just one example, in states that provide for a gubernatorial veto, an election bill that passes the legislature but is vetoed by the Governor would

makes the legislature substantively distinct, and that even if it must follow normal lawmaking process, it is not bound by at least some substantive state constitutional limitations.[175]

But all versions of the idea amount to the notion that the federal constitution immunizes certain state legislative action to some degree from the normal constraints of the state constitution, including (again, to some degree) state judicial interpretation of constitutional constraints. And all versions of the idea amount to the notion that this federal constitutional carveout occurs in one realm and one realm only: state action to regulate federal elections. If a state legislature regulates the election process through State Statute 100.10, that law works for state and local elections as all other state statutes do, but the idea is that the federal constitution requires a special state-constitution-free(ish) protective bubble when Statute 100.10 is applied to federal races on the ballot.

That concept is strikingly odd. State legislatures are creatures of state constitutions. State constitutions dictate who is eligible to serve in the legislature. State constitutions dictate how those representatives are chosen and how many representatives there will be. State constitutions dictate when sessions start and end, the process by which legislation is achieved, and the subjects on which legislatures may or may not act. Some constitutions supply all of these constraints directly and some delegate those decisions (or parts of those decisions) to the legislatures themselves or to other bodies, but no state legislature exists apart from its constitution. State constitutions are the soil in which legislation is grounded. There are no legislative epiphytes.

Extracting a state legislature from a state constitution, even for limited purposes, is an act of destructive creation, not an act of restoration. What you would get from such a process is no longer truly the "state legislature," which necessarily relies on its state constitution to give it shape, purpose, and most crucially, authority. If someone invites you to watch the Florida State marching band play, and you arrive at the location to find the band members without instruments and engaged in a vigorous game of pickleball, you may be watching the

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not regulate state or local elections. But under this theory, the federal constitution would ensure that the vetoed legislation regulated federal elections.

175. *See, e.g.*, Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. STATE U. L. REV. 811, 834-41 (2001); Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 866 (2015); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 24–25, 69, 91–92 (2020).

As mentioned above, *supra* note 174, the procedural version of the independent state legislature idea has some troubling practical consequences. At least one conceptual challenge for the *substantive* version of the theory is that if the primary relevant mode of constitutional analysis favoring state legislative exceptionalism is the Constitution's express textual enumeration of the "Legislature," there is no basis in that express constitutional text for distinguishing a role that carves out unique procedural space for the state legislature from a role that carves out unique substantive space for the state legislature.

membership of the Florida State marching band do something collectively, but you're not watching "the Florida State marching band play" in any recognizable sense.[176]

Instead, state legislatures legislate within the ecosystem of a state constitution. The process of legislating, including the substantive compromises legislatures make, all presume the operation of the state constitution. And when state judges interpret statutes, either to assess their meaning or to assess their validity, they do so within the ecosystem of the state constitution as well.

This is precisely what the Florida Supreme Court was doing in 2000. The statutory text relating to the intent of the voter, and the statutory text relating to the timing of post-election proceedings, were built for (and operate without significant contestation in) a wide variety of electoral scenarios. Recount proceedings added some challenging context that required further interpretive work on the court's part, to ensure that the statutes conformed to the state constitutional baseline even under some post-election stressors. As the court recognized, in light of the statutory permission to start a recount seven days after the election[177] and the statutory requirement to finish that recount seven days after the election,[178] something had to give, reconciling twin state constitutional obligations to arrive at a reasonably final answer and ensure at the same time that that final answer was reasonably correct. In such circumstances, deciding what it is that gives when and to what degree is merely the ordinary art of statutory interpretation.

The particular recount proceedings in 2000—cumbersome manual recounts to determine the voters' choices that the scanning machines were unable to detect with adequate accuracy given the infinitesimal electoral margin—added context more challenging still. The court's efforts to ensure that the state's statutes were implemented, in context, in a way consistent with the state constitution isn't a departure from the rules set by the state legislature. The general rules set by the state legislature come with the possibility, already baked in, of local adjustment in exceedingly unusual circumstances to conform to constitutional requirements that necessarily take priority. This point is exceedingly important to the interpretation of any statute. If applying the rules most naturally expressed by statutory text in abnormal

176. *Cf.* Levitt, *supra* note 173, at 1057 (presenting the analogy in the admittedly less engaging symphonic setting). This is consistent with, not contrary to, a normal understanding of semantic meaning. "In referring to 'the Supreme Court,' we understand that the institution has certain rules when it is acting in its usual judicial capacity, and count on normal practice for the granting of certiorari and handing out opinions—even as we understand that those rules may not govern when 'the Supreme Court' orders lunch or appears at dignitary events." *Id.* at 1057–58 n.16.

177. Fla. Stat. § 102.112 (2000) (providing a seven-day deadline for certification); Fla. Stat. § 102.166(4)(b) (2000) (providing an option to request recounts until the canvassing board certifies the election).

178. Fla. Stat. §§ 102.111, 102.112 (2000).

circumstances would have led to a violation of the state constitution, it is in those circumstances fulfilling legislative expectations to depart from the most natural reading of the text.[179]

Applying normal statutory rules in normal circumstances is normal judging. Applying normal statutory rules in abnormal circumstances, when doing so would substantively violate state constitutional commands, is not normal judging. Under those conditions, modest departures from normal statutory rules is normal judging. (Or, if you prefer, the act of normal judging includes a normal interpretive rule that sometimes requires deviating from normal statutory rules in abnormal circumstances. Legislators, who are amply familiar both with the limitations of perfect foresight and with the limitations of language, should know this and likely draft accordingly.) We all expect a "No vehicles in the park" rule to give way when lifesaving ambulance passage is required.[180]

The *Bush v. Gore* concurrence disagreed. Chief Justice Rehnquist thought that the Florida Supreme Court was not effectuating state legislative expectations.[181] But that assessment was necessarily based on the Chief Justice's own interpretation of Florida law. That includes his interpretation of Florida statutory text written with state statutory interpretive principles in mind, perhaps different from interpretive principles prevailing in the federal courts, butting in midstream into a decades-long conversation between Florida legislatures and Florida courts.[182] That includes his interpretation of what the Florida statutory text was meant to convey in light of the Florida Constitution, a topic on which federal courts also claim no special expertise. It also includes his interpretation of the Florida legislature's underlying interpretation of the Florida Constitution that informed the statutory text they were drafting—a topic, again, on which federal courts claim

179. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989) (interpreting an otherwise unambiguous federal statute in light of federal constitutional requirements, and despite the unambiguous text); *id.* at 527 (Scalia, J., concurring in the judgment) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the [dispositive statutory word] . . . that avoids this consequence.").

Crucially, this is not a claim about what the specific state legislature would have intended. Rather, this is a more general claim about both the nature of the legislative power and the nature of the jurisprudential interpretive task.

180. *See, e.g.*, Logan v. United States, 552 U.S. 23, 36 (2007) ("Statutory terms, we have held, may be interpreted against their literal meaning where the words 'could not conceivably have been intended to apply' to the case at hand."); *cf.* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (posing the "no vehicles in the park" hypothetical to illustrate the greater interpretive point).

181. *Bush*, 531 U.S. at 112-20 (Rehnquist, C.J., concurring).

182. *Cf.* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 181 (2023) (noting the impropriety of importing federal textualist doctrines, at the expense of "states' statutory construction statutes, legal precedent, practices, and conventions," in interpreting state law).

no special expertise. Consider the *Bush v. Gore* concurrence an exercise in mansplaining Florida law to Floridians.

More specifically, the concurrence's conclusion depended on federal judges' assessment that the Florida legislature (pre-2000) couldn't possibly have wanted to count votes when the voters did not precisely execute the instructions they were given even when the particular voter's intent was otherwise clear.[183] And the concurrence's conclusion depended on federal judges' assessment that the Florida legislature (pre-2000) couldn't possibly have wanted the dispute resolution to linger past the federal December 12 "safe harbor" deadline even given the uncertainty still present on December 11, 2000.[184] Those are both profoundly contestable propositions. And both of those depend at their heart on multiply layered federal judicial expectations with respect to state law that might or might not reflect how various state law actors viewed their own domain.

Indeed, any application of the "independent state legislature" idea—however modest or vigorous—involves these same contested state-law issues. An assertion that the federal constitution creates a special carveout for understanding state legislative action when (and only when) state legislatures regulate federal elections is effectively just a means of privileging federal courts' interpretation of state statutes over state courts' interpretation of those same statutes against the backdrop of the state constitution and familiar state legislative and judicial practice. Particularly when state legislatures aim to regulate federal and state elections in the same instrument, expecting (and perhaps hoping) that the state constitution will be an essential and integral part of the recipe, a federal judicial act of acontextual interpretation isn't rescuing an original state legislative intent. It is creating something new and different. The "independent state legislature" idea is a doctrinal attempt to unbake a loaf of bread.

Without access to Justice Kennedy's or Justice O'Connor's papers, we can't know for sure why the *Bush v. Gore* concurrence garnered only three votes.[185] But the very real jurisprudential difficulty above may offer a partial explanation why Justice Kennedy did not join the concurrence, and—even more striking—why Justice O'Connor abandoned a position for which she was, before oral argument, evidently decidedly a cheerleader.[186]

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183. *Bush*, 531 U.S. at 118-20 (Rehnquist, C.J., concurring).

184. *Id.* at 117, 120-21.

185. Derek Muller, *Why did Justice O'Connor abandon her own Article II argument in Bush v. Gore?*, ELECTION L. BLOG (May 4, 2023, 7:59am), https://electionlawblog.org/?p=135994 [https://perma.cc/56ZE-HRRS] (speculating about Justice O'Connor's rationale).

186. *See* Sandra Day O'Connor, Memorandum to the Conference (Dec. 10, 2000), https://www.documentcloud.org/documents/23795611-sandra-day-oconnor-bush-v-gore-memo/ [https://perma.cc/UZ7W-AJKR]; Derek Muller, *Justice O'Connor created the framework and the heart of the language for Chief Justice Rehnquist's concurring opinion in Bush v. Gore*, ELECTION L. BLOG (May 3, 2023 10:09 A.M.), https://electionlawblog.org/?p=135958

5. The Modern Shadows of the 2000 Election: "Independent State Legislature Theory"

In more recent times, the procedural component of the "independent state legislature" idea re-emerged in 2015 in a fight about whether Arizona could divest state legislative control over congressional redistricting in favor of an independent commission.[187] The very real jurisprudential difficulty above may offer a partial explanation why a majority of the Court rejected the notion of constitutional exceptionalism for an allegedly "independent" state legislature.[188] In that case, Chief Justice Roberts wrote an impassioned dissent.[189]

And the very real jurisprudential difficulty above may also offer a partial explanation why, when the Chief had his own shot at a majority eight years later in the substantive context, he too rejected the "independent state legislature" idea.[190] It is an idea with some surface textual appeal. But for twenty-five years, a majority of Justices have taken a sober look at the theory and its consequences and then stepped back from the abyss. Here be there dragons.

The latter case was *Moore v. Harper*, decided in 2023.[191] The claim involved a substantive version of the "independent state legislature" idea. The North Carolina Supreme Court had interpreted the state's constitution to prohibit partisan gerrymandering.[192] Petitioners in the *Moore* case claimed that as applied to congressional elections, the state supreme court's opinion unlawfully deprived the state legislature of its

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[https://perma.cc/5ADZ-LMF4] (reviewing Justice Stevens' archival documents to reveal that Justice O'Connor circulated a draft opinion along the lines of the "independent state legislature theory" that the concurrence would later adopt in significant part).

Beyond the concerns of judicial philosophy, there are several other reasons it may be suboptimal to adopt, as a matter of federal constitutional law, a state-constitution-free space for state legislative regulation of federal elections. Among them are the enormous practical difficulties with implementing a state statute meant to regulate an election process in which both federal and state races are on the ballot, where the state statute has a different meaning with respect to federal races (free of state constitutional constraints imposed by state courts) and state races (not free of state constitutional constraints imposed by state courts). *See, e.g.*, Levitt, *supra* note 173, at 1058-59.

187. *Ariz. Independent Redistricting Comm'n*, 576 U.S. 787.

188. *Id.* at 807-09, 813-24.

189. *Id.* at 824-25 (Roberts, C.J., dissenting).

190. Moore v. Harper, 600 U.S. 1, 30, 34 (2023) [hereinafter *Moore*]. *See also* Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper's *Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2023 CATO SUP. CT. REV. 275, 278-80 (2023) (charting the arc of Chief Justice Roberts' evolution).

191. *Moore*, 600 U.S. 1.

192. Harper v. Hall, 868 S.E.2d 499, 559 (N.C. 2022), *overruled on rehearing by* 886 S.E.2d 393, 448-49 (N.C. 2023). The U.S. Supreme Court had earlier declared partisan gerrymandering to be nonjusticiable as a matter of the federal constitution, but did not purport to limit state constitutional doctrine. Rucho v. Common Cause, 588 U.S. 684 (2019).

plenary authority under the federal constitution's Elections Clause.[193] And the Chief Justice, writing for the Court, rejected that proposition.[194] As the Court explained, "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review."[195]

At the same time that the Court emphatically rejected the notion that state legislatures could be extracted from their state constitutions when regulating federal elections, however, the opinion closed with the notion that state courts "do not have free rein."[196] Specifically, the Court noted that state court interpretations of state law could not "evade" federal law, mentioning several different contexts—cases under the Takings Clause, cases under the Contracts Clause, cases asserting adequate and independent state grounds for decisions precluding federal review, and yes, the *Bush v. Gore* concurrence[197]—in which federal courts have lent a somewhat skeptical federal eye to state court constructions of state law perceived to be marginal in some way.

The Court concluded with this cryptic (and tautological) summary of the state of the law:

> We do not adopt [any] . . . test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific. We 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. . . .
>
> State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause. But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution.[198]

Repeating the tautology with a slightly different formulation does not provide much clarity. So Justice Kavanaugh, in a solo concurrence, endeavored to put just a bit more meat on the bones:

> The question, then, is what standard a federal court should employ to review a state court's interpretation of state law in a case implicating the Elections Clause—whether Chief Justice Rehnquist's standard from *Bush v. Gore*; Justice Souter's standard from *Bush v. Gore*; the Solicitor General's proposal in this case; or some other standard.

193. Brief for Petitioners, Moore v. Harper, 600 U.S. 1 (2023), 2022 WL 4084287, at *13, 17-24.

194. *Moore*, 600 U.S. at 22.

195. *Id.*

196. *Id.* at 34.

197. *Id.* at 34-36.

198. *Id.* at 36-37.

> Chief Justice Rehnquist's standard is straightforward: whether the state court "impermissibly distorted" state law "beyond what a fair reading required." As I understand it, Justice Souter's standard, at least the critical language, is similar: whether the state court exceeded "the limits of reasonable" interpretation of state law. And the Solicitor General here has proposed another similar approach: whether the state court reached a "truly aberrant" interpretation of state law.
>
> As I see it, all three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication.[199]

This much is clear: the Court has rejected the "independent state legislature" idea for the lion's share of cases. And also, some nugget remains. Since *Moore*, commentators have come to differing understandings of how big the nugget might be.[200]

Justice Kavanaugh's concurrence, and the examples offered by Chief Justice Roberts in his majority opinion, do not give much shape to the import of the Elections Clause in this context. But they do offer at least the blurry outline of a vision: federal review of state decisions on state law should be anomalies, reserved for "truly aberrant" state judgments only. That is, state legislatures are subject to state law, including interpretations of state law by state courts. This "ordinary" judicial review includes an exceedingly wide range of interpretive capacity, including an abundance of interpretations with which federal courts might disagree if it were—counterfactually[201]—their charge to interpret state law in the first instance. But the boundaries of reasoned decision-making are not limitless, and it's conceivable that some state court decisions might live beyond the pale.

There is a familiar concept for policing the far boundaries of reasoned decisionmaking, already mentioned above.[202] It is the federal constitutional guarantee of due process. Through various doctrines rooted in comity, federalism, finality, comparative institutional

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199. *Id.* at 38-39 (Kavanaugh, J., concurring) (citations omitted).

200. *See, e.g.*, Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J. FORUM 881, 892, 900, 906 (2024) (noting the ambiguities, and arguing against interpreting the remaining nugget to license ahistorical review of state judgments pursuant to a cramped textualism); Bruce Ledewitz, Moore *News About the Independent State Legislature Doctrine*, 62 DUQ. L. REV. 327, 331, 338-40 (2024) (concluding that "the reports of the [Independent State Legislature] Doctrine's demise are greatly exaggerated"); 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, 62-63 (2024) (similarly fearing that the decision leaves much for federal review); Anna K. Jessurun et al., Moore v. Harper, *Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. REV. 1295, 1300, 1303, 1329 (2025) (finding the case to be a "decisive rejection" of the independent state legislature idea, and the substance left for review after *Moore* to be "extremely limited"); Amar, *supra* note 191, at 276-77, 283-84 (same).

201. *See supra* note 165 and accompanying text.

202. *See supra* text accompanying note 166.

competence, and the like, the federal Constitution tolerates a wide variety of legal decisions by state and federal actors in which federal courts might arrive at different conclusions if offered the opportunity for de novo consideration. Some of these doctrines tolerate not just modest close calls, but an exceptionally large range of "incorrect" decisionmaking.[203] And still those doctrines are not limitless.

Due process is the underlying protection for individuals against decisions that are lawless,[204] even when procedure might otherwise preclude review of decisions that are wrong—even "grievously or egregiously wrong."[205] These protections mark the outer bounds of deference to a number of different decisionmakers in a number of different contexts. Due process helps explain why the purportedly strategic decisions of criminal defense counsel have an outer limit.[206] Due process helps explain why executive decisions subject to qualified immunity have an outer limit.[207] Due process helps explain why the judgments of arbitral panels have outer limits.[208] Due process helps explain why

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203. In this way, they may operate as the rough federal constitutional equivalent of the business judgment rule, providing extreme deference for corporate decisionmaking. *See, e.g.*, In re Caremark Int'l, Inc., Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) ("[W]hether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through 'stupid' to 'egregious' or 'irrational', provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests.") (emphasis omitted).

204. *Cf.* Carolyn Shapiro, *State Law and Federal Elections After* Moore v. Harper, 99 N.Y.U. L. Rev. 2049, 2052 (2024).

205. This is the standard Justice Kavanaugh purports to apply in assessing when stare decisis should give way in constitutional cases. *See* Ramos v. La., 590 U.S. 83, 121-22 (2020) ("*First*, is the prior decision not just wrong, but grievously or egregiously wrong?"). Without endorsing the notion that Justice Kavanaugh consistently applies his own standard, the Court's reticence to "correct" state courts' interpretation of state law—a topic in which the Court claims no comparative advantage—must be at least as strong as its reticence to correct its own constitutional error, and likely significantly stronger.

206. *See* Bell v. Cone, 535 U.S. 685, 702 (2002) (offering a reminder that, in evaluating attorney performance for the "objectively unreasonable" conduct that denotes ineffective assistance under the Sixth Amendment, courts must "indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight."). The Sixth Amendment's guarantee of the "assistance of counsel" is the primary source of this standard, of course, but those obligations are incorporated as fundamental against the states in part because due process prohibits purported counsel from failing to meet a (low) threshold of legal competence. *See* Powell v. Ala., 287 U.S. 45, 65, 68-71 (1932).

207. *See* White v. Pauly, 580 U.S. 73, 79 (2017) (protecting officials against liability for an enormous swath of unlawful activity, but not when "existing precedent [has] placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.") (cleaned up).

208. *See* 9 U.S.C. § 10(a) (enumerating bases for overturning the award of an arbitral panel); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350-51 (2011) ("[R]eview under § 10 focuses on misconduct rather than mistake.").

federal judicial deference to state courts in habeas corpus proceedings,[209] or in abstention based on *Younger*,[210] have outer limits. Due process helps explain why domestic recognition of foreign judgments has an outer limit.[211]

This concept can help ground the Court's more cryptic pronouncements in *Moore*, in a manner also consistent with a 6-3 rejection of Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*. Both the *Moore* majority and Justice Kavanaugh in his *Moore* concurrence firmly rejected the implication of the "independent state legislative theory" that state legislatures should be immune from the "ordinary judicial review" that attends state judicial application of the state constitution to state statutes.[212] And both seemed to be grasping for some residual content to give the Elections Clause, to allow federal courts to police especially renegade state interpretations of state law. That content exists in the protections of due process. Due process tolerates error and disagreement, but forecloses jurisprudence so driven by bad faith or incompetence that it is unrecognizable as such.[213] Under this reconciliation of the doctrine, if the Florida Supreme Court's decision in 2000 did not itself violate due process, it also did not violate the Electors Clause.[214]

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209. *See* Va. v. LeBlanc, 582 U.S. 91, 94 (2017) ("In order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice. In other words, a litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. This is meant to be a difficult standard to meet.") (cleaned up).

210. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 49 (1971) (explaining that federal courts will not normally enjoin ongoing criminal state proceedings, even when they might decide federal issues, except in a showing of bad faith); Gibson v. Berryhill, 411 U.S. 564, 573-74, 575, 577-79 (1973) (extending the exception, in the civil licensure context, to tribunals demonstrating irreparable bias).

211. *See, e.g.*, Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687-88 (7th Cir. 1987) (noting that courts will effectuate judgments issued under a wide range of procedures distinct from those in American tribunals, as long as the essentials of due process were met); Hilton v. Guyot, 159 U.S. 113, 202 (1895); Restatement (Third) of Foreign Relations Law, § 482(1)(a) (Grounds for Nonrecognition of Foreign Judgments).

212. *Moore*, 600 U.S. at 22, 32, 34-37; *id.* at 38-39 (Kavanaugh, J., concurring).

213. As Professor Amar puts it, "Elections Clause challenges are limited to claims that state courts are misapplying or misunderstanding state law. And state law, of course, is the bailiwick of state, not federal judges." Amar, *supra* note 190, at 287. It is therefore only the lawless decision—one that itself violates due process—that would run afoul of this principle. *See also id.* at 289 (suggesting that only a case of a state court's intentional deception would meet the threshold of federal review for these purposes); *id* at 295 (suggesting that any state judicial ruling sufficiently lawless to violate the Elections Clause would also, inter alia, violate due process).

214. Note that this is a standard dependent on the qualities of the judicial decisionmaking, and independent from any determination of whether the recount process unfolding in Florida itself violated either equal protection or due process guarantees. It is entirely doctrinally consistent to find that the Florida Supreme Court's construction of Florida law did not itself violate due process—i.e., that the court's decisions were within the broad bounds of permissible statutory interpretation—and also to find that the recount process violated due process as a separate matter of federal law.

Moreover, interpreting the limits of the Electors and Elections Clauses on state courts to be coterminous with due process helps patch a theoretical historical hole. The Constitution of 1789 relied on state law as the default source of the rules for federal elections.[215] Substantive federal judicial review of state court decisions on state law, even at the extreme margins, was otherwise unavailable until the Fourteenth Amendment required due process of the states.[216] But that absence would have left substantial opportunity for state courts to foster mischief in federal elections, without any claim to a democratic mandate on behalf of the state's citizens.[217] Construing the Electors and Elections Clauses to incorporate due process constraints on the state judiciary places an outer boundary on the lawless state disruption of federal elections—a boundary that the Fourteenth Amendment's due process clause would later provide across a wider array of substantive arenas. And in so doing, it helps to plug a theoretical gap.[218]

B. The U.S. Supreme Court's Decisionmaking

The analysis above suggests that the decisions of the Florida Supreme Court in 2000 were not particularly close to defying the

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That is, there are substantive constructions of state law that might themselves yield outcomes violating due process, just as surely as if the question were presented directly by a state statute rather than by the state courts' interpretation of a state statute. Similarly, there are judicial constructions of state law that might not violate due process when applied prospectively but violate due process when applied retroactively. *See* Griffin v. N.C. State Bd. of Elections, 781 F. Supp. 3d 411, 434–44 (E.D.N.C. 2025) (finding such violations in a state court's post-election change to the rules of a North Carolina judicial election that would have disenfranchised voters casting ballots in line with pre-election regulations); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 706-11 (2001); Michael Weingartner & Carolyn Shapiro, *After the Oral Argument in* Moore v. Harper, 54 U. TOL. L. REV. 387, 401-05 (2023). Neither of these are particularly relevant in assessing the propriety of state court judgments under the Electors or Elections Clauses' textual prioritization of the role of a state legislature. To say that state court judgments that offend the Electors or Elections Clauses are only those that violate due process is not to say that the state court judgments that violate due process also necessarily offend the Electors or Elections Clauses.

215. *See* U.S. CONST. art. I, § 2, cl. 1; art. I, § 4; art. II, § 1, cl. 2.

216. *Cf.* Note, *Voting Wrongs and Remedial Gaps*, 137 HARV. L. REV. 1182, 1186 (2024) ("The dearth of federal court voting rights cases before the 1860s can be explained by the fact that the contours of voting rights, like other constitutional rights, were mostly decided in state courts in the first century of the United States.").

217. Until 1845, most states followed the federal model, appointing rather than electing their judges. *See* Laura Zaccari, *Judicial Elections: Recent Developments, Historical Perspective, and Continued Viability*, 8 RICH. PUB. INTEREST L. REV. 138, 139 (2004).

218. This Essay does not suggest that the Framers actually anticipated federal litigation under the Electors and Elections Clauses to correct even egregious state determinations on state law. Such a claim would seem contrary to the prevailing understanding of the role of federal courts in the antebellum period, and would require a deep review of historical documents beyond the scope of this Essay to determine whether such notions had been anticipated, even as a minority view. Instead, the point is only that to the extent that the antebellum absence of federal due process obligations on state courts left federal elections theoretically vulnerable to rogue state courts, the construction of Electors and Elections Clauses advanced in the text remedies the theoretical concern.

"ordinary judicial review" demarcating the coterminous bounds of due process and the Electors Clause. The *Bush v. Gore* concurrence, along with several observers with Republican priors, evidently disagreed—perhaps in part due to their presumption that partisanship played a role in the Florida Supreme Court's decisionmaking. But if some observers with Republican priors might be inclined to see the Florida Supreme Court's actions in 2000 as evidence of raw partisanship, it is just as true that some observers with Democratic priors were inclined to see the U.S. Supreme Court's actions in 2000 as evidence of raw partisanship.[219] This explanation seems similarly impoverished.

For one, the composition of the U.S. Supreme Court was indisputably split between more liberal and more conservative, but that split reflects a decidedly imperfect translation of partisan allegiance. It may seem unusual in a modern era of confirmation fights far more divided along partisan lines, but all nine Justices who decided *Bush v. Gore* advanced through the selection process with some level of bipartisan support. Five Justices formed the majority—Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, and Thomas—and all five were nominated by Republican Presidents.[220] But Democrat-controlled Senates confirmed Justices Kennedy and Thomas.[221] And though Republican-controlled Senates confirmed Chief Justice Rehnquist, Justice Scalia, and Justice O'Connor, none of those confirming Senates had a Republican majority voting bloc sufficient for cloture at the time, requiring support from Democratic Senators.[222] Two Justices dissenting in *Bush v. Gore*, Justices Stevens and Souter, were nominated by Republican Presidents but confirmed by Senates controlled by Democrats.[223] The other two dissenting Justices, Justices Ginsburg and Breyer, were nominated by Democratic Presidents, and though they were both confirmed by Democrat-controlled Senates, neither had a

219. *See, e.g.*, sources cited *supra* note 132.

220. *Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/Q4X3-ALBT].

221. Justice Kennedy was confirmed unanimously. *See* CONG. REC. S739, Feb. 3, 1988 (daily ed.). Eleven Democratic Senators voted to confirm Justice Thomas. CONG. REC. S26354, Oct. 15, 1991 (daily ed.).

222. Sixteen Democratic Senators voted to confirm Chief Justice Rehnquist. CONG. REC. S23803, Sept. 17, 1986 (daily ed.). Justices O'Connor and Scalia were both confirmed unanimously. CONG. REC. S21375, Sept. 21, 1981 (daily ed.) (O'Connor); CONG. REC. S23813, Sept. 17, 1986 (daily ed.) (Scalia).

223. Democrats controlled sixty-one seats for Justice Stevens' confirmation, nine months after cloture had been reduced to a 60-vote threshold. *See* RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURES IN THE SENATE 8-9 (2017) (describing cloture requirements). As it happened, Justice Stevens was confirmed unanimously. CONG. REC. S41128, Dec. 17, 1975 (daily ed.). Forty-six Democratic Senators voted to confirm Justice Souter. CONG. REC. S26996-97, Oct. 2, 1990 (daily ed.).

Democratic majority voting bloc sufficient for cloture, requiring support from Republican Senators.[224]

1. The Court as Decisionmaker of Last Resort

Some observers cut through this complexity with a caricatured view of the more conservative Justices as Republican-friendly and the more liberal Justices as Democratic-friendly. And there is no question that the final decision to freeze the status quo and end recount proceedings, supported by the "Republican-friendly" Justices, effectively determined that George Bush would take office as the 43rd President. But seven of the Justices—including Justices Souter and Breyer—acknowledged serious constitutional problems with the pending recount sufficient to preclude reliance on its results.[225] Justice Souter said that the different recount standards seemed "wholly arbitrary,"[226] and Justice Breyer concluded that the particular character of the recount proceedings in this instance "implicate[d] principles of fundamental fairness."[227] Even if the concurring and dissenting Justices bitterly disagreed about whether the Florida Supreme Court's interpretations of state statutes amounted to a violation of due process, seven Justices seemed to agree that the way that the recount was occurring in practice amounted to an unconstitutionally arbitrary proceeding.[228]

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224. Forty-one Republican Senators voted to confirm Justice Ginsburg. CONG. REC. S18414, Aug. 3, 1993 (daily ed.). Thirty-three Republican Senators voted to confirm Justice Breyer. CONG. REC. S18718, July 29, 1994 (daily ed.).

225. *Bush*, 531 U.S. at 111; *id.* at 133-35 (Souter, J., dissenting).

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

227. *Id.* at 145-46 (Breyer, J., dissenting).

228. The majority's holding purports to find a violation of equal protection. As many observers have noted, different counties conduct elections under different procedures all the time, and those procedures treat voters quite differently despite the fact that they are similarly situated but for their residence in distinct counties. *See, e.g.*, Laurence H. Tribe, eroG .v hsuB *and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 HARV. L. REV. 170, 177, 218, 225-26 (2001). That procedural variation is a regular characteristic of an electoral system designed for decentralized administration from the outset, U.S. CONST. art. I, § 4, and not seriously prone to constitutional question. That consequence may help to explain why the case's equal protection holding has so rarely been deployed to eliminate distinctions between counties in other aspects of the electoral system.

The Court's decision may have cited the Equal Protection Clause, but its description amounts to a critique grounded more in the arbitrary nature of the process as a whole than in the distinctions between standards used by different counties. That is, the constitutional holding unmistakably cites equal protection, but it sounds more in due process than in equal protection. *See, e.g.*, Tribe, *supra*, at 233-34. And if the particular circumstances of this particular recount violated due process, that too would help to explain why other geographic distinctions in the treatment of voters but not amounting to the same degree of arbitrariness would not have yielded invalidation in the wake of *Bush v. Gore*.

If *Bush v. Gore* were really a due process case, and not an equal protection case, it would not be the last opinion by Justice Kennedy to conflate the two. *Lawrence v. Texas*, striking a Texas law prohibiting sodomy, is a due process case that sounds an awful lot like an equal protection case, as Justice O'Connor recognized in her concurrence. Lawrence v. Tex., 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment). And *United States v. Windsor*, striking a federal law excluding same-sex partners from the definition of married

There is an explanation of *Bush v. Gore* that does not depend purely on partisanship, and it seems at least as compelling as the explanation that does.[229] The five Justices in the majority saw a process that they (and others) perceived as chaotic and arbitrary.[230] Moreover, given the nature of the uncertainty remaining, even if continuing but better-regulated proceedings could yield a more fulsome answer about Florida voters' ultimate preferences, there was little reason to believe that that answer would be any more accurate than the answer already on the shelf as of November 26. Any process designed to adjudicate the remaining ballots at the necessary speed would inevitably have excluded some ballots that should have been counted and included some that should not have been counted, under any standard at all. The ultimate answer might well have been different under a different procedure, but the five Justices in the majority were extremely skeptical that it would have been more trustworthy.

The election in Florida had effectively been a statistical tie, with the margin of error exceeding the margin of victory. And to the *Bush v. Gore* majority, the institutions charged with discerning the ultimate winner had exceeded their capacity to do so any more reliably than the discernment of November 26. Somebody had to make a decision about when to say when.

This potential explanation for the Supreme Court's actions—real or imagined, explicit or subconscious—should not be confused with a suggestion that the Supreme Court was correct in assessing that it should have been the body to make that call. There were certainly other contenders. The dissenters articulated serious arguments that the Supreme Court never should have taken the case in the first instance, and serious arguments that the Supreme Court should have allowed a remand[231]—and in both cases, the Florida Supreme Court would have had the opportunity to decide when enough was enough. The Florida State House took (questionably lawful) steps to assert itself as The Decider.[232] A federal statutory scheme provided a distinct mechanism to resolve legitimate contested claims over the true identity of a

spouses, is an equal protection case that sounds an awful lot like a due process case, as Justice Scalia recognized in his dissent. 570 U.S. 744, 792-94 (2013) (Scalia, J., dissenting).

229. And perhaps, in truth, the two were intertwined, in either the state Supreme Court decision or the national one, or both: motivated reasoning is a powerful drug.

230. *Cf., e.g.*, Tribe, *supra* note 228, at 247, 253-54 (suggesting that the Court's decision may have been motivated by its superficial assessment of the appearance of impropriety).

231. *See, e.g.*, *Bush*, 531 U.S. at 126-27 (Stevens, J., dissenting); *id.* at 129, 133-35 (Souter, J., dissenting); *id.* at 144 (Ginsburg, J., dissenting); *id.* at 144, 146-47, 153-57 (Breyer, J., dissenting).

232. FLA. H.R. JOUR. 20–21 (Spec. Sess. A 2000), http://www.leg.state.fl.us/data/session/2001/house/journals/pdf/bound/hj1212a.pdf [https://perma.cc/G4RT-BQM2]. This concurrent resolution was never passed by the Florida Senate: the measure passed the state House on December 12, but the *Bush v. Gore* opinion made further consideration unnecessary. *See* Levitt, *supra* note 173, at 1075-76.

Presidential winner[233]—and any consequent tussling over the identity of the electoral slate properly charged with casting Florida's votes in the electoral college[234]—with still a different array of final decisionmakers. That statute privileged Congress as the decisionmaker; in the event of a congressional stalemate, the decision of the state's executive in lending his signature to the certification of electors would govern.[235] There were, in short, no shortage of alternatives to the Supreme Court's
resolution.

But even with other options on the table, there is little to suggest that the *Bush v. Gore* majority made its decision merely as an insincere cover for raw partisan instincts. It is at least as likely that the majority believed—rightly or wrongly, but sincerely—that the decision properly fell to them under these extraordinary circumstances.

2. The Modern Shadows of the 2000 Election: The Electoral Count Reform Act

The decades since *Bush v. Gore* have afforded an opportunity to contemplate—and in some unfortunate instances, witness—the comparative potential for our decisive electoral institutions to be captured by actors motivated primarily by partisanship and narrow self-interest. And that experience offers a sort of strange vindication, if not for the Supreme Court's particular choice in *Bush v. Gore*, then at least for the role of the judiciary writ large.

In 2022, in an act of bipartisanship that now seems even more staggering in retrospect, Congress revised the rules for tallying electoral votes in the event of a post-election dispute. High on the list of objectives was addressing some of the difficulties revealed by *Bush v. Gore*. And it is interesting to note that although Congress did not validate the courts as the best post-election dispute resolution mechanism, it may well have recognized the courts' potential to be the least worst.

The Electoral Count Reform Act came to life on page 775 of a 1653-page consolidated appropriations act passed on December 29, 2022, in the waning hours of the 117th Congress.[236] It was, unquestionably, born out of January 6, 2021: the first domestic armed occupation of the U.S. Capitol in history, and a mob assault that led to at least seven deaths and hundreds of injuries, and saw the Confederate flag gain a purchase in the Capitol that it had never gained in the Civil War.[237]

233. *See infra* Part II.B.2.

234. U.S. CONST. amend. XII.

235. 3 U.S.C. § 15 (2000). In this particular circumstance, of course, Florida's Governor was Jeb Bush, George Bush's brother.

236. Electoral Count Reform Act of 2022, Pub. L. No. 117-328, Div. P, tit. I, 136 Stat. 4459, 5233-41 (2022) (codified at 3 U.S.C. § 1 et seq.).

237. *See* Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), https://www.nytimes.com/2022/01/05/us/politics/jan-6-

But the Electoral Count Reform Act was also born of *Bush v. Gore*. *Bush v. Gore* involved a very real dispute about who had won a presidential election. January 6 involved an entirely manufactured dispute about who had won a presidential election. But both revolved around the concept of electoral disputes heading beyond overtime and into Congress. January 6 preyed on a statutory ambiguity that the 2000 election had uncovered. And the Electoral Count Reform Act represented a bipartisan attempt to patch the problem, at least in part.

The Supreme Court's ultimate decision in *Bush v. Gore*—and the most controversial piece of that decision, to stop the recount outright rather than remand to the state courts—revolved around a provision then known as the "safe harbor" deadline in federal law.[238] According to federal statute, any state dispute resolution process resolved by the "safe harbor" would be treated as conclusive by Congress.[239] The Florida Supreme Court had alluded to this federal deadline, in passing.[240] The *Bush v. Gore* majority interpreted the brief allusion as a binding holding rendering the "safe harbor" date so important to Floridians that recount proceedings would have to stop.[241]

The reason that the "safe harbor" date was deemed so important to Floridians is federal law's treatment of what was supposed to happen next. This date was set, at the time, by the Electoral Count Act, an 1887 statute passed in the wake of the election of 1876: at the time, the country's last presidential procedural electoral catastrophe.[242] Under the Electoral Count Act, a state's declaration of electors by the "safe harbor" was to be treated as "conclusive"[243]—which strongly implies that a state's declaration of electors after the "safe harbor" would not be treated as conclusive. If a state offered no definitive declaration by the safe harbor, and multiple slates of would-be presidential

capitol-deaths.html [https://perma.cc/PV55-P8ZD]; Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html [https://perma.cc/HNM3-J82D].

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

239. 3 U.S.C. § 5 (2000).

240. *Palm Beach Cnty. Canvassing Bd.*, 772 So.2d at 1237. The broader opinion did not concern the federal deadline: it concerned the Secretary of State's obligation to include amended returns in the state's certification. The majority found that ignoring a county's returns would be appropriate only if the returns' tardiness would preclude a candidate from contesting certification or "preclud[e] Florida voters from participating fully in the federal electoral process." The footnote citation for that latter quotation was (in its entirety): "*See* 3 U.S.C. §§ 1-10 (1994)", which is a portion of the Electoral Count Act including the 3 U.S.C. § 5 safe harbor deadline. *Id.* at 1237 n.55. This was the minimal allusion to the safe harbor on which the *Bush v. Gore* majority relied.

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

242. For a detailed history of the election of 1876 and the development of the Electoral Count Act, see generally EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 117-149 (2016); Eric Shickler et al., *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and* Bush v. Gore, 16 J. L. & POL. 717 (2000).

243. 3 U.S.C. § 5 (2000).

electors presented electoral votes to Congress—each purporting to represent the state's "true" electoral choice—Federal law presented a decision structure that was … suboptimal.[244] The law gave some room to Congress to make a decision, and some room to the Governor of a contested state to make a decision in the absence of congressional agreement.[245] It offered a host of ambiguity about exactly who would decide what when. The only true consensus seemed to be that the Electoral Count Act was a mess.[246]

The conspiracy that was the run-up to January 6 took advantage of this procedural ambiguity. To be precise, the results of the 2020 election were not actually ambiguous: they were definitively clear, if relatively close. In no state was serious evidence ever presented with a legitimate lawful prospect of invalidating the results favoring former Vice President Joe Biden over President Donald Trump.[247] The results were vigorously contested. But contesting the tides does not make the tides less inevitable. Some of the challenges were dismissed on procedural grounds; many were reviewed on the merits and similarly tossed.[248] Because the state determinations were clear, and because Congress's constitutional job is to tally and thereby effectuate the votes of electors determined by the states, there should never have been any doubt at all about Congress's legal obligation.[249]

But the procedural oddities in the federal statutory scheme fueled unduly durable contestation. The array of litigants contesting the 2020 results drew out their claims long enough to contend that the dispute resolution process had not truly concluded by the "safe harbor." Trump's alleged co-conspirators—and in at least one case, Trump himself—urged state election officials to present false results.[250] As state

244. *See* 3 U.S.C. § 15 (2000).

245. *See id*.

246. *See, e.g.*, Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L. J. F. 312, 329-31 (2022); Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L. J. 309, 329-35 (2019); Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 542-44 (2004).

247. *See generally* MAJOR GARRETT & DAVID BECKER, THE BIG TRUTH (2022); SEN. JOHN DANFORTH ET AL., LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION (2022), https://lostnotstolen.org/ [https://perma.cc/A4NE-UV9D].

248. *See* sources cited *supra* note 247.

249. And yet, on January 6, 2021, 147 members of Congress voted without cause to reject lawful electoral votes. Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html [https://perma.cc/74XZ-5EK4].

250. Indictment at 3-6, United States v. Trump, No. 1:23-cr-00257 (D.D.C. Aug. 1, 2023); Indictment at 81, Ga. v. Trump, No. 23SC188947 (Ga. Super. Ct., Fulton Cnty. Aug. 14, 2023). Normally, a criminal indictment should be accepted only as probable cause and not as proof of the events described therein. However, in this extraordinary instance, the vast majority of the predicate acts for the crimes alleged in the indictments took place in public view or were widely contemporaneously reported with confirmation by multiple sources. *See generally* H.R. REP. NO. 117-663 (2022). For example, the fact that Trump himself on

officials—of both major parties—uniformly declined to unlawfully discard the lawful votes of millions of their constituents, Trump allies engineered slates of purported electors to fraudulently assert their status as legitimate representatives of the state's electoral votes.[251] The notion was that Congress (at Vice President Mike Pence's behest) would, on January 6, cite the ambiguity in the Electoral Count Act to either supplant legitimate electoral votes with fraudulent ones, or delay the count for some further resolution in the states.[252]

The attempts to undermine and override formal legal validation of legitimate and verified election results in the run-up to January 6 were not an acknowledged coup. They depended on the veneers of legal ambiguity in and around the Electoral Count Act and of ostensible decisional authority in the Vice President and the Congress.[253] "So you're saying there's a chance" was the unofficial motto of the insurrection.[254] And no, nobody with actual legal authority was saying there was a chance. But a few people squinting hard enough at the Twelfth Amendment and opportunistically combing the Electoral Count Act conjured a hook on which to hang a mirage of possibility.

January 2, 2021, urged Georgia state election officials to present false results was not only widely reported, but a recording of the call itself was released. *See, e.g.*, Stephen Fowler, *'This Was A Scam': In Recorded Call, Trump Pushed Official to Overturn Georgia Vote*, NPR (Jan. 3, 2021), https://www.npr.org/2021/01/03/953012128/this-was-a-scam-in-recorded-call-trump-pushed-official-to-overturn-georgia-vote [https://perma.cc/99LU-EUKN]; Allan Smith et al., *Trump Begs Georgia Secretary of State to Overturn Election Results in Remarkable Hourlong Phone Call*, NBC NEWS (Jan. 3, 2021), https://www.nbcnews.com/politics/donald-trump/trump-begs-georgia-secretary-state-overturn-election-results-remarkable-hourlong-n1252692 [https://perma.cc/99LU-EUKN]; Jason Morris et al., *In Call, Trump Demands Georgia Officials 'Find' Votes to Tilt Election*, CNN (Jan. 3, 2021), https://www.cnn.com/2021/01/03/politics/donald-trump-brad-raffensperger-call-washington-post/index.html [https://perma.cc/LC77-CPCN]; Amy Gardner & Paulina Firoz, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html [https://perma.cc/H7HQ-T9R4].

251. Indictment at 5-6, United States v. Trump, No. 1:23-cr-00257 (D.D.C. Aug. 1, 2023). In Pennsylvania and New Mexico, the language of the certificate signed by the ostensible electors contained language describing the certificates as contingent: in those states, the certificate language described the votes as electoral votes to be counted in the event that courts ultimately proclaimed Trump the legal winner of the state. In five other states, there were no such caveats: the certificates purported, fraudulently, to represent the votes of electors lawfully chosen as a result of the 2020 election. *See 2020 Presidential Election Unofficial Certificates Submitted to The Office of the Federal Register*, NAT'L ARCHIVES, https://www.archives.gov/foia/2020-presidential-election-unofficial-certificates [https://perma.cc/D69Z-8J2M] (last updated Oct. 2, 2024); Danny Hakim, *Prosecutions of Fake Electors for Trump Gain Ground in Swing States*, N.Y. TIMES (Apr. 17, 2024), https://www.nytimes.com/2024/04/17/us/trump-fake-electors.html [https://perma.cc/TP37-GJ6Z].

252. Indictment at 21-27, 32-34, 37, United States v. Trump, No. 1:23-cr-00257 (D.D.C. Aug. 1, 2023).

253. *See, e.g.*, Larry Schwartztol, *Congress's Power Over the Electoral Count*, 78 VAND. L. REV. 1265, 1282-85 (2025).

254. *Cf.* DUMB AND DUMBER (New Line Cinema 1994).

This all made the Electoral Count Reform Act a 2021-22 imperative.[255] In normal times, a statute like the ECRA is functionally irrelevant. Elections are held in the states and decided by the states. In normal times, Congress's job is no more complicated than a ceremonial abacus: conduct a bit of second-grade math to add the votes from the various states' electors, and announce the total. In abnormal times, though, the ECRA represents a bipartisan pre-election precommitment to dispute resolution with the highest possible stakes.[256]

Put differently, the Electoral Count Reform Act is an emergency failsafe for resolving cascading institutional failure. County registrars and election boards, state election officials and governors and state legislatures, members of Congress, and state and federal judges all have potential important official roles in determining a presidential election winner. The ECRA contemplates the notion that each of these institutions might fail—and that perhaps multiple such institutions might fail in sequence. And it attempts to arrive at a decision structure that mitigates the damage as best it can, landing what's left of the plane in one piece, if at all possible.

The ECRA's primary tool to this end is attempting to reduce ambiguity. The statute does not eliminate ambiguity entirely—there are, unfortunately, several sources of lingering ambiguity that could and should be relics of the past.[257] But it does resolve a few excuses for mischief that played outsized roles in both 2000 and 2020, by more clearly articulating the expected role and timing for which actors do what when.

For example, the old statutory structure in 3 U.S.C. § 2, adjacent to the Electoral Count Act, could have been misconstrued under some readings to empower state legislatures to act in a decisive way to determine an electoral winner after Election Day, if the results were unclear.[258] This is the provision that the Florida House found appealing

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255. In the interest of full disclosure: as the inaugural Senior Policy Advisor for Democracy and Voting Rights in the White House from 2021-2022, I had a role in the conversations around the development and passage of the Electoral Count Reform Act. And also, as with any piece of legislation, that is a space shared with **many** advocates and government officials, each with important roles of their own in the process.

256. *See generally* Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975 (2001) (noting the importance of ex ante rules like the Electoral Count Act in channeling the discretion of institutional decisionmakers who must face the crucible moment of a high-stakes dispute with obvious and profound partisan consequences).

257. *See, e.g.*, Derek T. Muller, *Administering Presidential Elections and Counting Electoral Votes after* Trump v. Anderson, 60 WAKE FOREST L. REV. 327, 345-368 (2025); Thomas "T.J." Kingeter, *The Electoral Count Act: "Regularly Given," the Denominator Problem, and the 101st Vote*, 53 SETON HALL L. REV. 905 (2023); Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should Be Changed*, 23 CARDOZO L. REV. 1159 (2002).

258. *See* 3 U.S.C. § 2 (2000). The history of this provision reveals that it did not mean what it purported to say, and was not designed to provide any operative federal consequence for purported unilateral post-election action by one or more state legislative chambers. *See* Levitt, *supra* note 173, at 1075-76.

in asserting its own authority to determine the results of the 2000 election,[259] and which served as at least one hook for urging state legislators to override the expressed will of their electorates in 2020.[260] The ECRA eliminated that provision.[261] State legislatures act proactively (as legislatures all do) in setting general rules before an election, and federal law now clarifies that they have no role in guiding the resolution of presidential election disputes or the selection of presidential electors after Election Day.[262] Instead, post-election proceedings are primarily an administrative matter, with disputes refereed as needed by courts.

As another example, in resolving those administrative tallies and any disputes that may arise about them, the old Electoral Count Act contained a "safe harbor" date which provided a state with certainty that Congress would count its proffered electors if disputes were resolved by a particular date.[263] At the same time, by providing certainty if dispute resolution met a deadline, the provision by negative implication provided a lack of certainty if those disputes were resolved afterward. The "safe harbor" drove the Supreme Court's decision in *Bush v. Gore*, amidst continuing questions about whether it should have done so, and the (frivolous) litigation continuing through the safe harbor date in 2020 lent fuel to the claims that there was still in late December of 2020 a dispute to be resolved by Congress. The ECRA eliminates this provision as well. In its place is a firm deadline, six days before the meeting of the electors, with clear responsibilities to the state executive to issue a final certification by that date.[264]

If the executive fails to issue a final certification by the deadline, or if the executive issues a certification that is unlawful, the ECRA

259. FLA. H.R. JOUR. 20–21 (Spec. Sess. A 2000), http://www.leg.state.fl.us/data/session/2001/house/journals/pdf/bound/hj1212a.pdf [https://perma.cc/MC8P-UZES].

260. *See* Draft Letter from Jeffrey Bossert Clark, Acting Assistant Att'y Gen., U.S. Dep't of Justice, et al., to Governor Brian P. Kemp et al. at 3 (Dec. 28, 2020), *reprinted in* Katherine Faulders & Alexander Mallin, *DOJ Officials Rejected Colleague's Request to Intervene in Georgia's Election Certification: Emails*, ABC NEWS (Aug. 3, 2021), https://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198 [https://perma.cc/8XYH-B3CQ]. The Acting Attorney General rejected the entreaty of DOJ official Jeffrey Clark to send the draft letter citing 3 U.S.C. § 2. A panel of the D.C. Court of Appeals Board on Professional Responsibility has recommended that Clark be disbarred in part on the basis of the letter. *See* Report and Recommendation, In re Jeffrey B. Clark, No. 22-BD-039 (D.C. Ct. App. Bd. of Prof. Responsibility July 31, 2025), https://s3.documentcloud.org/documents/26037617/2025-07-31-report-and-recommendation-of-the-board-on-professional-responsibility.pdf [https://perma.cc/7GWZ-72X4].

261. Electoral Count Reform Act of 2022, Pub. L. No. 117-328, Div. P, tit. I, § 102(a), 136 Stat. 4459, 5233 (2022) (repealing 3 U.S.C. § 2).

262. *See* 3 U.S.C. § 5(a)(1) (2023).

263. *See* 3 U.S.C. § 5 (2000).

264. 3 U.S.C. § 5(a)(1) (2023). The ECRA also offers some improved clarity over the predecessor statute about who that executive is in each state: the Governor of each state is the designated executive, unless the state's law or constitution before Election Day identifies another executive to fill the role. *Id.* § 21(3).

provides a structure for courts to get involved, with the opportunity to set things right, up to the day before the electors meet to cast their votes.[265] And it provides for an expedited federal judicial process, if necessary, limited to candidates, and with a procedure unique to this context.[266] The trial court in these expedited proceedings is a three-judge court comprising two federal appellate judges and one district judge, with the opportunity for (but not requirement of) certiorari review by the Supreme Court.[267]

All of this is designed to consolidate the post-election process so that by the time the electors cast their ballots in mid-December,[268] it is apparent to all that one, and only one, set of electors represents the state's true choice. This, in turn, helps clarify Congress's role when they meet in joint session to publicly tally those votes on January 6.[269] The ECRA expressly ratifies Vice President Mike Pence's view that the Vice President's role in the joint session is purely ministerial.[270] And Congress, with an increased threshold for lodging an objection to electoral votes, should never be faced with choosing between different electoral slates, but instead should only be ratifying that the slates they have received represent the electors already chosen in the dispute resolution process weeks before.[271] With respect to options on January 6, the ECRA attempts to answer "So you're saying there's a chance" with a more definitive "no."[272]

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265. *Id.* § 5(c)(1)(B). While the ECRA does not itself provide a cause of action, that cause of action exists in statutes authorizing litigation for deprivations of the franchise. *See, e.g.*, 42 U.S.C. § 1983; 52 U.S.C. §§ 10301, 10302, 10308(f), 10310(c). And the ECRA clearly contemplates the potential for judicial involvement in the event of a failure to issue a final lawful certification, including the notion that a court might "require" the issuance or revision of a final certification. 3 U.S.C. § 5(c)(1)(B).

266. *Id.* § 5(d). The expedited process is not exclusive: the ECRA expressly disavows any impact on pre-existing litigation pathways for those who are not candidates for President or Vice President. *Id.* § 5(d)(2).

267. *Id.* § 5(d)(1)(B), (D).

268. *Id.* § 7.

269. *Id.* § 15. The fact that the joint session of Congress is convened on January 6 is itself set by statute. *Id.* § 15(a).

270. *Id.* § 15(b)(1); *see also, e.g.*, *Pence's Letter to Congress on Jan. 6, 2021*, WASH. POST (Oct. 29, 2021 5:21 P.M.), https://www.washingtonpost.com/context/pence-s-letter-to-congress/a73a4363-4bae-42ff-9177-7816806c0227/ [https://perma.cc/TQX2-X9G2]. As Professor Larry Schwartztol recounts, this view was not merely Pence's invention: it is consistent with (if not required by) constitutional text, follows longstanding historical practice, and mirrors the emphatic view of Justice Bradley in his resolution of the disputed 1876 election. *See* Schwartztol, *supra* note 253, at 1292-96 & n.120.

271. 3 U.S.C. § 15(d)(2)(B)(i) (2023).

272. The statutory language still purports to provide a bit more rationale for Congress to reject electoral slates, under the unfortunately ambiguous standards for declaring electors' votes not "regularly given," than many observers would prefer. *Id.* § 15(d)(2)(B)(ii). That is, the version of the ECRA ultimately negotiated and enacted preserves something of a lingering ambiguous substantive decisionmaking role for Congress. It is perhaps unsurprising that a piece of legislation drafted and enacted by members of Congress would preserve something of a lingering ambiguous substantive decisionmaking role in the presidential electoral process for members of Congress.

These clarified roles arrive with a hierarchy of perceived risk, discernible in the ECRA design. State legislatures may have as prominent a role as they wish in legislating before the election, but they are sidelined from post-election process. The Twelfth Amendment gives Congress a distinct role in processing the count of the electoral votes,[273] but the ECRA seeks to reduce the set of inputs for that January 6 role by frontloading dispute resolution, and significantly raises the threshold for dissenting objections.[274] The bodies vested with primary post-election positions are the state dispute resolution mechanisms established by law before Election Day,[275] backstopped by the state's designated executive.[276] And in the event of further cascading post-election failure, the ECRA provides a means for the courts to get to a final answer,[277] and for those answers to be effectively final.[278]

The judicial role in this structure is nuanced. In the usual course, courts never need get involved after the election: local administrative bodies will tally ballots, state administrators will aggregate those tallies, state executives will certify electors' credentials, electors will cast ballots, and Congress will formally present and sum those electoral totals. In the event of normal abnormalities, courts are available to smooth out those bumps: state courts according to the rules set by states, and federal courts as additional failsafes according to familiar federal causes of action. In the event of catastrophic abnormalities that amount to advanced systems failure, the ECRA trusts courts as the institution of last resort to shepherd the arrival of single legitimate electoral slates at Congress's door.

The decision to privilege the courts as the sturdiest—or perhaps least worst—failsafe is not arbitrary, and is not the product of starry-eyed naivete. Instead, the rationale apparent in the ECRA offers an intriguing opportunity to reflect on the roles of the various entities in the 2000 election. The ECRA's choice reflects the recognition that the judiciary is socialized to tell itself that it makes decisions for reasons beyond partisanship. In so doing, the judiciary is socialized to have the potential to actually make decisions for reasons beyond partisanship. To be clear, other branches of other governments <u>did</u> heroically resist raw partisan impulses in 2020. Governors and Secretaries of State certified final tallies against partisan interest and intense partisan

273. The text of the Twelfth Amendment switches suddenly and notoriously from active to passive tense: the electors meet and vote and send in their votes, the President of the Senate opens the votes in front of Congress, "and the votes shall then be counted[.]" U.S. CONST. amend. XII.

274. *Compare* 3 U.S.C. § 15(d)(2)(B) (2023) (requiring 1/5 of the Senators and 1/5 of the Representatives to present an objection) *with* 3 U.S.C. § 15 (2021) (requiring just one Senator and one Representative to present an objection).

275. *Id.* § 5(a)(1).

276. *Id.*

277. *Id.* § 5(d).

278. *Id.* § 5(c)(1)(B), § 15(d)(1)(A), (d)(2)(B)(ii)(I).

pressure,[279] and legislative leadership refused to discard the votes of their constituents despite fervent entreaties.[280] Still, it's reasonable to wonder about the comparative durability of those commitments. The ECRA's choices also reflect the recognition that the judiciary is socialized to provide logic and rationale for their decisions, which together with multimember panels and multiple layers of review provides some insulation against one rogue actor acting on partisan impulses alone.[281]

In short, the ECRA recognizes that in the event of an election where the margin of victory exceeds the margin of error, courts may be the governmental institution most likely to say so. And in the event of an election where the margin of victory does not exceed the margin of error, courts may be the branch most likely to arrive at a final answer without provoking sustained armed conflict. It is not that courts are particularly good at this. Rather, the structure of the ECRA understands that they may well be the worst—were it not for all the others.[282]

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279. *See, e.g.*, Marshall Cohen et al., *Georgia's GOP Governor and Secretary of State Certify Biden Win, Quashing Trump's Longshot Attempt to Overturn Results*, CNN (Nov. 20, 2020 10:26 P.M.), https://www.cnn.com/2020/11/20/politics/georgia-certify-secretary-of-state-raffensperger [https://perma.cc/QX9N-7N3D]; Jonathan J. Cooper, *Arizona Governor Silences Trump's Call, Certifies Election*, AP (Dec. 2, 2020 7:35 P.M.), https://apnews.com/article/election-2020-donald-trump-arizona-elections-doug-ducey-e2b8b0de5b809efcc9b1ad5d279023f4 [https://perma.cc/FNS9-3VQY].

280. *See* Jordyn Phelps & Ben Gittleson, *Michigan GOP Lawmakers Reject Trump's Brazen Effort to Overturn Election Results*, ABC NEWS (Nov. 20, 2020 8:36 P.M.), https://abcnews.go.com/Politics/michigan-gop-lawmakers-reject-trumps-brazen-effort-overturn/story?id=74317220 [https://perma.cc/2VBW-DTHA].

281. In this context, the Supreme Court's staggeringly expanding (and increasingly unjustifiable) issuance of unexplained stays on the emergency docket in calendar year 2025, in decisions with profound and often irreparable impact, notably undermines confidence in the Supreme Court as a source of logical and rational decisionmaking well suited to the role that the ECRA anticipates for the judiciary. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023); Steve Vladeck, *Emergency Orders as Precedents*, ONE FIRST (July 28, 2025), https://www.stevevladeck.com/p/169-the-precedential-effects-of-orders [https://perma.cc/L4AZ-GA4F]; Steve Vladeck, *The Case for Not Writing*, ONE FIRST (July 17, 2025), https://www.stevevladeck.com/p/bonus-167-the-case-for-not-writing [https://perma.cc/UM27-Z67C]; Steve Vladeck, *The Inconsistent Court Strikes Again*, ONE FIRST (July 14, 2025), https://www.stevevladeck.com/p/167-the-inconsistent-court-strikes [https://perma.cc/B7RJ-9CN4]; Steve Vladeck, *Why the Court Needs to Explain Itself*, ONE FIRST (June 26, 2025), https://www.stevevladeck.com/p/bonus-161-why-the-court-needs-to [https://perma.cc/RG98-W2WT]. Lower trial and appellate courts have not yet generally succumbed to this particular vice—judges appointed by both Democratic presidents and Republican presidents have generally been finding facts and ruling on law in reasoned opinions in ways familiar to the judicial role, even in highly contentious cases, but the Supreme Court's recent proclivity for unreasoned exercises of raw power may call into question the wisdom of any ECRA role with the potential for Supreme Court resolution.

282. *Cf.* WINSTON CHURCHILL, CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 573 (Richard Langworth, ed. 2008) ("Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time.").

III. THE PEOPLE DECIDE ELECTIONS

The final significant misconception addressed in this Essay—necessarily briefly, in this forum—is a sociological misconception: that the election of 2000 is at its core an instruction that elections are decided by courts. The 2000 election was an anomaly, and we must actively fight the temptation to allow that anomaly to become the expectation.

To brand as misconception the notion that elections are decided by courts may seem an odd assertion given the unquestioned importance that courts have in pre-election challenges to discrete electoral regulations. And it may seem an odd assertion given the discussion immediately preceding, with an overly lengthy exposition of why the ECRA specifically privileges courts with a potentially decisive role in the federal presidential post-election structure. But remember, the ECRA is an emergency failsafe unnecessary in the normal course. Many of its features exist mostly not to be used.

When this Essay asserts that a misconception of the election of 2000 is that elections are decided by courts, it is not intended as an assertion that elections cannot be decided by courts. Of course they can. They have been. But it is a profound misconception that once the people have voted, we should expect the status of those votes to be conditional or contingent, waiting for a notable intervening judicial actor to drop another notable shoe. It is a profound misconception that once the ballots are in, elections normally are—or worse, should be—decided by courts.

Those of us who were alive for the election of 2000 lived through a black-swan event: an election involving more than 105 million ballots that was decided by only 537. Such an election is an election where winner and loser are functionally indistinguishable.

Such an election is not normal. Most American elections are not particularly close.[283] In the comparatively small percentage of races that are close, most are not anywhere near that close.[284] There are, it

283. Indeed, most American elections may not even be contested. *See* Michael Wines, *This Election Season, Most Races Aren't Races at All*, N.Y. TIMES (Oct. 30, 2024), https://www.nytimes.com/2024/10/30/us/election-uncontested-races.html [https://perma.cc/7VZU-C9TS] (reporting on a survey finding that 70% of elective offices in the 2024 general election were uncontested).

284. The 2016 Presidential election, for example, was close. But in order for Clinton to have won more electoral votes, she would have needed to overcome a 10,704-vote deficit in Michigan, a 44,292-vote deficit in Pennsylvania, and a 22,748-vote deficit in Wisconsin. *Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM'N 6 (Dec. 2017), https://www.fec.gov/resources/cms-content/documents/federalelections2016.pdf [https://perma.cc/2FTL-NGM4]. The 2020 Presidential election was close. But in order for Trump to have won more electoral votes, he would have needed to overcome at least an 11,779-vote deficit in Georgia, a 10,457-vote deficit in Arizona, a 20,682-vote deficit in Wisconsin (and then resolve an Electoral College tie). *Federal Elections 2020: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM'N 7 (Oct. 2022),

is true, very close races all the time.[285] But there are also elections all the time, for all kinds of offices. The ones close enough for the margin of error to exceed the margin of victory are, thankfully, quite rare.

The fact that we have endured a black-swan election in comparatively recent history—just 6 presidential elections ago still amounts to some recency bias—helps make the anomalous judicial engagement more salient. Moreover, the presence of a Supreme Court perceiving itself to be particularly muscular and reaching out to decide hotly contested cultural flashpoint issues in other arenas makes the prospect of judicial intervention more salient in the electoral arena as well. Active litigation efforts in and around the election of 2020, along with messaging from the President suggesting that he expects "his" Justices to be salient in election conflict, further reinforce the mistaken expectation that courts will prove decisive.[286]

And the public narrative in and around the election system helps to artificially inflate the salience of—and perhaps thereby potential for—judicial intervention, in ways both deceptive and destructive.

In the months before an election, the "thinkpiece-industrial complex"[287] now reliably churns out an endless sludge of what I've elsewhere called "electoral process porn."[288] Ominous and lurid, in conspiratorial tones, these articles and op-eds capitalize on electoral anxiety by offering a revealing glimpse into a pocket of underrecognized election procedure—a piece of back-office mechanics, a quirk of the statutory code—that with the right legal maneuvering could be The Key To

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https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf [https://perma.cc/5DA7-LTLM]. The 2024 Presidential election was close. But in order for Harris to have won more electoral votes, she would have needed to overcome a 29,397-vote deficit in Wisconsin, an 80,103-vote deficit in Michigan, and a 120,266-vote deficit in Pennsylvania. *Official 2024 Presidential General Election Results*, FED. ELECTION COMM'N 3, 5, https://www.fec.gov/resources/cms-content/documents/2024presgeresults.pdf [https://perma.cc/MR6S-XYH6] (last visited Sep. 14, 2025). Those are not margins even remotely close enough to implicate the judiciary as the ultimate decider.

285. *See* sources cited *supra* note 125.

286. *See, e.g.*, Niels Lesniewski, *Trump Wants New Justice to be Able to Decide 2020 Election*, ROLL CALL (Sept. 23, 2020 5:29 P.M.), https://rollcall.com/2020/09/23/trump-wants-new-justice-to-be-able-to-decide-2020-election/ [https://perma.cc/FSK7-EGLC]; Paul Blumenthal, *Trump Calls Them 'My Judges.' Will They Side with Him in Separation of Powers Fight?*, HUFFPOST (Oct. 24, 2019 2:45 P.M.), https://www.huffpost.com/entry/trump-judges-lawsuits_n_5db1d70ee4b03285e87ba2fd [https://perma.cc/A8CX-VM7Q].

287. I'm indebted to Andrew Prokop for the magnificent phrase. Andrew Prokop, *American Democracy Is Under Threat. But What Is that Threat, Exactly?*, VOX (Jan. 25, 2022 6:40 A.M.), https://www.vox.com/22798975/democracy-threats-peril-trump-voting-rights [https://perma.cc/6LSA-NUJK].

288. Justin Levitt, *Get Ready for the Scourge of Election Season: Electoral-Process Porn*, SLATE (July 22, 2024 2:33 P.M.), https://slate.com/news-and-politics/2024/07/election-season-electoral-process-porn-how-to-vote-conspiracy-theories.html [https://perma.cc/U5MZ-QEN7]; Justin Levitt, *Don't Panic Reading 'Electoral Process Porn': There Are Plenty of Safeguards to Make Sure Voters' Wishes are Respected*, THE CONVERSATION (Oct. 22, 2024 8:44 A.M.), https://theconversation.com/dont-panic-reading-electoral-process-porn-there-are-plenty-of-safeguards-to-make-sure-voters-wishes-are-respected-241403 [https://perma.cc/2AEN-AG3R].

The Whole Thing This Time. They then introduce the authors of disenfranchisement: shadowy operatives (or technological MacGuffins) and the cloaked funders with the nefarious notion to exploit the loophole. The pieces seem to delight in lingering lasciviously on impending transgression.

And they are, crucially, disempowering. Like its fleshier cousin, electoral process porn dehumanizes and desensitizes. It is written not to inform or motivate but to titillate. And distinct from other sensationalism, it cultivates the impression that American voters are not really the agents of their own destiny, because it cultivates the impression that an election can just be "overturned" or "stolen" out from under the public by another vote—the "real" vote—by the lineup of a judicial panel. In the process, it works to normalize the notion of judicial intervention that in fact remains, and should continue to remain, truly extraordinary. Imagineering clever attorneys and receptive jurists as regularized final deciders of the democratic process radically distorts what we should learn from the election of 2000.

A. Public Receptivity to Electoral Disempowerment

It is not particularly surprising that the electorate might be particularly susceptible to the notion that high-stakes elections are normally subject to the whims of a few powerful officials in black robes. The Supreme Court carefully cultivates its own mystique as the apex of a hierarchy in which judges assert increasingly exclusive reign over legal interpretation. As noted above, the Court has relatively recently decided an exceedingly prominent election, and that raises the salience of the prospects of a repeat performance. And some basic characteristics of our electoral system make it ripe for the wishcasting of a judicial *deus ex machina*.

First, our electoral process is variegated. We are the second most populous democracy in the world,[289] with more than 150 million voters, spanning 3.8 million square miles[290] and innumerable aspects of demographic and socioeconomic diversity, casting a ballot when election season arrives. American culture—to the extent that a melting pot of those dimensions can be said to share a culture in any meaningful way—is keenly attuned to celebrity. This means that our attention in self-governance is inevitably drawn not to the local city council members who most directly affect our daily lives, but to the national contest for a single head of state.

289. While assessments of the quality of democracies may vary, both India and the United States are usually considered democracies. *See, e.g.*, Democracy Index, 2024, OUR WORLD IN DATA, https://ourworldindata.org/grapher/democracy-index-eiu [https://perma.cc/87G6-WPXX] (last visited May 12, 2026).

290. *See* State Area Measurements and Internal Point Coordinates, U.S. CENSUS BUREAU (2010), https://www.census.gov/geographies/reference-files/2010/geo/state-area.html [https://perma.cc/DE4M-MNV4].

That diverse sea of humanity votes for this single national figure in a significantly decentralized way. That is not to say that there are no common elements—indeed, a minimalist national procedural floor is essentially the same nationwide. In forty-nine out of fifty states, there is a process to register, to sign up to be on a list of voters.[291] There is a process in every state to confirm that the people on the list are eligible: that they are who they say they are and live where they say they live. There is a process in every state for those people to request, vote, and submit a ballot in a window of time leading up to a fixed final Election Day, and a process in every state to tally the ballot choices to figure out who won. There are dispute resolution processes in every state along the way to address problems and complaints.

But beyond that baseline, the rules have slight variations in every state, in every county, and often from polling place to polling place or even poll worker to poll worker. Each of those variants can feel unfamiliar—or can be made to feel unfamiliar—to voters thousands of miles away.[292]

This observation should not be mistaken for an argument for one nationally uniform standard or administration by one national body. There are important safeguards in diversity, both in the benefits of innovation and in protections against corruption of centralized control.[293] But it does not detract from these net benefits to also recognize that the diversity has consequences of its own. Voters in Seattle, and rural Maine, and the Mississippi Delta, and the Arizona desert are all dependent on each other in arriving at a final national choice of a chief national executive, even if they have little in common beyond a similar

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291. *See, e.g.*, Laura Hinkle, *How North Dakota Administers Elections Without Voter Registration*, BIPARTISAN POL'Y CTR. (Aug. 11, 2023), https://bipartisanpolicy.org/blog/how-north-dakota-administers-elections-without-voter-registration/ [https://perma.cc/AJ5N-XP8S]. In North Dakota, the one state remaining, the government compiles and maintains the central voter file itself, without imposing on voters, and with a process for supplementing or correcting on election day. It looks a lot like a combination of what some call automatic and same-day registration in other states. *See, e.g.*, *id.*

292. Surveys reveal that 90-92% of Americans consistently trust their local elections, even as levels of trust in elections elsewhere across the country drop dramatically. *See, e.g.*, *Harris, Trump Voters Differ Over Election Security, Vote Counts and Hacking Concerns* 10-15, PEW RESEARCH CTR. (Oct. 24, 2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/10/PP_2024.10.24_election-security_report.pdf [https://perma.cc/LU78-L5FR].

293. *See, e.g.*, *Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 29, 2025), https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels [https://perma.cc/5UDK-6SG2]; *cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (identifying the ability of a "single courageous state" to serve as a "laboratory" of innovation). The desire of the current Administration to "take over the voting" and "nationalize the voting" may have made the dangers of centralized control more salient, but the danger of a centralized system long pre-existed President Trump. *See* Ahmad Damen et al., *What Does it Mean When the President Calls to "Nationalize the Voting"?*, NPR (Feb. 7, 2026 5:17 P.M.), https://www.npr.org/2026/02/07/nx-s1-5704400/what-does-it-mean-when-the-president-calls-to-nationalize-the-voting [https://perma.cc/2K8B-X6VN].

claim to a US passport. And so, in a country too big for trust, the unfamiliar variations in the rules can become seeds for imagined concern.

Second, our electoral process is sedimentary. The rules we set last year live atop the rules from ten years ago, which live atop rules from the 1980s, and 1880s, and 1780s. Some of those procedures are baked into the federal Constitution, or state constitutions, and others are set by statute or administrative rule or an official's more informal guidance. Layers upon layers of judicial gloss and past practice fill in the cracks, sometimes building on what came before and sometimes reacting against what came before. And we are constantly discovering new questions that were not precisely contemplated by the authors of these prior regulatory systems. Those questions may not have obvious answers.

The electoral process that we have at present is not likely the system that we would design today if we were starting from scratch. Like so many other American institutions, it is the product of the stubborn accretion of incremental path-dependent decisions, shaped by a few seismic disruptions.

The upshot of that development is that the electoral process holds an abundance of fossils. The fossils are sitting right there if you look hard enough, and they are occasionally thrust unavoidably into view. Some are relatively familiar: say, the malapportionment of the Electoral College,[294] or (from a slightly newer geological age) paper voter registration forms.[295] Some are more obscure, like the mechanics of the Vice President opening electoral envelopes on January 6.[296] They do not emerge often, but they can look pretty strange when they're unearthed.

Third, our electoral process is partisan. The rules are developed by legislators with partisan affiliations, interpreted by judges who often have partisan affiliations, and implemented by executive officials who usually have partisan affiliations. We are the only industrialized democracy with this design.[297]

Curiously, the fact that partisanship is a pervasive part of the environment does not mean that most procedures for casting and counting ballots are put in place to further antagonistic partisan ends, or that review of those procedures proceeds among partisan lines or to further partisan outcomes. This Essay has attempted to explain, above, the flaws in relying too heavily on partisanship in attempting to explain behavior in the wake of the election of 2000—where one

294. *See* U.S. CONST. art. II, § 1, cl. 2.

295. *See* 52 U.S.C. § 20508(a)(2), (b).

296. *See* U.S. CONST. amend. XII; 3 U.S.C. § 15.

297. *See, e.g.*, Rebecca Green, *Adversarial Election Administration*, 101 N.C. L. REV. 1077, 1078-80 (2023).

might assume the conditions for giving way to rank partisanship to be essentially at their apex—and that lesson seems generalizable.[298] Candidates repeatedly win elections in jurisdictions where individuals with opposing partisan loyalties set the rules and run the process. In our hyperpolarized political environment, it is not hard to imagine an election process truly optimized for partisan bloodsport. (In many states, redistricting is almost exactly the maximalist partisan war you'd expect.)[299] A system of election administration with partisanship really cranked up to 11 would look very different from the one we've got.

The point here is not that the electoral process proceeds with partisanship at full throttle. (It does not.) But because so many actors in the system also wear partisan identities, it is not surprising that the process can be seen with a partisan tint. Sports fans know the conspiracy theory that attends every call in a crucial playoff game: now imagine that the referees were wearing one team's uniform. Members of the public have partisan loyalties too, and research shows that these loyalties inevitably filter how we process the information we receive.[300] And when seen through a partisan lens, the procedures that are occasionally unfamiliar and sometimes strange and often outdated can look not just unfamiliar and strange and outdated, but nefarious.

B. The Modern Shadows of the 2000 Election: Dispelling the Disempowerment Narrative

All of this substrate offers fuel for the electoral process porn.

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298. *See generally* Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787 (2014).

299. *See, e.g.*, Laurel Rosenhall et al., *California Democrats Look to Redraw House Map to Counter Texas G.O.P.*, N.Y. TIMES (Aug. 5, 2025), https://www.nytimes.com/2025/08/05/us/politics/california-texas-redistricting-maps.html [https://perma.cc/L52A-PZLU]. And even the redistricting canvas, shot through with partisanship, needs a caveat. Federal law has not required congressional districts to be contiguous since 1911. Wood v. Broom, 287 U.S. 1, 6–8 (1932) (noting the lapse in a federal contiguity requirement); Shaw v. Reno, 509 U.S. 630, 647 (1993) (noting that contiguity is not constitutionally required). More than half of the state constitutions do not require congressional districts to be contiguous either. *Criteria for congressional districts*, ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/criteria-for-congressional-districts/ [https://perma.cc/S6Z3-RRXX] (last visited May 12, 2026). States without such limits could choose to forsake contiguity in their congressional districts to pursue maximum partisan advantage—it would be possible in many states to use noncontiguous districts to turn a congressional delegation entirely blue or entirely red—but at least in the modern era, no state has done so. *See, e.g.*, Justin Levitt, *A Spoonful of Sugar*, __ LOY. L.A. L. REV. __, text accompanying notes 18-22 (forthcoming 2026).

300. *See, e.g.*, ELIZABETH HARRIS ET AL., *The Psychology and Neuroscience of Partisanship*, *in* THE CAMBRIDGE HANDBOOK OF POLITICAL PSYCHOLOGY 52 (Danny Osborne & Chris G. Sibley eds., 2022), https://www.cambridge.org/core/books/abs/cambridge-handbook-of-political-psychology/psychology-and-neuroscience-of-partisanship/B87D1C89AFA721E913AC2C0B08D549C8 [https://perma.cc/3H74-8ADC].

There are a few different subgenres of the electoral process porn narrative that tend to teach voters that they are not in charge.[301] The version most salient here, and perhaps the most pernicious lingering consequence of the 2000 election, is the notion that voters have replaced their own agency in the elections process with a fiction that the courts are ultimately in control.[302]

More specifically, this vision of the electoral process is simply the dystopian civic reimagining of a heist thriller. It thrives on the particular twist that exploits an underrecognized loophole just waiting for the sufficiently crafty lawyer and the sufficiently devious jurist to lock eyes across a crowded courtroom. It is important to the power of the narrative that the loophole have the veneer of lawfulness and the sense of irrevocable finality once the gimmick is put in place. Breaking the law is mundane. But a way to execute an electoral college theft within the technical bounds of the existing structure, even when everyone understands that so doing would subvert the public will under the shared rules heading into the contest? That's the good stuff. The allure of the invented caper is in the ostensibly barely legal.

The notion of a lawful judicial overturning of an election is also mostly fantasy: an indulgence of magical legalism and a misunderstanding of what law is. Law is a mechanism for the resolution of disputes. Indeed, in the context of civil proceedings, it is a dispute resolution mechanism that those subject to it accept largely without the need for coercive force because the disputes to be resolved are real and not invented, and because the process by which it unfolds has both a recognizable structure and a recognizable logic. Legal writs rely a bit on Latin, but unlike in the Harry Potter universe, those incantations are not spells. If there is no actual dispute about the legitimacy of tens of thousands of votes, those votes cannot simply be magicked away through a legal process.[303] The fantastical alternative is just law cosplay.

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301. *See* sources cited *supra* note 288.

302. *See, e.g.*, George Tyler, *How Republicans May Steal the 2026 and 2028 Elections*, THE FULCRUM (Feb. 10, 2026), https://thefulcrum.us/democracy/voter-suppression-tactics-2026 [https://perma.cc/8L2E-KU3L]; Ari Berman, *Project 2026: Trump's Plan to Rig the Next Election*, MOTHER JONES (Sept.-Oct. 2025), https://www.motherjones.com/politics/2025/09/donald-trump-plan-to-rig-2026-midterm-elections-voter-suppression-gerrymandering-certification/ [https://perma.cc/94HK-D3AM]; Nick Allen, *Revealed: How Trump Could Be President until 2037 Due to a Simple Loophole in the Constitution*, DAILY MAIL (Mar. 29, 2025 9:45 A.M.), https://www.dailymail.co.uk/news/article-14536307/Trump-term-2037-simple-loophole-Constitution.html [https://perma.cc/BR5H-B4K3]; Lawrence Lessig & Matthew A. Seligman, *Here Is One Way to Steal the Presidential Election*, N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/01/22/opinion/election-president-steal-democracy.html [https://perma.cc/VPG7-KHX2].

303. This is not to suggest that law is the only mechanism either for resolving disputes or for asserting power, nor is it to suggest that all legal institutions will always issue purportedly legal decisions that are recognizably law. There have been episodes in history, domestic and international, in which law has run out, and in which actors have deployed other tools, including armed force, to redress grievance. Members of the electorate have agency in

But that is not to say that this sort of misunderstanding is benign. The defining feature of the notion that courts regularly will, or do, or should decide elections is that it communicates lack of agency. It contributes to the notion, both counterproductive and counterfactual, that participation does not matter because someone else is actually at the helm. That self-governance … isn't, really.

There is a quote, attributed to Plato,[304] on the pediment of the RFK Building in Washington, DC, the primary home for the Department of Justice. It reads "Justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens." That's true for democracy as well. We have to understand that we decide what happens to us.

There are conditions under which courts meaningfully decide election outcomes in a post-election process. But those conditions are not only not the norm, they are struck-and-killed-by-lightning improbable. People are indeed killed by lightning strikes—but it's rare enough that you neither do nor should expect it when you walk out of your front door.[305] When there are functional ties in an electoral environment, when the election turns on 537 votes out of 6 million, courts may decide the outcome, yes. That is a viable lesson from the election of 2000. But the inverse is an even more important lesson to internalize: we should not expect elections to come down to the courts the rest of the time.

these moments as well, though they involve action of a very different character than is the focus of this Essay. The point here is that there is no process that converts tens of thousands of legitimate votes into tens of thousands of illegitimate votes in a manner that comports with the rule of law, and which voters who accept adverse legal outcomes because they accept the rule of law will simply shrug and accept.

304. *See Deputy Att'y Gen. Rod Rosenstein Delivers Remarks at a Conference on Law Enforcement and Civil Rights at the Birmingham Civil Rights Institute*, U.S. DEP'T OF JUST. (Sept. 17, 2017), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-conference-law-enforcement-and [https://perma.cc/YX96-HF4T].

305. *See Weather Related Fatality and Injury Statistics*, NAT'L WEATHER SERV., https://www.weather.gov/hazstat/ [https://perma.cc/4DAH-BT97].