THE VINDICATION OF *BUSH V. GORE*

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	INTRODUCTION	419
I.	THE EQUAL PROTECTION CLAUSE	422
	A. The Per Curiam Approach to Equal Protection	422
	B. Academic Criticism of the Equal Protection Rationale	424
	C. The Development of an Equal Protection Doctrine in Federal Election Litigation	429
II.	THE LEGISLATURE THEREOF CLAUSE	429
	A. Chief Justice Rehnquist's Concurring Opinion	430
	B. Academic Criticism of the Legislature Thereof Clause Rationale	431
	C. Revitalization in Moore v. Harper	433
III.	ELECTORAL VOTE COUNTING DEADLINES	436
	A. The Identification of a December 12 Deadline	437
	B. Academic Criticism of a December 12 Deadline	439
	C. The Electoral Count Reform Act Codifies a Fixed Deadline	441
IV.	JUDICIAL SUPREMACY AND FINALITY IN PRESIDENTIAL ELECTIONS	443
	A. Contested Finality in Bush v. Gore	443
	B. Academic Criticism of Federal Court Intervention	445
	C. Empowering the Federal Courts to Resolve Presidential Election Disputes	447
V.	THE INTERIM RELIEF DOCKET STAY OF THE COUNTING OF THE BALLOTS	449
	A. The Stay Order	449
	B. Academic Criticism of the Stay	451
	C. Stays in the Federal Courts Since Bush v. Gore	452
	CONCLUSION	454

INTRODUCTION

The Supreme Court's decision in *Bush v. Gore* was, in understated terms, controversial. Justice Stevens, in his dissent, wrote that although "we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[1] This contemporary critique captured the prevailing view among many that *Bush v. Gore* had undermined

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1. Bush v. Gore, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

the Court's legitimacy and introduced an unprincipled decision into constitutional law. The American public was divided over the decision (although skepticism toward the Court dissipated within a short time).[2] And the decision was harshly and extensively criticized in the legal academy.[3]

In its most polemical form, a group of 554 law professors took out a full-page advertisement in the New York Times that ran on January 13, 2001, under the headline, "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."[4] They continued, "Suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges."[5] These law professors lamented that "the five justices were acting as political proponents for candidate Bush, not as judges."[6] They directed readers to a website, the-rule-of-law.com, which offered solutions for "What Can Be Done Now?"[7] One recommendation was to learn more about protests, including a website called CounterCoup.org, which tracked events ranging from a Funeral for Democracy in Juneau, Alaska to a reenactment of Shay's Rebellion in Massachusetts.[8] It was not just that *Bush v. Gore* was wrongly decided. It was that the decision itself reflected a threat to democracy and a legitimate political order.

For some time, critics of *Bush v. Gore* attacked every aspect of the opinion. And some believed, wrong as it was, the opinion was a one-off case—wrongly decided, to be sure, but one that would have no lasting influence. The majority opinion included the cryptic statement, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[9] Professor Laurence Tribe, who argued the case on Gore's behalf in the United States Supreme Court, mused that "if my analysis is correct, there simply is no 'there' there: as our constitutional shell game revealed, *Bush v. Gore* belongs to *no* constitutional tradition and

2. *See, e.g.*, Nathaniel Persily, *Foreword: The Legacy of* Bush v. Gore *in Public Opinion and American Law*, 23 ST. THOMAS L. REV. 325 (2011).

3. *See* David Cole, *The Liberal Legacy of* Bush v. Gore, 94 GEO. L.J. 1427, 1462-74 (2006) (chronicling eleven positive, thirty-two neutral, and thirty-five critical academic works reflecting on *Bush v. Gore* in the immediate years after the decision).

4. *554 Law Professors Say*, https://web.archive.org/web/20010203132400/http://www.the-rule-of-law.com/viewad.html) (last visited Feb. 13, 2026) (captured image of The Rule of Law website on February 3, 2001 by Internet Archive).

5. *Id.*

6. *Id.*

7. *Id.*

8. *What Can Be Done Now?*, https://web.archive.org/web/20010203133700/http://www.the-rule-of-law.com/whatnow.html (last visited Feb. 13, 2026) (captured image of The Rule of Law website on February 3, 2001 by Internet Archive); *Upcoming Nationwide Actions*, COUNTERCOUP.ORG, https://web.archive.org/web/20010121063341/www.geocities.com/countercoup/alerts.htm (last visited Mar. 19, 2026).

9. *Bush*, 531 U.S. at 109 (per curiam).

grows out of no constitutional doctrine, principle, or clause. Lacking roots, it is a plant anyone would be hard pressed to grow."[10] Professor Cass Sunstein called the legal reasoning "very bad," "order without law."[11] Academics, as this Article will show, offered a wide range of critiques of the opinion, from the practical to the theoretical, from the mildly critical to the scathing rebuke.

But time reveals a different story, one that resonates with a handful of defenders of *Bush v. Gore*.[12] In the quarter century since *Bush v. Gore*, each major and minor aspect of the decision has been vindicated. Federal courts routinely accept the conclusions reached in *Bush v. Gore* and rely upon them. Litigants cite *Bush v. Gore* to advance their claims. Congress has updated its laws to codify the instincts of the Court in *Bush v. Gore*.

This Essay examines five components of *Bush v. Gore*, each controversial in 2000, and each rather ordinary now. First, the majority opinion in *Bush v. Gore* articulated a rationale under the Equal Protection Clause that prohibits states from arbitrarily treating voters differently. Second, Chief Justice Rehnquist's concurring opinion emphasized that certain state court interpretations of state law in federal elections could be reexamined in the federal courts. Third, the Court found that there was a fixed deadline for Florida to finish counting electoral votes, well before the presidential electors met. Fourth, the Court's decision effectively resolved the dispute, rather than leaving the dispute to Congress. Fifth, the Court issued an interim order staying the state court's decision while it considered the case, avoiding a "count first, resolve later" situation. Each component, I argue, has been vindicated.

By vindication, I do not mean that the case was necessarily right as a matter of original public meaning of the Constitution, nor do I mean that its conclusions might not have been novel at the time the decision was issued. The Court's construction of the Presidential Electors Clause broke new ground, its citations to the Electoral Count Act had scant precedent, and its bottom line was, understandably, often read through a bottom-line approach of how it handed a victory to a Republican and a loss to a Democrat. Instead, I mean that, over time, the decision's conclusions have been widely accepted in law, a vindication of legal reasoning when removed from the passions of the political moment.

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10. Laurence H. Tribe, Erog .v Hsub *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 269 (2001) [hereafter Tribe, *Mirors*].

11. Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 759 7(2001).

12. *See, e.g.*, Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219 (2002); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 3-5 (2001); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 635 (2001).

I. THE EQUAL PROTECTION CLAUSE

The election in Florida in 2000 was exceptionally close. The first count revealed that Texas Governor George W. Bush carried the state by just 1,784 votes among nearly 6 million cast, apparently giving him victory over Vice President Al Gore.[13] And Florida's electoral votes would prove decisive: whichever presidential candidate carried the state would carry a majority of the Electoral College.

An automatic recount would take place, but Gore sought a manual recount under state election protest law in four Democratic-leaning counties.[14] Litigation ensued. Conflicts over the state's statutory deadlines to certify election results arose, as did the many challenges of recounting punch card ballots. The case made its way to the Supreme Court twice, the second time culminating in *Bush v. Gore*.

A. The Per Curiam Approach to Equal Protection

The per curiam majority opinion in *Bush v.* Gore relied on the Equal Protection Clause.[15] That holding rested on the principle that once a state grants the right to vote, it must not employ arbitrary or disparate treatment that values one person's vote over another's.[16] In Florida's manual recount ordered by the state's supreme court after the election, the United States Supreme Court found the lack of uniform standards for evaluating ballots (such as the varying treatment of "hanging chads," perforated paper that, when dislodged by a stylus, would indicate a vote cast for a candidate) violated this holding.[17]

Florida law had adopted an "intent of the voter" standard, "unobjectionable as an abstract proposition and a starting principle."[18] But the Court emphasized that Florida's procedures failed to meet the "minimum requirement for nonarbitrary treatment of voters" because there were no consistent rules for discerning voter intent.[19] The Court walked through the record to point out disparate practices or arbitrary treatment. It identified members of a canvassing board applying different standards in defining a legal vote,[20] a change in one county's

13. *Bush*, 531 U.S. at 100-01.

14. Gore carried, among other counties, Broward, Miami Dade, Palm Beach, and Volusia Counties. *See* Dave Leip's Atlas of U.S. Presidential Elections, *2000 Presidential General Election Results – Florida*, https://uselectionatlas.org/RESULTS/state.php?year=2000&fips=12. [https://perma.cc/J7YL-4DKJ] (last visited Jan. 26, 2026). Gore sought recounts in these four counties. *Bush*, 531 U.S. at 101.

15. *Bush*, 531 U.S. at 103.

16. *Id.* at 104-05.

17. *Id.* at 106-09.

18. *Id.* at 105-06.

19. *Id.*

20. *Bush*, 531 U.S. at 106.

standards in the middle of the recount,[21] adoption of standards for defining a "legal vote" that varied across three counties,[22] a recount of "overvotes" limited to three counties in the state when voters elsewhere could not have their ballots recounted under such a standard,[23] inclusion of a partial total from one county,[24] and recounts administered by ad hoc teams that lacked training to ensure they behaved consistently across teams.[25]

As a result, similarly-marked ballots might be counted in one county but rejected in another county. Such ballots could even be counted differently within a single county. This nonuniformity, the Court held, violated the Equal Protection Clause of the Fourteenth Amendment.[26] Although seven Justices agreed that the recount procedures raised constitutional problems, they split over the remedy. The five-justice majority concluded that no permissible recount could be completed before the "safe harbor" deadline of December 12, 2000, and halted the recount,[27] effectively ending the litigation.

The Equal Protection holding relied on little judicial precedent. One precedent was *Harper v. Virginia Board of Elections*. *Harper* was a 1966 decision that provided the majority with the quotation, "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[28] *Harper* had concluded that a poll tax was unconstitutional, because "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax."[29] The Court also cited *Reynolds v. Sims*, the "one person, one vote" case, for the proposition that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[30] Disparate treatment of voters across counties was likewise inappropriate under other Equal Protection precedents.[31]

Four justices wrote four dissenting opinions, with varying critiques of the majority. Justice Souter agreed that the recount process lacked uniform standards and could implicate equal protection concerns.[32]

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21. *Id.* at 106-07.

22. *Id.*531 U.S. at 107.

23. *Id.* at 107-08.

24. *Id.* at 108.

25. Bush, 531 U.S. at 109.

26. *Id.* at 103, 110-11.

27. *Id.* at 110.

28. Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

29. *Id.* at 666.

30. 377 U.S. 533, 555 (1964).

31. *Bush*, 531 U.S. at 107 (citing Gray v. Sanders, 372 U.S. 368 (1963), and Moore v. Ogilvie, 394 U.S. 814 (1969)).

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

But he dissented from the remedy. Rather than halting the recount, he would have remanded to Florida courts with instructions to adopt and apply consistent standards.[33] Likewise, Justice Breyer acknowledged equal protection issues in the administration of the recount but opposed the remedy.[34] He emphasized the importance of public confidence in the judiciary and warned against the appearance of partisanship: "The appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."[35]

Justices Stevens and Ginsburg, in contrast, offered more direct attacks on the Equal Protection Clause analysis. Justice Stevens believed the guidance of the "intent of the voter" was sufficiently clear, and that if any concerns arose about disparities, the state courts in Florida could address those concerns.[36] Justice Ginsburg likewise found the equal protection claim insubstantial.[37] The Florida Supreme Court's standards were not so unfair or imprecise that they rose to the level of a constitutional violation, and the standards were no more arbitrary than the standards used in the original count and certification.[38]

B. Academic Criticism of the Equal Protection Rationale

Because the Equal Protection Clause served as the primary basis for the Court's holding, it understandably drew a great deal of attention in the ensuing scholarly commentary. Legal scholars across the ideological spectrum criticized the *Bush v. Gore* equal protection holding as lacking any grounding in prior law. Professor Sunstein, for instance, noted that the Court's equal protection rationale "had no basis in precedent or in history."[39] Professor Tribe likewise argued the decision "belongs to *no* constitutional tradition and grows out of no constitutional doctrine," underscoring that it had no roots in Fourteenth Amendment jurisprudence.[40] Conservative commentators likewise expressed skepticism about the Court's reasoning. Professor Richard Epstein labeled the Court's equal protection theory "a confused nonstarter at best" that deserved the scorn it received from critics.[41]

One set of criticisms focused on the novelty of the Court's holding. Professor Richard Briffault, for instance, described *Bush v. Gore* as "unusual" for its treatment of the Equal Protection Clause.[42] Professor

33. *Id.* at 134-35.

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

35. *Id.* at 157.

36. *Bush*, 531 U.S. at 125-26 (Stevens, J., dissenting).

37. *Id.* at 143 (Ginsburg, J., dissenting).

38. *Id.*

39. Sunstein, *supra* note 11, at 758.

40. Tribe, *Mirrors*, *supra* note 10, at 269.

41. Epstein, *supra* note 12, at 614.

42. Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 376 (2001).

Briffault saw the Florida Supreme Court's actions as *expanding* opportunities for voters by giving a more robust opportunity to have their ballots counted in a recount.[43] Indeed, in his view, more closely scrutinizing the ballots of some voters to include more opportunities to count the ballots could not violate the Equal Protection Clause.[44] An equal protection problem only arises in the case of an "adoption of a standard intentionally discriminating against a group or groups of voters."[45]

Professor David Strauss agreed with this assessment, arguing that "a state must make decisions according to rules, rather than according to discretionary standards, at least when the costs of doing so are not too great."[46] Instead, the Court, in Professor Strauss's view, had "barely a fig leaf of principle, . . . smelled a rat[, and] . . . thought the Florida Supreme Court was up to no good."[47] Professor Tribe offered something similar in this critique: equal protection and treatment is no doubt required, but the Court's demand of nonarbitrary treatment of votes (with regard to construing marks and indentations) "comes from nowhere and overlooks several critical dimensions of the situation."[48] Indeed, "there is no hidden constitutional reason to uncover" in the opinion.[49]

The Court premised its Equal Protection holding on the disparities between votes that may or may not be counted, which Professor Frank Michelman rejected as a valid claim: "No one's equal dignity is impugned by this practice, and only Humpty Dumpty would describe it as valuing one person's vote over another's. Is this a human rights emergency? I would like you even to put a name to the human right undergoing violation here."[50]

Professor Briffault noted that geographical discrimination could have posed a problem but did not pose one under the facts of this case.[51] The Supreme Court was wrong to rely on cases like *Gray v. Sanders* (1963) and *Moore v. Ogilvie* (1969) in its analysis.[52] In *Gray*, the Supreme Court struck down Georgia's "county-unit" voting system, a system that gave some counties more political weight than others in a

43. *Id.* at 372.

44. *Id.* at 359-60.

45. *Id.* at 361.

46. David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 750 (2001).

47. *Id.* at 751.

48. Tribe, *Mirrors*, *supra* note 10, at 222.

49. *Id.*

50. Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 691 (2001).

51. Briffault, *supra* note 42, at 361-62.

52. Briffault, *supra* note 42, at 362-64.

statewide election, as violating "one person, one vote."[53] And in *Moore*, the Supreme Court held that an Illinois requirement that gave disproportionate weight to signatures from less-populated counties as a condition to place independent candidates on the ballot violated the Equal Protection Clause by diluting the power of residents in more populous counties.[54]

Unlike *Gray* and *Moore*, Professor Briffault argued, counties in Florida could have appropriately chosen a more restrictive or a more generous standard for assessing undervotes in a recount, and this standard would not prejudice each county's own voters.[55] Additionally, the variations were unpatterned.[56] While the electoral mechanisms in *Gray* and *Moore* both involved favored particular groups, a county's choice of manual recount standard correlated with no variable that would have presented equal protection concerns. Finally, the issue in *Gray*—that some votes had been cast but were ignored in the final decision—did not apply because all ballots that had been counted would have been tabulated in the final tally.[57] As Professor Briffault saw it, "Even if the Florida order could somehow be characterized as a change in the law, it is hard to see how such a change disenfranchised anyone."[58] The Florida Supreme Court increased the number of Floridians whose votes were counted and reduced disparities.

Some scholars also took issue with the use of precedents like *Reynolds* and *Harper*. Professor Samuel Issacharoff remarked that the ruling revived precedents that "had essentially collapsed of [their] own weight decades ago"[59] and detailed an "amorphous[]" fundamental right to vote.[60] Professor Sunstein agreed, saying that the caselaw cited to support the Court's position was "entirely far afield," and that "no one had ever thought that the Constitution requires that they be administered under clear and specific standards."[61] He called the Equal Protection holding a "bolt from the blue," with a great oddity of Justices Scalia and Thomas joining since the two are purported originalists.[62]

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53. Gray v. Sanders, 372 U.S. 368, 368-69 (1963). *See also* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1263-65 (2012).

54. Moore v. Ogilvie, 394 U.S. 814, 814 (1969).

55. Briffault, *supra* note 42, at 363 (". . . the intercounty differences in assessing imperfectly marked ballots were not commanded by the state. They were the results of local decisionmaking.")

56. *Id.* at 363.

57. *Id.* at 364-65, 367 n. 176.

58. *Id.* at 369.

59. Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 648 (2001).

60. *Id.* at 648-49.

61. Sunstein, *supra* note 11, at 764.

62. *Id.* at 765 & n.39.

Scholars likewise critiqued the absence of a theory undergirding the decision. Professor Issacharoff noted that the Court's attempt to limit the decision only to the 2000 election was "disingenuous" and "[w]ithout . . . doctrinal mooring."[63] Professor Heather Gerken had a similar critique, likening the decision to the Warren Court: "formalist reasoning unmoored from an explicit normative theory."[64]

Professor Pamela Karlan saw political motivation in the Court's decision, adding that the holding "once again vindicates the interests of middleclass, politically potent voters, while ignoring the interests of the clause's original beneficiaries" and "manifests the U.S. Supreme Court's general disdain for the other branches and levels of government."[65]

Professor Sunstein concluded that the reasoning belied the worst elements of judicial minimalism, rising to "a subminimalist opinion, giving the appearance of having been built for the specific occasion."[66] Professor Rick Hasen remarked that

> [T]he limiting language in the opinion, the lack of seriousness with which the Court undertook its own analysis, and the inconsistency of the opinion with other jurisprudence by this majority of Justices all point in the direction of assuming that *Bush v. Gore* is not good precedent for an expansive reading of equal protection law in elections.[67]

C. The Development of an Equal Protection Doctrine in Federal Election Litigation

The criticism of *Bush v. Gore*'s Equal Protection holding was vast. But lower courts did take it seriously, at least nominally consistent with a potential vision of judicial review advanced near the time of the decision.[68]

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63. Issacharoff, *supra* note 59, at 650.

64. Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407, 414 (2001). Professor Gerken later emphasizes:

> In *Bush v. Gore*, for example, the per curiam opinion stated that one source of the right at issue "lies in the equal weight accorded to each vote and the equal dignity owed to each voter," a phrase highly reminiscent of the Warren Court's suggestion that the mere failure to achieve exact population equality in districts somehow renders each person "that much less a citizen." While the words have a lovely ring to them, it is hard to describe the injuries in question, let alone explain why those injuries rise to constitutional status.

Id. at 415.

65. Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1366 (2001).

66. Sunstein, *supra* note 11, at 767.

67. Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 391 (2001).

68. *Id.* at 392-98.

Professor Michael Morley has tracked how lower courts used the Equal Protection decision in *Bush v. Gore* in subsequent cases—dozens upon dozens of judicial decisions grappling with the Equal Protection Clause in election cases. In a 2020 law review article, Professor Morley examined how the Supreme Court's decision in *Bush v. Gore* introduced what he called the "Uniformity Principle," a principle that once a state granted the right to vote by popular election, the state must then ensure that all voters were treated in a consistent, non-arbitrary way.[69] Far from being limited to its facts, *Bush v. Gore* saw wide-ranging examination and adoption in the lower courts.[70] Federal courts applied the uniformity requirement in a broad range of election-law contexts, including situations where state laws openly differentiated among voters,[71] local officials were given discretion in election administration,[72] or statutes were vague enough to permit inconsistent implementation.[73] Professor Morley argued that this principle would push states toward more centralized control over election procedures to avoid violations.[74] Courts were less willing to enforce uniformity in other types of cases concerning absentee or early voting, signature matching, or the voting rights of felons.[75]

Professor Morley followed up with an examination of judicial decisions after the COVID-19 pandemic.[76] He noted that courts would often treat county-to-county variances in election procedures (such as drop box use, or signature matching for absentee ballots) as generally permissible.[77] But he saw other courts expanding the doctrine to enjoin policies that offered disparate treatment of voters.[78]

Professor Morley's important synthesis of these judicial decisions demonstrates a lasting legacy of *Bush v. Gore*. The Equal Protection Clause has a firm footing in a range of election administration cases in the United States. True, Professor Morley noted that federal courts infrequently found Equal Protection violations.[79] But that does not mean that the Equal Protection Clause is toothless.

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69. Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 230-31 (2020).

70. *Id.* at 248-51.

71. *Id.* at 252.

72. *Id.* at 261.

73. *Id.* at 284.

74. *See* Morley, *supra* note 69, at 305; *see also* Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 576-78 (2021).

75. *See* Morley, *supra* note 69, at 299.

76. Michael T. Morley, Bush v. Gore's *Uniformity Principle and the 2020 Election*, 58 WAKE FOREST L. REV. 179, 179 (2023).

77. *Id.* at 196-201.

78. *Id.* at 208.

79. *Cf.* Richard L. Hasen, Bush v. Gore*'s Ironic Legacy*, 53 FLA. ST. U. L. REV. 313 (2026) (noting that the Supreme Court has never extended *Bush v. Gore* to other election contexts and that lower federal courts have been reluctant to implement it).

First, the standard to find an Equal Protection violation is designedly high. A violation occurs with the "arbitrary" treatment of voters. If many cases fail to meet this standard, it simply means that most election rules have some kind of justification. And there are opportunities in future litigation to consider what kinds of disparities could rise to the level of arbitrary ones.[80]

Second, states and the federal government have worked to improve decisionmaking to ensure consistency of treatment of voters. The Help America Vote Act of 2002 helped end the use of outdated voting machines that created the kinds of disparities in *Bush v. Gore*.[81] State legislatures have reduced election official discretion and created more uniform statewide rules.[82] Election administration has become a more professional field.[83] Errors in ballot tabulation have been reduced as election equipment has been modernized.[84] In short, we should expect to see less successful litigation over administration disparities if election disparities are actively being reduced.

The Equal Protection holding in *Bush v. Gore* may have been badly maligned at the time the decision was issued. And while the Supreme Court has been reluctant to cite the decision for this proposition, lower courts have not. A robust body of doctrine around the "Uniformity Principle" now exists. Cognizant of the problems of disparities in election administration, lawmakers have actively worked to reduce these disparities, by law and by practice.

II. THE LEGISLATURE THEREOF CLAUSE

The per curiam opinion in *Bush v. Gore* relied on the Equal Protection Clause and secured a five-justice majority of the Court. But Chief Justice Rehnquist wrote a separate concurring opinion, joined by Justices Scalia and Thomas. He focused on the Presidential Electors Clause—specifically, the Legislature Thereof Clause.

80. *See, e.g.*, Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079, 1121 (2021).

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

82. *See* Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WM. & MARY L. REV. 327, 381-82 (2023); Muller, *Reducing Election Litigation*, *supra* note 74, at 562.

83. *See* Rebecca Green, *Adversarial Election Administration*, 101 N.C. L. REV. 1077, 1094-95 (2023).

84. *See* R. Michael Alvarez et. al., *Voting: What Has Changed, What Hasn't, & What Needs Improvement*, CALTECH/MIT VOTING TECH. PROJECT 14 (Jan. 14, 2013), https://vote.caltech.edu/documents/146/Voting_Technology_Report_1_14_2013.pdf [https://perma.cc/44PT-R4LR]. .

A. Chief Justice Rehnquist's Concurring Opinion

Article II of the Constitution provides, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[85] Chief Justice Rehnquist argued that the Florida Supreme Court's method of interpreting Florida election law raised serious constitutional concerns under this Clause.

In developing his argument, Chief Justice Rehnquist drew upon *McPherson v. Blacker*, which recognized the broad power of state legislatures to determine the manner of appointing electors.[86] He cautioned that state courts should not usurp this power through judicial innovation under the guise of statutory interpretation. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[87]

Chief Justice Rehnquist emphasized that state courts may not ignore or substantially alter the legislative framework governing the appointment of electors. He argued that the Florida court's decision effectively departed from the legislative scheme by mandating a manual recount standard that was neither uniform nor clearly authorized by the legislature, and that the Florida court's decision risked missing timelines that the legislature wanted to meet. Federal courts must "ensure" that state courts do not "frustrate the legislative desire."[88] While federal courts are "deferential" to state interpretation of state law here, federal courts still undertake an "independent" analysis.[89] Here, Chief Justice Rehnquist concluded that the Florida Supreme Court "significantly departed from the statutory framework in place on November 7."[90] Despite "deferential" review, Chief Justice Rehnquist walked through a series of weaknesses in the Florida Supreme Court's interpretation of the state statute and found the interpretation to fail even deferential review.

Chief Justice Rehnquist's argument was first developed by Justice O'Connor in a memorandum circulated on December 10, 2000, shortly before oral argument.[91] Justice O'Connor ultimately did not join the opinion, but Chief Justice Rehnquist's opinion draws heavily from O'Connor's memorandum.[92] In the end, Justice Kennedy's preferred

85. U.S. CONST. art. II, § 1, cl. 2.

86. *Bush*, 531 U.S. at 113 (2000) (Rehnquist, C.J., concurring) (quoting McPherson v. Blacker, 146 U.S. 1, 27 (1892)).

87. *Id.*

88. *Id.* at 113.

89. *Id.* at 114.

90. *Id.* at 122.

91. 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 LAW BLOG (May 3, 2023, at 10:09 ET), https://electionlawblog.org/?p=135958 [https://perma.cc/G5M9-X6LB].

92. *Id.*

approach of focusing on the Equal Protection Clause secured a five-justice majority. Chief Justice Rehnquist's opinion served as secondary grounds for the decision for only three justices.

The dissenting opinion of Justice Souter appeared to admit Article II might be implicated, but it found no "substantial question under Article II."[93] He examined the statute to determine whether the state court's interpretation "transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the 'legislature' within the meaning of Article II," and he found that it did not.[94] Justices Stevens, Ginsburg, and Breyer joined this part of the opinion.[95]

B. Academic Criticism of the Legislature Thereof Clause Rationale

Legal scholars extensively criticized Chief Justice Rehnquist's opinion. Professor Jack Balkin argued that Chief Justice Rehnquist misunderstood *McPherson v. Blacker*. There, the Supreme Court upheld Michigan's division into districts because the state legislature is the "supreme authority except as limited by the constitution of the State."[96] In Professor Balkin's view, Chief Justice Rehnquist overread *McPherson* to constrain the Florida Supreme Court from interpreting Florida election law. To do so would be to assume that "one can divorce the Florida legislature from every other element of the Florida lawmaking process."[97] Chief Justice Rehnquist erred in arguing that "any substantial change in the law violated Article II" when "*McPherson* simply does not hold this."[98]

Professor Issacharoff considered Chief Justice Rehnquist's concurrence to be overbroad, a ruling that prohibited alterations to voting procedures that would otherwise be lawful outside the context of a presidential election.[99] Further, Professor Issacharoff foresaw a difficulty in the enforcement of the Legislature Thereof Clause: state election procedures are determined by county officials, so this framework would subject every local and state decision to federal judicial scrutiny.[100]

Professor Balkin raised a similar concern. In his view, Chief Justice Rehnquist's idea that a state supreme court could interpret the law as

93. *Bush*, 531 U.S. at 133 (Souter, J., dissenting).

94. *Id.*

95. *See id.* at 129. Justice Souter evaluated the Article II claim in Part II of his opinion. Justice Breyer joined all of Justice Souter's opinion. Justices Stevens and Ginsburg joined all but Part III of the decision, the part that dealt with the Equal Protection Clause claim.

96. *McPherson*, 146 U.S. at 25 .

97. Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE. L.J. 1407, 1414 (2001).

98. *Id.* at 1414 n.28 (emphasis omitted).

99. Issacharoff, *supra* note 59, at 645.

100. *Id.* at 646-47.

long as it does not impermissibly change the law "enters the realm of metaphysical speculation" and might not even reflect what Chief Justice Rehnquist himself really believed.[101] The law always changes with interpretations as ambiguities are clarified and more judicial explanations are added. What Chief Justice Rehnquist really believed, Professor Balkin suggested, is that the Florida Supreme Court could not take a "significant departure"[102] or "impermissibly distort[]"prior law.[103] Further, Professor Balkin argued that some of Chief Justice Rehnquist's interpretations of Florida law were "markedly worse" than the state supreme court's interpretations.[104]

Others saw hypocrisy in the methodological approach. Professor Jesse Choper asserted that Chief Justice Rehnquist was "strikingly at odds with [his] broader views on federalism" and intervened when it was not required because "the Florida court's alleged impropriety would stand had the Supreme Court declined to intervene."[105] Professor Robert Schapiro saw the opinion as one that "represents a major break from fifty years of settled law," an "assault on certain aspects of the post-New Deal constitutional order."[106]

Other critiques were more sweeping. Professors Vikram Amar and Alan Brownstein flatly stated "[t]he bottom line is that neither text nor structure, nor history nor precedent—properly understood—compel" the sweeping Article II reading that Chief Justice Rehnquist advanced in *Bush v. Gore*.[107] Similarly, Professor Michael Klarman called Chief Justice Rehnquist's Article II rationale doctrinally "odd" and bereft of justification, noting that the concurrence "offer[ed] no originalist or functionalist justification for its Article II argument," resting instead on a "bare textualist claim [that] is almost laughable."[108] Professor Tribe observed that Chief Justice Rehnquist "adopted [the Bush team's] objection wholesale without any independent analysis of the statutory text," claiming that Chief Justice Rehnquist merely echoed the arguments of Bush's lawyers rather than engaging in a neutral examination of Florida law.[109]

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101. Balkin, *supra* note 97, at 1416.

102. *See id.* at 1416-17 (quoting *Bush*, 531 U.S. at 113).

103. *Id.*

104. *Id.* at 1425.

105. Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 348 (2001).

106. Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89, 89, 91 (2002).

107. Vikram Amar & Alan Brownstein, Bush v. Gore *and Article II: Pressured Judgment Makes Dubious Law*, 48 FED. LAW. 27, 33 (2001).

108. Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1734-36 (2001).

109. Tribe, *Mirrors*, *supra* note 10, at 199.

C. *Revitalization in* Moore v. Harper

In the years since *Bush v. Gore*, cases brought before the United States Supreme Court occasionally tried to reanimate the legal theory behind Chief Justice Rehnquist's opinion. Despite academic criticism, the opinion had the backing of three Supreme Court justices, and it might carry weight in future cases. And even though it was only a concurring opinion, litigants repeatedly brought cases before the Court invoking the argument in this opinion.

In 2004, the Supreme Court—over the dissenting views of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—denied certiorari in a case that raised a claim under Article I's Legislature Thereof Clause involving redistricting in Colorado.[110] In 2015, the Supreme Court decided *Arizona State Legislature v. Arizona Independent Redistricting Commission*, in which the Supreme Court held the "Legislature" in Article I could include the people acting by initiative.[111] Justice Ginsburg, on behalf of five justices and over a pointed dissenting opinion by Chief Justice Roberts, concluded Arizona's redistricting commission could draw the state's congressional districts, because the people could authorize the creation of the commission and its rules via initiative without the institutional legislature's involvement.[112]

Cases continued to arise before the Court, and various justices expressed interest in them, particularly around the 2020 election. In *Republican Party of Pennsylvania v. Boockvar*, Justice Alito, joined by Justices Thomas and Gorsuch, expressed interest in evaluating a decision of the Pennsylvania Supreme Court that extended the statutory deadline for mail-in ballots to be received by citing a broad provision of the state constitution.[113] In *Democratic National Committee v. Wisconsin State Legislature*, a federal district court extended Wisconsin's deadline for receiving absentee ballots.[114] The Supreme Court permitted a stay of that decision to remain in effect, and Justice Kavanaugh wrote separately to note that "federal courts" must "ensure that state courts do not rewrite state election laws."[115]

More justices seemed to be interested in evaluating what the Legislature Thereof Clauses meant and what constraints these clauses placed upon courts in the interpretation of state laws that regulated

110. Colo. Gen. Assembly v. Salazar, 541 U.S. 1093, 1093 (2004) (mem.) (Rehnquist, C.J., dissenting).

111. 576 U.S. 787, 817-18 (2015)

112. *Id.* at 824.

113. 141 S. Ct. 1, 1 (2020) (Alito, J., statement with respect to denial of the motion to expedite consideration of certiorari).

114. Democratic Nat'l Cmte. v. Bostelmann, 488 F.Supp.3d 776, 803 (W.D. Wis. 2020).

115. Democratic Nat'l Cmte. v. Wisc. State Legislature, 141 S. Ct. 28, 34-35 n.1 (2020) (Kavanaugh, J., concurring in the denial of application to vacate stay).

federal elections. The Supreme Court's decision to grant certiorari in *Moore v. Harper* gave it the opportunity to do so.[116]

*Moore v. Harper*arose after North Carolina legislature enacted a congressional redistricting plan after the 2020 census.[117] The plan was challenged in state court by voters and advocacy groups as an unconstitutional partisan gerrymander under the North Carolina Constitution.[118] The North Carolina Supreme Court held that the plan violated the state constitution.[119] But in doing so, the state supreme court construed four provisions of the state constitution—the Free Elections Clause, the Equal Protection Clause, the Free Speech Clause, and the Freedom of Assembly Clause—in combination to prohibit partisan gerrymandering.[120] The legislature petitioned the Supreme Court and argued that the Elections Clause granted state legislatures independent and exclusive authority to regulate federal elections.[121] The legislature claimed that it should be free from interference by state courts and from regulation by the state constitution.[122]

Chief Justice Roberts, writing for the majority, reaffirmed longstanding precedents, including *Smiley v. Holm*[123] and *Arizona State Legislature*,[124] which held that state legislatures act under the Elections Clause within the bounds of their state constitutions and remain subject to review by state courts.[125] The Court explained that legislatures derive their authority from state constitutions and must conform to the procedural and substantive constraints those constitutions impose.[126]

Although the Court confirmed that state courts have the authority to enforce state constitutional provisions when reviewing federal election laws, the Court also underscored that the Elections Clause independently constrains state courts. Part V of the opinion in *Moorev. Harper* opens, "Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein."[127] And later, Chief Justice Roberts notes, "We hold only that state courts may not transgress the ordinary bounds of judicial review such that they

116. 600 U.S. 1, 1 (2023).
117. *Id.* at 10.
118. *Id.* at 11.
119. *Id.* at 11-12 (citing Harper v. Hall, 868 S.E.2d 499 (2022)).
120. *Id.* at 8-9.
121. *Moore*, 600 U.S. at 26.
122. *Id.*
123. 285 U.S. 355 (1932).
124. *Ariz. State Legislature*, 576 U.S. 787 (2015).
125. *Moore*, 600 U.S. at 26-30.
126. *Id.* at 30-32.
127. *Id.* at 34.

arrogate to themselves the power vested in state legislatures to regulate federal elections."[128]

In explaining that the Elections Clause constrains state court, Chief Justice Roberts relied on *Bush v. Gore*:

> Chief Justice Rehnquist, joined in a concurring opinion by Justice THOMAS and Justice Scalia, acknowledged the usual deference we afford state court interpretations of state law, but noted "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." Id., at 114. He declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that "impermissibly distorted them beyond what a fair reading required." Id., at 115. Justice Souter, for his part, considered whether a state court interpretation "transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the 'legislature' within the meaning of Article II." Id., at 133 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).[129]

Chief Justice Roberts elevated the principles articulated in Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* into the majority holding in *Moore v. Harper*.[130] He also used the fact that Justice Souter, joined by three other justices, in dissent in *Bush v. Gore* engaged with the legal claim with respect to the power of the state courts as a legitimate claim.[131] And while *Moore v. Harper* involved the Legislature Thereof Clause of Article I, not Article II as relied upon in *Bush v. Gore*, the Court treated the two as coextensive. [132].

Six justices joined this opinion in *Moore v. Harper*. Justice Thomas, joined by Justices Alito and Gorsuch, dissented because they believed the case was moot.[133] Justice Thomas also expressed concern that the majority had expanded *Bush v. Gore* to a "new field," an "uncertain path" that would cause Justice Thomas to "hesitate" before committing to this path.[134] While Justice Thomas had joined the concurring opinion in *Bush v. Gore*, he worried that the majority was now taking that opinion *too far*. That is, while Justice Thomas did not repudiate his views, he acknowledged that the majority had extended *Bush v. Gore* to "large swaths of state constitutional law."[135]

Justice Kavanaugh concurred, advocating for a deferential but meaningful federal review of state court decisions in election cases. He outright recommended adoption[136] of Chief Justice Rehnquist's opinion

128. *Id.* at 36.
129. *Id.*
130. *Moore*, 600 U.S. at 36.
131. *Id.*
132. *Id.*
133. *Id.* at 40-41 (Thomas, J., dissenting).
134. *Id.* at 64-65.
135. *Moore*, 600 U.S. at 65.
136. *Id.* at 39 (Kavanaugh, J., concurring).

from *Bush v. Gore* as a framework: "Chief Justice Rehnquist's standard is straightforward: whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required.'"[137] Because the majority opinion did not offer more detail of what the "ordinary bounds of judicial review" look like, Justice Kavanaugh's opinion offers a valuable, and perhaps ultimately influential, context even further elevating *Bush v. Gore*.

Legal commentary after *Bush v. Gore* often treated Chief Justice Rehnquist's opinion as something radical—not simply the result he reached, but the fact that he found a legal theory in the Legislature Thereof Clause that could constrain state courts and invite federal review of state court decisions in the first place. By 2023, however, an outright majority of the Supreme Court embraced the theory behind Chief Justice Rehnquist's concurrence. It affirmed that the Legislature Thereof Clauses constrained state courts when construing state statutes regulating federal elections.

True, *Moore* has not yielded an influx of federal courts second-guessing what state courts have done. Chief Justice Rehnquist's opinion in *Bush v. Gore* emphasized that federal review should be "deferential" to state courts.[138] Chief Justice Roberts's opinion in *Moore* likewise acknowledged that judges may engage in "ordinary" judicial review—and only when a state courts "arrogate[s]" legislative power should a federal court step in.[139] It is possible that few judicial decisions are so egregious. And state courts are also on notice. State courts can explain how their decisions naturally follow from their existing precedent.[140] But Chief Justice Rehnquist's opinion in *Bush v. Gore* is no longer an outlier. It has been elevated to a majority Supreme Court holding, and it has been extended to both presidential and congressional elections.

III. ELECTORAL VOTE COUNTING DEADLINES

The Equal Protection Clause and the Legislature Thereof Clause provided two substantive grounds for the Court's decision in *Bush v. Gore*. But other elements of the opinion attracted scrutiny. Another important—if contentious—proposition implicated the timeline for the recount. More specifically, when must presidential election disputes end?

137. *Id.* at 38 (quoting *Bush*,531 U.S. at 115 (Rehnquist, C.J., concurring)).

138. *Bush*,531 U.S. at 114 (Rehnquist, C.J., concurring).

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

140. *See, e.g.*, Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 702-06 (2002).

A. The Identification of a December 12 Deadline

The Supreme Court granted certiorari in *Bush v. Gore* on December 9, 2000.[141] It heard oral argument on December 11 and issued its decision on December 12.[142] Presidential electors would meet to vote on December 18, and Congress would count those electoral votes on January 6, 2001.[143]

Near the end of the majority's per curiam decision in *Bush v. Gore*, it offered this explanation about the timeline in the case:

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U. S. C. § 5. 772 So. 2d, at 1289; see also *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.
>
> Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. *See post*, at 134 (Souter, J., dissenting); *post*, at 145-146 (Breyer, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U. S. C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).[144]

The majority here deferred to the Florida Supreme Court's conclusion about timing. That conclusion turned on what the Electoral Count Act of 1887 provided with respect to its "safe harbor" deadline.

After the deeply contested presidential election of 1876, Congress added a provision of law to incentivize states to resolve disputes about presidential elections and to bind Congress in the counting of electoral votes. The "safe harbor" provision of the Electoral Count Act instructed Congress that if a state provided for a "final determination of any controversy or contest" in its selection of electors at least six days before the electors met, "such determination . . . shall be conclusive" in

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

142. *Id.* at 98.

143. *Id.* at 143-44 (Ginsburg, J., dissenting).

144. *Id.* at 110-11.

Congress.[145] In essence, Congress would defer to state election results in presidential elections if the state could resolve the disputes in a timely fashion.

On November 21, 2000, in *Palm Beach County Canvassing Bd. v. Harris*, the Florida Supreme Court indicated that Florida voters were to "participat[e] fully in the federal election process," citing 3 U.S.C. §§ 1-10—which included §5, the "safe harbor" provision of the Electoral Count Act of 1887.[146] "Consistent with the Florida election scheme," returns could be amended from a recount unless they are "so late" that they "preclude" full participation.[147]

This decision went to the United States Supreme Court. In a unanimous decision on December 4, *Bush v. Palm Beach County Canvassing Board*, the Court stated that the "state legislature has provided for final determination . . . made at least six days prior to" the time that electors meet.[148] The Court remanded the case back to the Florida Supreme Court for further proceedings.[149] Its return to the Supreme Court became *Bush v. Gore*.

By December 12—six days before the electors met—time had run out for additional proceedings. The Florida Supreme Court indicated, as understood by the United States Supreme Court, that December 12 should be the deadline.[150] The unanimous decision of the United States Supreme Court on December 4 suggested as much.[151] But by December 12, some other justices had second thoughts.

Justice Souter called the Section 5 issue "not serious."[152] Section 5 was a rule that bound Congress, and states were not required to comply with it. Instead, Souter would have required resolution by December 18.[153] Justice Breyer likewise found that it might be possible to finish counting by December 18.[154] Justice Stevens' opinion pointed to the Hawaii election of 1960, in which Hawaii finalized the appointments of a slate of electors on January 4, 1961—long after the "safe harbor" deadline.[155] Justice Ginsburg found that January 6 was the

145. 3 U.S.C. § 5 (2000) (superseded 2022).

146. *Bush*, 531 U.S. at 110 (quoting Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1237 (Fla. 2000)).

147. *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d at 1239.

148. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 77-78 (2000) (per curiam).

149. *Id.* at 78.

150. *Bush*, 531 U.S. at 110 (citing *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d at 1237).

151. *Palm Beach Cnty., Canvassing Bd.*, 531 U.S. at 77-78 ("If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors.").

152. *Bush*, 531 U.S. at 130 (Souter, J., dissenting).

153. *Id.* at 135.

154. *Id.* at 146-47 (Breyer, J., dissenting).

155. *Id.* at 127 (Stevens, J., dissenting).

true date of "ultimate significance," the date when Congress would meet to count votes.[156]

The dissenting opinions offered varying possibilities about a later deadline. If a later deadline had been accepted, Gore might have continued to fight. The deadline proved fatal for Gore's chances. He conceded to Bush with the recognition there was no viable way forward—in Gore's words, "the finality of this outcome."[157] This timeline proved critical to the litigation. A firm deadline prevented additional opportunities to proceed with the recount after the Court's decision. The "safe harbor" date functioned as a de facto hard deadline.

B. Academic Criticism of a December 12 Deadline

Legal scholarship critical of *Bush v. Gore* often adopted the dissenters' view. Professor Tribe, who had represented Gore, slammed the "woeful inadequacy" of the decision to shut down the Florida recount process on December 12.[158] Professor Tribe posted that "the Court's remedy has been criticized by nearly every commentator to consider the issue."[159] Professor Tribe argued,

> You can read the Florida statutes—which deal with presidential and gubernatorial elections in the same set of provisions—backwards and forwards without finding even the slightest clue that the state legislature ever decided that all recounts in a contested presidential election must stop by December 12 or, for that matter, at any time before the electors meet to give their votes on December 18, or even before Congress starts to count the votes on January 6.[160]

For Professor Tribe, these dates were not noteworthy individual dates, but mere intervals before the ultimate dates of significance, January 6:

> For the Court decreed an election outcome that transmuted the underlying count into a presidency and, in the process of so doing, *created* divisions—between the count and recount; between December 12 and December 18; between December 18 and January 6—where none in fact existed in reality. Each stage was one in a continuous process that did not end (and *could not* end in a constitutional sense) until Congress had tabulated the votes of the electors.[161]

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156. *Id.* at 144 (Ginsburg, J., dissenting).

157. 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/6QB7-RG6N].

158. Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMM. 571, 589 (2002).

159. *Id.*

160. Tribe, *Mirrors*, *supra* note 10, at 265-66.

161. *Id.* at 270.

Professor Jack Balkin noted that the "safe harbor" deadline "is merely a convenience and not a requirement."[162] He explained, "There are many examples of electoral votes being finalized after the safe harbor period, so missing the safe harbor deadline would hardly be an unmitigated disaster."[163] Hawaii in 1960 was one example, but in several other states even in 2000 they missed the deadline. The true deadline, he quoted from officials at the National Archives, would be December 18.[164] Professor Balkin admits a prudential case could be made that a fight in Congress on January 6 would have been "especially bitter" and problematic—but only if Bush would have won anyway.[165]

Professor Balkin also argued that Chief Justice Rehnquist was overconfident that the Florida Legislature wanted to take advantage of the "safe harbor" provision. The text of the Florida Election Code was completely silent; December 18 was the actual deadline; the Florida legislature planned to certify a slate of electors that would change the law after the November 7 election, forsaking the "safe harbor" position; and the Supreme Court's own action in staying the recount and then issuing the opinion on December 12 is actually what impeded the recount.[166]

Professor Beth Garrett considered the Florida Legislature's purported intent to take advantage of the "safe harbor" deadline "probably fictive," because she thought it unlikely that state election code drafters knew about the federal provision.[167] Professor Kim Lane Scheppele similarly took issue with the Supreme Court's approach. She argued that it effectively turned the "safe harbor" provision into a "blockaded port" that "prohibited recount ships from exploring the waters beyond the safe harbor."[168] The Court did so despite no indicia of intent from the Florida Legislature and the Florida Supreme Court's indication that they would go beyond it if there were important considerations of fairness at stake.[169] Professor Scheppele saw this as the failure of the rule of law here. If the Gore team attempted to create a uniform set of

162. Balkin, *supra* note 97, at 1431.

163. *Id.* at 1421.

164. *Id.* at 1422.

165. *Id.* at 1436-39.

166. *Id.* at 1422-23.

167. Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 989 (2001).

168. Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1427 (2001).

169. *Id.* at 1427. *See also id.* at 1427 n.176 ("Given 3 U.S.C. § 15, there was absolutely no reason for the Supreme Court to step in and stop the election. The law had not yet run out. Both the Constitution in the Twelfth Amendment and federal law under 3 U.S.C. § 15 still defined what should happen next. It was left to Congress to decide, in the end, whether the recount procedures produced an adequate result, which would be determined in the Congress's judgment about whether to accept a particular slate of electors. The Supreme Court's decision preempted this congressional function.").

counting standards, it would miss the deadline; if it attempted to meet the deadline, the standards would fail. Constitutional courts, Scheppele asserted, seek to resolve (and, when necessary, remove) contradictions like these. Instead, the Supreme Court "astounding[ly]" "participate[d] actively in the creation of such an impossibility."[170]

C. The Electoral Count Reform Act Codifies a Fixed Deadline

Despite this criticism of the deadline, other academics acknowledged the benefit of a fixed timeline,[171] and federal courts began to adopt the "safe harbor" deadline as a firm deadline for resolving disputes.[172] In 2016, Green Party candidate Jill Stein sought recounts in Wisconsin, Michigan, and Pennsylvania after the election. In a lawsuit in Michigan over the recount, the Sixth Circuit concluded, "Federal law requires that all disputes over a state's delegation to the Electoral College be resolved by December 13, 2016"[173]—that is, the "safe harbor" deadline. And in litigation in Pennsylvania, a federal court rejected Stein's effort to pursue a recount: "[G]ranting the relief Plaintiffs seek would make it impossible for the Commonwealth to certify its Presidential Electors by December 13 (as required by federal law)."[174] Here, too, a federal court relied upon the "safe harbor" deadline, later citing *Bush v. Gore*.[175] The court explained, "Pennsylvania has opted into the federal 'safe harbor' that allows it to determine conclusively its Presidential Electors through state procedures."[176] But the court in Pennsylvania made no such examination of whether Pennsylvania had actually opted into this deadline. The legislature enacted no statute with an express deadline, and no state courts had concluded so. In these two court cases, however, federal courts took the "safe harbor" deadline as the federal deadline for resolving disputes over presidential election.

The invitation of the dissenting opinions of *Bush v. Gore* yielded catastrophic results in the 2020 election. As litigation persisted across states in 2020, legal memoranda relied upon the dissenting opinions in *Bush v. Gore* to claim the deadline was not the "safe harbor" deadline, but something later. Kenneth Chesebro's memorandum to James

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170. *Id.* at 1428.

171. *See, e.g.*, Daniel P. Tokaji, *An Unsafe Harbor: Recounts, Contests, and the Electoral College*, 106 MICH. L. REV. FIRST IMPRESSIONS 84, 84 (2008).

172. *See generally* Derek T. Muller, *Restraining Judicial Application of the 'Safe Harbor' Provision in the Electoral Count Act*, 81 OHIO ST. L.J. ONLINE 221, 221 (2020).

173. Stein v. Thomas, 672 F. App'x 565, 568 (6th Cir. 2016) (per curiam).

174. Stein v. Cortés, 223 F. Supp. 3d 423, 426 (E.D. Pa. 2016).

175. *Id.* ("Pennsylvania thus must certify its election results tomorrow to retain its right to make the final determination of its Electors. See Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam).").

176. *Id.*

Troupis in Wisconsin, for instance, explained that the "real" deadline was January 6, not December 8.[177] He later explained,

> Similar[]ly, Justice Ginsburg noted that the date which has "ultimate significance" under federal law is "the sixth day of January," the date set by 3 U.S.C. § 15 on which the Senate and House determine "the validity of electoral votes." Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting).[178]

Citing the precedent in Hawaii from 1960, the Chesebro memoranda advanced the argument that legal disputes could proceed into January, and that disputes should be resolved in Congress.

This strategy, in one respect, was not wrong. *Bush v. Gore* looked at the deadline as the state of Florida set it. True, federal courts did later extend the deadline to other contexts, regardless of whether the state legislature had preferred the deadline. But the invitation from the dissenting justices in *Bush v. Gore* to extend contests well before the "safe harbor" deadline now had legs. And in the absence of a legislative directive to the contrary, the "safe harbor" was simply a rule guiding Congress, not a firm rule.

And while some federal courts had embraced the "safe harbor" deadline as a final deadline for state resolution of certifying electoral votes, it was not universally acknowledged. Litigation strategy after the 2020 election brought to the fore the perils of the *Bush v. Gore* dissenting opinions. Congress would step in to clarify that the deadline was, in fact, a firm and fixed deadline. Congress enacted the Electoral Count Reform and Presidential Transition Improvement Act of 2022. One of the Act's many clarifying features was a new, firm deadline for certifying elections. The newly-amended 3 U.S.C. § 5 now reads:

> Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.[179]

177. Memorandum from Kenneth Chesebro to Judge James R. Troupis, Attorney for Trump Campaign, Re: The Real Deadline for Settling a State's Electoral Votes (Nov. 18, 2020), https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-November-18-2020.pdf [https://perma.cc/EGY7-88KP].

178. Memorandum from Kenneth Chesebro to James R Troupis, Attorney for Trump Campaign, Re: Important That All Trump-Pence Electors Vote on December 14 (Dec. 6, 2020), https://int.nyt.com/data/documenttools/chesebro-dec-6-memo/ce55d6abd79c2c71/full.pdf [https://perma.cc/U79W-VB9K].

179. 3 U.S.C. § 5(a)(1).

In the event a state fails to meet this deadline, ordinary relief is available in the courts, including mandamus, to ensure a state submits its vote totals before the electors meet.[180]

Congress turned what was once a contested assumption into an explicit deadline. In short, Congress vindicated the majority opinion in *Bush v. Gore*. Lower federal courts had already begun to adopt the *Bush v. Gore* principle that disputes over certification of electoral votes must be resolved conclusively six days before the electors meet. That principle has now been codified into law. The contrary suggestions in the dissenting opinions in *Bush v. Gore* that later dates are more appropriate have been rejected.

Of course, *Bush v. Gore* turned on an interpretation of an older statute and the will of a state legislature. One could also rightly critique the holding of the Court in 2000 as inconsistent with the text of the Act and inconsistent with the will of the legislature. The Electoral Count Reform Act does not purport to reflect which view in 2000 was the appropriate interpretation of that statute. But the fallout in subsequent elections, particularly 2020, revealed to Congress that the majority's view was certainly the better policy, and it is now the law governing presidential elections.

IV. JUDICIAL SUPREMACY AND FINALITY IN PRESIDENTIAL ELECTIONS

The Court's decision in *Bush v. Gore* effectively ended any viable path for Gore to proceed with his contest—at least, ended any viable path in the courts or in a state administrative recount. The United States Supreme Court had rendered a decision that declared the present state of the recount unconstitutional. It held there was a fixed deadline to resolve the recount, a deadline that had been reached. Gore ended his legal challenges, and the recount ceased. In theory, another avenue to challenge the election remained open to Gore. He could have challenged the results in Congress.

A. Contested Finality in Bush v. Gore

The Electoral Count Act anticipated that there may be disputes over electoral votes. Indeed, the fraught presidential election of 1876 with deep controversies over the true winning slate of electoral votes in multiple states drove Congress to enact the Act in 1887. Members of Congress could object to the counting of electoral votes under specific circumstances:

> [N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified

180. *See* Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WM. & MARY L. REV. 327, 364-65 (2023).

> to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.[181]

But the Act's language was complicated. It conditioned counting on to those votes that were "regularly given." At the time, that meaning was understood to mean cast pursuant to law.[182] Votes "lawfully certified to according to section 6"—certified by the governor after appointment and after any controversy relating to appointment—should also be counted, if only one slate of electoral votes had been received.[183] If multiple slates "purporting to be" a return from a state were received, the Act gave rules for how to count them.[184] Objections should be in writing, "and shall state clearly and concisely, and without argument, the ground thereof."[185] Any objection needed to be signed by one Representative and one Senator.[186] After the objection, the houses would separate for debate of up to two hours, and a majority of both houses was required to sustain any objection.[187]

The Act was, mercifully, almost entirely unused in Congress after enactment. In 1969, members of Congress objected to whether to count one electoral vote in North Carolina that was cast by a "faithless elector," one intended to support Richard Nixon but who cast a vote for George Wallace.[188] Neither house voted to sustain the objection.[189] That was its only use.

It was unclear whether Congress retained the power—as a constitutional matter or as a statutory matter—to engage in a substantive judgment over the legitimacy of certified electoral votes. Historically, Congress had exercised such power. It did so in the election of 1876, when it needed to discern between two purportedly certified slates of electoral votes.[190] It did so in the election of 1872, too.[191] The Act of 1887, however, certainly sought to make it more difficult for Congress to engage in such substantive judgment. And it was plausibly read to

181. 3 U.S.C. § 15 (2000) (amended 2022).

182. Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1534-35 (2021).

183. 3 U.S.C. § 15 (2000) (amended 2022).

184. *Id.*

185. *Id.*

186. *Id.*

187. 3 U.S.C. § 17 (2000) (amended 2022).

188. 115 CONG. REC. 146 (1969).

189. *Id.* at 170, 246.

190. *See* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 581-82 (2004).

191. *See* Muller, *Regularly Given*, *supra* note 182, at 1545-50.

suggest that if a state only certified one slate of electoral votes, Congress held no power to second-guess that determination.[192]

Nevertheless, dissenting justices remained open to the possibility that Congress could—and even should—enter the fray, and that courts should stay out of it. In dissent, Justice Souter regretted that alternative options could not play out, including the possibility that "political tension could have worked itself out in the Congress following the procedure provided in 3 U. S. C. § 15."[193] He emphasized that if a dispute arose over the deadlines to certify election results, "even that determination is to be made, if made anywhere, in the Congress."[194] In evaluating the Equal Protection Clause issue, Souter first prefaced his remarks, "It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute."[195]

Justice Ginsburg emphasized, "none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on 'the sixth day of January,' the validity of electoral votes. § 15."[196] Justice Breyer argued that both the Twelfth Amendment and the Electoral Count Act of 1887 commit counting of electoral votes to Congress, and "there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think that the Constitution's Framers would have reached a different conclusion."[197] That is, there was reason to think the Supreme Court would not have the last word on the matter. It might ultimately be left to Congress.

B. Academic Criticism of Federal Court Intervention

Academic skeptics critiqued the Court's intervention in this dispute, arguing alternatively it was inappropriate for the Court to weigh in and that dispute resolution was best left to Congress. Professor Tribe noted,

> There is a powerful case indeed for the Court playing no role other than to protect Congress's decisionmaking function—that is, for treating the matter as a political question textually committed to Congress under the Twelfth Amendment, rather than a legal question properly resolved by a court.[198]

192. Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 517 & n.231 (2010).

193. *Bush*, 531 U.S. at 129 (Souter, J., dissenting).

194. *Id.* at 130.

195. *Id.* at 133.

196. *Id.* at 144 (Ginsburg, J., dissenting) (quoting 3 U.S.C. § 15).

197. *Id.* at 153-55 (Breyer, J., dissenting).

198. Tribe, *Mirrors*, *supra* note 10, at 277.

According to Professor Tribe, the House Committee that passed the Electoral Count Act of 1887 specified that the power to resolve election disputes "is *not* entrusted" to the Court but rather that it "rests with the two Houses, and there is no other constitutional tribunal."[199] Professor Tribe believed that the Court opted "to short-circuit the elaborate set of political processes" as a way to recast Bush's victor for the history books.[200]

Professor Briffault saw the Supreme Court's intervention to run afoul of traditional conceptions of election federalism. Equal protection had been applied in guaranteeing the casting and counting of ballots, but the administration of elections was something else.[201] Federal courts deferred to state and local control over run-of-the-mill problems and would only intervene when local policies "interfe[e] with the ability to cast a ballot or have it properly counted."[202]

Professor Erwin Chemerinsky wrote an article entitled "*Bush v. Gore* Was Not Justiciable."[203] Among other things, Professor Chemerinsky argued that the matter was a "political question," a "commitment" to Congress to count electoral votes.[204] Professor Choper agreed, arguing that the Electoral Count Act, pursuant to the Twelfth Amendment, "assigns to Congress the authority and responsibility to settle disputes remaining after a state has tried to resolve electoral contests through 'judicial' (which Florida expressly chose to do) or other means."[205]

Professor Garrett believed the Court robbed Congress of utilizing its statutory dispute resolution mechanism. The Electoral Count Act provided an ex ante framework to resolve issues like this one. An approach consistent with the Act would abide by the political compromises hashed out in Congress, rather than an approach where the judiciary intervened.[206] Professor Issacharoff suggests the same:

> It is entirely fair to read 3 USC § 5 as codifying an important principle of electoral democracy requiring the rules of engagement to be explicated ex ante and to be fairly immutable under the strain of electoral conflict. The basic premise is that election officials, who are most likely partisan figures, cannot be trusted to improvise electoral remedies once

199. *Id.* at 279 (quoting H.R. REP. NO. 49-1638, at 2 (1886) (as submitted by Rep. Caldwell for the Select Committee on the Election of President and Vice-President)).

200. *Id.* at 287.

201. Briffault, *supra* note 42, at 349.

202. *Id.* at 354-55.

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

204. *Id.* at 1107.

205. Choper, *supra* note 105, at 341-42.

206. Garrett, *supra* note 167, at 981. Professor Garrett here cites Rep. Cooper's statement: "I think that it would be wise if the contest should be made in the face of existing law rather than that the law should be made in the face of the existing contest." 18 CONG. REC. 47 (1886).

> the impact of their decisions is known and the temptation toward self-serving behavior becomes irresistible. Such an approach would have the advantage of fitting in well within a theory of democratic governance that relies heavily on procedural precommitments to insure fairness.[207]

To that end, both Professors Garrett and Issacharoff lamented that the Supreme Court inserted itself when the political process could have played out. Practically, Professor Garrett noted, the Justices' action may have fed the self-fulfilling prophecy of amplifying people's distrust of Congress.[208]

C. Empowering the Federal Courts to Resolve Presidential Election Disputes

The suggestions in the dissenting opinions in *Bush v. Gore* that Congress could independently evaluate the validity of electoral votes did not go unnoticed. On January 6, 2001, members of the House attempted to lodge seriatim objections in the joint session where the electoral votes were being counted.[209] An objection at that time required one member of the House and one member of the Senate to join an objection.[210] With each attempted objection, the House member admitted to the presiding officer and President of the Senate[211]—Vice President Al Gore—that no Senator had joined the objection. After these serial failed attempts, the votes were counted.

The attempted objections were the first since 1969.[212] But they would not be the last. After Bush won re-election in 2004, a new objection would be lodged in Congress during the counting of votes in 2005. One member of the House and one member of the Senate objected to the counting of Ohio's electoral votes.[213] The chambers separated for two hours of debate, and the objection failed.[214]

The next two presidential elections saw no attempted objections. But upon the election of another Republican, this time Donald Trump, Democratic members of Congress again attempted to object. They attempted to object to the electoral votes from Alabama, Florida, Georgia, Michigan, Mississippi, North Carolina, South Carolina, West Virginia, Wisconsin, and Wyoming, with myriad objections ranging

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207. Issacharoff, *supra* note 59, at 646.

208. Garrett, *supra* note 167, at 983.

209. 147 CONG. REC. 123 (2001).

210. 3 U.S.C. § 15 (2000) (amended 2022).

211. U.S. CONST. amend. XII. *See also* Derek T. Muller, *The President of the Senate, the Original Public Meaning of the Twelfth Amendment, and the Electoral Count Reform Act*, 73 CASE W. RSRV. L. REV. 1023, 1023-24 (2023).

212. 115 CONG. REC. 198-201 (1969).

213. 151 CONG. REC. H84-86 (daily ed. Jan. 6, 2005).

214. 151 CONG. REC. H127 (daily ed. Jan. 6, 2005); 151 CONG, REC, S56 (daily ed. Jan. 6, 2005).

from foreign interference in the election to violations of the Voting Rights Act.[215] These objections failed for want of a Senator to join any of the attempted objections.[216] In 2021, Republicans turned around and objected. They secured bicameral support for objections to Arizona and Pennsylvania, citing allegations of fraud and certain judicial decisions in those states, and members of the House attempted to object to other states.[217] These objections likewise failed.[218]

The dissenting opinions in *Bush v. Gore* suggested that resolution of disputes was best left to the political process and to Congress. The experience after 2000, in contrast, revealed that the political process and Congress were uniquely poor places to resolve contentious election disputes. Congress failed to take the Electoral Count Act seriously. Instead, members of Congress saw that the Act permitted objections, and members objected, without heeding the remainder of the constraints the Act put upon their conduct. Likewise, the violent riots at the Capitol on January 6, 2021, were a product of a suggestion to the public that Congress could simply exert its will upon the counting of electoral votes.

Congress had increasingly abused its power to count electoral votes as more members of Congress sought to revisit final election results. And Congress would prefer for the judicial process to resolve disputes—just as the courts had done in *Bush v. Gore*.

The Electoral Count Reform Act of 2022 enhanced the power of the courts and reduced the power of Congress in resolving disputes about presidential electors. It gave priority to state administrative or judicial determinations with respect to certifications. For purposes of counting electoral votes, the Act treats as "conclusive" a certificate of ascertainment of appointment of electors out of a state process, and it likewise permits certificates issued or revised pursuant to state or federal judicial relief to be treated as conclusive.[219] When Congress now convenes to count electoral votes, it is more difficult to object, because it now requires one-fifth of the members of each chamber to join an objection rather than a single member from each chamber.[220] This new threshold makes it more difficult to even entertain the opportunity to second-guess a court judgment in an election dispute.

There are two exclusive and clearly enumerated objections: that the electors were not lawfully certified, or that the votes of the electors

215. 163 CONG. REC. H186-89 (daily ed. Jan. 6, 2017). *See also* Muller, *Regularly Given*, *supra* note 182, at 1543.

216. 163 CONG. REC. H186-89 (daily ed. Jan. 6, 2017).

217. 167 CONG. REC. H77, H82-91 (daily ed. Jan. 6, 2021); 167 CONG. REC. S31-32 (daily ed. Jan. 6, 2021). *See also* Muller, *Regularly Given*, *supra* note 182, at 1544.

218. 167 CONG. REC. H93, H112 (daily ed. Jan 6, 2017); 167 CONG. REC. S31-32, S38 (daily ed. Jan. 6, 2017).

219. 3 U.S.C. § 5(c)(1)(A) & (B).

220. 3 U.S.C. § 15(d)(2)(B)(i)(II).

were not regularly given.[221] Because Congress shall treat as "conclusive" any certification issued pursuant to a judicial order, an objection to the previously litigated substantive issues behind the certification would be improper. Congress, in other words, sought to tie its own hands and to defer to the courts, including, explicitly, the federal courts.[222]

The majority decision in *Bush v. Gore* offered a definitive resolution from a federal court. Critics lamented that the court had truncated the administrative election process with a judicial decision. They called for federal courts to remain on the sidelines, which would allow political actors and Congress to resolve disputes. Over the next twenty years, this call proved ill advised. Political actors and Congress could not be trusted to resolve disputes in a manner that was based upon law. The absence of judicial finality sowed uncertainty among the public. And Congress ultimately enacted a law ratifying the practice in *Bush v. Gore*. It bound itself to heed the decisions of federal courts with respect to presidential elections and made it more difficult to second-guess judicial determinations.

V. THE INTERIM RELIEF DOCKET STAY OF THE COUNTING OF THE BALLOTS

One more contentious decision from *Bush v. Gore*, but this decision did not appear in the December 12 opinion of the court. Instead, it came three days earlier, on December 9.

After the Supreme Court's unanimous decision in *Bush v. Palm Beach County Canvassing Board*, the Court remanded the case for the Florida Supreme Court's further consideration. The Florida Supreme Court came back with a new decision, ordering the recount to continue. Bush petitioned the United States Supreme Court once again. On December 9, over four dissenting justices, the Supreme Court stayed the order of the Florida Supreme Court and set a briefing and argument schedule. Staying the order effectively stopped the recount.

A. The Stay Order

The Court's brief order granting the stay included no explanation. This practice was unremarkable, Justice Scalia noted in a separate concurring opinion, because "it is not customary for the Court to issue an opinion in connection with its grant of a stay."[223] Today, the Court's failure to offer reasons for interim relief, such as whether to issue a

221. 3 U.S.C. § 15(d)(2)(B)(ii)(I) & (II).

222. *See, e.g.*, Jason Willick, *The Triumph and Tragedy of the Senate's Electoral Count Reform*, WASH. POST (July 26, 2022), https://www.washingtonpost.com/opinions/2022/07/26/senate-electoral-count-act-pluses-minuses/ [https://perma.cc/BPM3-ZZ8V].

223. Bush v. Gore, 531 U.S. 1046, 1046 (2000) (mem.) (Scalia, J., concurring) [hereinafter *Bush II*].

stay, has gained significant attention from academics.[224] But Justice Scalia raised two important points about the Court's order.

First, Justice Scalia noted, "[i]t suffices to say that the issuance of the stay suggests that a majority of the Court, while not deciding the issues presented, believe that petitioners have a substantial probability of success."[225] On this Justice Scalia was right. Three days later, the five justices who joined the order issuing the stay joined the per curiam opinion in *Bush v. Gore* and concluded that the recount violated the Equal Protection Clause.[226] The stay presaged the merits decision.

Second, Justice Scalia identified "irreparable harm" to Bush if a stay were not issued. He opined,

> The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.[227]

The likelihood of success on the merits informed the irreparability of the harm. If the recount method was of questionable legal validity—or, more significantly, if there was a likelihood a Court would find the recount was unlawful—then counting them under that method promised to sow public chaos. It would offer an election result with the patina of judicial approval, only to have that result reversed by a subsequent judicial decision.

Justice Stevens saw matters differently in dissent. He wrote, "[t]ime does not permit a full discussion of the merits. It is clear, however, that a stay should not be granted unless an applicant makes a substantial showing of a likelihood of irreparable harm."[228] That is, "irreparable harm" was a *necessary* condition to earn a stay from the Supreme Court. He went on, "[c]ounting every legally cast vote cannot constitute irreparable harm."[229] Stevens here assumes the merits, which likewise informs the irreparability of the harm. If they are legally cast votes—that is, if the recount mechanisms put in place by the state supreme court were appropriate—then of course the ballots should be counted, and there could not be irreparable harm. Stevens

224. *See, e.g.*, William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY. 1 (2015). A cursory Westlaw search reveals over 600 academic articles since 2013 that use the phrase "shadow docket."

225. *Bush II*, 531 U.S. at 1046 (Scalia, J., concurring).

226. *Bush*, 531 U.S. at 109-11.

227. *Bush II*. 531 U.S. at 1046-47 (Scalia, J., concurring).

228. *Id.* at 1047 (Stevens, J., dissenting).

229. *Id.* at 1047.

then went on to summarize briefly that it was "not clear" Florida violated federal law.[230]

B. Academic Criticism of the Stay

Professor Strauss took a dim view of the stay decision. To him, Justice Scalia's view of irreparable harm entailed "suppressing truthful information . . . in order to protect the President of the United States from political harm" which was outweighed by the "vastly greater" potential harm to Vice President Gore.[231] To Strauss, the only circumstances in which the balance of equities favored Bush was if the Supreme Court had already decided how it was going to rule:

> If there had been any chance that the Vice President would win in the Supreme Court, the stay was indefensible. But if it were a foregone conclusion that the Florida Supreme Court's decision would be reversed, even the administrative expense of counting might justify a stay. In addition, if five justices had already made up their minds that they were going to rule in favor of Governor Bush, the stay, however controversial, ensured that they would not be in the awkward position of reversing an apparent Gore victory.[232]

This, for Professor Strauss, would explain why the Justices granted certiorari in fewer than twenty-four hours after the Florida Supreme Court decision. The Justices did not have the requisite familiarity with the facts or understanding of what was practicable or awareness of the state law involved. Instead, they had already reached their decision before hearing the case.

Likewise, Professor Balkin wondered, "[b]ut how could Bush have been irreparably harmed by letting the recounts continue? One would think that the irreparable harm would be to Gore, who would not be able to get a recount finished in time."[233] Linda Greenhouse reflected, "[t]his was a problematic definition of irreparable injury, and in retrospect, of course, it is clear that the party who suffered irreparable harm from the stay was Vice President Gore."[234]

Professor Tribe claimed the First Amendment prohibited such reasoning: freedom of speech and of the press prevent government suppression of information simply to keep voters' minds from being

230. *Id.* at 1048.

231. Strauss, *supra* note 46, at 742-43.

232. *Id.* at 743.

233. Balkin, *supra* note 97, at 1411.

234. Linda Greenhouse, *Learning to Live with* Bush v. Gore, 4 GREEN BAG 2D 381, 386 (2001).

"irreversibly polluted" by learning of the recount manner.[235] Professor Peter Shane saw Justice Scalia's opinion as evidence of "tendentiousness."[236]

C. Stays in the Federal Courts Since Bush v. Gore

The Supreme Court's development of doctrine with respect to injunctive relief and stays, however, reveals that the majority's approach in *Bush v. Gore* was an ordinary exercise of its stay authority. It was simply one less frequently used at that time than it is today. And Justice Scalia's words on irreparable harm have gained more widespread acceptance.

First, the Court in *Nken v. Holder* (2009) emphasized that there are four "traditional stay factors" that courts should consider in deciding whether to issue a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[237] The Court here admitted, "A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one,"[238] and "There is substantial overlap between these and the factors governing preliminary injunctions."[239] And the Court continued, "The first two factors of the traditional standard are the most critical."[240] That is, likelihood of success and irreparable injury were the two most important factors.

Professor Sam Bray has noted that "likelihood of success on the merits" has come to dominate federal courts' decisions with respect to issuing a preliminary injunction.[241] In a survey of four circuits, he found that in nearly all cases, likelihood of success correlated with the decision to grant or deny an injunction. Likewise, irreparable harm is also highly correlated with a court's decision to grant relief.[242]

The Supreme Court has increasingly been asked to issue interim relief in high profile cases in recent years.[243] And Justice Kavanaugh

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235. Tribe, *Mirrors*, *supra* note 10 at 286.

236. Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 579 (2001).

237. Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

238. *Id.* at 428.

239. *Id.* at 434.

240. *Id.*

241. Samuel L. Bray, *Preliminary Injunction Realism*, 44 REV. LITIG. 203, 206 (forthcoming 2025).

242. *Id.* at 219.

243. *See, e.g.*, Baude, *supra* note 224, at 3; Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1015-16 (2024) (reviewing STEPHEN VLADECK, THE SHADOW DOCKET:

has explained this often requires an early assessment of likelihood of success on the merits.[244] *Bush v. Gore* presaged what would become the increasingly important trend of the Court to issue interim relief—sometimes on an "emergency" basis—that often required an assessment of the merits. Short-fuse litigation may not be a desirable basis to decide the merits, but it is simply what judges are sometimes asked to do.

For cases in an interim relief posture, the likelihood of success on the merits inquiry is an ordinary part of the judicial process. The assessment of a preliminary injunction or a stay requires it. Indeed, *Bush v. Gore* had already come to the Court in a slightly different procedural posture the week before, and the merits issues were well known to the Court by the time it came up again.

Second, over the last quarter century, the irreparable harm of a "count first, resolve later" approach became more obvious. In 2025, for instance, litigation over a close North Carolina Supreme Court election created pressures similar to *Bush v. Gore*. After the votes had been canvassed, challenges arose with respect to groups of ballots that had been counted. The details of the case are complicated and winding, but the bottom line was not. The North Carolina Supreme Court held that some batches of ballots should not have been counted, and those ballots would not be included in a subsequent tally unless those deficiencies could be cured.[245] This decision faced a challenge in federal court, among other things, as a violation of the Equal Protection Clause (yes, citing *Bush v. Gore*) and the Due Process Clause.[246]

The North Carolina Supreme Court's decision created a complication for the federal court. If the federal court waited until the end of the cure process, the results of the election would appear to change. And the federal court might need to issue relief that would appear to change the result yet again. Professor Hasen noted that if votes were excluded from the count in a state judicial decision, then ordered to be added back to the count in a subsequent federal court decision, "the

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HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023)).

244. *See, e.g.*, Noem v. Vasquez Perdomo, 146 S.Ct. 1, 6 (2025) (mem.) (Kavanaugh, J., concurring in grant of stay) ("In sum, the Government has demonstrated a fair prospect of success on the merits and has met the other factors for an interim stay . . . ."); Labrador v. Poe, 144 S.Ct. 921, 929 (2024) (mem.) (Kavanaugh, J., concurring in grant of stay) ("[T]his Court has little choice but to decide the emergency application by assessing likelihood of success on the merits."); Trump v. CASA, Inc., 606 U.S. 831, 877 (2025) (Kavanaugh, J., concurring) ("[I]n deciding applications for interim relief involving major new statutes or executive actions, we often have no choice but to make a preliminary assessment of likelihood of success on the merits; after all, in cases of that sort, the other relevant factors (irreparable harm and the equities) are often very weighty on both sides.").

245. Griffin v. N.C. St. Bd. of Elections, 913 S.E.2d 894, 896-97 (N.C. 2025).

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

result looks like it should flip," and some voters will "wrongly believe fraud stole the election."[247]

This is precisely the harm Justice Scalia identified in his opinion: "casting a cloud upon what he claims to be the legitimacy of his election."[248] Indeed, it accords with Professor George Priest's defense of Justice Scalia's opinion: "It has been my experience (and I would expect, the experience of every other empirical worker) that any empirical counting conducted prior to determining the final standard for the count must usually be abandoned and the counting begun again from the start once the appropriate standard is determined."[249] And the harm that comes with a "count first, rule later" approach has been more broadly recognized as problematic. Pre-election litigation is preferred to post-election litigation.[250]

The December 9 stay anticipated the concern of public confidence in the process behind elections. It also rightly articulated the harm of what could later be seen as a misleading or illegitimate tally.

Admittedly, the December 9 stay, issued with minimal explanation, exerted outsized influence in *Bush v. Gore*. It halted the recount, set in motion the timeline that rendered further proceedings moot, and signaled to the public and to litigants that even interim judicial orders could profoundly shape electoral legitimacy. In this sense, the Court's emergency powers—especially in election cases—proved to be not merely procedural tools, but interim orders of significant political and constitutional consequence.

CONCLUSION

Many facets of *Bush v. Gore* have now become fixed parts of our jurisprudence. Lower courts regularly cite *Bush v. Gore* for its doctrine. The Supreme Court has ratified portions of it in later opinions. Its practices presaged later practices of the federal courts. Some of its claims have been codified into federal law. After a quarter century, it has become clear that this decision was not a one-ride ticket. And perhaps there is one more lesson. Every decision of the Supreme Court, even those that purport to be one-off cases "limited to the present

247. Richard L. Hasen, *We're Getting Dangerously Close to a Losing North Carolina Candidate Being Declared the Winner*, SLATE (Apr. 14, 2025, at 12:53 ET), https://slate.com/news-and-politics/2025/04/bush-v-gore-supreme-court-ruling-north-carolina-election.html [https://perma.cc/G7NA-CAPY].

248. *Bush*, 531 U.S. 1046, at 1047 (Scalia, J., concurring).

249. George L. Priest, *Reanalyzing* Bush v. Gore*: Democratic Accountability and Judicial Overreaching*, 72 U. COLO. L. REV. 953, 979 (2001).

250. *Cf.* Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J. F. 312, 344 (2022); Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 574 (2021); Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 37 (2007).

circumstances," has precedential value—a fact that the Court and litigants should be cognizant of in every case, great or small.