BUSH V. GORE IN HISTORICAL PERSPECTIVE

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As *Bush v. Gore*[1] approaches its twentieth anniversary, it occupies a curious place in the American public consciousness. A majority of Americans today lived through the 36-day period in late 2000 that led up to the ruling and were old enough to have followed the events.[2] While the details may now seem indistinct and technical, many recall the continuous shifts in the apparent winner of the presidential election as the recounts and post-election legal challenges proceeded. I was in my first year of law school at the time—disappointingly too inexperienced and untrained to participate in the litigation—and had the privilege of discussing each development in my weekly small-group constitutional law class. History was unfolding before our eyes. Along with the rest of the nation, we felt the disquieting uncertainty over which candidate would be declared the winner, and whether his opponent—and the public—would accept that victory.

For an entire generation of younger Americans, however, *Bush v. Gore* is a purely historical event whose outcome is already known, as much an artifact of the past as the Apollo 11 moon landing or the Korean War. The Court issued its ruling before the college students, law students, and other young adults of today were born or while they were too young to understand. To them, *Bush v. Gore* is part of the pre-existing firmament of American history and law.[3]

Bush v. Gore is a testament to the strength of our democracy. The world witnessed a peaceful transition of power, with control of the White House shifting from one political party to the other, despite deep-rooted disagreements over the final tally of Florida's votes. And the rule of law as set forth in the U.S. Constitution was upheld, with the Electoral College's results respected, even though it required the election of the candidate who had lost the national popular vote.

At the same time, the case points to the potential fragility of our democratic process. Federal and state courts may interpret the rules governing an election in unexpected ways, after votes have been cast and the courts are well aware of which candidates would benefit from various interpretations. They may also hold certain rules unconstitutional in post-election litigation, completely changing the apparent results. If a state legislature believes that election officials or courts have gone off the rails in determining the outcome of a presidential election, it may even attempt to appoint its own competing slate of presidential electors.[4] Moreover, the Electoral Count Act of 1887, which governs the process that Congress uses to count and determine the validity of electoral votes, is archaic, confusingly drafted, and leaves certain important issues unresolved.[5] And in a hotly contested election, Congress may assert power to disregard state officials'

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[1] 531 U.S. 98 (2000) (per curiam).

[2] *See* William H. Frey, *Now, More Than Half of Americans Are Millenials or Younger*, BROOKINGS (July 30, 2020), https://www.brookings.edu/blog/the-avenue/2020/07/30/now-more-than-half-of-americans-are-millennials-or-younger/.

[3] *See* Richard L. Hasen, *Teaching* Bush v. Gore *as History*, 56 ST. LOUIS U. L.J. 665, 666-67 (2012).

[4] The Florida Legislature took steps toward implementing this strategy in December 2000 as post-election proceedings dragged on. *See, e.g.*, Jeffrey Gettleman, *Florida House OKs Slate of Electors Beholden to Bush*, L.A. TIMES (Dec. 13, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-dec-13-mn-64909-story.html; *Florida Legislature Calls Special Session to Name Presidential Electors*, CNN (Dec. 6, 2000, 6:31 PM), https://www.cnn.com/2000/ALLPOLITICS/stories/12/06/fla.legislature/index.html.

[5] *See* ch. 90, 24 Stat. 373 (1887) (codified as amended at 3 U.S.C. §§ 5-7, 15-18).

determinations, federal courts' rulings, and potentially even the constraints of the Act itself in deciding which electoral votes to count.[6]

Bush v. Gore raises important questions about the proper role of federal courts in adjudicating constitutional challenges to the outcomes of federal elections. The case also established a Uniformity Principle that requires election officials to treat voters equally, even with regard to technical election administration issues that previously had not been deemed constitutionally significant. While many commentators questioned whether *Bush*'s holding would have any lasting force beyond the 2000 election, lower courts have applied its Uniformity Principle throughout the past two decades to a wide range of election-related issues. Over the years to come, the Supreme Court is likely to revisit this key holding from *Bush*, to decide how it fits with precedents from the Civil Rights Era that sometimes allow states to apply different rules to different groups of voters participating in the same election.

The Federal Judiciary's Role in Presidential Elections

One fundamental question about *Bush v. Gore* is whether the Supreme Court should have heard the case at all. Justice Breyer forcefully dissented from the opinion, in part on the grounds that both the Constitution and Electoral Count Act empower Congress, rather than the Supreme Court, to resolve disputes concerning the outcomes of Presidential elections.[7] Several commentators echoed this critique, arguing that *Bush v. Gore* presented a nonjusticiable political question that was inappropriate for the Supreme Court's intervention.[8]

In *Baker v. Carr*, the Supreme Court identified several types of cases over which federal courts may not exercise subject-matter jurisdiction, because they present political questions.[9] *Baker* bars courts from asserting jurisdiction over a dispute when there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" or a lack of "judicially discoverable and manageable standards" for resolving it.[10] The political question doctrine also applies where, among other things, adjudicating a matter would exhibit disrespect for a coordinate branch of government, undermine a "political decision already made," or lead to "embarrassment from multifarious pronouncements by various departments on one question."[11] None of these considerations applied to *Bush v. Gore*.

The Constitution assigns ultimate responsibility for resolving federal elections to the chambers of Congress. Each house is the sole judge of the elections, qualifications, and returns of its own members.[12] And the chambers of Congress are likewise responsible for counting and

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[6] Some commentators have questioned whether a federal statute can constrain the chambers of Congress' constitutional authority to count electoral votes. *See, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2002).

[7] Bush v. Gore, 531 U.S. 98, 155 (2000) (per curiam).

[8] *See, e.g.*, Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMMENT. 571, 573-74 (2002); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1105 (2001); 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, 537 (2001); *see also* Samuel Isaacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 639 (2001); *cf.* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

[9] 369 U.S. 186, 217 (1962).

[10] *Id*.

[11] *Id*.

[12] *See* U.S. CONST. art. I, § 5, cl. 1.

determining the validity of electoral votes.[13] Neither federal courts nor other entities may interfere with Congress' constitutional authority over these matters.[14]

Bush v. Gore did not concern Congress' counting of electoral votes, however. Rather, the case involved the anterior issues of whether state election officials should conduct a statewide recount in the presidential election or include certain results of more localized recounts to determine which competing slate of presidential electors the Secretary of State would certify as elected. After the candidates litigated the matter in Florida state court, the U.S. Supreme Court was free to adjudicate the federal issues in the same way it would any other case.[15] Its ruling no more usurped Congress' authority to count or determine the validity of electoral votes than the Florida Supreme Court judgment it reversed. Moreover, the Constitution governs state officials' actions at all stages of the electoral process, from voter registration and determining voter eligibility long before an election begins, to the actual conduct of the election itself, to counting ballots and canvassing results during the post-election period. Federal courts are available to adjudicate constitutional or federal statutory issues that arise at any stage of this process.

In 1870, the Reconstruction Congress sought to preclude federal courts from adjudicating constitutional challenges to the results of federal elections.[16] It enacted the Enforcement Act, granting federal district courts jurisdiction to adjudicate election contests arising from violations of the newly ratified Fifteenth Amendment.[17] The Act contained an important proviso, however; it did not apply to disputes over elections for "elector of President or Vice President, representative or delegate in Congress."[18] Congress thereby excluded federal courts from adjudicating Fifteenth Amendment challenges concerning those offices to preserve its constitutional prerogative to resolve federal elections.[19]

The very next year, Congress enacted the Civil Rights Act of 1871.[20] That statute granted federal courts jurisdiction over suits against state or local officials for violating "any rights, privileges, or immunities secured by the Constitution," without excluding cases concerning federal elections.[21] And a few years later, Congress granted federal courts general federal-question jurisdiction, including over cases arising under the Constitution[22] (subject to an amount-in-controversy requirement that Congress ultimately eliminated[23]). Neither of these subsequent jurisdictional grants purported to limit the federal judiciary's ability to hear constitutional challenges relating to the outcomes of federal elections.[24] Thus, except for an extremely brief interlude during Reconstruction, not even Congress itself views its prerogative to determine the outcomes of federal elections as precluding federal courts from adjudicating constitutional challenges concerning those elections' results.

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[13] *Id*. art. II, § 1, cl. 3; *id*. amend. XII; *see also* 3 U.S.C. §§ 15-18.
[14] *See* Roudebush v. Hartke, 405 U.S. 15, 25-26 (1972); *see also* Nixon v. United States, 506 U.S. 224, 230, 237-38 (1993); *cf.* Powell v. McCormack, 395 U.S. 486, 550 (1969).
[15] *See* Martin v. Hunter's Lessee, 14 U.S. 304, 351 (1816).
[16] *See* Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction Over Election Contests, and the Political Question Doctrine*, FLA. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694839.
[17] Ch. 114, § 23, 16 Stat. 140, 146 (1870) (codified as amended at 28 U.S.C. § 1344 (2018)).
[18] *Id*.
[19] *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 3872 (1870) (statement of Rep. Bingham).
[20] Ch. 22, 17 Stat. 13 (1871).
[21] *Id*. § 1, 17 Stat. at 13 (codified as amended at 28 U.S.C. § 1343(a)(3) (2018)).
[22] Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.
[23] Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369 (codified as amended at 28 U.S.C. § 1331 (2018)).
[24] *See* Powell v. McCormack, 395 U.S. 486, 516 (1969).

The Constitution's grants of power to Congress do, however, impose some limits on the federal judiciary's authority concerning cases like *Bush v. Gore*. First, a federal court's rulings concerning the outcomes of federal elections—including whether the Constitution requires or prohibits the counting of particular votes—are not binding on Congress. Rather, Congress is free to revisit such issues for itself when exercising its power to determine the elections of its members or count electoral votes. Second, federal courts are generally barred from engaging in judicial review of Congress' resolutions of federal elections. While the judiciary can have a substantial impact on which federal candidates or slates of presidential electors states certify to Congress, the ultimate decision on whether to accept those results lies with Congress itself.

Bush v. Gore as Precedent

Another recurring attack on *Bush v. Gore* is that the majority determined the outcome based on a principle that it crafted solely for that occasion and did not wish to apply to any future cases. Toward the end of its opinion, the Court inserted a caveat declaring, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[25] Defining the relevant facts narrowly, the Court noted that the case involved a highly unusual situation: "a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards."[26] Critics charge that this apparent attempt to prevent future courts from applying *Bush*'s principles in other contexts renders the opinion a suspect "ticket for one train only."[27]

Whatever the merits of such critiques at the time the Court issued the opinion, they have proven to be erroneous. *Bush v. Gore*'s holding has evolved into an important principle of constitutional law. The case extended the Constitution's Equal Protection Clause[28] to require equal treatment of similarly situated voters, even with regard to technical "nuts and bolts" issues of election administration, such as the rules for ballot counting.[29] Equal Protection restrictions, the Court explained, apply not only to the "initial allocation of the franchise," but "to the manner of its exercise," as well.[30] A state may not subject voters to "arbitrary and disparate treatment" that "value[s] one person's vote over that of another."[31] This holding may be called *Bush v. Gore*'s Uniformity Principle.

Admittedly, the Supreme Court itself has not cited *Bush v. Gore* in any subsequent majority opinions. Its only reference to the case appears in a concurrence by Justice Thomas, who cited it for the proposition that states have plenary authority over the appointment of presidential

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[25] Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam).
[26] *Id*.
[27] Linda Greenhouse, *Thinking About the Supreme Court After* Bush v. Gore, 35 IND. L. REV. 435, 436 (2002); *accord* Isaacharoff, *supra* note 8, at 650; *see also* Laurence H. Tribe, Comment, *eroG v. hsuB and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 HARV. L. REV. 170, 269 (2001); Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 830 (2002); *cf.* Chad Flanders, *Please Don't Cite This Case! The Precedential Value of* Bush v. Gore, 116 YALE L.J. POCKET PART 141, 144 (2006), http://yalelawjournal.org/forum/please-dona8217t-cite-this-case-the-precedential-value-of-bush-v-gore.
[28] U.S. CONST. art. XIV, § 1.
[29] Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 377 (2001).
[30] *Bush*, 531 U.S. at 104.
[31] *Id*. at 104-05.

electors.[32] Notwithstanding *Bush v. Gore*'s limiting language, however, lower federal courts and state courts throughout the nation have applied its Uniformity Principle in a wide range of circumstances.[33] Most basically, courts have invoked the principle when holding that a jurisdiction or election official may not intentionally apply different rules to similarly situated groups of voters or ballots, when such distinctions would afford people substantially different opportunities to either cast a vote or have it accepted as valid.[34]

Courts have likewise invalidated laws that expressly delegate broad discretion over particular issues to county and local officials when they result in substantial disparities in the ability of various political subdivisions' voters to cast ballots or have them counted.[35] For example, several courts have struck down state laws allowing localities to choose among different types of certified voting machines with substantially different error rates, because voters participating in the same statewide elections would have different chances of having their votes counted.[36] In other cases, courts rejected disparities among counties' rules governing important election-related issues such as the permissibility of third-party ballot harvesting,[37] the need for voters who register online to submit hard-copy signatures,[38] and the inclusion of checkboxes on absentee ballot request forms to confirm voters' citizenship.[39] Gross disparities in resources among different polling places that result in substantially different waiting times have also been held, in extreme cases, to violate *Bush*'s Uniformity Principle.[40]

Finally, courts have been skeptical about laws establishing vague, subjective standards that officials in different jurisdictions may interpret and apply in different ways. In particular, based

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[32] Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 35 n.2 (2013) (Thomas, J., concurring) (*quoting Bush*, 531 U.S. at 104).

[33] *See generally* Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, GEO. MASON L. REV. (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694851.

[34] *See, e.g.*, Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 242 (6th Cir. 2011); Charfauros v. Bd. of Elections, No. 99-15789, 2001 U.S. App. LEXIS 15083, at *26, 37 (9th Cir. May 10, 2001), *as amended*, 2001 U.S. App. LEXIS 15090 (9th Cir. July 6, 2001); State *ex rel.* Skaggs v. Brunner, 900 N.E.2d 982, 984 (Ohio 2008) (per curiam); Day v. Robinwood W. Comm. Improvement Dist., No. 4:08-CV-01888 (ERW), 2009 U.S. Dist. LEXIS 36586 (E.D. Mo. Apr. 29, 2009), *judgment entered*, 693 F. Supp. 2d 996 (E.D. Mo. 2010); Gallivan v. Walker, 54 P.3d 1069, 1077, 1092, 1094 n.12 (Utah 2002).

[35] *See, e.g.*, Jones v. DeSantis, No. 4:19-cv-300-RH/MJF, 2020 U.S. Dist. LEXIS 90729, at *112 (N.D. Fla. May 24, 2020); League of Women Voters v. Blackwell, 432 F. Supp. 2d 723, 728 (N.D. Ohio 2005), *aff'd in part and rev'd in part*, 548 F.3d 463 (6th Cir. 2008); State *ex rel.* Colvin v. Brunner, 896 N.E.2d 979, 991 (Ohio 2008) (per curiam).

[36] *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006), *vacated and reh'g en banc granted*, No. 05-3044, 2006 U.S. App. LEXIS 32545 (6th Cir. 2006) (en banc), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (en banc) (order); S.W. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1133 (C.D. Cal. 2003), *rev'd*, 344 F.3d 882 (9th Cir. 2003), *rev'd*, 344 F.3d 914 (9th Cir. 2003) (en banc); Black v. McGuffage, 209 F. Supp. 2d 892 (N.D. Ill. 2002); Common Cause v. Jones, 213 F. Supp. 2d 1106, 1107 (C.D. Cal. 2001), *reconsid. denied*, 213 F. Supp. 2d 1110 (C.D. Cal. 2002); *cf.* Wexler v. Lepore, 342 F. Supp. 2d 1097, 1108 (S.D. Fla. 2004), *aff'd*, 452 F.3d 1226 (11th Cir. 2006).

[37] Pierce v. Allegheny Cty. Bd. of Elections, 324 F. Supp. 2d 684, 706 (W.D. Pa. 2003).

[38] Mullins v. Cole, 218 F. Supp. 3d 488, 495 (S.D. W. Va. 2016).

[39] Bryanton v. Johnson, 902 F. Supp. 2d 983, 989 (E.D. Mich. 2012).

[40] League of Women Voters v. Brunner, 548 F.3d 463 (6th Cir. 2008); Fleming v. Gutierrez, No. 13-CV-222 (WJ/RHS), 2014 U.S. Dist. LEXIS 183748 (D. N. Mex. Sept. 12, 2014), *appeal dismissed as moot*, 785 F.3d 442 (10th Cir. 2015).

on the facts of *Bush v. Gore*, they have required states to apply specific, detailed rules when counting ballots.[41]

The Scope of *Bush v. Gore*'s Uniformity Principle

Important limits exist on the Uniformity Principle. For example, the principle requires states to ensure equal treatment only of voters participating in the same election. Different municipalities may adopt varying voting rules for purely local proceedings like bond issuances or municipal elections that each jurisdiction's residents vote upon separately.[42] Likewise, even when states adopt vague or subjective standards, equal protection concerns generally do not arise when a single decisionmaker is responsible for applying them.[43] Moreover, unintentional disparities in the treatment of different voters generally do not rise to the level of Equal Protection violations.[44] And courts have generally upheld the constitutionality of "matching" requirements that require election officials to determine whether a voter's signature[45] or personal information[46] "matches" official records, an identification card is "valid,"[47] or distinct government records containing similar information both refer to the same voter.[48]

Perhaps the most significant limitation on the applicability of *Bush v. Gore*'s Uniformity Principle is that most courts have declined to apply it to early and absentee voting.[49] This limitation stems from a pair of Supreme Court cases from the late 1960s in which the Court sought to make

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[41] *See, e.g.*, State *ex rel.* League of Women Voters v. Herrera, 203 P.3d 94, 95 (N. Mex. 2009); Big Spring v. Jore, 109 P.3d 219, 225-26 (Mont. 2005); *see also* Democratic Senatorial Campaign Comm. v. Detzner, 347 F. Supp. 3d 1033, 1038 (N.D. Fla. 2018); Dolan v. Powers, 260 S.W.3d 376, 380, 382 (Mo. App. 2008).

[42] *See, e.g.*, *Hunter*, 635 F.3d at 242; Walker v. Exeter Region Coop. Sch. Dist., 284 F.3d 42, 46 (1st Cir. 2002); Ways v. City of Lincoln, No. 4:00-CV-3216, 2002 U.S. Dist. LEXIS 14919, at *73 (D. Neb. July 29, 2002); Clark v. McCann, 243 Cal. App. 4th 910, 921 (4th Dist. 2015).

[43] *See, e.g.*, *Hunter*, 635 F.3d at 241; Miller v. Treadwell, 736 F. Supp. 2d 1240, 1244 (D. Alaska 2010); Miller v. Treadwell, 245 P.3d 867, 873 (Alaska 2010).

[44] *See, e.g.*, Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 912-13, 920-21 (E.D. Va. 2018); Feehan v. Marcone, 204 A.3d 666, 691, 695-97 & n.39 (Conn. 2019), *cert. denied*, 140 S. Ct. 144 (2019); *see also* Barber v. Bennett, No. CV-14-02489-TUC-CKJ, 2014 U.S. Dist. LEXIS 165748, at *11-12, *15 (D. Ariz. Nov. 27, 2014).

[45] *See, e.g.*, Lemons v. Bradbury, 538 F.3d 1098, 1106 (9th Cir. 2008); Protect Marriage Ill. v. Orr, 458 F. Supp. 2d 562, 573 (N.D. Ill. 2006), *aff'd*, 463 F.3d 604 (7th Cir. 2006); Barber v. Bennett, No. CV-14-02489-TUC CKJ, 2014 U.S. Dist. LEXIS 165748, at *11-12, 15 (D. Ariz. Nov. 27, 2014); *see also* Miller v. Treadwell, 736 F. Supp. 2d 1240, 1244 (D. Alaska 2010); Miller v. Treadwell, 245 P.3d 867, 873 (Alaska 2010). *But see* Democratic Exec. Comm. v. Detzner, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018), *aff'd sub nom.*, Democratic Executive Comm. of Fla. v. Lee, 915 F.3d 1312, 1319 (11th Cir. 2019).

[46] *See, e.g.*, N.E. Ohio Coalition for the Homeless v. Husted, 2:06-CV-896, 2016 U.S. Dist. LEXIS 74121, at *138 (S.D. Ohio June 7, 2016), *aff'd in relevant part and rev'd in part*, 837 F.3d 612, 636 (6th Cir. 2016), *reh'g & reh'g en banc den'd*, No. 16-3603/3691, 2016 U.S. App. LEXIS 18451 (6th Cir. 2016) (en banc), *stay denied*, 137 S. Ct. 14 (2016), *cert. denied*, 137 S. Ct. 2265 (2017); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 836-37 (S.D. Ind. 2006), *aff'd sub nom.*, Crawford v. Marion Cty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); Sheehan v. Franken (*In re* Contest of Gen. Election), 767 N.W.2d 453, 466 (Minn. 2009).

[47] *See, e.g.*, ACLU v. Santillanes, 546 F.3d 1313, 1324 (10th Cir. 2008). *But see* DNC v. Bostelmann, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 102410, at *19-20 (W.D. Wis. June 10, 2020).

[48] *See, e.g.*, Democratic Party v. Va. State Bd. of Elections, No. 1:13-CV-1218, 2013 U.S. Dist. LEXIS 151713, at *1-2 (E.D. Va. Oct. 21, 2013).

[49] *See, e.g.*, Griffin v. Roupas, 385 F.3d 1128, 1129 (7th Cir. 2004); Fair Elections Ohio v. Husted, No. 1:12CV797, 2012 U.S. Dist. LEXIS 161614 (S.D. Ohio Nov. 1, 2012); Suydam v. Town of Rumford, No. 2:15-cv-00203-NT, 2015 U.S. Dist. LEXIS 72723, at *8-9 (D. Me. June 4, 2014).

it easier for the government to expand opportunities to vote.[50] In *Katzenbach v. Morgan*, the Court upheld a provision of the Voting Rights Act that prohibited states from applying their literacy requirements to people who had been educated in Spanish-language schools in Puerto Rico.[51] At the time, New York required voters to be literate. Since the statute was a "reform measure aimed at eliminating an existing barrier to the exercise of the franchise," rather than a restriction on the right to vote, the classifications it drew were subject only to rational basis scrutiny.[52] The fact that the statute extended voting rights only to certain people who were unable to read and write in English did not violate the Equal Protection Clause

In *McDonald v. Board of Election Commissioners*, the Court applied this principle to uphold an Illinois state law that did not allow pretrial detainees held in their home counties to cast absentee ballots.[53] The Court held that the case did not involve "the fundamental right to vote," but rather only "a claimed right to receive absentee ballots."[54] It explained, "the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise."[55] Thus, restrictions on eligibility for absentee voting were subject only to rational basis scrutiny.[56]

The *Katzenbach-McDonald* line of cases appears to be in direct tension with the *Bush v. Gore* Uniformity Principle. *Katzenbach* and *McDonald* allow states and localities to selectively extend opportunities for absentee or early voting only to certain groups of voters, on the grounds that the Constitution generally does not restrict states' ability to facilitate voting or remove barriers to it. On the other hand, *Bush* requires that all voters within a jurisdiction be afforded substantially comparable opportunities to vote. Given the critical roles that absentee and early voting have come to play in our electoral system—especially as a result of COVID-19—the clash between these lines of authority may force the Court to revisit *Bush v. Gore* and address the scope of its central holding.

Conclusion

As the years pass, *Bush v. Gore* will continue its transition from shared national experience to purely historical event. Rather than an anomaly limited to the unique context of the 2000 presidential election, the case established a far-ranging Uniformity Principle that lower courts have applied to most aspects of election administration. Over the years to come, the Court is likely to revisit the case to decide whether to extend that Uniformity Principle even further, to absentee and early voting.

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[50] McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969); Katzenbach v. Morgan, 384 U.S. 641, 657 (1966).
[51] 384 U.S. at 656.
[52] *Id*. (quoting Semler v. Dental Examiners, 294 U.S. 608, 610 (1935)).
[53] *McDonald*, 394 U.S. at 803-04.
[54] *Id*. at 807.
[55] *Id*. at 807-08.
[56] *Id*. at 809.