
***Bush v. Gore's* Uniformity Principle and the Equal Protection Right to Vote**

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Introduction

The American electoral system has traditionally been highly decentralized, administered primarily at the county and local levels by officials vested with substantial discretion.¹ Such local control, Professor Richard Briffault explains, “curbs abuses of power by the upper level government; builds democracy; increases the satisfaction of citizen preferences; and facilitates innovation, experimentation and political learning.”²

*Bush v. Gore*³ heralded the beginning of a new era in election law⁴—an era permeated by what Professor Rick Hasen colorfully calls the “Voting Wars.”⁵ The *Bush* Court expanded equal protection principles beyond their traditional historical contexts of eliminating barriers to voter eligibility,⁶ preventing unduly burdensome election-related requirements,⁷ and equalizing the weight of people’s votes.⁸ In *Bush*, the Court applied equal protection requirements to “nuts-and-bolts” election administration issues such as vote-counting.⁹ The *Bush* Court’s insistence on uniform

¹ HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 20 (2009); Nathaniel Persily, “Celebrating” the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States, 44 *IND. L. REV.* 85, 85 (2010) (emphasizing “the extreme decentralization of administrative responsibilities and policymaking” within the American electoral system). For an overview of states’ different systems for administering elections, see KATHLEEN HALE, ROBERT MONTJOY & MITCHELL BROWN, *ADMINISTERING ELECTIONS: HOW AMERICAN ELECTIONS WORK* 1–3, 33–43 (2015). See generally JOSEPH P. HARRIS, *ELECTION ADMINISTRATION IN THE UNITED STATES* (1934).

² Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 *FLA. ST. U. L. REV.* 325, 351 (2001). But see Note, *Toward a Greater State Role in Election Administration*, 118 *HARV. L. REV.* 2314, 2327–28 (2005) (arguing that decentralized control of elections is unwarranted).

³ 531 U.S. 98 (2000) (per curiam).

⁴ Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 *STAN. L. REV.* 1411, 1431 (2016); see also Samuel Isaacharoff, Opinion, *The Court in the Crossfire*, *N.Y. TIMES* (Dec. 14, 2000), <https://perma.cc/NR8K-QUMY>.

⁵ RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN*, at ix–xii, 3–8 (2012).

⁶ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 332 n.1, 335, 342–43 (1972) (invalidating three- and twelve-month residency requirements to vote); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668, 670 (1966) (invalidating poll tax for state and local elections).

⁷ See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983) (invalidating early filing deadlines for independent presidential candidates).

⁸ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (invalidating state legislative districts with substantially different populations).

⁹ Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 *FLA. ST. U. L. REV.* 377, 378 (2001); see also Derek T. Muller, *The Democracy Ratchet*, 94 *IND. L.J.* 451, 485 (2019). The Supreme Court’s opinions concerning the 2000 presidential election also lent some support to the “independent state legislature doctrine”: the notion that state constitutions cannot limit or constrain the Presidential Electors Clause’s delegation of authority specifically to the legislature of each

treatment of voters¹⁰—call it *Bush's* Uniformity Principle—raises challenging questions for the traditional structure of election administration.

The Court's holding complements roughly contemporaneous federal laws requiring states to centralize authority over many aspects of federal elections. The National Voter Registration Act of 1993 required each state to appoint a chief election official.¹¹ The Help America Vote Act of 2002, enacted in the aftermath of *Bush v. Gore*, expanded those officials' authority over voter registration and certain other aspects of federal elections.¹² States typically apply federal requirements concerning federal elections to state and local elections, as well, to avoid the cost, administrative burdens, and potential for public confusion of maintaining completely different electoral systems for offices at different levels of government.¹³ Thus, as a matter of both constitutional and statutory law, the federal government is requiring states to assert more centralized control over their elections and establish more uniform standards for conducting them.

While *Bush v. Gore* kicked off the "Voting Wars" era, its famous limiting language caused many scholars to question whether the ruling would have any precedential effect.¹⁴ The Court declared, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."¹⁵ Pointing to that language shortly after the ruling was issued, Professor Hasen expressed doubt that the case would "have much precedential effect."¹⁶ He

state. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, GA. L. REV. (forthcoming 2020) (manuscript at 5–8, 17–25, 79–84), <https://perma.cc/XXL9-YGDW>. The doctrine has also been interpreted as requiring courts to avoid infringing on the legislature's authority by applying a rigorous plain-meaning approach when construing state laws regulating federal elections. See *id.* (manuscript at 64) (citing *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76, 78 (2000) (per curiam)).

¹⁰ *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

¹¹ Pub. L. No. 103-31, § 10, 107 Stat. 77, 87 (1993) ("Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act.") (codified at 52 U.S.C. § 20509 (2018)).

¹² Pub. L. No. 107-252, § 303(a)(1)(A), 116 Stat. 1666, 1708–09 (2002) (codified at 52 U.S.C. § 21083(a)(1)(A)).

¹³ See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 111 (2017).

¹⁴ For a brief discussion of the issue, see Chad Flanders, Commentary, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 144 (2006) (claiming that *Bush v. Gore* is "contradictory," because it both "set[] down a rule and den[ie]d that any rule had been set down").

¹⁵ *Bush*, 531 U.S. at 109.

¹⁶ Hasen, *supra* note 9, at 381.

declared years later that “*Bush v. Gore* is dead”¹⁷ and, as late as 2013, reaffirmed that his conclusion remained true, except within the Sixth Circuit.¹⁸ Pointing to what he termed “the Court’s disingenuous limiting instruction,” Professor Samuel Issacharoff echoed these sentiments, cautioning that the case risked becoming a “classic ‘good for this train, and this train only’ offer.”¹⁹ Professor Laurence Tribe reached a similar prognosis, declaring, “*Bush v. Gore* belongs to no constitutional tradition and grows out of no constitutional doctrine, principle, or clause. Lacking roots, it is a plant anyone would be hard pressed to grow.”²⁰

Not all commentators believed that the case would be inert. Professors Ned Foley and Daniel H. Lowenstein each predicted that courts would require states to apply *Bush v. Gore*’s uniformity requirements more strictly in quasi-judicial proceedings involving evidence about particular ballots or voters than to more systematic issues like resource allocation decisions.²¹ They likewise agreed that *Bush*’s uniformity requirement would likely apply more strictly to decisions concerning voters or ballots made by a single, centralized official or entity than to decisions made by various local officials.²² Professor Foley further suggested that the Court would be more likely to tolerate disparate treatment of voters in different localities that arises from an express state policy of delegating authority to local decisionmakers, than when such disparities arise unexpectedly as a result of vague, statewide standards.²³ This Article assesses *Bush*’s Uniformity Principle as the case turns two decades old. It is based on a personal review of each of the 471 federal and state court rulings that cite the case as of June 30, 2020.²⁴ It offers four main conclusions.

¹⁷ Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 3 (2007).

¹⁸ Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1899 (2013) (“In the rest of the country, *Bush v. Gore* is still basically dead.”).

¹⁹ Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001).

²⁰ 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) (emphasis omitted); see also Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 830–31 (2001).

²¹ Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035, 1036–37 (2007) [hereinafter Foley, *Refining the Taxonomy*]; see also Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925, 933–46 (2007); Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007, 1029–30 (2007).

²² Foley, *Refining the Taxonomy*, *supra* note 21, at 1039; Lowenstein, *supra* note 21, at 1030–32.

²³ Foley, *Refining the Taxonomy*, *supra* note 21, at 1041–43; cf. Helen Norton, *What Bush v. Gore Means for Elections in the 21st Century*, 2 WYO. L. REV. 419, 427–30 (2002) (discussing possible applications of *Bush v. Gore*’s Uniformity Principle).

²⁴ Some commentators previously considered the applicability of *Bush*’s Uniformity Principle in the years after the ruling was handed down but before a substantial body of precedent had time to develop. See, e.g., Edmund S. Sauer, Note, “Arbitrary and Disparate” Obstacles to Democracy: The Equal Protection Implications of *Bush v. Gore* on Election Administration, 19 J.L. & POL. 299, 301 (2003) (“[T]he

First, despite the Supreme Court's attempt to cabin its ruling in *Bush v. Gore*, as well as the reticence of some lower courts,²⁵ *Bush's* Uniformity Principle has evolved into a fully enforceable, generally applicable election-law doctrine.²⁶ Courts have applied the principle in three main sets of circumstances: (1) laws and other legal directives that expressly or intentionally afford substantially different opportunities to vote to different groups of voters; (2) laws that delegate authority to local officials to determine important election-related policies; and (3) vague laws that implicitly leave room for potentially inconsistent interpretations or applications by local officials.

Second, the Uniformity Principle requires states to centralize some election-related policies and decisions that they historically had left to the discretion of county or municipal officials.²⁷ This imperative toward centralization is likely to only increase over time as courts continue to apply the Principle in new contexts and states amend their election laws to avoid potential constitutional challenges.

Third, attempts to invoke *Bush's* Uniformity Principle have been least successful in challenges to disparities in the availability of absentee or early voting; administrative "matching" provisions, such as those requiring election officials to compare a voter's name, address, or signature to information in her official records; and disputes involving voting rights for felons.²⁸

Finally, *Bush's* Uniformity Principle is in direct tension with the Supreme Court's prior approach to applying the Equal Protection Clause in election cases, embodied in the Civil Rights Era case *Katzenbach v. Morgan*.²⁹ *Katzenbach* held that laws which selectively expand voting rights or opportunities exclusively for members of certain groups are subject only to rational basis review and generally valid.³⁰ Allowing states to selectively make voting easier only for some members of the public seems inconsistent with the *Bush* Court's insistence that all voters participating in an election be treated equally.³¹

Supreme Court's equal protection holding in *Bush v. Gore* . . . can be applied in other contexts, rendering some local government practices vulnerable to constitutional challenge.").

²⁵ See *infra* notes 61–64, 67–78.

²⁶ See *infra* Part II.

²⁷ See *infra* Section II.B.

²⁸ See *infra* Sections II.A, II.C.

²⁹ 384 U.S. 641 (1966); see *infra* Part IV.

³⁰ 384 U.S. at 657.

³¹ This Article focuses solely on the Equal Protection Clause's uniformity requirement as articulated in *Bush v. Gore*. It does not address the other major component of equal protection jurisprudence concerning voting rights, which prohibits undue burdens on voting. Such challenges are usually brought under the Supreme Court's rulings in *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983), and

Part I of this Article briefly introduces *Bush's* Uniformity Principle. Part II explores how lower courts have applied that holding over the past two decades in a variety of contexts, including to state laws that expressly distinguish between different groups of voters, delegate discretion to local officials, or establish vague standards subject to a range of interpretations. This discussion demonstrates that courts have been most resistant to applying the Uniformity Principle to absentee and early voting, administrative “matching” requirements, and challenges involving felons’ voting rights.

Part III examines how court rulings in election cases may raise similar equal protection concerns when granting relief only to particular voters or within certain political subdivisions in a state. Over the past few years, academics and courts have debated the validity of nationwide injunctions—or, more accurately, defendant-oriented injunctions—in which a court prohibits a government agency or official from applying a challenged legal provision to anyone, anywhere in the relevant jurisdiction, including third-party non-litigants.³² Some courts have suggested that such sweeping relief may be necessary in election cases, however, because enjoining an unconstitutional election-related law as it applies only to the plaintiffs in a lawsuit may violate *Bush's* Uniformity Principle. The issue remains unresolved with no consensus in sight.

Part IV then explores the tension between *Bush's* Uniformity Principle and the Supreme Court’s longstanding holding in *Katzenbach* that the Equal Protection Clause allows the government to selectively expand or protect voting rights only for certain groups. The Article then briefly concludes.

Burdick v. Takushi, 504 U.S. 428, 434 (1992). They are not conventional equal protection claims because they do not contend that the challenged legal provision impermissibly applies different standards to different groups of voters. Rather, these claims assert that a uniform standard which applies to all voters within a jurisdiction is nevertheless invalid because the burdens it imposes on some people do not sufficiently further the state’s interests, or those state interests are not sufficiently important. These disparate impact arguments often seem more like substantive due process challenges than true equal protection claims.

³² See Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487, 489–90, 492–93 (2016) [hereinafter Morley, *De Facto Class Actions?*]; Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 6–7 (2019) [hereinafter Morley, *Disaggregating Nationwide Injunctions*].

I. *Bush v. Gore's Uniformity Principle*

Numerous authors have recounted the story of *Bush v. Gore* at length,³³ so this Part will touch briefly upon only a few essential highlights. In Florida's 2000 presidential election, following an automatic machine recount, George W. Bush led Al Gore by only a few hundred votes out of nearly six million cast.³⁴ Gore sought manual recounts in four counties; after the deadline elapsed for those recounts, Bush retained his lead.³⁵ Gore then filed an election contest in state court, challenging among other things the state's refusal to include certain ballots in his tally.³⁶

The Florida Supreme Court ordered election officials to accept hundreds of additional votes from Palm Beach and Miami-Dade Counties, a judicial recount of 9,000 additional ballots from Miami-Dade County, and a manual recount throughout the state's other counties of all "undervotes" in the presidential election.³⁷ The US Supreme Court issued an emergency stay of this order³⁸ and reversed the judgment a few days later.³⁹

The Court began by emphasizing that the Constitution does not guarantee anyone the right to vote for President, since state legislatures have plenary authority to decide how to appoint their presidential electors.⁴⁰ Once a state decides to appoint electors based on the outcome of a popular election, however, the election is subject to constitutional restrictions, including equal protection principles.⁴¹ The Court emphasized that equal protection restrictions apply not only to the "initial allocation of the franchise," but "to the manner of its exercise" as well.⁴² The state may not subject voters to "arbitrary and disparate treatment" that "value[s] one

³³ See, e.g., Briffault, *supra* note 2, at 330–45; Lynne H. Rambo, *The Lawyers' Role in Selecting the President: A Complete Legal History of the 2000 Election*, 8 TEX. WESLEYAN L. REV. 105 (2002).

³⁴ Rambo, *supra* note 33, at 156.

³⁵ *Id.* at 156, 172.

³⁶ *Id.* at 217.

³⁷ *Gore v. Harris*, 772 So. 2d 1243, 1260–62 (Fla. 2000) (per curiam), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

³⁸ *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (mem.).

³⁹ *Bush*, 531 U.S. at 111.

⁴⁰ *Id.* at 104 (citing U.S. CONST. art. II, § 1). The Constitution's delegation of authority specifically to the state legislature, rather than to the state as a whole, may have other important implications as well. See *supra* note 9 (discussing the independent state legislature doctrine).

⁴¹ *Bush*, 531 U.S. at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

⁴² *Id.*

person's vote over that of another."⁴³ This equal protection prohibition on "arbitrary and disparate treatment" of different voters participating in the same election is *Bush's* Uniformity Principle.

The Court concluded that the Florida Supreme Court's ruling violated this Uniformity Principle in three distinct ways.⁴⁴ First, the Court held that Florida's standard for determining whether a ballot counted as a valid vote was too vague, and that various election officials applied it inconsistently.⁴⁵ Florida law required ballots to be counted if election officials could ascertain "the intent of the voter."⁴⁶ The Court noted that the state had not adopted "specific rules" to guide officials on "how to interpret the marks or holes or scratches" on ballots to ensure "equal application" of this vague, subjective standard.⁴⁷ "The formulation of uniform rules to determine intent," the Court concluded, "is practicable and . . . necessary."⁴⁸

The Court pointed out that the absence of specific, uniform rules "led to unequal evaluation of ballots in various respects."⁴⁹ It explained that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."⁵⁰ Palm Beach County had repeatedly changed its standards over the course of the recount.⁵¹ The Court concluded, "This is not a process with sufficient guarantees of equal treatment."⁵² Thus, a law that allowed various election officials to treat similarly marked ballots inconsistently when deciding whether to accept them as valid votes violated the Equal Protection Clause.

Second, counties also differed in the universe of ballots that they manually recounted. Miami-Dade, Palm Beach, and Broward Counties performed manual recounts of all ballots for which their automatic tallying machines did not record a vote for President, including ballots that the machines had classified as undervotes (i.e., those not registering any votes for president) and overvotes (i.e., those registering multiple votes for

⁴³ *Id.* at 104–05.

⁴⁴ *See id.* at 105–08 (concluding that the Florida Supreme Court's ruling "d[id] not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right").

⁴⁵ *Id.* at 106.

⁴⁶ *Id.* at 105–06 (quoting *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam)).

⁴⁷ *Bush*, 531 U.S. at 106.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 106; *see also id.* at 107 ("[E]ach of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County . . .").

⁵¹ *Id.* at 106.

⁵² *Id.* at 107.

president).⁵³ The Florida Supreme Court ordered all other counties in the state, in contrast, to perform a manual recount only of undervotes.⁵⁴ Thus, voters whose ballots had been classified as overvotes by automatic tallying machines were treated differently depending on the county in which they lived. Again, inconsistent treatment of similarly marked ballots in different counties—this time, whether they were included within the manual recount at all—violated the Equal Protection Clause.⁵⁵

Finally, the Florida Supreme Court required the Secretary of State to include partial results from Miami-Dade County's incomplete recount within the final tally.⁵⁶ The county had failed to complete its recount by the deadline. By including such partial recount results, the Florida Supreme Court afforded Miami-Dade voters whose ballots had been manually recounted an extra opportunity to have their votes recognized as valid that other voters within the county were denied. The Equal Protection Clause prohibited the state from treating similarly marked ballots within the same county differently from each other.⁵⁷

The Court attempted to cabin the scope of its ruling by declaring that it applied only “in the special instance of a statewide recount under the authority of a single state judicial officer.”⁵⁸ It emphasized, “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”⁵⁹ True to its word, the Supreme Court has never cited *Bush v. Gore* in a majority opinion. Indeed, as of June 30, 2020, a Supreme Court justice has cited the case only once: Justice Thomas quoted *Bush* in a footnote in a dissent to support the proposition that states have plenary authority over the appointment of presidential electors.⁶⁰

⁵³ *Bush*, 531 U.S. at 107–08.

⁵⁴ *Id.* at 102 (quoting *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam)).

⁵⁵ *See id.* at 108.

⁵⁶ *See id.*

⁵⁷ *See id.* at 109 (“The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter . . .”).

⁵⁸ *Id.*

⁵⁹ *Bush*, 531 U.S. at 109.

⁶⁰ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 35 n.2 (2013) (Thomas, J., dissenting) (quoting *Bush*, 531 U.S. at 104). Justice Thomas stated that the Constitution gives Congress “no authority whatsoever” to “regulate Presidential elections.” *Id.*

Based on *Bush's* limiting language, courts have consistently refused to extend the Uniformity Principle to criminal cases,⁶¹

⁶¹ See *United States v. Nosal*, 844 F.3d 1024, 1053 n.8 (9th Cir. 2016) (Reinhardt, J., dissenting) (characterizing *Bush* as “a ticket for one train only” (quoting Linda Greenhouse, *Thinking About the Supreme Court After Bush v. Gore*, 35 IND. L. REV. 435, 436 (2002))); *Majors v. Warden*, No. 99-cv-00493, 2016 U.S. Dist. LEXIS 70099, at *381 (E.D. Cal. May 26, 2016) (holding that *Bush* “considered specific problems stemming from the 2000 presidential election. The Court explicitly limited its holding to those election process issues”); *Reay v. Scribner*, No. CIV S-02-2067, 2008 U.S. Dist. LEXIS 3590, at *84–86 (E.D. Cal. Jan. 16, 2008) (rejecting an equal protection challenge to the allegedly different standards that various jurisdictions within the state used in deciding whether to appoint post-conviction counsel, declaring, “The Supreme Court expressly limited its analysis to the unique circumstances relating to the 2000 presidential election process in Florida and the various recount procedures developed to address those circumstances”), *recommendations adopted*, No. 02-cv-2067, 2008 U.S. Dist. LEXIS 16234 (E.D. Cal. Mar. 3, 2008), *aff'd*, 369 F. App'x 847 (9th Cir. 2010); *Austin v. Wilkinson*, 502 F. Supp. 2d 660, 671 & n.6 (N.D. Ohio 2006) (noting that, in an “exception” to the rule that the Supreme Court’s opinions “guide the future actions of those before and not before the Court” by creating precedent, the *Bush* Court “limited the holding’s authority to the facts in that case”); *People v. Pena*, No. B148324, 2002 Cal. App. Unpub. LEXIS 4373, at *33 n.10 (Cal. Ct. App. Jan. 30, 2002) (reaffirming that *Bush v. Gore* did not affect prosecutors’ broad discretion over criminal charging decisions); *State v. Scherner*, 225 P.3d 248, 260–62 (Wash. Ct. App. 2009) (rejecting equal protection challenge to law allowing the state to introduce evidence of the defendant’s prior sexual offenses in sex crime prosecutions and holding that, because of “the self-limiting language of the [*Bush*] opinion . . . [e]xcept in the rare circumstances where the facts at issue show some resemblance to the contested 2000 presidential election, the precedential value of *Bush v. Gore* is ambiguous at best and the opinion should not be cited to support other equal protection claims” (footnote omitted)), *aff'd sub nom. State v. Gresham*, 269 P.3d 207 (Wash. 2012); *State v. Gallion*, 2002 WI App 265, ¶ 10 (rejecting equal protection challenge to truth-in-sentencing provisions); *State v. Smart*, 2002 WI App 240, ¶¶ 6–8 (rejecting equal protection challenge to sentencing guidelines); see also *infra* notes 62–63 (citing additional sources). But see *Weatherspoon v. Oldham*, No. 17-cv-2535-SHM-cgc, 2018 U.S. Dist. LEXIS 30386, at *6 (W.D. Tenn. Feb. 26, 2018) (granting writ of habeas corpus to prisoner challenging constitutionality of cash bail system), *reconsideration denied*, 2018 U.S. Dist. LEXIS 65983 (W.D. Tenn. Apr. 19, 2018).

particularly in challenges to prosecutorial discretion over the death penalty⁶² or the validity of reasonable doubt instructions.⁶³ They have likewise

⁶² For cases setting the precedents within their respective jurisdictions rejecting challenges to the death penalty based on *Bush*, see *Moon v. Davis*, No. LA CV08-08327, 2018 U.S. Dist. LEXIS 227935, at *209–10 (C.D. Cal. May 1, 2018) (refusing to apply *Bush v. Gore* in the criminal context because the Court “expressly limited its analysis to the circumstances of the 2000 presidential election and the Florida recount procedures”); *Hoyos v. Davis*, No. 09cv0388 L, 2017 U.S. Dist. LEXIS 165592, at *430–31 (S.D. Cal. Oct. 4, 2017) (“Petitioner’s reliance upon *Bush v. Gore* is misplaced, as that decision involved legal challenges arising from the 2000 presidential election . . .”); *Sonner v. Filson*, No. 00-cv-01101, 2017 U.S. Dist. LEXIS 139462, at *62–64 (D. Nev. Aug. 25, 2017) (“[T]he holding in *Bush v. Gore* does not apply in the criminal procedure context.”); *Roybal v. Davis*, 148 F. Supp. 3d 958, 1105–06 (S.D. Cal. 2015) (“Given the expressly limited nature of the Supreme Court’s holding, the Court remains unpersuaded that *Bush v. Gore* is relevant to [a death penalty case].”); *Rundle v. Warden*, No. 08-cv-01879, 2013 U.S. Dist. LEXIS 167445, at *524–26 (E.D. Cal. Nov. 21, 2013), *aff’d*, 782 F. App’x 581 (9th Cir. 2019), *petition for cert. filed*; No. 20-5617 (2020); *Crowe v. Terry*, 426 F. Supp. 2d 1310, 1354–56 (N.D. Ga. 2005), *aff’d*, 490 F.3d 840 (11th Cir. 2007); *Black v. Bell*, 181 F. Supp. 2d 832, 879 (M.D. Tenn. 2001), *remanded*, No. 02-5032, 2007 U.S. App. LEXIS 30798 (6th Cir. May 30, 2007); *Lewis v. State*, 24 So. 3d 480, 536 (Ala. Crim. App. 2006), *aff’d sub nom. Ex parte Lewis*, 24 So. 3d 540 (Ala. 2009); *People v. Vines*, 251 P.3d 943, 987 (Cal. 2011), *modified by* No. S065720, 2011 Cal. LEXIS 8084 (Cal. 2011), *overruled in part on other grounds by* *People v. Hardy*, 418 P.3d 309 (Cal. 2018); *People v. Bennett*, 199 P.3d 535, 571 n.19 (Cal. 2009); *State v. Nichols*, No. 05SC29988, 2006 Ga. Super. LEXIS 116 (Super. Ct. Dec. 21, 2006); *St. Clair v. Commonwealth*, 451 S.W.3d 597, 658 (Ky. 2014); *State v. Clark*, 220 So. 3d 583, 691–92 (La. 2016), *vacated*, *Clark v. Louisiana*, 138 S. Ct. 2671 (2018) (mem.); *Galloway v. State*, 122 So. 3d 614, ¶¶ 242–45 (Miss. 2013) (en banc); *People v. Owens*, No. 547/99, 2001 N.Y. Misc. LEXIS 463, at *7–8 (N.Y. Sup. Ct. Apr. 2, 2001); *State v. Longo*, 148 P.3d 892, 904–05 (Or. 2006); *Cunningham v. Thompson*, 62 P.3d 823, 845–46 (Or. Ct. App. 2003); *State v. Cross*, 132 P.3d 80, 101 (Wash. 2006) (en banc) (“[W]e decline to apply the principles announced in *Bush* outside of election law. The Supreme Court clearly indicated it did not intend application outside of that narrow realm.”); *Burns v. State*, No. W2004-00914-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1282, at *201–05 (Crim. App. Dec. 21, 2005); *Threadgill v. State*, 146 S.W.3d 654, 672 (Tex. Crim. App. 2004) (en banc); *see also* *Jurado v. Davis*, No. 08cv1400, 2018 U.S. Dist. LEXIS 158379, at *488–90 (S.D. Cal. Sept. 17, 2018) (rejecting challenge to death penalty based on *Bush* because it “was a narrow holding that specifically dealt with legal challenges arising from a presidential election”); *Cornwell v. Warden*, No. 06-cv-00705, 2018 U.S. Dist. LEXIS 25346, at *376–77 (E.D. Cal. Feb. 14, 2018) (“In *Bush v. Gore*, the Court considered specific problems stemming from the 2000 presidential election. The Court explicitly limited its holding to those election process issues.”), *recommendations adopted*, 2019 U.S. Dist. LEXIS 45206 (E.D. Cal. Mar. 18, 2019); *Chinn v. Warden*, No. 02-cv-512, 2013 U.S. Dist. LEXIS 91248, at *54 n.6 (S.D. Ohio June 28, 2013) (“*Bush v. Gore* was decisive, but has never again been cited by the Supreme Court, and drawing any ‘instruction’ from it is extremely hazardous.”), *adopted*, 2020 U.S. Dist. LEXIS 94062 (S.D. Ohio May 29, 2020); *Ripkowski v. Thaler*, No. 07-4097, 2010 U.S. Dist. LEXIS 36102, at *65 (S.D. Tex. Mar. 31, 2010) (“The opinion in *Bush v. Gore* expressly states that it is limited to the specific facts of that case.”), *aff’d*, 438 F. App’x 296 (5th Cir. 2011); *Anderson v. Dretke*, No. 03cv171, 2006 U.S. Dist. LEXIS 3379, at *25 n.2 (E.D. Tex. Jan. 18, 2006) (“The Court notes that the Supreme Court [in *Bush*] accepted a somewhat similar argument . . . but that Court stated in its opinion that the reasoning in the case could not be used in other cases.” (citation omitted)); *Hughes v. Dretke*, No. H-01-4073, 2004 U.S. Dist. LEXIS 33589, at *72 (S.D. Tex. Apr. 30, 2004) (“[T]he holding in *Bush v. Gore* is expressly limited only to the unique circumstances relating to the 2000 election . . . There is no indication that this limited holding was intended to apply in any other context.”).

generally refused to apply *Bush* in civil cases outside the context of election law.⁶⁴ A handful of courts have cited *Bush* to underscore the fact that their rulings in particular cases should not be applied as precedent in future cases.⁶⁵ Conversely, some dissenters have invoked *Bush* to critique majority opinions for attempting to unduly limit the scope of their holdings.⁶⁶

⁶³ Pratt v. Evans, No. 02-CV-0872-MCE (HC), 2010 U.S. Dist. LEXIS 16382, at *5-7 (E.D. Cal. Feb. 23, 2010) (emphasizing the narrowness of *Bush*'s holding), *aff'd sub nom.* Pratt v. Hedgpeth, 519 F. App'x 509 (9th Cir. 2013); Baca v. Scribner, No. CIV. S-05-0506, 2008 U.S. Dist. LEXIS 26665, at *24 (E.D. Cal. Mar. 28, 2008) (rejecting equal protection challenge to reasonable doubt instruction because *Bush* "was not a criminal case and did not consider the equal protection problems, if any, arising from the use of California's reasonable doubt instruction"), *recommendation adopted*, 2008 U.S. Dist. LEXIS 74290 (E.D. Cal. Aug. 22, 2008); Nguyen v. Runnels, No. C 04-1124, 2007 U.S. Dist. LEXIS 24908, at *51-54 (N.D. Cal. Mar. 21, 2007) ("[T]he United States Supreme Court limited its holding in *Bush v. Gore* to the circumstances relating to the 2000 election."); People v. Tatmon, No. A109381, 2007 Cal. App. Unpub. LEXIS 5546, at *56-57 (Cal. Ct. App. July 9, 2007); People v. Warren, No. C039112, 2002 Cal. App. Unpub. LEXIS 3600, at *4-5 (Cal. Ct. App. Feb. 27, 2002); *see also cf.* Roberts v. Harrison, No. CV F 05-01006, 2008 U.S. Dist. LEXIS 104178, at *41-43 (E.D. Cal. Dec. 15, 2008) (rejecting defendant's equal protection challenge under *Bush* to reasonable doubt instructions because juries in all criminal cases are given the same instructions on the issue).

⁶⁴ *See, e.g.*, Ellis v. Chao, No. 01 Civ. 0280, 2001 U.S. Dist. LEXIS 19988, at *12-13 (S.D.N.Y. Dec. 3, 2001) ("[I]t is highly doubtful that the holding of *Bush v. Gore* applies to internal union elections. The Supreme Court cautioned that its consideration in that case was 'limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)), *aff'd in part, vacated in part on other grounds, and remanded*, 336 F.3d 114 (2d Cir. 2003); Regante v. Dir., Div. of Tax'n, 19 N.J. Tax 296, 301 (Super. Ct. App. Div. 2001) (rejecting equal protection challenge to state's calculation of out-of-state income); *In re Town of Verona v. Cuomo*, 997 N.Y.S.2d 670 (Sup. Ct. 2014) (declining to apply *Bush* to allow a constitutional challenge to a settlement agreement that required an Indian tribe to support a proposed state constitutional amendment). *But see* Vallien v. State ex rel. Dep't of Transp. & Dev., 812 So. 2d 894, 904 (La. Ct. App. 2002) (Thibodeaux, J., concurring in part and dissenting in part) (opining that a state damages cap violated equal protection by arbitrarily discriminating among tort victims (citing *Bush*, 531 U.S. at 106)); Harrison Cnty. Bd. of Supervisors v. Carlo Corp., 833 So. 2d 582, ¶¶ 8-10 (Miss. 2002) (en banc) (applying *Bush*'s Uniformity Principle to a county's exercise of discretion to determine the amount of attorney's fees to charge a delinquent taxpayer).

⁶⁵ *See, e.g.*, Sorchini v. City of Covina, 250 F.3d 706, 709 n.2 (9th Cir. 2001) (per curiam) ("This excuse is valid only in this case." (citing *Bush*, 531 U.S. at 98)); *see also* Port Arthur Indep. Sch. Dist. v. Klein & Assocs. Pol. Rels., 70 S.W.3d 349, 353 & n.1 (Tex. App. 2002) (Burgess, J., concurring) (emphasizing that the majority's holding should be "restrict[ed] . . . to these specific parties and facts" (citing *Bush*, 531 U.S. at 109, 121)).

⁶⁶ *See, e.g.*, Spears v. Stewart, 283 F.3d 992, 996 (9th Cir. 2001) (Reinhardt, J., dissenting from denial of rehearing en banc) ("The decision in this case is similar to that in *Bush v. Gore*—good for this case and this case only—except that here the decision is not even good for this case." (footnote omitted)); Morgan v. Bank of N.Y. Mellon, 200 So. 3d 792, 797 (Fla. Dist. Ct. App. 2016) (Makar, J., dissenting from denial of rehearing en banc) ("[T]he majority opinion has been revised to ensure that it is constrained to its facts, so much so that it falls into a category of cases that are 'limited to the present circumstances' and ought never be cited as precedent." (quoting *Bush*, 531 U.S. at 109)).

Bush's limiting language has also made some courts hesitant to rely on its Uniformity Principle in the context of election cases.⁶⁷ In one especially clear example, the district court rejected the notion that *Bush v. Gore's* "sweeping language" authorized the plaintiff's equal protection claim, since the *Bush* Court had been "cautious to limit its ruling . . . to the circumstances before it, which involved a statewide election for the President of the United States."⁶⁸ The court continued, "[T]herefore, its applicability to this or any other case involving concerns over voting rights and equal protection is dubious."⁶⁹ Courts have likewise resisted litigants' efforts to invoke the Uniformity Principle in challenges to ranked-choice

⁶⁷ *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *12, *55-56 (N.D. Cal. Sept. 8, 2008) (rejecting disabled voters' equal protection challenge under *Bush* to the use of certain voting machines because, "by its own language, and universal agreement, *Bush* does not apply outside its own facts and circumstances: a court-ordered statewide recount, by a body charged with ensuring uniformity among counties, which failed to do so"); *Green Party v. Weiner*, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) ("The Supreme Court explicitly warned that *Bush*, if not entirely a one-day ticket, was decided on extraordinary facts, such that its holding 'is limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)); *Cobb v. Thurman*, 957 So. 2d 638, 640-41, 646 n.5 (Fla. Dist. Ct. App. 2006) (noting that *Bush* was "limited to [its] facts" and "declin[ing] to extend [its] holdings," in the course of rejecting an equal protection challenge to a directive requiring county election officials to post notices at polling places that votes for a withdrawn candidate whose name still appeared on the ballot would be counted as votes for a replacement candidate, even though a lower court had enjoined officials from posting the sign and people who had already voted had no opportunity to see it); see also *Young v. Hosemann*, 598 F.3d 184, 185, 189, 192 (5th Cir. 2010) (exercising subject-matter jurisdiction over a challenge to a state prohibition on felon voting in presidential elections, but rejecting the challenge on the merits); *Barber v. Bennett*, No. CV-14-02489, 2014 U.S. Dist. LEXIS 165748, at *11-12, *15 (D. Ariz. Nov. 27, 2014) (rejecting a challenge to allegedly vague requirements for confirming signature matches on ballots and stating that *Bush* "did not invalidate different county systems regarding implementation of election procedures"); *Jagla v. Ill. St. Bd. of Elections*, No. 10-C-7324, 2011 U.S. Dist. LEXIS 60146, at *4-5 (N.D. Ill. June 6, 2011) (refusing to apply *Bush's* Uniformity Principle in a challenge to the exclusion of a minor party candidate's name from the ballot); *Ostrom v. O'Hare*, 160 F. Supp. 2d 486, 497 (E.D.N.Y. 2001) (rejecting plaintiffs' argument that "[i]t is black-letter law that money equals votes" and holding that their reliance on *Bush* "simply does not make sense"); *infra* notes 70-78. *But see State ex rel. League of Women Voters v. Herrera*, 203 P.3d 94, 98 (N.M. 2009) ("In part because of the opinion's unusual self-limiting phrase, the precedential weight of *Bush v. Gore* is ambiguous, but the case nevertheless appears to have continuing life.").

⁶⁸ *Walker v. Exeter Region Coop. Sch. Dist.*, 157 F. Supp. 2d 156, 159 n.6 (D.N.H. 2001), *aff'd*, 284 F.3d 42 (1st Cir. 2002).

⁶⁹ *Id.* The district court in *Walker* need not have gone so far because the Uniformity Principle, on its own terms, would not have applied in that case. The plaintiffs had challenged the fact that school districts which held town meetings to vote on bond issuances needed to approve the bonds by a two-thirds supermajority, while districts that voted on the same matters at traditional elections required only a sixty percent vote. *Id.* at 157-58. Because the law held voters participating in different local elections to different standards, *Bush's* requirement of uniform treatment for voters within the same electorate was inapplicable.

voting (also called instant-runoff voting);⁷⁰ the Electoral College;⁷¹ states' winner-take-all systems for appointing presidential electors;⁷² laws binding presidential electors;⁷³ voter identification requirements;⁷⁴ the exclusion of candidates from the ballot for technical violations of petition requirements;⁷⁵ redistricting standards;⁷⁶ the Democratic Party's

⁷⁰ Baber v. Dunlap, 349 F. Supp. 3d 68, 77, 80 (D. Me.) (denying temporary restraining order), *preliminary injunction denied*, 376 F. Supp. 3d 125 (D. Me.), *appeal dismissed*, No. 18-2250, 2018 U.S. App. LEXIS 37137 (1st Cir. Dec. 28, 2018); Dudum v. City & Cnty. of San Francisco, No. C 10-00504, 2010 U.S. Dist. LEXIS 47020, at *19 (N.D. Cal. Apr. 16, 2010), *aff'd sub. nom.* Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011); Minn. Voters Alliance v. City of Minneapolis, 766 N.W.2d 683, 698 (Minn. 2009).

⁷¹ Trinsey v. United States, No. 00-5700, 2000 U.S. Dist. LEXIS 18387, at *7-8 (E.D. Pa. Dec. 21, 2000); *see also* Liu v. Ryan, 724 F. App'x 92, 93 (2d Cir. 2018).

⁷² Baten v. McMaster, 374 F. Supp. 3d 563, 569 (D.S.C. 2019), *aff'd*, 967 F.3d 345 (4th Cir. 2020); League of United Latin Am. Citizens v. Abbott, 369 F. Supp. 3d 768, 779-80 (W.D. Tex. 2019) ("Bush's precedential value is unclear. Its primary opinion is expressly 'limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)), *aff'd*, 951 F.3d 311 (5th Cir. 2020); Lyman v. Baker, 352 F. Supp. 3d 81, 87-88 (D. Mass. 2018) ("[T]he precedential value of *Bush* is unclear, as the main opinion expressly states that it is 'limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)), *aff'd*, 954 F.3d 351 (1st Cir. 2020); Rodriguez v. Brown, No. 18-cv-001422, 2018 U.S. Dist. LEXIS 221795, at *8 (C.D. Cal. Sept. 21, 2018); Conant v. Brown, 248 F. Supp. 3d 1014, 1025, 1028 (D. Or. 2017), *aff'd*, 726 F. App'x 611 (9th Cir. 2018); *see also* Strunk v. U.S. House of Reps., 24 F. App'x 21, 23 (2d Cir. 2001); Williams v. North Carolina, No. 17-CV-265, 2017 U.S. Dist. LEXIS 181115, at *2, *11 (W.D.N.C. Oct. 2, 2017), *recommendations adopted sub nom.* Williams v. N.C. State Bd. of Elections, 2017 U.S. Dist. LEXIS 179833 (W.D.N.C. Oct. 31, 2017), *aff'd*, 719 F. App'x 256 (4th Cir. 2018) (per curiam); Schweikert v. Herring, No. 16-CV-00072, 2016 U.S. Dist. LEXIS 166854, at *7 (W.D. Va. Dec. 2, 2016).

⁷³ Abdurrahman v. Dayton, No. 16-cv-4279, 2016 U.S. Dist. LEXIS 178222, at *8, *11 (D. Minn. Dec. 23, 2016), *aff'd*, 903 F.3d 813 (8th Cir. 2018), *reh'g denied*, No. 16-4551, 2018 U.S. App. LEXIS 31567 (8th Cir. Nov. 7, 2018); Baca v. Hickenlooper, No. 16-cv-02986, 2016 U.S. Dist. LEXIS 177991, at *7 (D. Colo. Dec. 21, 2016), *overruled in part by* Chiafalo v. Washington, 140 S. Ct. 2316 (2020); Chiafalo v. Inslee, 224 F. Supp. 3d 1140, 1145 (W.D. Wash. 2016), *injunction denied*, No. 16-36034, 2016 U.S. App. LEXIS 23392 (9th Cir. Dec. 16, 2016). *But see* Baca v. Colo. Dep't of State, 935 F.3d 887, 951-52 (10th Cir. 2019) (invalidating state law requiring presidential electors to cast their electoral votes for the presidential candidate who received a plurality of the popular vote within the state), *rev'd sub. nom.* Colo. Dep't of State v. Baca, 140 S. Ct. 2316 (2020) (per curiam).

⁷⁴ ACLU v. Santillanes, 546 F.3d 1313, 1324-25 (10th Cir. 2008), *rev'g* 506 F. Supp. 2d 598 (D.N.M. 2007).

⁷⁵ Minnus v. Bd. of Elections, No. 10-CV-3918, 2010 U.S. Dist. LEXIS 91969, at *12 (E.D.N.Y. Sept. 3, 2010); Ramratan v. N.Y. City Bd. of Elections, No. 06-CV-04770, 2006 U.S. Dist. LEXIS 63831, at *14-15 (E.D.N.Y. Sept. 7, 2006).

⁷⁶ *See, e.g.,* Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 284 F. Supp. 2d 1240, 1247-48 (D. Ariz. 2003) (refusing to apply *Bush's* "principles in a different context" and rejecting the argument that *Bush* requires states to "apply consistent standards in redistricting"); Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 857-58 (Ariz. Ct. App. 2005) (per curiam) (holding that the Equal Protection Clause does not require an independent redistricting commission to promulgate regulations to better define the state constitution's requirement that the districts it draws be "competitive"); *In re* Constitutionality of House Joint Resol. 1987, 817 So. 2d 819, 831 n.17 (Fla. 2002) (holding that *Bush* did not require the legislature to

superdelegate rules;⁷⁷ and the absence of voting rights in presidential elections for citizens of US territories and possessions.⁷⁸

Many more courts have been willing to cite various parts of *Bush v. Gore* for uncontroversial principles for which they could have just as easily cited other authorities.⁷⁹ These principles include the facts that the Equal

promulgate detailed “extraconstitutional standards” to govern redistricting), *superseded by constitutional amendment*, FLA. CONST. art. III, § 21 (2020). A few courts have invoked *Bush* in redistricting cases, but it does not appear to have affected the applicable rules or analysis. *See, e.g.*, *Wright v. North Carolina*, 787 F.3d 256, 259, 263 (4th Cir. 2015). Some have expressly emphasized that the case did not affect traditional redistricting doctrine. *See, e.g.*, *Hall v. Louisiana*, Civ. Act. No. 12-00657, 2015 U.S. Dist. LEXIS 43231, at *9 (M.D. La. Mar. 31, 2015), *judgment entered*, 108 F. Supp. 3d 419 (M.D. La. 2015).

⁷⁷ *Kurzorn v. Democratic Nat’l Comm.*, 197 F. Supp. 3d 638, 643 (S.D.N.Y. 2016).

⁷⁸ *Goodwin v. Fawkes*, 67 V.I. 104, 137 (Super. Ct. 2016) (holding that citizens of the US Virgin Islands have no constitutional right to vote for federal office); *accord Ballentine v. United States*, Civ. No. 1999-130, 2001 U.S. Dist. LEXIS 16856, at *53–54 (D.V.I. Oct. 15, 2001) (requesting supplemental briefing), *dismissed*, 2006 U.S. Dist. LEXIS 96631, at *1 (D.V.I. Sept. 21, 2006), *aff’d*, 486 F.3d 806 (3d Cir. 2007); *see also Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) (holding that citizens of Puerto Rico have no constitutional right to vote for president); *Segovia v. Bd. of Election Comm’rs*, 201 F. Supp. 3d 924, 944–45 (N.D. Ill. 2016) (holding that the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) was constitutionally valid even though it allowed former residents of the United States to continue voting in federal elections if they move to the Northern Mariana Islands, but not if they move to other territories), *aff’d in relevant part and rev’d in part sub nom. Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018); *Charles v. U.S. FEC*, No. 11-110, 2012 U.S. Dist. LEXIS 118428, at *9–10 (D.V.I. Aug. 16, 2012) (holding that citizens of US Virgin Islands have no constitutional right to vote for president); *Goodwin v. U.S. FEC*, No. 11-106, 2012 U.S. Dist. LEXIS 125926, at *9–10 (D.V.I. Aug. 16, 2012); *Igartúa de la Rosa v. United States*, 331 F. Supp. 2d 76, 79 (D.P.R.) (holding that citizens of Puerto Rico have no constitutional right to vote for president), *aff’d sub nom. Igartúa-de la Rosa v. United States*, 386 F.3d 313 (1st Cir. 2004) (per curiam), *vacated by* No. 04-2186, 2005 U.S. App. LEXIS 6269 (1st Cir. Apr. 15, 2005), *aff’d en banc*, 417 F.3d 145 (1st Cir.).

⁷⁹ *See, e.g.*, *Buffin v. City & Cnty. of San Francisco*, No. 15-cv-04959, 2018 U.S. Dist. LEXIS 6853, at *19–20, *19 n.18 (N.D. Cal. Jan. 16, 2018) (holding that discrimination regarding fundamental rights triggers strict scrutiny under the Equal Protection Clause); *Logan v. Pub. Emps. Ret. Ass’n*, 163 F. Supp. 3d 1007, 1033–34 (D.N.M. 2016) (“In general, federal courts must use great caution when interfering with state elections.”); *Sadhu v. Gonzales*, No. 06-2664, 2006 U.S. Dist. LEXIS 86540, at *8 (D.N.J. Nov. 29, 2006) (“[C]ourts assume Congress knows about other statutes already in effect and drafts new statutes with the existing statutes in mind.”); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 435–38 (E.D. Mich. 2004) (holding that failure to have one’s ballot counted constitutes irreparable injury and issuing a preliminary injunction requiring election officials to count provisional ballots cast at the wrong precinct anywhere within the correct municipality); *United States v. Bobo*, 323 F. Supp. 2d 1238, 1243 (N.D. Ala. 2004) (discussing the importance of public confidence in judges in the context of judicial recusal); *Welker v. Cicerone*, 174 F. Supp. 2d 1055, 1067 (C.D. Cal. 2001) (“[E]nsuring that a duly elected official has the opportunity to represent her constituents is unquestionably in the public interest.”); *People v. Pelegrin*, 959 N.Y.S.2d 401, 405 n.3 (N.Y. Crim. Ct. 2013) (noting that a fundamental rights analysis is the same under the Due Process and Equal Protection Clauses); *McFarland v. Pemberton*, 530 S.W.3d 76, 92 n.20 (Tenn. 2016) (“[E]ven duties which appear on their face to be ministerial, such as counting votes, may in some circumstances require the exercise of judgment and discretion.”); *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 416 & n.21 (Tex. 2009)

Protection Clause protects the fundamental right to vote,⁸⁰ particularly the right of eligible voters to have their validly cast ballots counted;⁸¹ the Equal Protection Clause limits the state's ability to regulate the manner in which people exercise their voting rights;⁸² candidates have third-party standing to assert voters' constitutional right to vote;⁸³ state legislatures

(Willett, J., concurring) ("An appellate court can issue a mandate earlier than the rules ordinarily prescribe if it has good cause for making its judgment more immediately final and enforceable."); *Walker v. Doe*, 558 S.E.2d 290, 294 (W. Va. 2001) (discussing propriety of per curiam rulings), *overruled on other grounds*, *State v. McKinley*, 764 S.E.2d 303 (W. Va. 2014).

⁸⁰ See *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 337, 340 (4th Cir. 2016) (affirming district court's dismissal of racial gerrymandering claims, but reversing its rejection of a one-person, one-vote claim); *Stein v. Cortés*, 223 F. Supp. 3d 423, 437–38 (E.D. Pa. 2016) (rejecting challenge to the use of electronic voting machines and holding that voters had no constitutional right to a recount); *Stein v. Thomas*, 222 F. Supp. 3d 539, 542, 545 (E.D. Mich.) (issuing a temporary restraining order requiring a state to commence recounting ballots in a presidential election immediately, before the expiration of a statutorily required waiting period which the court held was likely unconstitutional as applied), *aff'd*, 672 F. App'x 565 (6th Cir. 2016); *Citizens for a Pub. Train Trench Vote v. City of Reno*, 53 P.3d 387, 394–95 (Nev. 2002) (en banc) (per curiam) (Young, J., dissenting) (concluding that an initiative should have been placed on the ballot); see also *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F. Supp. 3d 935, 939–40, 940 n.25, 947 (M.D.N.C. 2017) (invalidating municipal redistricting plan with population deviations exceeding eight percent that was enacted for partisan purposes).

⁸¹ See, e.g., *Hoblock v. Albany Cnty. Bd. of Elections*, 341 F. Supp. 2d 169, 176, 178 (N.D.N.Y. 2004) (granting preliminary injunction to enjoin the state from certifying election results while a dispute over whether to count certain absentee ballots remained pending), *remanded*, 422 F.3d 77 (2d Cir. 2005), *aff'd*, 487 F. Supp. 2d 90 (N.D.N.Y. 2006) (ordering state to count absentee ballots that election officials had erroneously issued).

⁸² *Brakebill v. Jaeger*, 932 F.3d 671, 681, 687 (8th Cir. 2019) (Kelly, J., dissenting) (arguing that the majority erred in upholding the state's voter identification law); *Ivey v. Johnston*, No. 18-cv-1429, 2019 U.S. Dist. LEXIS 126989, at *7 n.5 (D. Minn. July 24, 2019) (rejecting the argument that banning civilly committed sex offenders from using the Internet violates the First Amendment "right to an informed electorate"), *recommendation adopted*, 2019 U.S. Dist. LEXIS 143713 (D. Minn. Aug. 23, 2019); *Mich. State A. Philip Randolph Inst. v. Johnson*, 209 F. Supp. 3d 935, 940, 946 (E.D. Mich.) (entering preliminary injunction against state law eliminating straight-ticket voting in Michigan), *stay denied*, No. 16-cv-11844, 2016 U.S. Dist. LEXIS 107429 (E.D. Mich. Aug. 15, 2016), *stay denied*, 833 F.3d 656 (6th Cir.), *stay denied*, 137 S. Ct. 28 (2016), *vacated*, 2019 U.S. Dist. LEXIS 181173 (E.D. Mich. Feb. 7, 2019); *Veasey v. Perry*, 71 F. Supp. 3d 627, 690 (S.D. Tex. 2014), *aff'd in part and vacated in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *vacated and reh'g en banc granted*, 815 F.3d 958 (5th Cir.), *on reh'g en banc*, 830 F.3d 216 (5th Cir. 2016); *Doe v. Rowe*, 156 F. Supp. 2d 35, 51 (D. Me. 2001) (holding that Maine's system for disenfranchising mentally ill people under guardianship violated equal protection); *State ex rel. Brown v. Ashtabula Cnty. Bd. of Elections*, 142 Ohio St. 3d 370, ¶¶ 28, 34–35 (per curiam) (O'Connor, C.J., concurring in the judgment) (applying *Anderson-Burdick* balancing to hold that a sore loser law which allowed candidates who lost primary elections to run only for certain local and specialized offices was unconstitutional).

⁸³ See, e.g., *Hawkins v. Wayne Twp. Bd.*, 183 F. Supp. 2d 1099, 1101, 1103 (S.D. Ind. 2002) (allowing candidate to challenge election results on the grounds that voters from certain districts had erroneously been given the wrong ballots).

have plenary power over the selection of presidential electors,⁸⁴ because the Constitution does not affirmatively guarantee the right to vote,⁸⁵ including for the office of President;⁸⁶ and a federal court must generally defer to a state supreme court's interpretation of state law.⁸⁷ Citing the

⁸⁴ See, e.g., *Ariz. Libertarian Party v. Schmeral*, 28 P.3d 948, 953 & n.5 (Ariz. Ct. App. 2001) (rejecting constitutional challenge to state laws governing the selection of minor political parties' leaders); see also *Gelineau v. Johnson*, 904 F. Supp. 2d 742, 744, 747–48 (W.D. Mich. 2012) (holding that a minor political party lacked the right to have a vice-presidential candidate appear on the ballot without a properly nominated and statutorily eligible presidential candidate); *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 175 (W.D. Pa. 2011) (rejecting an equal protection challenge to restrictions on canvassers gathering signatures for petitions).

⁸⁵ See, e.g., *Simmons v. Galvin*, 575 F.3d 24, 26, 31 (1st Cir. 2009) (upholding disenfranchisement of incarcerated inmates); *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1299–1300, 1325–26 (N.D. Fla. 2016) (holding that the Constitution forbade a county from counting disenfranchised state prisoners as part of the population count when apportioning school board districts); *Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth*, 100 N.E.3d 326, 327, 331 n.19 (Mass. 2018) (upholding voter registration deadline against a state constitutional challenge); cf. *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 814 & n.27 (Del. Ch. 2015) (contending that the Constitution protects an implied right to vote).

⁸⁶ See, e.g., *Taitz v. Democrat Party of Miss.*, No. 12-CV-280, 2015 U.S. Dist. LEXIS 178819, at *11–13 (S.D. Miss. Mar. 31, 2015) (dismissing challenge to President Obama's eligibility to run for president).

⁸⁷ See *Pinho v. Gonzales*, 432 F.3d 193, 212–13 (3d Cir. 2005); *Ramos-Becerra v. Hatfield*, No. 14-cv-0917, 2017 U.S. Dist. LEXIS 9370, at *6–7 (M.D. Pa. Jan. 24, 2017) (quoting *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring)); *United States v. Nieves-Galarza*, No. 11-CR-057, 2017 U.S. Dist. LEXIS 3579, at *3–4 (M.D. Pa. Jan. 10, 2017) (quoting *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)), *aff'd*, 718 F. App'x 159 (3d Cir. 2017); *Jacobs v. City of Chicago*, No. 14-CV-5335, 2015 U.S. Dist. LEXIS 5385, at *4 (N.D. Ill. Jan. 16, 2015) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); *Kuri v. City of Chicago*, No. 13-C-1653, 2014 U.S. Dist. LEXIS 180669, at *4 (N.D. Ill. June 11, 2014) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); *Weigel v. Maryland*, 950 F. Supp. 2d 811, 836 n.59 (D. Md. 2013) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); *Ismail v. Cnty. of Orange*, 917 F. Supp. 2d 1060, 1070 n.7 (C.D. Cal. 2012) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)), *aff'd*, 676 F. App'x 690 (9th Cir. 2017); *Shallal v. Stovall*, No. 08-10308, 2009 U.S. Dist. LEXIS 54025, at *7–8 (E.D. Mich. June 25, 2009) (citing *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring)); *Phillips v. Lafler*, No. 06-15192, 2009 U.S. Dist. LEXIS 45417, at *22 (E.D. Mich. May 28, 2009) (citing *Bush*, 531 U.S. at 112, 114 (Rehnquist, C.J., concurring)); *Filson v. Langman*, No. 99-30021-FHF, 2002 U.S. Dist. LEXIS 22036, at *17 (D. Mass. Nov. 13, 2002) (quoting *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); see also *Rutherford v. Columbia Gas*, 575 F.3d 616, 625–26 (6th Cir. 2009) (Clay, J., concurring in part and dissenting in part); *Sec. Ins. Co. v. Trustmark Ins. Co.*, 283 F. Supp. 2d 602, 606, 607 n.4 (D. Conn. 2003), *aff'd sub nom. Sec. Ins. Co. v. TIG Ins. Co.*, 360 F.3d 322 (2d Cir. 2004). Likewise, in habeas cases, a federal court generally must even defer to a state court's interpretation of the US Constitution. *Evans v. Thompson*, 465 F. Supp. 2d 62, 73 (D. Mass. 2006) (quoting *Bush*, 531 U.S. at 136–37 (Ginsburg, J., dissenting)), *aff'd*, 518 F.3d 1 (1st Cir. 2008); *Common Cause v. Pennsylvania*, 447 F. Supp. 2d. 415, 435–36 (M.D. Pa. 2006) (citing *Bush*, 531 U.S. at 142 (Ginsburg, J., dissenting)), *aff'd*, 558 F.3d 249 (3d Cir. 2009).

A few courts, in contrast, have held that *Bush* allows federal courts to reject state courts' interpretations of state law under certain narrow circumstances. See, e.g., *Republican Party v. Kelly*, 247 F.3d 854, 891 (8th Cir. 2001) (Beam, J., dissenting) (noting that federal courts defer to state courts on

concurrence in *Bush v. Gore*,⁸⁸ several courts have recognized that the Presidential Electors Clause specifically empowers the legislature of each state, rather than state executive officials⁸⁹ or state courts,⁹⁰ to regulate

questions of state law except “where an error of state law works a singular national impact”), *rev'd on other grounds sub nom.* Republican Party v. White, 536 U.S. 765 (2002); *Besser v. Walsh*, No. 02 Civ. 6775, 2003 U.S. Dist. LEXIS 21474, at *123 n.59 (S.D.N.Y. Nov. 26, 2003) (“[A] federal court may ‘re-examine[] a state-court interpretation of state law’ on ‘rare occasions’ when it ‘appears to be an obvious subterfuge to evade consideration of a federal issue.’” (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (internal quotation marks omitted), and citing *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring))), *aff'd*, 601 F.3d 163 (2d Cir. 2010).

⁸⁸ 531 U.S. at 111–22 (Rehnquist, C.J., concurring).

⁸⁹ See *Libertarian Party v. Dardenne*, No. 08-582-JJB, 2008 U.S. Dist. LEXIS 137402, at *2–3, *8–9 (M.D. La. Sept. 24, 2008) (holding that, where Hurricane Gustav forced the Secretary of State’s office to be closed on the statutory deadline for political parties to file their presidential candidates’ ballot-access petitions, the Secretary violated the Presidential Electors Clause by unilaterally establishing a new deadline and excluding parties that did not meet it); *Libertarian Party v. Brunner*, 567 F. Supp. 2d 1006, 1011–12 (S.D. Ohio 2008) (holding that the Secretary of State violated the Elections Clause and Presidential Electors Clause by establishing ballot access requirements for minor parties after a federal court invalidated the state’s statutory requirements, because the legislature had not delegated its authority to promulgate such rules); *cf.* *Baldwin v. Cortés*, 378 F. App’x 135, 138–39 (3d Cir. 2010) (rejecting plaintiffs’ Presidential Electors Clause challenge to “the Secretary [of State’s] 1984 entry into the consent decrees” changing the deadline for candidates to file ballot-access petitions, due to “the Pennsylvania legislature’s explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme”), *aff’g* No. 08-CV-01626, 2008 U.S. Dist. LEXIS 72035, at *7–12 (M.D. Pa. Sept. 12, 2008); *Largess v. Sup. Jud. Ct.*, 373 F.3d 219, 227 (1st Cir. 2004) (per curiam) (noting the disagreement among the Justices in *Bush* over whether the Presidential Electors Clause limits “the internal allocation of power in a state government”); *Moore v. Hosemann*, No. 08-cv-573, 2008 U.S. Dist. LEXIS 141865, at *4 (S.D. Miss. Sept. 29, 2008) (“[Although] federal courts will review state actions that are a significant departure from, or go beyond a fair reading of, state election laws . . . the Secretary of State’s interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state’s election statutes.”).

⁹⁰ See *Republican Party of Arkansas v. Kilgore*, 98 S.W.3d 798, 799–801 (Ark. 2002) (per curiam) (holding that, outside the context of a constitutional challenge, state courts could not extend polling place hours due to election irregularities where state law did not authorize them to do so, because “[t]he legislative branch of our state government has spoken on this issue, and there is no provision in our Election Code authorizing an extension of voting times by the judiciary”); see also *Stein v. Thomas*, No. 16-14233, 2016 U.S. Dist. LEXIS 186038, at *9 (E.D. Mich. Dec. 7, 2016) (applying a state court’s interpretation of a state law governing recounts in presidential elections, because the court “neither ignored a statutory term, nor is there even a hint that it was basing its decision on something other than the statute,” and the court “made an arguable interpretation of the statute before it”); *Miller v. Treadwell*, 736 F. Supp. 2d 1240, 1243 (D. Alaska 2010) (applying a state supreme court’s interpretation of a state law governing the counting of write-in votes in a US Senate race, because that court “did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the State’s past practice of making voter intent a priority”); *cf.* *Lance v. Davidson*, 379 F. Supp. 2d 1117, 1123, 1126 n.12 (D. Colo. 2005) (holding that the *Rooker-Feldman* doctrine precluded the federal district court from exercising jurisdiction over the plaintiffs’ Elections Clause claim), *vacated and remanded*

presidential elections. Lower courts have also alluded to the *Bush* Court's willingness to adjudicate the case's merits as evidence that the political question doctrine is narrow.⁹¹ Others appear to have cited *Bush* primarily to criticize it, though such rulings seem to be issued far less frequently.⁹²

sub nom. *Lance v. Dennis*, 546 U.S. 459 (2006) (per curiam) (holding that the lower court erred in dismissing the plaintiffs' Elections Clause claim under the *Rooker-Feldman* doctrine), *remanded to* 444 F. Supp. 2d 1149 (D. Colo.) (holding that plaintiffs were collaterally estopped from litigating their Elections Clause claim), *aff'd in part and vacated in part sub nom.* *Lance v. Coffman*, 549 U.S. 437 (2007) (holding that the generalized grievance doctrine precluded the plaintiff voters from asserting standing to challenge a congressional redistricting scheme imposed by a state court for violating the legislature's prerogatives under the Elections Clause); *see generally* Morley, *De Facto Class Actions?*, *supra* note 32 (discussing the independent state legislature doctrine).

⁹¹ *See* *Doe v. Bush*, 323 F.3d 133, 141 (1st Cir. 2003) (noting that the majority in *Bush* did not expressly address the political question doctrine); *Bissonette v. Podlaski*, No. 15-cv-00334-SLC, 2018 U.S. Dist. LEXIS 94198, at *51 (N.D. Ind. June 5, 2018); *McMahon v. Pres. Airways, Inc.* 460 F. Supp. 2d 1315, 1319 (M.D. Fla. 2006), *aff'd*, 502 F.3d 1331 (11th Cir. 2007); *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 273 & n.3 (D.D.C. 2005), *aff'd*, 559 F.3d 578 (D.C. Cir. 2009), *aff'd en banc*, 607 F.3d 836 (D.C. Cir. 2010); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 779–80 (Tex. 2005); *see also In re Methyl Tertiary Butyl Ether Prods. ("MTBE") Liab. Litig.*, 438 F. Supp. 2d 291, 297 n.29 (S.D.N.Y. 2006); *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 68 (E.D.N.Y. 2005); *McInnish v. Bennett*, 150 So. 3d 1045, 1065 n.19 (Ala. 2014) (Moore, C.J., dissenting); *Att'y Gen. v. Bd. of State Canvassers*, 888 N.W.2d 57, 58 (Mich. 2016) (mem.) (Young, C.J.) (recusing himself from a case concerning the presidential election while recognizing that, "[a]fter the disintegration of the political question doctrine and such cases as *Bush v. Gore*, courts are increasingly called upon to settle frank political questions" (footnote omitted)); *Alexander v. Taylor*, 51 P.3d 1204, ¶ 18 (Okla. 2002). One district court suggested that Justice Rehnquist's concurrence in *Bush* allows federal courts to adjudicate cases relating to presidential elections rather than abstaining in favor of state courts. *See Nader v. Keith*, No. 04-C-4913, 2004 U.S. Dist. LEXIS 16660, at *1–2, *14 (N.D. Ill. Aug. 23, 2004) (exercising jurisdiction over a challenge to ballot-access requirements by an independent candidate for president), *aff'd*, 385 F.3d 729 (7th Cir. 2004).

⁹² *See Walker v. Exeter Region Coop. Sch. Dist.*, 157 F. Supp. 2d 156, 159 n.6 (D.N.H. 2001) (asserting gratuitously that "numerous commentators and law professors have criticized the decision for its usurpation of state court power and its unjustifiable expansion of the Equal Protection Clause . . . Whether the court was in fact guided more by personal preferences than by sound legal principles need not be addressed . . ."), *aff'd*, 284 F.3d 42 (1st Cir. 2002); *Gonzalez v. United States*, 135 F. Supp. 2d 112, 115 n.5 (D. Mass.) ("[T]he fallout from *Bush v. Gore* makes it likely that resort to [jurisdiction stripping] will become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect." (citation omitted)), *aff'd sub nom.* *Brackett v. United States*, 270 F.3d 60 (1st Cir. 2001); *see also Igartúa-de la Rosa v. United States*, 417 F.3d 145, 181 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) (noting that courts must "respect and comply with" decisions such as *Bush* "irrespective of how disputed they may be"); *Rosselló-Gonzalez v. Calderón-Serra*, 398 F.3d 1, 19 (1st Cir. 2004) (Torruella, J., concurring) (discussing "individual or collective disagreement" with *Bush's* outcome); *Mhanna v. U.S. Dep't of Homeland Sec., Citizenship & Immig. Servs.*, No. 10-292, 2010 U.S. Dist. LEXIS 13139, at *30 n.6 (D. Minn. Feb. 16, 2010) (quoting *Gonzalez*, 135 F. Supp. 2d at 115 n.5); *Stephenson v. Woodward*, 182 S.W.3d 162, 176 (Ky. 2005) (Lambert, C.J., concurring) ("[T]here was a] widely held view that the Supreme Court of the United States had exceeded its jurisdiction in halting the recounting of votes in Florida, thus assuring the election of President Bush . . ."); *cf. In re*

The next two Parts explore the wide range of circumstances in which courts have invoked *Bush's* Uniformity Principle in resolving election-related cases.

II. Applying the Uniformity Principle

Courts have construed *Bush v. Gore's* Uniformity Principle as requiring election officials to treat voters within an electorate in a substantively similar manner in many, though not necessarily all, respects. These courts have implemented the principle in three main ways. Section A explains that a jurisdiction or election official may not intentionally apply different rules to similarly situated groups of voters or ballots that result in substantially different opportunities to either cast a vote or have it accepted as valid. This requirement flows directly from *Bush's* holding that election officials across a state must apply the same specific standards when recounting ballots in the same election.⁹³ Section B shows that a state may not formally delegate broad discretion to county or local officials that results in substantial disparities in the ability of various political subdivisions' voters to cast their ballots and have them be counted.

Section C discusses equal protection challenges arising from allegedly vague state laws. *Bush v. Gore* suggests that a state may not promulgate broad, vague, and subjective standards that different election officials (either within the same political subdivision or across different subdivisions) may construe or apply differently, resulting in substantial disparities among voters' chances of being able to cast ballots or have them be counted. This requirement stems from *Bush v. Gore's* rejection of Florida's "intent of the voter" standard as too indeterminate to cabin election officials' discretion.⁹⁴ Unlike the other categories of equal protection challenges, such vagueness claims often fail. Finally, Section D concludes by summarizing the principles that may be discerned from these Uniformity Principle rulings.

Before delving into this analysis, it is helpful to outline the generally accepted contours of the Uniformity Principle. Courts have recognized three main restrictions on its scope. First, the principle applies only to voters participating in the same election. Distinctions in rules among separate, parallel elections do not raise constitutional concerns. For example, different municipalities may adopt varying voting rules and procedures

Charges of Jud. Misconduct, 404 F.3d 688, 699 (2d Cir. 2005) ("[R]easonable people disagree over the soundness of the opinions in [*Bush v. Gore*].").

⁹³ See 531 U.S. at 105–06.

⁹⁴ *Id.* at 105.

for purely local proceedings, like bond issuances⁹⁵ or municipal elections,⁹⁶ which each jurisdiction's residents vote upon separately. Similarly, a state may use different voting mechanisms for major and minor parties' primary elections, since each primary is a distinct election involving a different electorate.⁹⁷ In *Save Palisade Fruitlands v. Todd*,⁹⁸ the Court of Appeals for the Tenth Circuit held that a state may allow voters in home-rule counties to enact county-level ordinances through a public initiative process, while prohibiting voters in statutory counties from doing so.⁹⁹

Second, the Uniformity Principle is obviously not violated when all voters within a jurisdiction are subject to the same rules and procedures.¹⁰⁰

⁹⁵ See, e.g., *Walker*, 284 F.3d at 46 (rejecting equal protection challenge to a state law establishing different super-majority requirements by which different municipalities were required to approve bond measures, because "the votes are on local bond issues and each vote within the district is counted equally. There is no issue here of a state-wide vote tabulated differently in constituent districts" (emphasis omitted)); cf. *Ways v. City of Lincoln*, No. 00CV3216, 2002 U.S. Dist. LEXIS 14919, at *73-74 (D. Neb. July 29, 2002) (holding that equal protection is not violated where local ordinances from various municipalities differ from each other), *aff'd*, 331 F.3d 596 (8th Cir. 2003).

⁹⁶ See, e.g., *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 242 (6th Cir. 2011) ("Because voters in other counties may not cast votes for a local judgeship, remedying poll-worker error with respect to votes in this race does not result in unequal treatment of voters outside Hamilton County."); *Clark v. McCann*, 196 Cal. Rptr. 3d 547, 555 (Ct. App. 2015) ("Even if the Orange County Registrar of Voters adopted a different procedure for counting provisional ballots, Orange County voters did not vote in the Chula Vista City Council election."). *But see State ex rel. Painter v. Brunner*, 941 N.E.2d 782, ¶ 41 (per curiam) (holding that applying special procedures to investigate the validity of certain provisional ballots cast in an election for county juvenile court judge "may have caused . . . equal protection concerns," because provisional ballots cast elsewhere throughout the state were not similarly investigated).

⁹⁷ See *Green Party v. Weiner*, 216 F. Supp. 2d 176, 192, 198 (S.D.N.Y. 2002) (rejecting equal protection challenge to the use of different voting mechanisms for major and minor parties' primary elections, because "the different technologies for casting and counting votes are in effect utilized in completely distinct, separate elections, and cannot advantage one candidate over another in head-to-head competition").

⁹⁸ 279 F.3d 1204 (10th Cir. 2002).

⁹⁹ *Id.* at 1208, 1212-13 (holding that the Equal Protection Clause permits the state to grant different rights concerning county-level initiatives to voters in different types of counties, because "voters in statutory and home rule counties never have their votes weighed differently on the same question").

¹⁰⁰ *George v. Hargett*, 879 F.3d 711, 728, 730 (6th Cir. 2018) (rejecting equal protection challenge to requirements for ratification of state constitutional amendments); *Rosselló-Gonzalez v. Calderón-Serra*, 398 F.3d 1, 16 n.29 (1st Cir. 2004) (noting that the plaintiffs' "vote dilution" claim under *Bush* would have presented "stronger" grounds for "federal intervention," if it had not been "rendered moot by the fact that all ballots will be adjudicated in the same uniform manner during the recount"); *Baber v. Dunlap*, 376 F. Supp. 3d 125, 139 n.20 (D. Me. 2018) (rejecting plaintiff's equal protection challenge under *Bush* to ranked-choice voting because "[t]he record in this case does not reveal the application of inconsistent standards" to different ballots); *Davis v. Detroit Downtown Dev. Auth.*, No. 17-cv-11742, 2017 U.S. Dist. LEXIS 225010, at *6 (E.D. Mich. June 19, 2017) (rejecting equal protection

For this reason, vague standards typically do not raise uniformity concerns when ultimate responsibility for applying them rests with a single centralized decisionmaker.¹⁰¹

Third, despite the Uniformity Principle, courts (except for the US Court of Appeals for the Sixth Circuit) have held that unintentional mistakes by election officials, including those which prevent certain people from being able to vote, generally do not rise to the level of equal protection violations.¹⁰² Federal courts have generally declined to set aside

challenge to municipal entity's alleged diversion of property tax funds that voters had approved for educational purposes to subsidize an arena instead, in part because all voters were affected equally); *Greene v. Huff*, No. C15-1881-JCC, 2016 U.S. Dist. LEXIS 80129, at *8-9 (W.D. Wash. June 20, 2016) (rejecting equal protection challenge to a municipality's decision to hold a single election to determine who would fill both the unexpired five-week portion of a previous term, as well as the upcoming full term, of a seat on the city council, even though the elections for other council seats held at the same time were only for the upcoming full terms); *Samuel v. V.I. Bd. of Elections*, No. 2012-0094, 2013 U.S. Dist. LEXIS 3689, at *18-19 (D.V.I. Jan. 6, 2013) (rejecting equal protection challenge to the use of voting machines that were not certified by the US Election Assistance Commission, because the decision affected all voters equally); *Dudum v. City & Cnty. of San Francisco*, No. C 10-00504 RS, 2010 U.S. Dist. LEXIS 47020, at *19 (N.D. Cal. Apr. 16, 2010) (rejecting equal protection challenge to ranked-choice voting because "election officials tabulate every vote and conduct each round in an identical manner"), *aff'd sub nom. Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Marion Cnty. Democratic Party v. Marion Cnty. Election Bd.*, No. IP 01-1963-C-T/K, 2002 U.S. Dist. LEXIS 11330, at *42-44 (S.D. Ind. May 9, 2002) (rejecting equal protection challenge to election board's decision to require all voters, including those who cast straight-ticket ballots, to vote separately on races for judgeships, because all voters were being treated the same); *In re Election for Sch. Comm. Rep. for Dist. 3*, No. CV-04-695, 2004 Me. Super. LEXIS 257, at *5 (Super. Ct. Dec. 3, 2004) (rejecting equal protection challenge to a municipal school board election under *Bush* because "a standard citywide policy prevailed" concerning voters who attempted to vote at the incorrect polling place near closing time, while recognizing that a claim might have existed "if some polling places had accepted ballots from late voters who presented themselves at the wrong precincts while other polling places had refused such ballots"); *cf. Paher v. Cegavkse*, No. 20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 92665, at *20 n.16 (D. Nev. May 27, 2020) (rejecting equal protection challenge to statewide COVID-19 response plan for the primary elections, because there was no claim that "votes will be counted differently, or what constitutes a valid vote would differ as among the counties").

¹⁰¹ See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 241 (6th Cir. 2011) (rejecting equal protection challenge to a district court order requiring a county board of elections to "review all deficient provisional ballots within the county under the same standard, and not just those cast at one particular location"); *Miller v. Treadwell*, 736 F. Supp. 2d 1240, 1244 (D. Alaska 2010) (rejecting equal protection challenge to Alaska's vague standards for counting write-in votes in a US Senate race, because "the write-in ballots in this case were counted and tabulated by a single state-wide election board and the determination of challenged ballots was made by a single individual, the Director"); *Miller v. Treadwell*, 245 P.3d 867, 873 (Alaska 2010) (per curiam) ("We fail to see how having one person examine all overcount, undercount, and write-in ballots and all ballots challenged by either candidate is not a uniform standard.")

¹⁰² See, e.g., *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 912-13, 920-21 (E.D. Va. 2018) (holding that plaintiffs were unlikely to succeed in their equal protection challenge concerning an election for state legislature in which the winning candidate prevailed by only seventy-three votes,

elections on constitutional grounds where poll workers erroneously gave a potentially dispositive number of people ballots for an election in which they were ineligible to vote. Courts have likewise rejected equal protection challenges to the results of elections where poll workers gave a potentially dispositive number of voters the wrong ballots, preventing them from voting in the races at issue.¹⁰³ Even though these cases resulted in similarly situated voters being treated differently, the courts held that the disparities did not cause equal protection problems because they were unintentional and arose from “individual and infrequent polling-place irregularities and verification procedures.”¹⁰⁴ And election officials may cease or otherwise fix any such unintentional errors that have occurred, even when such corrections would result in later voters being treated differently from earlier ones.¹⁰⁵ As discussed later, however, the Sixth Circuit has rejected this limitation.¹⁰⁶ The remainder of this Part explains the various contexts in which, consistent with these constraints, courts have applied *Bush's* Uniformity Principle.

election officials gave eighty-six eligible voters the wrong ballots, and an additional sixty-one ineligible voters cast ballots in it); *Feehan v. Marcone*, 204 A.3d 666, 691, 695–97, 696 n.39 (Conn.) (rejecting equal protection claim where election officials at a polling place mistakenly distributed the wrong stack of ballots, thereby denying the voters who used those ballots the opportunity to vote for the correct candidates), *cert. denied*, 140 S. Ct. 144 (2019).

¹⁰³ See *infra* note 139. One exception to this principle is where election officials inadvertently excluded a candidate's name from the ballot in violation of a federal court order that directed them to ensure that the candidate was included. See *Dascola v. City of Ann Arbor*, No. 14-cv-11296-LPZ, 2014 U.S. Dist. LEXIS 99040, at *1–2, *14–15 (E.D. Mich. July 22, 2014) (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). In *Dascola*, election officials distributed corrected absentee ballots to the affected voters with a warning that the original ballots, which had improperly omitted the candidate's name, would be disregarded. *Id.* at *6–7. The district court held that the Equal Protection Clause prohibited election officials from counting the original ballots which had excluded the candidate; it permitted them to count only the replacement ballots containing the candidate's name. *Id.*

¹⁰⁴ *Barber v. Bennett*, No. CV-14-02489-TUC-CKJ, 2014 U.S. Dist. LEXIS 165748, at *11–12, *15, *19 (D. Ariz. Nov. 27, 2014) (rejecting equal protection challenge to allegedly vague guidance for implementing signature-matching requirements for ballots).

¹⁰⁵ *Bennett v. Mollis*, 590 F. Supp. 2d 273, 281 (D.R.I. 2008); see also *Cobb v. Thurman*, 957 So. 2d 638, 646 & n.5 (Fla. Dist. Ct. App. 2006) (upholding state directive requiring county election officials to post notices at polling places informing voters that votes for a withdrawn candidate would be instead counted for a replacement candidate whose name did not appear on the ballot, even though a lower court had enjoined the sign from being posted and, as a result, people who had already voted did not have the opportunity to see it); cf. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1214 (10th Cir. 2002) (“One isolated, unchallenged incident in which the electors of one statutory county enacted legislation by an initiative does not give rise to an equal protection violation.”).

¹⁰⁶ See *infra* notes 127–128 and accompanying text.

A. *Intentionally Treating Voters Differently*

At its core, the Uniformity Principle prohibits election officials from intentionally providing materially different opportunities to voters participating in the same election to either cast ballots or have their ballots be counted.¹⁰⁷ Importantly, however, many courts have refused to apply the principle to absentee or early voting.¹⁰⁸ Most obviously, the Uniformity Principle generally requires a jurisdiction to apply the same procedures and requirements to all voters to confirm their eligibility to vote.¹⁰⁹ States also must weigh all votes¹¹⁰ or petition signatures equally.¹¹¹ Typically they must likewise allow all voters participating in a general election for a public entity that exercises substantial governmental authority to cast the

¹⁰⁷ See, e.g., *Davis v. Kester*, No. 17-0021, 2018 U.S. Dist. LEXIS 165022, at *3 (E.D. Pa. Sept. 26, 2018) (affirming that “[w]ithin the context of voting, the Equal Protection Clause is implicated when a state classifies voters in disparate ways,” but rejecting a prisoner’s claim that the warden of his jail violated his constitutional rights by failing to warn him about the deadline for requesting an absentee ballot).

¹⁰⁸ See *infra* notes 170–187, 358–375 and accompanying text.

¹⁰⁹ See *Charfauros v. Bd. of Elections*, No. 99-15789, 2001 U.S. App. LEXIS 15083, at *25–26, *37 (9th Cir. May 10, 2001) (holding that discriminatory treatment of Republican voters whose residency was challenged violated equal protection), *as amended* 2001 U.S. App. LEXIS 15090 (9th Cir. July 6, 2001).

¹¹⁰ This aspect of the Uniformity Principle traces back to the Supreme Court’s one-person, one-vote ruling in *Reynolds v. Sims*, 377 U.S. 533, 562–63, 568 (1964).

¹¹¹ See *Idaho Coal. United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077 & n.7 (9th Cir. 2003) (striking down requirement that at least five percent of voters from each of at least half of the state’s counties sign a petition to have an initiative placed on the ballot); *Bernbeck v. Gale*, 58 F. Supp. 3d 949, 957–58 (D. Neb. 2014) (striking down state constitutional provisions requiring an initiative petition to contain signatures from five percent of registered voters in each of two-fifths of the state’s counties, because those provisions accorded greater weight to signatures from voters in sparsely populated counties than to signatures from voters in heavily populated counties), *vacated on other grounds*, 829 F.3d 643 (8th Cir. 2016) (holding that the plaintiff lacked standing); *Gallivan v. Walker*, 2002 UT 89, ¶¶ 5–8, 11, 67–68, 74 n.12 (invalidating state law requiring a petition for a ballot initiative to contain, “from each of at least 20 counties, legal signatures equal to 10% of the total of all votes cast in that county for all candidates for governor at the last regular general election” (quoting UTAH CODE ANN. § 20A-7-201(2)(a)(ii) (LexisNexis 2001)).

same number of votes¹¹² and choose from among the same range of candidates.¹¹³

Day v. Robinwood West Community Improvement District,¹¹⁴ for example, concerned elections for the board of directors of a local improvement district in Missouri.¹¹⁵ The district granted one vote to each registered voter who lived within its boundaries, as well as one vote for each parcel of property a person owned.¹¹⁶ The US District Court for the Eastern District of Missouri struck down this scheme.¹¹⁷ Citing *Bush's* Uniformity Principle, the court declared, "By giving some individuals more votes than others, Defendants have diluted the voting power of some qualified voters."¹¹⁸ Laws allowing only freeholders (i.e., landowners) to sign certain petitions or participate in certain elections are likewise generally infirm.¹¹⁹

Several courts have also applied the Uniformity Principle in the context of ballot-counting disputes. In those cases, like *Bush* itself, election officials violated equal protection principles by treating similar ballots differently.¹²⁰ One of the best examples of a court applying the Uniformity

¹¹² See, e.g., *Nageak v. Mallott*, 426 P.3d 930, 944 & n.58 (Alaska 2018) (suggesting that equal protection concerns arose when voters in one municipality were erroneously permitted to participate in both the Republican and third-party primaries, while voters in other municipalities could participate in only a single primary). Certain special-purpose districts with narrow responsibilities are exempt from these equal-voting requirements. See *Ball v. James*, 451 U.S. 355, 371 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728–30 (1973).

¹¹³ See, e.g., *Erlandson v. Killffmeyer*, 659 N.W.2d 724, 735–36 (Minn. 2003) (en banc) (Page, J., concurring in part and dissenting in part) (joining in majority opinion holding that, where a US Senate candidate died and his party nominated a replacement, the Equal Protection Clause prohibited the state from providing updated ballots at polling places to voters who had previously received absentee ballots with the deceased candidate's name, while declining to mail updated absentee ballots to such voters who requested them).

¹¹⁴ No. 08-CV-01888 ERW, 2009 U.S. Dist. LEXIS 36586 (E.D. Mo. Apr. 29, 2009), *judgment entered*, 693 F. Supp. 2d 996, 996–97 (E.D. Mo. 2010).

¹¹⁵ *Id.* at *1–3.

¹¹⁶ *Id.* at *2 ("If an individual owns property in the district and is a registered voter, they would receive two ballots. Someone who is a registered voter and the owner of two pieces of property in the district would receive three ballots, and so forth.").

¹¹⁷ *Id.* at *8 (granting motion for preliminary injunction); see also *Day*, 693 F. Supp. 2d at 1003.

¹¹⁸ *Day*, 2009 U.S. Dist. LEXIS 36586, at *5; *Day*, 693 F. Supp. 2d at 1003–04.

¹¹⁹ See *Bd. of Lucas Cnty. Comm'rs v. Waterville Twp. Bd. of Trs.*, 171 Ohio App. 3d 354, 2007-Ohio-2141, 870 N.E.2d 791, 799 (striking down a law allowing only freehold voters to sign a petition to create a new township).

¹²⁰ See *State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 826 (S.D. Ohio) (declining to remand case because a substantial equal protection issue existed where election officials in one county within a congressional district rejected provisional ballots that lacked the voter's name, while officials in the other two counties within that district counted them), *judgment entered*, 588 F. Supp. 2d 828, 838 (S.D. Ohio), *vacated*, 549 F.3d 468, 471–72 (6th Cir. 2008) (per curiam) (ordering case remanded because the plaintiffs had alleged only state-law claims, rather than a federal equal protection claim), *remanded to*

Principle to the ballot-counting process is the Sixth Circuit's ruling in *Hunter v. Hamilton County Board of Elections*.¹²¹ *Hunter* held that election officials must apply consistent, "specific standards" when deciding whether to count provisional ballots, "apply[ing] similar treatment to equivalent ballots."¹²²

State law provided that a provisional ballot could be counted only if it was from the precinct in which a voter was registered.¹²³ The law further required election workers to assist voters in casting their ballots.¹²⁴ Following the 2010 elections, the Hamilton County Board of Elections decided to count provisional ballots that had been cast at the board's central office, even if they were from the wrong precinct. The board presumed that such errors could have occurred only if poll workers at the office gave voters the wrong ballots.¹²⁵ The board refused to apply the same approach, however, to provisional ballots from the wrong precincts that were cast within multi-precinct voting centers.¹²⁶ In those cases, the board declined to presume that poll workers' errors had caused voters to cast provisional ballots from the wrong precincts.

The US Court of Appeals for the Sixth Circuit held that this disparity violated equal protection.¹²⁷ It explained that the

intra-jurisdiction unequal treatment undertaken by the Hamilton County Board is constitutionally impermissible. The Board arbitrarily treated one set of provisional ballots

No. 08-cv-1077, 2009 U.S. Dist. LEXIS 92890, at *10-11, *11 n.1 (S.D. Ohio Sept. 18, 2009) (denying attorneys' fees for improper removal of election litigation to federal court, while reiterating that "if Franklin County used a different standard to evaluate provisional ballots than Union and Madison Counties used in the same race, that could present a *Bush v. Gore* problem"), *aff'd*, 629 F.3d 527 (6th Cir. 2010); *see also* Common Cause Georgia v. Kemp, 347 F. Supp. 3d 1270, 1297, 1299-1300 (N.D. Ga. 2018) (holding that "serious provisional balloting count issues" must be "consistently and properly handled," and granting a temporary restraining order requiring election officials to review the eligibility of anyone who cast a provisional ballot and did not appear on the statewide voter registration list).

¹²¹ 635 F.3d 219 (6th Cir. 2011), *aff'g* No. 10CV820, 2010 U.S. Dist. LEXIS 128434 (S.D. Ohio Nov. 22, 2010) (issuing preliminary injunction requiring election officials to determine which provisional ballots were cast in the correct polling place but the wrong precinct as the result of poll worker error); *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 839 (S.D. Ohio 2012) (issuing a permanent injunction on an equal protection claim, which required election officials to apply the same approach to provisional ballots from the wrong precincts that had been cast at polling places as they applied to similarly improper provisional ballots from the wrong precincts that had been cast at the central election office).

¹²² 635 F.3d at 235.

¹²³ *Id.* at 223.

¹²⁴ *Id.*

¹²⁵ *Id.* at 224-25.

¹²⁶ *Id.* at 236-37.

¹²⁷ *Id.*

differently from others, and that unequal treatment violates the Equal Protection Clause . . . [I]t chose to consider evidence of poll-worker error for some ballots, but not others, thereby treating voters' ballots arbitrarily, in violation of the Equal Protection Clause.¹²⁸

Importantly, the Sixth Circuit's equal protection analysis did not hinge on the notion that voters had a constitutional or statutory right to have election officials count provisional ballots from the wrong precinct that the voters had received due to poll worker error. Rather, the court concluded that, because the county board had decided to count some provisional ballots from the wrong precincts without an individualized showing of poll worker error (i.e., ballots cast at the central election office), the Equal Protection Clause required the board to count all of them.

*Keyes v. Gunn*¹²⁹ involved a ballot-counting dispute even closer to the facts of *Bush*.¹³⁰ State election officials had concluded that a Mississippi state House of Representatives race was a tie.¹³¹ Pursuant to state law, the candidates drew straws to resolve the election and the Democratic candidate won.¹³² The Republican candidate filed an election contest under the state constitution with the state House.¹³³ The House voted to reject five of the nine provisional ("affidavit") ballots that state officials had counted.¹³⁴ Under the House's tally, the Republican candidate prevailed and the Democrat was unseated.¹³⁵

Five voters who had cast provisional ballots sued various legislative officials, alleging that the legislature's actions violated the Equal Protection Clause.¹³⁶ Citing *Bush*, they claimed that the "defendants intentionally treated plaintiffs differently from others voting by affidavit ballot, and there was no rational basis for the disparate treatment beyond an impermissible desire to alter the outcome of the election."¹³⁷ The district court held the plaintiffs had stated a valid equal protection claim under 42 U.S.C. § 1983.¹³⁸ It reasoned that *Bush* bars states from counting certain ballots while refusing to count other, materially indistinguishable ballots. The Fifth Circuit, however, reversed, holding that a rarely used federal law

¹²⁸ *Hunter*, 635 F.3d at 242–43.

¹²⁹ 230 F. Supp. 3d 588 (S.D. Miss. 2017), *rev'd*, 890 F.3d 232 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018).

¹³⁰ *Id.* at 591.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 592.

¹³⁴ *Id.*

¹³⁵ *Keyes*, 230 F. Supp. 3d at 592.

¹³⁶ *Id.*

¹³⁷ *Id.* at 598.

¹³⁸ *Id.*

barred the district court from exercising subject-matter jurisdiction over the claim.¹³⁹

The Ohio Supreme Court adopted a similar approach in *State ex rel. Skaggs v. Brunner*,¹⁴⁰ which involved a congressional election that spanned multiple counties within the state.¹⁴¹ Prior to the election, the Secretary of State's office notified county boards of election that provisional ballots could not be counted unless they contained both the voter's printed name and signature.¹⁴² Following the election, however, at the behest of the Democratic congressional candidate, the Secretary of State instructed one county board of election to count provisional ballots so long as they contained *either* a voter's printed name *or* the voter's signature.¹⁴³ The Ohio Supreme Court ruled that this selective post-election change in ballot-counting rules violated *Bush's* Uniformity Principle. The court held, "By changing her instructions for one county but not for others after the election at the request of a candidate, the secretary of state failed to ensure that the same rules would be applied to each provisional voter of every county in the state."¹⁴⁴

At times, courts have applied the Uniformity Principle to intentional discrimination among voters concerning voting opportunities, as well. For example, in *Obama for America v. Husted*,¹⁴⁵ the Sixth Circuit held that it was unconstitutional for the state of Ohio to allow only domestic military voters to cast ballots in person over the weekend before Election Day.¹⁴⁶ The court noted that, although military voters can face unexpected emergencies that prevent them from voting in person on Election Day, other voters may face similar contingencies.¹⁴⁷ The court concluded that the Equal Protection Clause therefore prohibited the state from making special accommodations only for military voters.¹⁴⁸ The court added that it

¹³⁹ *Keyes v. Gunn*, 890 F.3d 232, 239–40 (5th Cir. 2018) (citing 28 U.S.C. § 1344 (2018)). For a critique of the Fifth Circuit's jurisdictional ruling, 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://perma.cc/27KZ-8RLK>.

¹⁴⁰ 900 N.E.2d 982 (per curiam).

¹⁴¹ *Id.* ¶ 1.

¹⁴² *Id.* ¶ 6 (citing OHIO REV. CODE ANN. § 3505.183(B)(1)(a) (LexisNexis 2020)).

¹⁴³ *Id.* ¶¶ 20, 23.

¹⁴⁴ *Id.* ¶ 58.

¹⁴⁵ 697 F.3d 423 (6th Cir. 2012).

¹⁴⁶ *Id.* at 437.

¹⁴⁷ *Id.* at 435 ("At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters . . .").

¹⁴⁸ *Id.* at 436.

would be “worrisome . . . if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges.”¹⁴⁹

One federal district court went so far as to conclude that the Uniformity Principle prohibits states from treating people who register to vote online differently from those who register in person or by mail.¹⁵⁰ As required by the National Voter Registration Act,¹⁵¹ the State of Texas automatically updated voter registration records of people who renewed or updated their driver’s license information in person or by mail.¹⁵² When people did so online, however, the Department of Public Safety’s website sent them a link to the Secretary of State’s office to manually update their voter registration information.¹⁵³ The district court held, among other things, that this disparity violated the Equal Protection Clause because the state lacked a rational basis for distinguishing between hard-copy and online registrants in this manner.¹⁵⁴

Notwithstanding the Uniformity Principle, courts have upheld differential treatment of voters within the same electorate under a variety of circumstances. Most basically, the differences among various groups of voters can sometimes be sufficient to warrant differential treatment. In *Taft v. Cuyahoga County Board of Elections*,¹⁵⁵ a city council election initially ended in a tie between two candidates; following a coin flip, candidate Frederick Taft was declared the winner.¹⁵⁶ When the ballots were recounted, Taft lost a vote from a certain precinct and his opponent was declared the winner instead.¹⁵⁷ The county board of elections then investigated all of the ballots from that precinct and determined that the ballot at issue had a hanging chad.¹⁵⁸ During a subsequent election contest, the

¹⁴⁹ *Id.* at 435. For further discussion of *Obama for America* and its tensions with Supreme Court precedent, see *infra* Part IV.

¹⁵⁰ *Stringer v. Pablos (Stringer I)*, 320 F. Supp. 3d 862, 897–900 (W.D. Tex. 2018), *rev’d sub nom.* *Stringer v. Whitley (Stringer II)*, 942 F.3d 715, 725 (5th Cir. 2019) (holding that the plaintiffs lacked standing to challenge the online registration system), *preliminary injunction renewed sub nom.* *Stringer v. Pablos (Stringer III)*, No. SA-16-CV-257-OG, 2020 U.S. Dist. LEXIS 16686, at *24–25 (W.D. Tex. Jan. 30, 2020) (holding that the plaintiffs had established standing and remained likely to succeed on their equal protection claim).

¹⁵¹ 52 U.S.C. § 20504(a).

¹⁵² *Stringer I*, 320 F. Supp. 3d at 872.

¹⁵³ *Id.* at 869.

¹⁵⁴ *Id.* at 899–900; see also *Stringer III*, 2020 U.S. Dist. LEXIS 16686, at *23–24.

¹⁵⁵ 854 N.E.2d 472 (per curiam).

¹⁵⁶ *Id.* ¶ 2.

¹⁵⁷ *Id.* ¶¶ 3–4.

¹⁵⁸ *Id.* ¶ 5.

court determined that the contested ballot should have been counted and reinstated Taft as the victor.¹⁵⁹

Taft's opponent then challenged the recount, contending that the county board had violated *Bush's* Uniformity Principle by reviewing ballots only from one particular precinct.¹⁶⁰ The Ohio Supreme Court rejected that claim, pointing out that "there was no evidence that any other precincts had experienced the same counting problems as Precinct D's."¹⁶¹ Thus, it was not "arbitrary" for election officials to limit the recount to that precinct.¹⁶²

Moreover, intentional differences in the treatment of different voters or ballots violate the Uniformity Principle only when they affect a person's ability to vote or the secrecy of their ballots. In *Jones v. Samora*,¹⁶³ the ballots for a municipal election had numbered stubs attached to them, which could be cross-referenced against a list to determine which voters cast them.¹⁶⁴ Election officials removed the stubs for ballots cast in person before counting them but left the stubs attached for absentee ballots.¹⁶⁵ There was no evidence, however, that the election judges had attempted to identify any voters who had cast absentee ballots.¹⁶⁶ The Colorado Court of Appeals concluded, "[A]lthough the counting method that the Town used *risks* a deprivation of constitutional rights, that risk never flowered into an actual deprivation of constitutional rights."¹⁶⁷ Thus, not all distinctions in the treatment of ballots during the counting process violate the Uniformity Principle. Some further, substantive impact on voting rights must also be established.

Courts have also generally refused to apply the Uniformity Principle—and allowed jurisdictions to intentionally treat various voters differently—in certain discrete contexts. Most commonly, courts have typically held—contrary to the Sixth Circuit's ruling in *Obama for America v. Husted*¹⁶⁸—that the Uniformity Principle does not fully apply to absentee

¹⁵⁹ *Id.* ¶¶ 6, 9.

¹⁶⁰ *Id.* ¶ 28.

¹⁶¹ *Taft*, 854 N.E.2d at 478, ¶ 31; *see also* *Hawkins v. Blunt*, No. 04-4177-CV-C-RED, 2004 U.S. Dist. LEXIS 21512, at *36-37 (W.D. Mo. Oct. 12, 2004) (rejecting an equal protection challenge to a state law allowing provisional ballots to be counted only if they were cast in the correct precinct, because the state had legitimate interests in ensuring that voters had the opportunity to vote in all applicable races and requiring voters to cast their ballots at a particular place).

¹⁶² *Taft*, 854 N.E.2d at 478, ¶ 31.

¹⁶³ 395 P.3d 1165 (Colo. App. 2016).

¹⁶⁴ *Id.* ¶ 9.

¹⁶⁵ *Id.* ¶ 12.

¹⁶⁶ *Id.* ¶ 35.

¹⁶⁷ *Id.* ¶ 84 (emphasis in original).

¹⁶⁸ *See supra* notes 145-49 and accompanying text.

and early voting. As discussed later,¹⁶⁹ the Supreme Court has held that the fundamental right to vote does not extend to absentee ballots.¹⁷⁰ Building on that holding, many courts have concluded that states may limit eligibility to cast absentee ballots to only certain groups of voters. For example, in *Griffin v. Roupas*,¹⁷¹ several working mothers challenged Illinois's absentee voter law.¹⁷² The state allowed voters to cast absentee ballots only if they were going to be absent from their home county on Election Day, or could not vote in person due to physical disability, religious observance, or the need to perform certain governmental duties.¹⁷³ The plaintiffs contended that the Equal Protection Clause required the state to allow them to cast absentee ballots, as well, since their jobs and childcare responsibilities made in-person voting unreasonably burdensome for them.¹⁷⁴

The Seventh Circuit unanimously rejected this argument. It recognized that virtually any election restriction will “exclude, either de jure or de facto, some people from voting.”¹⁷⁵ The court also noted that Illinois's limits on absentee voting made it difficult for many groups of people other than the plaintiffs to vote, as well, “such as emergency-room and other medical personnel, persons who work at the other end of a large county from their precinct, persons who work at two jobs, and those who are caring for a sick or disabled family member.”¹⁷⁶ By attacking Illinois's restrictions on absentee voting, “the plaintiffs [were] claiming a blanket right of registered voters to vote by absentee ballot.”¹⁷⁷ Rejecting that conclusion, the court declared that it was up to each state to balance the benefits and drawbacks of absentee voting and decide how broadly to allow it.¹⁷⁸ Other courts, adopting similar reasoning, have reached the same conclusion.¹⁷⁹

Likewise, in *Fair Elections Ohio v. Husted*,¹⁸⁰ the district court denied the plaintiffs' motion to expand access to absentee voting for pretrial

¹⁶⁹ See *infra* Part IV.

¹⁷⁰ *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969).

¹⁷¹ 385 F.3d 1128 (7th Cir. 2004).

¹⁷² *Id.* at 1129.

¹⁷³ *Id.* (citing 10 ILL. COMP. STAT. § 5/19-1 (2009)).

¹⁷⁴ *Id.* at 1132.

¹⁷⁵ *Id.* at 1130.

¹⁷⁶ *Id.*

¹⁷⁷ *Griffin*, 385 F.3d at 1130.

¹⁷⁸ *Id.* at 1131.

¹⁷⁹ See, e.g., *Suydam v. Town of Rumford*, No. 15-cv-00203-NT, 2015 U.S. Dist. LEXIS 72723, at *8–9 (D. Me. June 4, 2015); see also *Gustafson v. Ill. State Bd. of Elections*, No. 06 C 1159, 2007 U.S. Dist. LEXIS 75209, at *36–39 (N.D. Ill. Sept. 30, 2007) (upholding state law that allowed different localities to offer different opportunities for early voting, even in the context of statewide elections).

¹⁸⁰ No. 12CV797, 2012 U.S. Dist. LEXIS 161614 (S.D. Ohio Nov. 1, 2012).

detainees who were arrested the weekend before Election Day.¹⁸¹ Ohio law required voters to submit requests for absentee ballots by noon on the Saturday before Election Day.¹⁸² The law created an exception that applied when a voter, or the child of a voter, became unexpectedly hospitalized between that deadline and Election Day.¹⁸³ Such voters could request an absentee ballot until 3:00 p.m. on Election Day, which could be delivered to the voter in the hospital by either a family member or a bipartisan team of election officials.¹⁸⁴ The plaintiff organization sued, claiming that the state violated *Bush's* Uniformity Principle by failing to provide a comparable opportunity to request and receive absentee ballots to prisoners who were unexpectedly arrested over the weekend before Election Day.¹⁸⁵ The district court refused to issue a temporary restraining order.¹⁸⁶ It found that requiring election boards to extend the deadline either for all voters who were “prevented from voting on Election Day due to unforeseen circumstances,” or instead specifically for arrestees, would be “too onerous.”¹⁸⁷

Courts have likewise declined to apply *Bush's* Uniformity Principle to discretionary decisions concerning restoration of felons' voting rights. In *Hand v. Scott*,¹⁸⁸ the US District Court for the Northern District of Florida aggressively applied a sweeping view of the Uniformity Principle to conclude that Florida's system for restoring voting rights to felons violated the Equal Protection Clause.¹⁸⁹ Disregarding a binding summary affirmance of the Supreme Court on the grounds that it purportedly “has not aged well,”¹⁹⁰ the district court held that Florida's system unconstitutionally granted “unfettered discretion” over felon re-enfranchisement to the Governor and his Executive Clemency Board.¹⁹¹

The US Court of Appeals for the Eleventh Circuit stayed this ruling.¹⁹² It began by recognizing that section 2 of the Fourteenth Amendment

¹⁸¹ *Id.* at *3–4.

¹⁸² *Id.* at *6 (citing OHIO REV. CODE ANN. §§ 3509.03, 3509.08(A) (LexisNexis 2020)).

¹⁸³ *Id.* at *10 (citing § 3509.08(B)).

¹⁸⁴ *Id.* at *10–12.

¹⁸⁵ *Id.* at *13.

¹⁸⁶ *Fair Elections Ohio*, 2012 U.S. Dist. LEXIS 161614, at *68.

¹⁸⁷ *Id.* at *58.

¹⁸⁸ 285 F. Supp. 3d 1289 (N.D. Fla.), *permanent injunction entered*, 315 F. Supp. 3d 1244 (N.D. Fla.), *stayed*, 888 F.3d 1206 (11th Cir. 2018), *vacated and dismissed as moot sub nom. Hand v. DeSantis*, 946 F.3d 1272 (11th Cir. 2020).

¹⁸⁹ *Id.* at 1306–08 (granting summary judgment to plaintiffs).

¹⁹⁰ *Id.* at 1306–07 (citing *Beacham v. Braterman*, 300 F. Supp. 182, 183 (S.D. Fla. (three-judge court), *aff'd*, 396 U.S. 12 (1969)).

¹⁹¹ *Id.* at 1304.

¹⁹² *Hand*, 888 F.3d at 1215.

“expressly empowers the states to abridge a convicted felon’s right to vote.”¹⁹³ Since felons lack the constitutional right to vote, restrictions on the re-enfranchisement process do not trigger any form of heightened scrutiny. And binding Supreme Court precedent “confirm[s] the broad discretion of the executive to grant and deny clemency.”¹⁹⁴ Clemency is an intrinsically equitable process through which the Executive grants mercy—the absence of uniform standards and sweeping discretion are inherent, pervasive attributes.¹⁹⁵ Since Florida’s felon re-enfranchisement system had not been adopted for racially discriminatory purposes, it was constitutionally valid.¹⁹⁶ Thus, the Eleventh Circuit concluded, the Uniformity Principle is categorically inapplicable to discretion-based re-enfranchisement procedures for felons.

In conclusion, the Uniformity Principle generally forbids states or election officials from providing materially different treatment to similarly situated groups of voters participating in the same election. In particular, they must accord equal weight to all voters’ petition signatures and ballots, and apply the same standards when determining the validity of, or counting, voters’ ballots. The Uniformity Principle does not apply, however, where differences among various groups of voters warrant different treatment, or the differential treatment does not impact a person’s opportunity to vote or to have their vote be counted and given full effect. Finally, courts generally refuse to apply the Uniformity Principle in certain contexts such as restrictions on absentee and early voting, or discretionary aspects of the process for re-enfranchising felons.

B. *Delegating Discretion to Local Officials*

The Uniformity Principle also generally prohibits states from delegating discretion to county or local officials over policies concerning statewide elections when differences among various political subdivisions’ rules or procedures would lead to materially different voting opportunities for their respective citizens.¹⁹⁷ Courts have most frequently applied the

¹⁹³ *Id.* at 1209 (quoting U.S. CONST. amend. XIV, § 2); *see also* Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (upholding the constitutionality of felon disenfranchisement).

¹⁹⁴ *Hand*, 888 F.3d at 1209.

¹⁹⁵ *Id.* at 1209 (“If a state pardon regime need not be hemmed in by procedural safeguards, it cannot be attacked for its purely discretionary nature.”).

¹⁹⁶ *Id.* at 1210 (“The problem for the appellees in this case, however, is that they have not shown (nor have they even claimed) that Florida’s constitutional and statutory scheme had as its purpose the intent to discriminate on account of, say, race, national origin, or some other insular classification . . .”).

¹⁹⁷ *See* Jones v. DeSantis, No. 19-cv-300-RH/MJF, 2020 U.S. Dist. LEXIS 90729, at *112 (N.D. Fla. May 24, 2020) (holding, in a challenge to the constitutionality of Florida’s system for determining

Uniformity Principle in this context to prohibit counties within a state from using different voting machines with substantially different error rates. Courts have also invalidated substantial variations among localities' election procedures or resources that led to disparities in voting opportunities. In contrast, courts have generally upheld grants of discretion concerning the timing or location of election-related processes, especially absentee and early voting, even though differences in such policies can substantially impact voters' ability to participate in statewide elections.

1. Voting Systems

Voters have invoked the Uniformity Principle to challenge the types of voting machines that states and counties adopt. These cases generally fall within two broad categories. In one line of precedent, plaintiffs challenged the Secretary of State's decision to certify a range of different types of voting machines which counties could choose to adopt. Such plaintiffs sought to prevent the use of less advanced voting systems with higher error or ballot-rejection rates, such as punch-card ballots, in certain counties. They argued that disparities among different counties' voting systems violated the Uniformity Principle by affording voters arbitrarily different likelihoods of having their votes counted in statewide elections. Courts were generally sympathetic to such claims, although, for various procedural and jurisdictional reasons, few of these matters resulted in binding precedent.

whether felons paid their court-ordered fines and fees to have their voting rights restored, that the plaintiffs had stated a "substantial claim" that "the different eligibility standards in different counties will violate . . . the equal-protection principle established by *Bush*"; *League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723, 728 (N.D. Ohio 2005) (holding, in a challenge to the use of different types of voting machines in different counties, that "[a] state having power to ensure uniform treatment of voters cannot adopt policies leading to disparate treatment of those voters and thereafter plead 'no control' as a defense"), *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, ¶ 60 (per curiam) (noting that the Uniformity Principle may have been violated when certain county prosecuting attorneys advised their respective county boards of elections to disregard a directive from the secretary of state that the prosecuting attorneys deemed unlawful); *see also* *PG Publ'g Co. v. Aichele*, 902 F. Supp. 2d 724, 758 n.17 (W.D. Pa. 2012) (suggesting that equal protection problems arise when "different local entities" employ "varying standards" that cause one person's vote to be valued over that of another), *aff'd*, 705 F.3d 91 (3d Cir. 2013); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 839 A.2d 451, 461 (Pa. Commw. Ct. 2003) (en banc) (Leadbetter, J., dissenting) (arguing that, where a county election board instructed third-party ballot harvesters that they could return absentee ballots in violation of state law, the court should decline to count those ballots because "allowing a patchwork of different rules from county to county in a statewide election implicates equal protection concerns"), *rev'd*, 843 A.2d 1223, 1234–35 (Pa. 2004) (holding that absentee ballots returned in violation of state law were invalid).

The other line of cases, ironically, challenged the use of advanced electronic voting systems on the grounds that they were allegedly vulnerable to hacking, and did not produce a paper trail of ballots that could be manually reviewed by voters and counted or audited by election officials to confirm an election's results. These plaintiffs claimed that the availability of paper ballots for absentee voters, but not people who voted in-person, violated the Uniformity Principle. Except for a pair of outlier federal cases in Georgia,¹⁹⁸ courts consistently have rejected those claims.

The earliest challenges to voting systems arising from *Bush v. Gore* focused on states' decisions to allow counties to use outdated systems.¹⁹⁹ In *Common Cause v. Jones*,²⁰⁰ California law specified that county officials could adopt any voting system certified by the Secretary of State.²⁰¹ The secretary certified several systems, including punch-card ballots, which allegedly were substantially less likely than other systems to record valid votes.²⁰² The US District Court for the Central District of California held that the plaintiffs had stated a valid Equal Protection Claim by alleging that the secretary's "permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory."²⁰³ Following the court's refusal to dismiss the case, the secretary decertified the punch-card systems.²⁰⁴ The court subsequently ruled that it was feasible for counties still using punch-card systems to

¹⁹⁸ See *Curling v. Raffensperger (Curling III)*, 403 F. Supp. 3d 1311, 1342, 1345 (N.D. Ga. 2019) (holding that plaintiffs had stated a valid equal protection claim "that Georgia's voting scheme results in the arbitrary and disparate treatment of its citizens based on their chosen method of voting: in person via DRE or by absentee paper mail-in ballot"); *Curling v. Raffensperger (Curling II)*, 397 F. Supp. 3d 1334, 1412 (N.D. Ga. 2019) (entering preliminary injunction barring the state from using DRE machines without paper trails after 2019); *Curling v. Kemp (Curling I)*, 334 F. Supp. 3d 1303, 1322, 1325 (N.D. Ga. 2018) (holding that the use of electronic voting machines without paper trails was likely unconstitutional because, unlike paper ballots, they could be hacked, but declining to issue a preliminary injunction due to the proximity of the election), *aff'd in part on other grounds sub nom.*, *Curling v. Worley*, 761 F. App'x 927 (11th Cir. 2019) (holding that sovereign immunity did not bar the plaintiffs' claims, but declining to address the merits); see also *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1274 (N.D. Ga. 2019) (holding that a challenge to electronic voting machines was not moot despite the recent enactment of a law requiring the purchase of new machines).

¹⁹⁹ Such challenges continued to be brought even years after that ruling. See, e.g., *Andrade v. NAACP of Texas*, 345 S.W.3d 1, 11 (Tex. 2011) (holding that plaintiffs had standing to bring an equal protection challenge to the use of different voting technologies in different counties).

²⁰⁰ 213 F. Supp. 2d 1106 (C.D. Cal. 2001), *reconsideration denied*, 213 F. Supp. 2d 1110 (C.D. Cal. 2002).

²⁰¹ *Id.* at 1107 (citing CAL. ELEC. CODE §§ 19100, 19201 (West 2000)).

²⁰² *Id.*

²⁰³ *Id.* at 1109.

²⁰⁴ *Common Cause*, 213 F. Supp. 2d at 1112.

replace them with certified voting systems for the 2004 elections and ordered them to do so.²⁰⁵

In 2003, however, voters successfully petitioned to hold a recall election for Governor Gray Davis.²⁰⁶ The election was scheduled for October of that year, before punch-card machines were fully eliminated throughout the state.²⁰⁷ Less than three months before the election, in *Southwest Voter Registration Education Project v. Shelley*,²⁰⁸ voting rights groups sought a preliminary injunction to delay the recall election until election officials replaced the remaining punch-card systems.²⁰⁹ The district court denied the motion, ruling that any deviations in error rates among different counties' voting systems would not "amount to illegal or unconstitutional treatment" of voters.²¹⁰ The court read *Bush* as "strongly hint[ing] that rational basis review might be appropriate to claims of marginally disparate error rates among varying voter technologies."²¹¹ To the extent *Bush* supported "an elevated standard of review," the court added, "there are many reasons to believe [*Bush's*] analysis was limited to its unique context."²¹² Regardless of the proper level of scrutiny, the court concluded, the impossibility of obtaining replacement voting equipment in time for the October election was a compelling reason to allow counties to use their existing systems.²¹³

A panel of the US Court of Appeals for the Ninth Circuit reversed, enjoining the recall election.²¹⁴ The Ninth Circuit emphasized that punch-card systems were "significantly more prone to errors that result in a voter's ballot not being counted than the other voting systems being used in California."²¹⁵ The Secretary of State's decision to decertify punch-card systems further confirmed their unreliability.²¹⁶ The court noted that the plaintiffs had "present[ed] almost precisely the same issue as the Court

²⁰⁵ *Id.* at 1113.

²⁰⁶ *S.W. Voter Registration Educ. Project v. Shelley*, 278 F. Supp. 2d 1131, 1133 (C.D. Cal.), *rev'd*, 344 F.3d 882 (9th Cir.), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003).

²⁰⁷ *Id.* at 1134.

²⁰⁸ *Id.* at 1131.

²⁰⁹ *Id.* at 1134.

²¹⁰ *Id.* at 1139.

²¹¹ *Id.* at 1140.

²¹² *S.W. Voter*, 278 F. Supp. 2d at 1140.

²¹³ *Id.* at 1141.

²¹⁴ *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 913 (9th Cir.), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003).

²¹⁵ *Id.* at 896.

²¹⁶ *Id.* at 898–99.

considered in *Bush*, that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause.”²¹⁷

Only a week later, the panel’s decision was reversed by the Ninth Circuit sitting en banc.²¹⁸ The en banc panel unanimously held—without explanation—that the plaintiffs had failed to establish a likelihood of success on the merits of their equal protection claim.²¹⁹ It further concluded that enjoining the election, which had already begun, would impose severe hardship on both the state and its voters that outweighed any benefit to the plaintiffs.²²⁰ Thus, the court rejected the plaintiffs’ request for injunctive relief and allowed the election to proceed.²²¹ Due to the brevity of the analysis, it is unclear whether the en banc panel was repudiating the district court’s reasoning in *Common Cause*.

Plaintiffs were more successful in challenging differences among counties’ voting machines in the US District Court for the Northern District of Illinois in *Black v. McGuffage*.²²² In *McGuffage*, the plaintiffs challenged an Illinois law that allowed each of the state’s 110 local election authorities to choose among several types of voting systems certified by the state board of elections, including punch-card ballots (with either in-precinct or centralized counting) and optical-scan systems (also with either in-precinct or centralized counting).²²³ Jurisdictions with optical-scan systems had lower error rates than those with punch-card systems. Jurisdictions with in-precinct counting also had lower error rates since election officials could alert people who voted in person about problems with their ballots; counties that used centralized counting could not.²²⁴

The plaintiffs argued that, by “leav[ing] the choice of voting system up to local authorities,” the law violated the Equal Protection Clause.²²⁵ They explained that the law allowed arbitrarily different treatment of similarly situated voters: “[S]ome authorities will choose a system with less accuracy than others. As a result, voters in some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office.”²²⁶ The plaintiffs maintained that there was no rational basis for allowing different jurisdictions

²¹⁷ *Id.* at 895.

²¹⁸ *S.W. Voter*, 344 F.3d at 919–20 (en banc).

²¹⁹ *Id.* at 919.

²²⁰ *Id.* 919–20.

²²¹ *Id.*

²²² 209 F. Supp. 2d 889 (N.D. Ill. 2002).

²²³ *Id.* at 892.

²²⁴ *Id.*

²²⁵ *Id.* at 899.

²²⁶ *Id.*

participating in the same statewide elections to adopt different voting systems.²²⁷

Invoking *Bush's* Uniformity Principle, the district court concluded that the plaintiffs had stated a valid claim.²²⁸ The "heart of the problem," the court explained, is that "people in different counties have significantly different probabilities of having their votes counted."²²⁹ The absence of a "uniform standard" for determining the validity of votes raised constitutional concerns, whether disparities resulted from differences among human counters, as in *Bush*, or voting machines.²³⁰ These equal protection concerns were exacerbated, the court noted, because many of the jurisdictions that used voting systems with higher error rates had electorates that were disproportionately comprised of traditionally marginalized voters.²³¹ Following this ruling, the parties "reached a settlement under which Chicago and Cook County officials agreed to use their 'best, immediate and continuing efforts' to replace punch-card voting systems by 2006."²³²

This type of argument was also successful before a panel of the US Court of Appeals for the Sixth Circuit in *Stewart v. Blackwell*.²³³ The plaintiffs complained that counties across the state used a variety of different voting systems, including punch-card ballots, optical scan systems, touchscreens, and even lever voting machines. As in Illinois, some counties with optical scan equipment tallied ballots at each precinct, allowing election officials to alert voters if their ballots contained overvotes or undervotes. Others tallied their ballots centrally, providing voters no such notice.²³⁴ The plaintiffs alleged that allowing some counties to use "unreliable, deficient voting equipment, including the punch card ballot," violated the Equal Protection Clause.²³⁵

Citing *Bush*, the Sixth Circuit held that the Equal Protection Clause protects the right "to have one's vote counted on equal terms."²³⁶ The use of different technologies in different counties meant that voters had "unequal chance[s]" of having their votes be recognized as valid.²³⁷

²²⁷ *Id.*

²²⁸ *McGuffage*, 209 F. Supp. 2d at 902.

²²⁹ *Id.* at 899.

²³⁰ *Id.*

²³¹ *Id.*

²³² Sauer, *supra* note 24, at 317.

²³³ See 444 F.3d 843, 859–60, 868–70 (6th Cir.), *vacated and reh'g en banc granted*, No. 05-3044, 2006 U.S. App. LEXIS 32545 (6th Cir. July 21, 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007).

²³⁴ *Id.* at 847.

²³⁵ *Id.* at 846. The plaintiffs also challenged the use of punch-card ballots under the Due Process Clause and section 2 of the Voting Rights Act. *Id.*

²³⁶ *Id.* at 868.

²³⁷ *Id.* at 870.

Accordingly, the use of less reliable voting equipment in certain counties was subject to strict scrutiny.²³⁸ The state's interests in saving money and administrative convenience were insufficient to warrant the use of less reliable systems in certain jurisdictions.²³⁹ The court concluded that the Secretary of State's decision to certify punch-card ballots and central-count optical scan systems was unconstitutional.²⁴⁰

The Sixth Circuit emphasized, "Unequal treatment and unfairness are perpetrated by allowing this technology to remain certified."²⁴¹ It added that the Secretary's decision to certify voting systems with different error rates would even fail rational basis scrutiny²⁴²—a conclusion that is almost certainly incorrect. The court declared, without citation, "The loss of so many votes because of the continued use of machines that the State admits are substandard is arbitrary and cannot be considered rational in light of so-claimed, but unsupported, cost concerns."²⁴³ The court added, however, that it did "not seek to constitutionalize" or "mandate uniformity and absolute equality" in local voting procedures.²⁴⁴ Judge Gilman's dissenting opinion objected that strict scrutiny should not apply in the context of a "challenge to the nuts-and-bolts of election administration" that involved neither discriminatory intent nor votes being weighted differently.²⁴⁵ The full Sixth Circuit granted rehearing en banc and vacated the panel's ruling.²⁴⁶ It later dismissed the case as moot before reaching a ruling when the Secretary of State voluntarily decertified the challenged voting systems.²⁴⁷

The US Court of Appeals for the Eleventh Circuit, recognizing the bounds of the Uniformity Principle, held that counties may use different types of voting systems, so long as their citizens have substantially

²³⁸ *Id.* at 862.

²³⁹ *Stewart*, 444 F.3d at 869.

²⁴⁰ *Id.* at 869–70 ("The continued certification of this technology by the Secretary of State does not provide the minimal adequate procedural safeguards to prevent the unconstitutional dilution of votes based on where a voter resides.").

²⁴¹ *Id.* at 870.

²⁴² *Id.* at 872.

²⁴³ *Id.* at 872–73.

²⁴⁴ *Id.* at 876.

²⁴⁵ *Stewart*, 444 F.3d at 883 (Gilman, J., dissenting).

²⁴⁶ *Stewart v. Blackwell*, No. 05-3044, 2006 U.S. App. LEXIS 32545, at *1 (6th Cir. July 21, 2006) (en banc).

²⁴⁷ *Stewart v. Blackwell*, 473 F.3d 692, 693–94 (6th Cir. 2007) (en banc) (order).

equivalent chances of having their votes counted.²⁴⁸ In *Wexler v. Anderson*,²⁴⁹ the Eleventh Circuit held that counties using touchscreen voting machines may apply different recount procedures than those with optical-scan machines.²⁵⁰ The court noted that the state was not required to use the same voting system statewide.²⁵¹ It further pointed out that the plaintiffs did not claim that the differences between the recount procedures made it less likely that certain people would be able to “cast effective votes.”²⁵² The court concluded that the state “has important reasons for employing different manual recount procedures according to the type of voting system a county uses,” due to “the differences in the technologies themselves and the types of errors voters are likely to make in utilizing [them].”²⁵³

The second main category of challenges to voting machines involve the exact opposite type of claim. Rather than arguing that certain counties’ systems were too antiquated because they relied on paper ballots, these plaintiffs maintained that certain counties’ technology was too advanced, precisely because it eliminated the use of paper ballots. In California, for example, a few years after *Common Cause* and *Southwest Voter Registration Education Project*, a California voter argued in *Weber v. Shelley*²⁵⁴ that Riverside County’s decision to adopt Direct Recording Electronic (“DRE”), or touchscreen, voting machines violated her equal protection rights.²⁵⁵ She argued that, unlike paper-based systems, DRE machines did not leave a “paper trail” of ballots cast.²⁵⁶ Rather, information about people’s votes was created and stored only electronically. The court rejected her claims, holding, “It is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-

²⁴⁸ See *Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006), *aff’g* *Wexler v. Lepore*, 342 F. Supp. 2d 1097 (S.D. Fla. 2004). *Lepore* rejected an Equal Protection challenge under *Bush* to differences among the recount procedures in various Florida counties because the state had established “uniform, nondifferential standards for what constitutes a legal vote under each certified voting system.” *Lepore*, 342 F. Supp. 2d at 1108.

²⁴⁹ 452 F.3d 1226.

²⁵⁰ *Id.* at 1233.

²⁵¹ *Id.* (“[L]ocal variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on.” (quoting *Bush v. Gore*, 531 U.S. 98, 134 (2000) (Souter, J., dissenting) (second alteration in original))).

²⁵² *Id.* at 1232.

²⁵³ *Id.* at 1233.

²⁵⁴ 347 F.3d 1101 (9th Cir. 2003).

²⁵⁵ *Id.* at 1103–04.

²⁵⁶ *Id.* at 1103.

guessing.”²⁵⁷ Most other courts to consider the issue have relied on this reasoning to reject identical claims.²⁵⁸

Even though the Georgia Supreme Court had flatly rejected a challenge to DRE voting machines in 2009,²⁵⁹ a federal court in Georgia recently held in *Curling v. Kemp*²⁶⁰ (later renamed *Curling v. Raffensperger*²⁶¹)

²⁵⁷ *Id.* at 1107 (citations omitted). Another California federal court subsequently rejected an equal protection challenge brought by disabled voters to the voting machines that several counties used. *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *29–32 (N.D. Cal. Sept. 9, 2008). The plaintiffs essentially brought a disparate impact claim, alleging that the machines allowed most people to deposit their ballots independently, but forced disabled voters to rely on third-party assistance. *Id.* at *70–71. The court noted, “[T]he plaintiffs have presented no evidence that a voter using an AutoMARK has ever been pressured by an assisting third party to change his or her vote; has ever been prevented from voting for the candidate of his or her choice; or has ever had his or her ballot improperly cast or not counted.” *Id.* at *72–73. Thus, the use of such machines did not impose a severe burden on disabled voters’ rights. *Id.* at *75. The court upheld the defendant counties’ use of them under rational basis scrutiny. *Id.* at *78.

²⁵⁸ *Heindel v. Andino*, 359 F. Supp. 3d 341, 359, 365 (D.S.C.) (holding that plaintiffs lacked standing to pursue an equal protection claim against the use of DRE voting machines on the grounds they were susceptible to hacking, because any such hacking was purely speculative and the risk constituted a generalized grievance), *appeal dismissed and opinion vacated*, No. 19-1204, 2019 U.S. App. LEXIS 33121 (4th Cir. Nov. 5, 2019); *Shelby Cnty. Advocs. for Valid Elections v. Hargett*, 348 F. Supp. 3d 764, 772–74 (W.D. Tenn. 2018) (applying rational basis scrutiny and upholding the use of paperless electronic voting machines because “[n]o one is being turned away from the polls and there is no evidence that votes are not being counted” (citing *Weber*, 347 F.3d at 1106–07)), *aff’d*, 947 F.3d 977 (6th Cir. 2020) (per curiam); *Wexler v. Lepore*, 878 So. 2d 1276, 1281–82 (Fla. Dist. Ct. App. 2004) (rejecting challenge to certification of DRE machines on the grounds that they did not produce paper ballots to be used for recounts, and noting that “we cannot say the use of a paperless voting system severely restricts the right to vote in the State of Florida” (citing *Weber*, 347 F.3d at 1105–07)); *Favorito v. Handel*, 684 S.E.2d 257, 261–62 (Ga. 2009) (rejecting equal protection challenge to DRE voting machines because any voter could choose to cast an absentee paper ballot and the use of different recount procedures for DRE machines due to their lack of paper ballots was reasonable); *Gusciora v. Corzine*, No. MER-L-2691-04, 2010 N.J. Super. Unpub. LEXIS 2319, at *332–33 (N.J. L. Div. Feb. 1, 2010) (“[T]he State’s decision to certify paperless DRE voting systems as an alternative to paper ballots, and the decision by the various counties to use such a system, represents reasonable nondiscriminatory choices, and thus do not violate a voter’s equal protection or due process rights.” (citing *Weber*, 347 F.3d at 1107)), *aff’d sub nom.* *Gusciora v. Christie*, No. A-5608-10T3, 2013 N.J. Super. Unpub. LEXIS 2278 (N.J. App. Div. Sept. 16, 2013) (per curiam); *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011) (upholding a county’s use of DRE voting machines without a paper trail because the machines offered “significant benefits” without imposing “severe restrictions on voters” (citing *Weber*, 347 F.3d at 1107)); *see also* *Fla. Democratic Party v. Hood*, 884 So. 2d 1148, 1153 (Fla. Dist. Ct. App. 2004) (upholding the Florida Department of State’s emergency rule requiring manual recounts of paper ballots, but not votes cast on DRE machines).

²⁵⁹ *Favorito*, 684 S.E.2d at 261–62.

²⁶⁰ *Curling I*, 334 F. Supp. 3d 1303 (N.D. Ga. 2018), *aff’d in part on other grounds sub nom.*, *Curling v. Worley*, 761 F. App’x 927 (11th Cir. 2019).

²⁶¹ *Curling II*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019).

that their lack of a paper trail likely violated the Equal Protection Clause.²⁶² The court relied on testimony from a computer science professor who explained how a hacker could insert an infected memory card into a DRE machine to contaminate it with undetectable malware.²⁶³ A cybersecurity expert had also been able to remotely access a computer server containing confidential election-related information, until the FBI eventually seized the server due to the security vulnerability.²⁶⁴ Additionally, the court emphasized that various governmental entities and other expert bodies had recommended that states adopt voting systems with paper ballots.²⁶⁵

Based on the possibility that someone might hack the state's voting systems, the court concluded that the plaintiffs had demonstrated a "serious risk" that "votes cast by DRE may be altered, diluted, or effectively not counted on the same terms as someone using another voting method," such as paper ballots.²⁶⁶ The district court declined to issue a preliminary injunction enjoining the use of DRE machines in the 2018 election, however, because it would have been impossible for the state to adopt a new voting system in time.²⁶⁷

After the election, the court reaffirmed its earlier holding by denying a motion to dismiss the plaintiffs' claims.²⁶⁸ The court reiterated, "Plaintiffs have plausibly and sufficiently demonstrated a legitimate concern that when they vote by DRE, their vote is in jeopardy of being counted less accurately and thus given less weight than a paper ballot."²⁶⁹ Accordingly, the plaintiffs had adequately alleged that the state was engaging in "arbitrary and disparate treatment of its citizens based on their chosen method of voting: in person via DRE or by absentee paper mail-in ballot."²⁷⁰ Even after the state legislature passed a law requiring that DRE machines be replaced with ballot-marking devices and optical scan machines,²⁷¹ the

²⁶² *Curling I*, 334 F. Supp. 3d at 1322, 1325, 1327 (finding that the plaintiffs had a likelihood of success on the merits of their constitutional claims, but denying a preliminary injunction due to the proximity of the election); *see also Curling III*, 403 F. Supp. 3d at 1311, 1343, 1345 (denying motion to dismiss); *Curling II*, 397 F. Supp. 3d 1334, 1412 (N.D. Ga. 2019) (entering preliminary injunction barring the state from using DRE machines without paper trails after 2019).

²⁶³ *Curling I*, 334 F. Supp. 3d at 1308–09; *Curling III*, 403 F. Supp. 3d at 1319–20.

²⁶⁴ *Curling I*, 334 F. Supp. 3d at 1310; *Curling III*, 403 F. Supp. 3d at 1321. The court did not address whether any of the plaintiffs' experts' actions violated federal or state law.

²⁶⁵ *Curling I*, 334 F. Supp. 3d at 1311; *Curling III*, 403 F. Supp. 3d at 1322.

²⁶⁶ *Curling I*, 334 F. Supp. 3d at 1325.

²⁶⁷ *Id.* at 1327–28.

²⁶⁸ *Curling III*, 403 F. Supp. 3d at 1345.

²⁶⁹ *Id.* at 1343.

²⁷⁰ *Id.* at 1342.

²⁷¹ *Curling II*, 397 F. Supp. 3d 1334, 1340 (N.D. Ga. 2019).

court entered a preliminary injunction to confirm that the state was prohibited from using DRE machines after 2019.²⁷²

The *Curling* court's analysis was pervasively flawed in numerous respects. First, the lynchpin of the plaintiffs' equal protection claim was that electronic voting is more susceptible to, or involved a higher likelihood of, manipulation than paper ballots.²⁷³ But they failed to provide any evidence of the *relative* vulnerability of those systems to the court. Just as electronic voting machines are susceptible to hacking, paper ballots are susceptible to theft, loss, destruction, and alteration. Just as hackers could break into electronic computer systems, so too could criminals or corrupt insiders break into election offices to tamper with paper ballots. All voting systems are potentially vulnerable to illegal manipulation; different systems face different types of threats. The fact that Georgia's DRE machines and underlying networks had vulnerabilities did not establish that those systems were overall substantially *more* vulnerable than paper ballots.

Second, the district court did not contend with the Supreme Court's rulings in *Katzenbach v. Morgan*²⁷⁴ and *McDonald v. Board of Election Commissioners*.²⁷⁵ The Supreme Court held in those cases that, when a state takes steps to expand voting opportunities—for example, by allowing absentee voting—restrictions on such measures are subject only to rational-basis scrutiny.²⁷⁶ Under that reasoning, even if absentee voting were more secure than in-person voting on DRE machines, the state's decision to expand voting rights by granting voters that alternative cannot subject the DRE system to heightened scrutiny. As discussed in Part IV, there are serious questions as to how to reconcile *Katzenbach* and *McDonald* with *Bush's* Uniformity Principle, and it is unclear whether those cases fully survive *Bush*. But the district court failed to even consider these issues.

Third, the plaintiffs' attempt to invoke *Bush's* Uniformity Principle necessarily fails because the state was not treating different groups of voters differently. Rather, it offered all voters the option to either cast their votes in person on DRE machines or on paper-based absentee ballots.²⁷⁷ If any plaintiffs believed their votes were too insecure on a DRE machine,

²⁷² *Id.* at 1412.

²⁷³ *Curling I*, 334 F. Supp. 3d at 1316 (“Plaintiffs allege that Defendants are requiring them to vote early, mail a paper absentee ballot, and pay for postage to avoid having to use unsecure DRE machines, thereby subjecting them to unequal treatment.”); *see also id.* at 1325 (discussing plaintiffs’ “concern that when they vote by DRE, their vote is in jeopardy of being counted less accurately and thus given less weight than a paper ballot. . . . Plaintiffs are alleging that they are less likely to be able to cast accurate or effective ballots when voting by DRE.”).

²⁷⁴ 384 U.S. 641 (1966).

²⁷⁵ 394 U.S. 802 (1969).

²⁷⁶ *Id.* at 806–09; *Katzenbach*, 384 U.S. at 657.

²⁷⁷ *See Curling I*, 334 F. Supp. 3d at 1316.

they were free to cast absentee ballots, instead.²⁷⁸ Because the state presented all voters with the same range of voting options, it did not deny anyone equal protection of the laws.

At heart, the plaintiffs were not really complaining about alleged violations of the Uniformity Principle. Their true contention was that *any* use of DRE machines would render *everyone's* votes—regardless of whether those votes had been cast on DRE machines or paper ballots—vulnerable to dilution by potentially fraudulent votes from hackers.²⁷⁹ In other words, the plaintiffs objected to Georgia's adoption of DRE-based voting at all, rather than to the disparities between DRE machines and paper ballots. Their concerns existed equally, regardless of whether everyone voted on DRE machines, or the alternative of paper ballots were also available. Thus, the plaintiffs' argument did not truly sound in equal protection.

Finally, the plaintiffs' claims were based on the speculative possibility that someone might commit a crime by hacking the DRE voting machines in order to change vote tallies.²⁸⁰ In other contexts, courts have held that plaintiffs lack standing to attempt to compel states to adopt additional election security measures based on the speculative possibility that people may illegally attempt to manipulate election results. They have rejected such concerns about election security as nonjusticiable generalized grievances.²⁸¹ Oddly, the district court held that the generalized grievance doctrine did not apply since plaintiffs' experts had already hacked into the state's voting systems.²⁸² The court should not have allowed plaintiffs to manufacture or bolster their own standing through their own witnesses' hacking. And, in any event, such hacking of a state's election-related systems is precisely the kind of threat to election integrity that courts usually treat as a generalized grievance, since it jeopardizes the accuracy and legitimacy of an election's outcome for all voters equally.²⁸³ In short, the

²⁷⁸ See *Favorito v. Handel*, 684 S.E.2d 257, 261 (Ga. 2009).

²⁷⁹ Cf. *Curling I*, 334 F. Supp. 3d at 1324–25 (explaining the plaintiffs' claim that “the DRE voting system deprives them or puts them at imminent risk of deprivation of their fundamental right to cast an effective vote”).

²⁸⁰ *Id.* at 1316 (“Plaintiffs plausibly allege a threat of a future hacking event that would jeopardize their votes and the voting system at large.”); *Curling III*, 403 F. Supp. 3d 1311, 1341 (N.D. Ga. 2019).

²⁸¹ See, e.g., *Paher v. Cegavske*, No. 20-cv-00243, 2020 U.S. Dist. LEXIS 92665, at *10–11 (D. Nev. May 27, 2020).

²⁸² *Curling I*, 334 F. Supp. 3d at 1314 (holding that the generalized grievance doctrine was inapplicable because “[p]laintiffs have alleged that the DRE voting system was actually accessed or hacked multiple times” by their experts); *Curling III*, 403 F. Supp. 3d at 1340 (“Plaintiffs have alleged and offered evidence to show that the DRE voting system was actually accessed multiple times already—albeit by cybersecurity experts who reported the system’s vulnerabilities to state authorities . . .”).

²⁸³ See *Shelby Cnty. Advocs. for Valid Elections v. Hargett*, No. 2:18-cv-02706-TLP-dkv, 2019 U.S. Dist. LEXIS 156740, at *25–27 (W.D. Tenn. Sept. 13, 2019), *aff'd*, 947 F.3d 977 (6th Cir. 2020); Sweigert

Curling district court went far beyond enforcing the constitutional right to vote. It instead displaced the state legislature and state executive officials to make subjective political judgments about the proper balance among election security, cost, ease of use, administrability, and other important state concerns.

Thus, plaintiffs have successfully invoked *Bush v. Gore* in numerous challenges to state certification laws that allowed some counties to use low-tech voting systems with higher error rates, while other counties used electronic equipment that yielded fewer rejected ballots. Outside of Georgia federal court, however, plaintiffs have been far less successful in bringing *Bush*-based equal protection challenges to electronic voting machines on the grounds they lack a paper trail and could be hacked.

2. Election Procedures

States may also violate *Bush's* Uniformity Principle by delegating broad discretion to county or local officials to determine important policies or procedures for statewide elections. Violations can occur when variations among different localities' rules may cause voters in different counties or municipalities to have substantially different opportunities to vote.²⁸⁴ For example, in *Pierce v. Allegheny County Bd. of Elections*,²⁸⁵ the US District Court for the Eastern District of Pennsylvania held that the plaintiffs were likely to prove an equal protection violation where the challenged state law allowed officials in each county to adopt one of three different possible rules regarding the return of completed absentee ballots by third parties (colloquially, ballot harvesting).²⁸⁶ The court explained that the Equal Protection Clause prohibited different counties across the state from employing "different standards . . . to determine whether an absentee ballot should be counted."²⁸⁷ Voters in counties that allowed third-party ballot harvesting from people without disabilities "may be afforded greater voting strength than similarly-situated voters" in other counties.²⁸⁸

Similarly, in *Mullins v. Cole*,²⁸⁹ a county clerk in West Virginia refused to accept electronic signatures from people who registered to vote

v. Podesta, 334 F. Supp. 3d 46, 54–55 (D.D.C. 2018); *Stein v. Cortés*, 223 F. Supp. 3d 423, 433 (E.D. Pa. 2016).

²⁸⁴ Cf. *Somers v. S.C. State Election Comm'n*, 871 F. Supp. 2d 490, 492, 497–98 (D.S.C. 2012) (dismissing equal protection challenge to "variations in transmission dates of state primary ballots to [military and overseas voters] by different county election commissions," due to lack of standing).

²⁸⁵ 324 F. Supp. 2d 684 (W.D. Pa. 2003).

²⁸⁶ *Id.* at 705–06.

²⁸⁷ *Id.* at 699.

²⁸⁸ *Id.*

²⁸⁹ 218 F. Supp. 3d 488 (S.D. W. Va. 2016).

online.²⁹⁰ The clerk would instead send anyone who registered online a paper application to sign, along with a postage-prepaid return envelope.²⁹¹ The US District Court for the Southern District of West Virginia held, among other things, that this policy violated *Bush's* Uniformity Principle, since clerks in other counties had not required online applicants to provide hard-copy signatures.²⁹²

Conversely, the US District Court for the District of Nevada rejected concerns about geographic disparities among different counties in *Paher v. Cegavske*,²⁹³ which involved statewide presidential preference primary elections.²⁹⁴ There, the Nevada Secretary of State adopted a vote-by-mail plan to mitigate the risk of COVID-19.²⁹⁵ The plan required the state's largest county (Clark County, which includes Las Vegas) to automatically mail absentee ballots to all registered voters, including inactive voters, and allow "field registrars" to collect completed ballots from voters.²⁹⁶ Other counties, in contrast, would mail ballots only to active voters and not allow collection by field registrars. Voters in those other counties sued, claiming that the plan violated equal protection by making it easier for Clark County residents to vote than for them.²⁹⁷

The district court rejected this argument, explaining that the state is "not constitutionally prohibited from making voting easier" for certain people.²⁹⁸ It predicted that most of the ballots that Clark County mailed to inactive voters would be returned as undeliverable.²⁹⁹ It further noted that Clark County had not received many requests from voters to have field registrars collect their ballots.³⁰⁰ Thus, it was "unlikely" that allowing field registrars to pick up "an already voted ballot, for which there is also an option to drop off or mail-in with postage provided, would result in greater voting strength."³⁰¹

The court went on to hold that, even if the unique voting rules for Clark County made voting easier there, such geographic distinctions among voting procedures were constitutionally permissible. While "Clark

²⁹⁰ *Id.* at 493.

²⁹¹ *Id.* at 490.

²⁹² *Id.* at 495 ("[T]he geographical disparity created by this policy between residents of Cabell County and [the] rest of West Virginia violates the Equal Protection Clause.").

²⁹³ No. 20-cv-00243, 2020 U.S. Dist. LEXIS 92665 (D. Nev. May 27, 2020).

²⁹⁴ *Id.* at *4.

²⁹⁵ *Id.* at *4-5.

²⁹⁶ *Id.* at *6.

²⁹⁷ *Id.* at *20.

²⁹⁸ *Id.* at *3.

²⁹⁹ *Paher*, 2020 U.S. Dist. LEXIS 92665, at *21-22.

³⁰⁰ *Id.* at *22.

³⁰¹ *Id.*

County's Plan may make it easier or more convenient to vote in Clark County, [it] does not have any adverse effects on the ability of voters in other counties to vote."³⁰² Part IV of this Article will reconsider *Paher's* holding, exploring whether a state—or local officials within a state—may selectively make voting easier for certain groups of people participating in an election.

Similar equal protection issues may also arise when some localities disregard state-level directives or policies. For example, in *Bryanton v. Johnson*,³⁰³ the Michigan Secretary of State added a checkbox to voter registration forms and absentee ballot request forms, requesting that voters confirm their US citizenship.³⁰⁴ The secretary ordered that voters be given ballots regardless of whether they checked the box, however. Different counties implemented these directives differently. While many counties followed the secretary's instructions, some omitted the checkbox from their forms.³⁰⁵ Furthermore, counties that added the checkbox treated voters' failure to check it in different ways. Many counties followed the secretary's instructions and allowed people who left the box blank to cast ordinary in-person or absentee ballots. Some counties instead allowed voters who did not check the citizenship box to cast only provisional ballots, while one clerk's office would return the form to the voter with the question highlighted.³⁰⁶ The court observed, "[I]nconsistent administration of the citizenship verification question will lead to extensive arbitrary and disparate treatment" of voters.³⁰⁷

Bryanton, however, takes equal protection principles to an unwarranted extreme. First, state laws, regulations, or administrative directives cannot be struck down under the Equal Protection Clause simply because some local officials refuse to follow them.³⁰⁸ Second, the court required localities to treat voters identically even in matters that did not affect their ability to obtain a ballot and vote. Including a citizenship checkbox on election-related forms—particularly where citizenship was an unquestioned qualification for voting, no supporting evidence was required, and ballots were still provided to people who left the box blank—cannot be deemed a constitutionally cognizable burden on voting rights.

The court, however, held that the checkbox imposed a substantial burden on voters, because the voting process could take longer if people

³⁰² *Id.* at *24.

³⁰³ 902 F. Supp. 2d 983 (E.D. Mich. 2012).

³⁰⁴ *Id.* at 989.

³⁰⁵ *Id.* at 991–92.

³⁰⁶ *Id.* at 992.

³⁰⁷ *Id.* at 999; *see also id.* at 997 (discussing “inconsistencies” in application and enforcement).

³⁰⁸ *See id.* at 1001.

failed to complete it. The court pointed out that, when someone left the box blank election officials would remind the voter about the citizenship requirement, and someone might challenge the voter's eligibility.³⁰⁹ These possibilities exist with regard to virtually any election-related requirement, however. *Bush's* Uniformity Principle does not appear to require election officials throughout a state to treat voters in a mechanistically identical manner. Some differences may exist in the signage and layout of polling places; the layout and content of forms; election officials' greetings, interactions with, and statements to voters; and a universe of other such practical factors.

Finally, a main driving factor underlying the court's conclusion was that the secretary lacked authority under Michigan law to add the citizenship checkbox to registration or absentee ballot request forms.³¹⁰ The Eleventh Amendment and state sovereign immunity, however, precluded the plaintiffs from suing the secretary in federal court for violating state constitutional or statutory restrictions,³¹¹ and the court asserted that it was not addressing the plaintiffs' state-law claims.³¹² Moreover, a state official's violation of state law generally does not amount to a federal constitutional violation.³¹³ The Equal Protection Clause is not a backdoor vehicle for litigating state-law claims in federal court. In short, the plaintiffs should have directly challenged, in the proper forum, the secretary's authority to add a citizenship checkbox to election-related forms, rather than constitutionalizing either the decision of some officials to ignore that order, or minor differences in waiting times or voters' experiences at polling places that could arise among the jurisdictions that faithfully applied it.

One of the most important cases in which a litigant claimed that disparities among various counties' policies violated the Uniformity Principle was the Minnesota Supreme Court's ruling in *Sheehan v. Franken*.³¹⁴ *Sheehan* was an election contest arising from the 2008 US Senate election between Norm Coleman and Al Franken.³¹⁵ Based on the initial vote tally, incumbent Republican Coleman was ahead by 206 votes out of a total of

³⁰⁹ *Bryanton*, 902 F. Supp. 2d at 1004.

³¹⁰ *Id.* at 1002–03.

³¹¹ See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding that the exception to sovereign immunity in *Ex parte Young* 209 U.S. 123 (1908), is “inapplicable in a suit against state officials on the basis of state law”).

³¹² *Bryanton*, 902 F. Supp. 2d at 986 (“[T]he Court will not deal with state law based Counts III and IV.”).

³¹³ See *Nordlinger v. Hahn*, 505 U.S. 1, 26 (1992) (“A violation of state law does not by itself constitute a violation of the Federal Constitution.”).

³¹⁴ 767 N.W.2d 453 (Minn. 2009).

³¹⁵ See *id.* at 456.

more than 2.4 million votes cast.³¹⁶ A manual recount put Franken ahead by 225 votes.³¹⁷

Coleman filed an election contest in state court, arguing among other things that “differences among jurisdictions in their application of the statutory requirements for absentee voting” violated *Bush's* Uniformity Principle.³¹⁸

In other words, because some local election boards had been willing to count absentee ballots despite certain technical defects—for example, if the ballot's witness was not a registered voter—Coleman argued that it would violate equal protection to disqualify other ballots whose only problem was that same technical defect.³¹⁹

Rejecting this claim, the Minnesota Supreme Court held that “equal protection is not violated every time public officials apply facially neutral state laws differently.”³²⁰ Its ruling rested primarily on the US Supreme Court's 1944 ruling in *Snowden v. Hughes*,³²¹ issued over a half century before *Bush v. Gore*.³²² *Snowden* held that election officials' “unlawful administration” of a state law does not violate the Equal Protection Clause unless a plaintiff can show that those officials intentionally discriminated against him.³²³ Applying *Snowden*, *Sheehan* held that disparities among different counties' policies for determining the validity of absentee ballots, including differing degrees of compliance with state laws governing their validity, did not constitute intentional discrimination.³²⁴ The court recognized that “differences in available resources, personnel, procedures, and technology necessarily affected the procedures used by local officials reviewing absentee ballots.”³²⁵ Such differences among counties' policies, even

³¹⁶ *Id.* at 457.

³¹⁷ *Id.*

³¹⁸ *Id.* at 458; *id.* at 463 (explaining that Coleman “argues that the differing application and implementation by election officials of the statutory requirements for absentee voting violated equal protection”).

³¹⁹ NED FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 324-25 (2016); see also *Sheehan*, 767 N.W.2d at 463 (explaining Coleman's argument “that similarly situated absentee ballots were treated differently depending on the jurisdiction in which they were cast and that this disparate treatment violated equal protection”).

³²⁰ *Sheehan*, 767 N.W.2d at 463.

³²¹ 321 U.S. 1 (1944).

³²² *Sheehan*, 767 N.W.2d at 463 (citing *Snowden*, 321 U.S. 1); see also *id.* at 464 (“*Snowden* requires a showing that the statutory standards were applied differently with the intent to discriminate in favor of one individual or class over another.”).

³²³ *Snowden*, 321 U.S. at 7-8, 11-12.

³²⁴ *Sheehan*, 767 N.W.2d at 464 (“Coleman neither claims nor produced any evidence that the differing treatment of absentee ballots among jurisdictions during the election was the result of intentional or purposeful discrimination against individuals or classes.”).

³²⁵ *Id.*

though they resulted in state law being applied inconsistently to materially identical ballots, did not violate the Equal Protection Clause.

Toward the end of its Equal Protection analysis, after setting forth its main reasoning, the court explained why its ruling was consistent with *Bush v. Gore*.³²⁶ It held that *Bush* did not prohibit “[v]ariations in local practices for implementing absentee voting procedures.”³²⁷ Accordingly, various counties could establish differing procedures for processing absentee ballots, based in part on differences in “available resources,” “personnel,” and “technology.”³²⁸ Any resulting disparities in the treatment of materially identical absentee ballots were therefore constitutionally permissible.³²⁹

The court also distinguished *Bush* on the grounds that, unlike Florida’s vague standard for determining the validity of votes, Michigan had established “clear statutory standards for acceptance or rejection of absentee ballots.”³³⁰ Finally, the Court dismissed *Bush*’s significance because that case involved materially identical ballots being treated differently, whereas Coleman’s election contest involved materially identical absentee ballot return envelopes being treated differently.³³¹ The risk of partisan discrimination was lower, the court reasoned, since election officials reviewing absentee ballot envelopes did not know the particular candidate for whom a voter had cast their ballot.³³²

Unfortunately, Coleman did not seek certiorari from the US Supreme Court, so the Court did not have the opportunity to review the Minnesota Supreme Court’s misapplication of *Bush*’s Uniformity Principle. *Sheehan* was a patently erroneous and unpersuasive reading of *Bush*, in several respects. First, the court incorrectly imposed excessively restrictive *mens rea* requirements for Equal Protection claims under the Uniformity Principle. The court held that disparate treatment of similarly situated voters did not violate the Equal Protection Clause unless election officials were intentionally discriminating against particular people or groups.³³³

In *Bush*, however, the Supreme Court never found that either the Secretary of State, or particular counties within the State of Florida, were intentionally discriminating against anyone. Rather, it emphasized the “arbitrary and disparate treatment” of voters that arose from the fact that

³²⁶ *Id.* at 466.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Sheehan*, 767 N.W.2d at 464.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 464–65.

different election officials were treating materially identical ballots in completely different ways.³³⁴ Coleman had satisfied the Equal Protection Clause's *mens rea* requirements, as applied in *Bush*, by demonstrating that "local election officials made deliberate and intentional decisions to apply particular interpretations of the statutory requirements for absentee voting."³³⁵

Second, the Minnesota Supreme Court conclusorily distinguished Michigan's absentee voting statute from Florida's "intent of the voter" standard on the grounds that Michigan's law established "clear . . . standards for acceptance or rejection of absentee ballots."³³⁶ Even if Michigan's statute were more detailed than Florida's law, however, the fact remained that election officials in various counties were interpreting and applying it in substantially different manners, resulting in disparate treatment of identically completed absentee ballot materials. A statute that is reasonably susceptible to such disparate interpretations seems to raise the same Equal Protection concerns as Florida's law.

Third, the Minnesota Supreme Court's reasoning appears to be backwards in an important respect. Rather than focusing on *Bush's* Uniformity Principle, *Sheehan* instead emphasized that *Bush* did not "address[] the question of 'whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.'"³³⁷ Extrapolating from the *Bush* Court's silence on that issue, *Sheehan* concluded that counties have the prerogative to establish their own election-related policies—even if disparities among such policies lead to materially identical ballot materials being treated differently.

Sheehan failed to recognize that *Bush's* Uniformity Principle acts as a constraint on disparities among political subdivisions' election-related policies. Though counties have broad discretion in administering statewide elections, such discretion does not authorize "arbitrary and disparate treatment" of voters that results in substantial differences in their opportunities to cast ballots or the likelihood that those ballots will be accepted and recognized as valid votes.³³⁸ *Sheehan* mistakenly viewed disparities among counties' policies as a valid reason for allowing identical

³³⁴ *Bush v. Gore*, 531 U.S. 98, 104–05, 106 (2000) (per curiam) ("[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.").

³³⁵ *Sheehan*, 767 N.W.2d at 464.

³³⁶ *Id.* at 466.

³³⁷ *Id.* (quoting *Bush*, 531 U.S. at 109).

³³⁸ *Bush*, 531 U.S. at 104.

absentee ballot materials to be treated differently.³³⁹ To the contrary, such disparate treatment of identical absentee ballot materials rendered unconstitutional the disparities among the counties' policies concerning absentee ballots.

Fourth, *Sheehan* discounted *Bush*'s relevance on the grounds that *Bush* involved inconsistent treatment of ballots themselves, whereas *Sheehan* involved inconsistent treatment of absentee ballot envelopes.³⁴⁰ Both cases, however, involved the legal sufficiency of voters' markings on the legally required materials they submitted to vote. It seems arbitrary and contrary to *Bush*'s Equal Protection principles to conclude that the Constitution requires consistent treatment of comparably completed ballots, but not comparably completed envelopes containing ballots. In both cases, the validity of the person's vote itself is at stake. The Constitution's protections for voting rights should not depend on whether a state requires voters to provide information on the ballot itself, or the accompanying ballot envelope instead.

Finally, the *Sheehan* court primarily relied upon the US Supreme Court's 1944 ruling in *Snowden* as the basis for its reasoning.³⁴¹ *Snowden* long predated not only *Bush*, but the Civil Rights Era and most of modern election law. *Snowden* was of the era of *Colegrove v. Green*,³⁴² in which the Court was much more reticent to enter the "political thicket" by enforcing constitutional restrictions in the electoral process.³⁴³ Had the Minnesota Supreme Court instead used *Bush*'s Uniformity Principle as the foundation for its analysis, it may well have reached a different outcome.

In short, it appears that the *Sheehan* Court sought to construe *Bush*'s Uniformity Principle as narrowly as possible, past the point of credulity. It refused to apply the principle in a case whose facts were surprisingly comparable to *Bush* itself: local officials in a statewide recount for a federal election applying inconsistent standards to determine whether particular votes could be counted. *Sheehan* appears inconsistent with both the holding and reasoning of *Bush*; future courts should reject *Sheehan* as a persuasive precedent on these issues.

³³⁹ *Sheehan*, 767 N.W.2d at 466 ("[T]he disparities in application of the statutory standards on which Coleman relies are the product of local jurisdictions' use of different methods to ensure compliance with the same statutory standards . . .").

³⁴⁰ *Id.* ("In *Bush*, officials conducting the recount were reviewing the face of the ballot itself . . .").

³⁴¹ *Id.* at 463–64 (citing *United States v. Snowden*, 321 U.S. 1, 7–8, 11–12 (1944)).

³⁴² 328 U.S. 549 (1946).

³⁴³ *Id.* at 556; see also Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2090–2101 (2018) (discussing the evolution of voting as a fundamental right protected by the Equal Protection Clause over the course of the twentieth century).

3. Polling-Place Resources

The Uniformity Principle's requirement of equal treatment for all voters can extend down to the granular level of polling place resources. The US Court of Appeals for the Sixth Circuit's ruling in *League of Women Voters v. Brunner*³⁴⁴ is the leading opinion applying the Equal Protection Clause to resource disparities among different polling places in the same election. The plaintiffs claimed that the state had conducted the 2004 presidential election using "non-uniform standards, processes, and rules," as well as "wholly inadequate systems, procedures, and funding."³⁴⁵ The Sixth Circuit held that they stated a valid equal protection claim under *Bush*.³⁴⁶ It emphasized that polling place wait times ranged from two to twelve hours, in part because polling places across the state had substantially different ratios of voters to voting machines.³⁴⁷ At least one polling place was open until 4:00 A.M. on the morning after Election Day.³⁴⁸ The court also noted a wide range of other concerns, including the allegations that some voters had been given incorrect information about where to vote, "[p]rovisional balloting was not used properly," and some disabled voters were improperly turned away.³⁴⁹ The court concluded that *Bush*'s Uniformity Principle prohibited such substantial disparities among polling places across the state.³⁵⁰

Likewise, in *Fleming v. Gutierrez*,³⁵¹ voters in a certain New Mexico municipality waited up to five hours to vote in the 2012 presidential election—far longer than anywhere else in the state.³⁵² Some voting centers, which had replaced polling places at each precinct, did not close until midnight due to the lines.³⁵³ The court termed the election a "debacle."³⁵⁴ It found that the primary cause of the delay was that the county had established too few voting centers in the municipality and provided insufficient numbers of voting machines.³⁵⁵ The court went on to emphasize that the

³⁴⁴ 548 F.3d 463 (6th Cir. 2008).

³⁴⁵ *Id.* at 466.

³⁴⁶ *Id.* at 478.

³⁴⁷ *Id.* at 477–78 ("Voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others.").

³⁴⁸ *Id.* at 478.

³⁴⁹ *Id.*

³⁵⁰ *Brunner*, 548 F.3d 463 at 476–77.

³⁵¹ No. 13-CV-222, 2014 U.S. Dist. LEXIS 183748 (D. N. Mex. Sept. 12, 2014), *appeal dismissed as moot*, 785 F.3d 442 (10th Cir. 2015).

³⁵² *Id.* at *3.

³⁵³ *Id.* at *8.

³⁵⁴ *Id.* at *3, *18.

³⁵⁵ *Id.* at *10.

county clerk's failure to provide enough resources was an intentional decision, rather than the result of mere negligence.³⁵⁶ The court concluded that the county clerk's intentional failure to provide sufficient voting machines or voting centers to the municipality violated the Uniformity Principle.³⁵⁷

4. Timing and Location Issues

One aspect of the evolving jurisprudence under the Uniformity Principle may be particularly surprising. Courts have generally rejected equal protection challenges to differences among localities concerning the times and locations for early voting and voter registration. For example, in *Gustafson v. Illinois State Board of Elections*,³⁵⁸ the US District Court for the Northern District of Illinois upheld a state law delegating broad authority over early voting to local officials.³⁵⁹ The law empowered counties to determine how many early voting locations to establish. Many counties allowed early voting only at the office of the county clerk or election board, while others operated multiple sites. Moreover, some counties conducted early voting on weekends, others permitted it only on Saturday, and at least eight counties did not offer weekend voting at all.³⁶⁰

The court refused to apply any form of heightened scrutiny to these disparities because the statute "manifest[ed] no intent to invidiously discriminate based on race, class, or geographic location."³⁶¹ As discussed in Part IV, the district court also placed great weight on the principle that laws expanding voting opportunities, even just for certain groups of voters, are subject only to rational basis review.³⁶² Because the statute guaranteed a "bare minimum" of early voting opportunities for all Illinois voters, the court reasoned, any "district-to-district variation above and beyond those minimum standards is irrelevant."³⁶³ The court concluded that the legislature could "allow[] each voting district to tailor its approach to early voting in a manner consistent with [that district's] unique demands and

³⁵⁶ *Id.* at *31–32.

³⁵⁷ *Fleming*, 2014 U.S. Dist. LEXIS 183748, at *32–33; cf. *Wandering Medicine v. McCulloch*, No. CV 12-135, 2014 U.S. Dist. LEXIS 183736, at *20–22 (D. Mont. Mar. 26, 2014) (holding that plaintiffs had stated a valid claim that election officials in three counties with Native American reservations intentionally discriminated against Native Americans by eliminating satellite voting locations).

³⁵⁸ No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209 (N.D. Ill. Sept. 30, 2007).

³⁵⁹ *Id.* at *33.

³⁶⁰ *Id.* at *4.

³⁶¹ *Id.* at *18.

³⁶² See *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

³⁶³ *Gustafson*, 2007 U.S. Dist. LEXIS 75209, at *19.

abilities.”³⁶⁴ The fact that “wide discretion might be applied inconsistently from one jurisdiction to another is to be expected.”³⁶⁵

The US Court of Appeals for the Seventh Circuit reached the same conclusion in *Harlan v. Scholz*.³⁶⁶ State law required all counties that used electronic poll books to allow same-day voter registration at polling places on Election Day.³⁶⁷ Smaller counties that still used paper pollbooks, in contrast, had the option to allow same-day registration either at all polling places, or instead only at the central election office.³⁶⁸ A Republican congressional candidate brought an equal protection challenge to the law on the grounds that it “disadvantages voters in smaller counties that do not have e-pollbooks, and thus comparatively boosts Democratic voter turnout.”³⁶⁹

The district court granted a preliminary injunction.³⁷⁰ It held that selectively allowing same-day voter registration only for residents of certain counties “severely burden[ed] [the] right to vote” of people living in counties that did not offer that opportunity, placing them “at a severe disadvantage.”³⁷¹ The court added, “The application of this legislation favors the urban citizen and dilutes the vote of the rural citizen.”³⁷² The Seventh Circuit, however, reversed this ruling.³⁷³ The appellate court concluded that the plaintiff had failed to provide evidence “that the law severely burdens the smaller-county residents.”³⁷⁴ It concluded, “Even though [the law] does not force quite as many options on the smaller counties as it does on the . . . largest counties, it . . . provides realistic same-day options even in the smaller places.”³⁷⁵

The Seventh Circuit’s analysis ignored the Uniformity Principle upon which the district court’s ruling was based. It did not assess whether voters in different counties were unconstitutionally afforded substantially different opportunities to vote. Rather, the court simply asked whether prohibiting same-day voter registration at polling places substantially burdened voting rights—the same analysis it would have applied had the rules for

³⁶⁴ *Id.* at *33.

³⁶⁵ *Id.* at *35.

³⁶⁶ 866 F.3d 754 (7th Cir. 2017).

³⁶⁷ *Id.* at 755–56.

³⁶⁸ *Id.* at 756–57.

³⁶⁹ *Id.* at 757.

³⁷⁰ *Harlan v. Scholz*, 210 F. Supp. 3d 972 (N.D. Ill. 2016), *rev'd*, 866 F.3d 754 (7th Cir. 2017).

³⁷¹ *Id.* at 976–77.

³⁷² *Id.* at 977.

³⁷³ *Harlan*, 866 F.3d 754.

³⁷⁴ *Id.* at 759.

³⁷⁵ *Id.* at 761.

smaller counties applied equally across the state.³⁷⁶ The court's approach was consistent with *Gustafson*, however.³⁷⁷ Since same-day voter registration expanded voting opportunities, the Equal Protection Clause did not require the state to guarantee that alternative for everyone simply because the state had mandated it for citizens of large counties.³⁷⁸

C. *Vague and Subjective Statewide Standards*

In contrast to other types of constitutional claims under the Uniformity Principle, challenges to local officials' discretion in construing or applying vague statewide standards have generally failed.³⁷⁹ Most of these cases fall into two categories. First, plaintiffs in recent years have argued that *Bush's* Uniformity Principle prohibits states from enforcing various "matching" requirements. State laws often require election officials to determine whether a voter's signature on an absentee ballot, provisional ballot, or petition matches their signature on file. Other laws require officials to determine whether the address on an absentee or provisional ballot matches a voter's address on file, or a voter's appearance sufficiently "matches" (i.e., resembles) the picture on their identification card.³⁸⁰ These statutes typically specify only that an election official must determine whether a match exists, without providing more detailed guidance either as to what constitutes a "match," or the types of deviations or errors that election officials should overlook.³⁸¹ Plaintiffs have argued that such general directives provide insufficient guidance, allowing different election officials to treat minor deviations differently.³⁸²

Most courts to consider the issue have rejected such claims, holding that requiring election officials to determine whether a voter's signature

³⁷⁶ See *id.*

³⁷⁷ See *supra* notes 358–65 and accompanying text.

³⁷⁸ See *infra* Part IV.

³⁷⁹ See *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1278–79 (11th Cir. 2019) (declining to stay a district court injunction that required election officials to implement "in good faith" a procedure to allow voters to cure defects in their signatures on absentee ballots, and holding that the order did not create equal protection problems due to vagueness). *But see* *Ohio Republican Party v. Brunner*, 544 F.3d 711, 733 (6th Cir. 2008) (en banc) (Moore, J., dissenting) (expressing concern that counties' procedures for "deal[ing] with . . . mismatches" between voter registration records and motor vehicle records "may not be uniform and could result in disproportionate disenfranchisement" in violation of *Bush*).

³⁸⁰ See, e.g., OKLA. STAT. ANN. tit. 26, § 7-114(B)(2) (West, Westlaw through 2019 legislation); TENN. CODE ANN. § 2-7-112(a)(1) (LEXIS through 2020 Regular Sess.); WIS. STAT. § 6.79(2)(a) (2020).

³⁸¹ See *id.*

³⁸² See, e.g., *ACLU v. Santillanes*, 546 F.3d 1313, 1324 (10th Cir. 2008); *Barber v. Bennett*, No. CV-14-02489-TUC, 2014 U.S. Dist. LEXIS 165748, at *11–13 (D. Ariz. Nov. 27, 2014).

on a petition³⁸³ or ballot materials³⁸⁴ matches that person's signature on file provides sufficient guidance to prevent arbitrary treatment. Courts have similarly rejected challenges to laws requiring officials to confirm whether a voter's name on an identification card³⁸⁵ or address on a ballot envelope³⁸⁶ matches the information in that person's voter registration record.

³⁸³ See, e.g., *Lemons v. Bradbury*, 538 F.3d 1098, 1106 (9th Cir. 2008) (concluding that "Oregon's standard for verifying referendum signatures [is] sufficiently uniform and specific to ensure equal treatment of voters," where the secretary of state directed local election officials to "[c]ompare the signature on the petition and the signature on the voter registration card to identify whether the signature is genuine and must be counted" (alteration in original)); *Protect Marriage Ill. v. Orr*, 458 F. Supp. 2d 562, 573 (N.D. Ill.) (upholding signature match requirement for petition signatures because "it is neither arbitrary nor capricious for the [state board of elections] to instruct local election jurisdictions to see if the signature 'reasonably compares' to a voter's registration record card"), *aff'd*, 463 F.3d 604 (7th Cir. 2006).

³⁸⁴ See *Barber*, 2014 U.S. Dist. LEXIS 165748, at *11-12, *15, *19-21 (rejecting equal protection challenge to the alleged lack of specific standards for matching signatures on provisional ballot affidavits to election records, on the grounds that *Bush* "did not invalidate different county systems regarding implementation of election procedures," and the complaint focused on "individual and infrequent polling-place irregularities and verification procedures"); see also *Miller v. Treadwell*, 736 F. Supp. 2d 1240, 1244 (D. Alaska 2010) (rejecting equal protection challenge to the standard used to count write-in votes in a US Senate race, because "although the determination of whether to count the vote is subject to a certain degree of subjectivity, the standard itself is uniform across the board"); *Miller v. Treadwell*, 245 P.3d 867, 873 (Alaska 2010) ("We fail to see how having one person examine all overcount, undercount, and write-in ballots and all ballots challenged by either candidate is not a uniform standard."); cf. *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222-23 (D.N.H. 2018) (declining to reach equal protection claim because the court invalidated the signature-match requirement for absentee ballots on procedural due process grounds instead).

³⁸⁵ See, e.g., *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 836-37 (S.D. Ind. 2006) (arguing that an election official's oath to fairly enforce election laws "certainly suffices to assuage the vague, hypothetical concerns cited by Plaintiffs" about the lack of guidance as to whether a person's name on their identification card "conform[s]" with the name in their voter registration record), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). Courts have likewise held that a law requiring election officials to confirm whether an identification card is "valid" is neither unconstitutionally vague nor grants too much discretion to those officials. *Santillanes*, 546 F.3d at 1313, 1324-25 (holding that terms such as "current" and "valid" were not "inherently confusing or difficult to apply given the function of the voter identification requirement: to match the person presenting as a voter with the identification"), *rev'g*, 506 F. Supp. 2d 598, 631-32, 641, 643 (D.N.M. 2007). *But see* *DNC v. Bostelmann*, No. 20-cv-249, 2020 U.S. Dist. LEXIS 102410, at *19-20 (W.D. Wis. June 10, 2020) (declining to dismiss equal protection challenge to alleged disparities among various counties' policies concerning absentee ballots, including what qualified as a valid postmark, their application of documentation and witness requirements, and construction of legal provisions concerning "indefinitely confined" voters).

³⁸⁶ See *Ne. Ohio Coal. for the Homeless (NEOCH IV) v. Husted*, No. 06-CV-896, 2016 U.S. Dist. LEXIS 74121, at *135-36, *138 (S.D. Ohio June 7, 2016) (holding that local election boards' discretion in deciding whether an absentee ballot envelope contained sufficient information "does not rise to the level of the standard-less recount in *Bush*"), *aff'd in relevant part and rev'd in part*, 837 F.3d 612 (6th Cir. 2016) (*NEOCH V*).

Likewise, courts have upheld laws requiring election officials to identify potentially duplicative voter registration records by scouring various databases for matches.³⁸⁷

As mentioned earlier, these laws generally do not tell election officials specifically how to go about determining whether “matches” exist. Nor do they usually identify the type or quantity of discrepancies, mistakes, or omissions that would be sufficient to constitute a mismatch. Even though such matching requirements leave election officials with some degree of discretion and require them to exercise a modicum of personal subjective judgment, courts have held that the potential for minor variations among different officials’ conclusions is constitutionally permissible. The Sixth Circuit, for example, stated, “Arguable differences in how election boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected.”³⁸⁸ Echoing this sentiment, one district court declared, “It is possible and perhaps even probable that these procedures will result in different election jurisdictions analyzing petition signatures differently, but differing results do not violate equal protection principles where they are not a result of arbitrary or capricious policies.”³⁸⁹

The US District Court for the Northern District of Florida, in contrast, took a very different view, calling county officials’ “discretion” concerning signature matching “problematic.”³⁹⁰ It pointed out that some counties may “go above and beyond to ensure voters have a chance to cure a signature mismatch,” while others “may choose not to exercise th[at] level of care and concern.”³⁹¹ Such discretion allowed officials in different counties to make “arbitrary and unreasonable decisions” in “reject[ing] ballots based on signature mismatches.”³⁹² A divided Eleventh Circuit panel affirmed this analysis, stating:

Florida allows each county to apply its own standards and procedures for executing the signature-match requirement, virtually guaranteeing a crazy quilt of enforcement of the requirement from county to county. . . . And even if election officials uniformly and

³⁸⁷ See *Democratic Party v. Va. State Bd. of Elections*, No. 13-CV-1218, 2013 U.S. Dist. LEXIS 151713, at *1–2, *7 (E.D. Va. Oct. 21, 2013); cf. *Ohio Republican Party v. Brunner*, 544 F.3d 711, 733 (6th Cir. 2008) (en banc) (Moore, J., dissenting) (expressing concern that “the procedures each county uses to deal with these mismatches” between voter registration records and motor vehicle records “may not be uniform and could result in disproportionate disenfranchisement” in violation of *Bush*).

³⁸⁸ *NEOCH V*, 837 F.3d at 636.

³⁸⁹ *Protect Marriage Ill. v. Orr*, 458 F. Supp. 2d 562, 573 (N.D. Ill.), *aff’d*, 463 F.3d 604 (7th Cir. 2006).

³⁹⁰ *Democratic Exec. Comm. v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018), *aff’d sub nom.* *Democratic Exec. Comm. v. Lee*, 915 F.3d 1312 (11th Cir. 2019).

³⁹¹ *Id.*

³⁹² *Id.*

expertly judged signatures, rightful ballots still would be rejected just because of the inherent nature of signatures.³⁹³

Judge Gerald Bard Tjoflat issued a powerful dissent, systematically dismantling the district court's analysis.³⁹⁴

The Northern District of Florida's conclusion seems erroneous. Requiring election officials to compare a voter's name, address, or signature to voter registration records, or determine whether a person is the one depicted in the photograph on an identification card, calls for the ordinary exercise of human judgment. Given the wide variation among different types of names, addresses, and signatures (to say nothing of human faces), it would be extraordinarily difficult for regulators to attempt to catalogue and specify the appropriate response for every type of mistake, apparent discrepancy, or mismatch that could arise.³⁹⁵ And it would be unduly burdensome and time consuming to require election officials to attempt to compare each inconsistency to a series of marginally different exemplars compiled in a guide to determine the appropriate response. Indeed, such attempts to enforce uniformity would themselves create second-order inconsistencies about whether election officials had analogized each name, address, or signature mismatch to the correct exemplar. It is unlikely that the Equal Protection Clause prohibits election officials from making such limited subjective judgments for themselves when engaging in fundamentally bureaucratic tasks involving election-related paperwork.

The other main category of cases in which plaintiffs have invoked the Uniformity Principle to challenge allegedly vague legal provisions is litigation over states' standards for determining whether ballots qualify as legally valid votes. These challenges most closely implicate the specific equal protection issue at the heart of *Bush*. Courts have emphasized that *Bush* requires states to apply uniform standards in counting ballots.³⁹⁶ A vague

³⁹³ *Lee*, 915 F.3d at 1320.

³⁹⁴ *Id.* at 1331 (Tjoflat, J., dissenting).

³⁹⁵ The State of Colorado has made such an effort, preparing a guide to assist with signature matches. COLO. SEC'Y OF STATE, SIGNATURE VERIFICATION GUIDE (Sept. 13, 2018), <https://perma.cc/UHL7-TYC6>.

³⁹⁶ See *Democratic Senatorial Campaign Comm. v. Detzner*, 347 F. Supp. 3d 1033, 1038 (N.D. Fla. 2018) (holding that "the standards used to determine voter intent during a manual recount must be uniform so that votes have an equal chance of being counted," and affirming the use of Florida's rules as "uniform, nondifferential standards that provide a reasonable procedure to determine the intent of voters"); *Baber v. Dunlap*, 376 F. Supp. 3d 125, 139 n.20 (D. Me. 2018) (stating it is "unacceptable" for election officials to "apply varied standards for interpreting voter intent" to different ballots in the same election); *Dolan v. Powers*, 260 S.W.3d 376, 380, 382 (Mo. App. 2008) (ordering election officials to count votes where the voter circled the candidate's political party rather than filling in the oval near the candidate's name, and noting that "equal protection demands that ballots be considered according to specific, uniform, statewide standards, beyond vague directives to determine the intent of the voter" (quotation marks omitted)); *Big Spring v. Jore*, 109 P.3d 219, 225, 227 (Mont. 2005) ("The

“intent of the voter standard” on its own is generally insufficient because it leaves local officials too much discretion, allowing inconsistencies in application.³⁹⁷ Legislatures or state officials must provide more specific guidance to ensure consistent treatment of ballots. Courts generally have upheld rules specifying how election officials should treat different types of potential errors on ballots³⁹⁸ so long as they are reasonably detailed and determinate.³⁹⁹

In *State ex rel. League of Women Voters v. Herrera*,⁴⁰⁰ for example, the New Mexico Supreme Court upheld the validity of a state law requiring handwritten marks on ballots to be counted as valid votes if precinct officials “unanimously agree that the voter’s intent is clearly discernable,” because the New Mexico Secretary of State had promulgated detailed rules on how to apply that standard.⁴⁰¹ The dispute began when the secretary—despite having promulgated such detailed guidance—issued an emergency regulation prohibiting election officials from applying that

Supreme Court concluded in *Bush* that allowing county officials to exercise their individual discretion in interpreting ballots violated the Equal Protection Clause . . . [S]imilar ballots [must be] treated uniformly from county to county . . .”, *rev’g*, No. DV 04-258, 2004 Mont. Dist. LEXIS 3676, at *18–20 (Mont. Dist. Ct. Dec. 17, 2004) (holding that a county “may not accord arbitrary and disparate treatment to voters by applying different standards to the same type and class of ballots,” and holding that ballots in which two bubbles were filled in for a race, but one was crossed out, should count as a vote for the other marked candidate); *see also* *Rosello v. Calderon*, No. 04-2551, 2004 U.S. Dist. LEXIS 27216, at *16–17 (D.P.R. Nov. 30, 2004) (asserting jurisdiction over equal protection claim under *Bush v. Gore* that alleged disparate treatment of absentee and “split” ballots), *mandamus denied sub nom.* *Rosello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 4 n.29 (1st Cir. 2004) (noting the district court’s assertion that *Bush v. Gore* might allow plaintiffs to challenge the application of inconsistent standards for counting “split ballots,” but concluding that no such claim existed because, after the lawsuit was filed, it appeared that the ballots would be adjudicated consistently); *Burns v. Cnty. of Musselshell*, 454 P.3d 685, 685, 691 (Mont. 2019) (holding that a county had violated equal protection restrictions by agreeing to a vague set of guidelines for counting write-in votes that deviated from state law in an election for county office); *Appeal of McDonough*, 816 A.2d 1022, 1030–31 (N.H. 2003) (McGuire, J., concurring) (stating that “having a uniform rule of ballot interpretation to determine voter intent is practicable and . . . necessary,” while affirming the state ballot law commission’s decision concerning ballots where voters both cast a party-line vote and also voted for candidates in some individual races (quotation marks omitted)).

³⁹⁷ *Bush v. Gore*, 531 U.S. 98, 105–06 (2000) (per curiam).

³⁹⁸ *See, e.g.*, FLA. ADMIN. CODE 1S-2.027(4)(b)–(c) (2008) (providing examples of various types of potential errors on ballots).

³⁹⁹ *Detzner*, 347 F. Supp. 3d at 1038; *Dolan*, 260 S.W.3d at 380, 382; *see Appeal of McDonough*, 816 A.2d at 1029; *see also Big Spring*, 109 P.3d at 225, 227; *cf. Burns*, 454 P.3d at 685 (holding that a county had violated equal protection restrictions by agreeing to a vague set of guidelines for counting write-in votes that deviated from state law in an election for county office).

⁴⁰⁰ 203 P.3d 94 (N.M. 2009).

⁴⁰¹ *Id.* at 95 (quoting N.M. STAT. ANN. § 1-9-4.2(B) (LexisNexis 2003, as amended through 2007)).

statutory provision when counting ballots.⁴⁰² She concluded that the statute established a vague, subjective standard that was likely unconstitutional under *Bush v. Gore*.⁴⁰³ The League of Women Voters sought a writ of mandamus to compel the secretary to continue enforcing the statute.⁴⁰⁴ The New Mexico Supreme Court granted the writ, concluding that the statute was valid.⁴⁰⁵

The state supreme court began by emphasizing that *Bush* purported to be limited to the facts of the 2000 presidential election.⁴⁰⁶ It further noted that, unlike in Florida, the New Mexico Secretary of State had provided “clear context and guidance for local election officials” as to what qualified as a valid vote.⁴⁰⁷ The secretary had promulgated thirty “graphical examples of ballots with unconventional markings, accompanied by rules about how to interpret such marks.”⁴⁰⁸ This detailed guidance was enough to cabin election officials’ discretion and prevent arbitrarily disparate treatment of voters who submit similarly marked ballots. Prohibiting election officials from counting votes that did not fall into any of those pre-identified categories, the court added, could “lead to unnecessary disenfranchisement.”⁴⁰⁹ It also noted that New Mexico allowed a vote to be counted only when precinct officials reached a unanimous agreement about the voter’s intent, while Florida lacked a unanimity requirement.⁴¹⁰

The court acknowledged the “theoretical possibility” that “election officials in different parts of the state could interpret the same ballot marking differently.”⁴¹¹ It dismissed such concerns, however, claiming that “there must be some room for discretion by local officials in order to guard against disenfranchisement.”⁴¹² Thus, ballot-counting rules can survive constitutional scrutiny even if they do not address every conceivable way someone might fill out a ballot, but rather leave some residual of discretion for election officials.

Some courts nevertheless remain reluctant to make subjective assumptions about voter intent in cases where the ballot-counting rules do not specify whether particular markings may be counted as a vote. For

⁴⁰² *Id.* at 96 (citing N.M. CODE R. § 1.10.12.15(C) (LexisNexis 2008)).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 95.

⁴⁰⁵ *Id.*

⁴⁰⁶ *League of Women Voters*, 203 P.3d at 97–98.

⁴⁰⁷ *Id.* at 98.

⁴⁰⁸ *Id.*

⁴⁰⁹ *See id.* at 99.

⁴¹⁰ *Id.* at 98.

⁴¹¹ *Id.*

⁴¹² *League of Women Voters*, 203 P.3d at 98.

example, the absentee ballots at issue in *Big Spring v. Jore*⁴¹³ each featured darkened bubbles next to the names of two different candidates running for the same seat in the state legislature, along with an X through one of those bubbles.⁴¹⁴ Although the state had adopted rules for counting absentee ballots as required by *Bush*, those rules did not address a situation like that.⁴¹⁵ The Montana Supreme Court concluded that, in the absence of any specifically applicable rule, the ballots had to be rejected as either overvotes or spoiled ballots.⁴¹⁶ It explained that, under *Bush*, “allowing county officials to exercise their individual discretion in interpreting ballots violated the Equal Protection Clause.”⁴¹⁷ The court declined to speculate about the voters’ intent.⁴¹⁸ Thus, the Uniformity Principle generally permits states to adopt objective standards that require election officials to exercise a limited degree of personal judgment over certain narrow issues, but such judgment must be especially cabined when it comes to interpreting ballots.

D. *The Uniformity Principle Two Decades Later*

Based on this analysis of nearly two decades’ worth of cases in which courts have adjudicated claims arising under *Bush*’s Uniformity Principle, it is possible to draw both descriptive and normative conclusions. Descriptively, plaintiffs seem most likely to succeed when challenging legal directives that, on their face, expressly require or allow materially different treatment for different people participating in the same election. Courts have held that the Uniformity Principle prohibits most laws granting a different number of votes to each voter,⁴¹⁹ or affording different weights to their votes or petition signatures.⁴²⁰ The principle also bars election officials from applying different treatment to identically cast ballots from different voters participating in the same election.⁴²¹

⁴¹³ 109 P.3d 219 (Mont. 2005).

⁴¹⁴ *Id.* at 220.

⁴¹⁵ *Id.* at 224.

⁴¹⁶ *Id.* at 224–226.

⁴¹⁷ *Id.* at 225.

⁴¹⁸ *Id.* at 226.

⁴¹⁹ See *Day v. Robinwood W. Comm. Improvement Dist.*, No. 08CV01888, 2009 U.S. Dist. LEXIS 36586 (E.D. Mo. Apr. 29, 2009), *judgment entered*, 693 F. Supp. 2d 996 (E.D. Mo. 2010).

⁴²⁰ See *supra* note 111.

⁴²¹ See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011); *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1297, 1299–1300 (N.D. Ga. 2018); *Keyes v. Gunn*, 230 F. Supp. 3d 588, 597–98 (S.D. Miss. 2017), *rev’d*, 890 F.3d 232 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018); *State ex rel. Skaggs v. Brunner*, 900 N.E.2d 982, 984–86, 992–93 (Ohio 2008) (*per curiam*); see also *Stringer I*, 320 F. Supp. 3d 862, 897–901 (W.D. Tex. 2018), *rev’d sub nom. Stringer II*, 942 F.3d 715 (5th

There are two major exceptions to this observation. First, courts have been reluctant to apply the Uniformity Principle to early and absentee voting.⁴²² They have generally tolerated laws that single out certain groups of voters, or voters in particular geographic areas, for more extensive voting opportunities than others. In many ways, these rulings are surprising because, in other respects, the Uniformity Principle requires all people participating in the same election to be afforded equal opportunities to vote. Most of these rulings are based on the Supreme Court's holdings in *McDonald v. Board of Election Commissioners* that the right to vote does not include absentee voting,⁴²³ and in *Katzenbach v. Morgan* that laws making it easier for certain groups to vote are subject only to rational basis scrutiny.⁴²⁴ Part IV considers these precedents in greater depth.

Second, courts have likewise declined to apply the Uniformity Principle to felons challenging the administration of discretionary procedures for having their voting rights restored.⁴²⁵ Outside these admittedly important contexts, however, laws that facially afford materially different treatment to different groups of voters participating in the same election appear to fare worst under the Uniformity Principle.

Courts have been almost as skeptical of laws that expressly delegate authority to county or municipal election officials to set substantial voting-related policies. Courts have been particularly unwilling to allow different jurisdictions within a state to adopt different voting systems with substantially different error rates.⁴²⁶ They have likewise rejected inter-

Cir. 2019) (holding that plaintiffs lacked standing to challenge restrictions concerning the online registration system), *preliminary injunction renewed sub nom. Stringer III*, Nos. SA-16-CV-257, SA-20-CV-46, 2020 U.S. Dist. LEXIS 16686, at *20–21 (W.D. Tex. Jan. 30, 2020).

⁴²² See *Griffin v. Roupas*, 385 F.3d 1128, 1129–30 (7th Cir. 2004); *Suydam v. Town of Rumford*, No. 15-cv-00203-NT, 2015 U.S. Dist. LEXIS 72723, at *8–9 (D. Me. June 4, 2014); *Fair Elections Ohio v. Husted*, No. 12CV797, 2012 U.S. Dist. LEXIS 161614 (S.D. Ohio Nov. 1, 2012).

⁴²³ 394 U.S. 802, 807–08 (1969).

⁴²⁴ 384 U.S. 641, 657 (1966).

⁴²⁵ See *Hand v. DeSantis*, 946 F.3d 1272 (11th Cir. 2020) (citing *Beacham v. Braterman*, 300 F. Supp. 182, 183 (S.D. Fla.) (three-judge court), *summarily aff'd*, 396 U.S. 12 (1969)).

⁴²⁶ See *Stewart v. Blackwell*, 444 F.3d 843, 870–71 (6th Cir.), *vacated and reh'g en banc granted*, No. 05-3044, 2006 U.S. App. LEXIS 32545 (6th Cir. 2006), *vacated as moot en banc*, 473 F.3d 692 (6th Cir. 2007); *Black v. McGuffage*, 209 F. Supp. 2d 892, 897–99 (N.D. Ill. 2002); *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1107–08 (C.D. Cal. 2001); *Wexler v. Lepore*, 342 F. Supp. 2d 1097, 1108, 1110 (S.D. Fla. 2004), *aff'd*, 452 F.3d 1226 (11th Cir. 2006).

Most courts have been far less receptive to equal protection challenges to electronic voting machines on the grounds they lack a paper trail and are more susceptible to hacking than paper ballots. See *Weber v. Shelley*, 347 F.3d 1101, 1103–04, 1106–07 (9th Cir. 2003); *supra* note 258 (collecting cases). *But see Curling III*, 403 F. Supp. 3d 1311, 1343–45 (N.D. Ga. 2019); *Curling II*, 397 F. Supp. 3d 1334, 1412 (N.D. Ga. 2019); *Curling I*, 334 F. Supp. 3d 1303, 1308, 1327–28 (N.D. Ga. 2018), *aff'd in part sub nom. Curling v. Worley*, 761 F. App'x 927 (11th Cir. 2019).

jurisdictional differences in rules concerning issues like third-party ballot harvesting,⁴²⁷ electronic signatures on election-related documents,⁴²⁸ and even the contents of voting-related forms.⁴²⁹ And in extreme cases, differences among polling places' resources that lead to major disparities in voters' wait times may violate the Uniformity Principle, as well.⁴³⁰ In contrast, courts have upheld grants of discretion to local officials over the timing and locations for early voting and voter registration.⁴³¹

Finally, based on the facts of *Bush* itself, courts have insisted that jurisdictions develop specific standards for counting votes, rather than allowing election officials to decide for themselves what a voter intended their ballot markings to mean.⁴³² Courts are far more lenient when it comes to other allegedly vague standards that require election officials to exercise a limited degree of personal judgment or discretion, such as when determining whether a voter's signature⁴³³ or personal information⁴³⁴ "matches" official records, an identification card is "valid,"⁴³⁵ or two government records with similar information both refer to the same voter.⁴³⁶ Courts generally decline to invalidate such bureaucratic matching requirements under the Uniformity Principle.

⁴²⁷ See *Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F. Supp. 2d 684, 689–90, 706 (W.D. Pa. 2003). *But see* *Paher v. Cegavske*, No. 20-cv-00243-WGC, 2020 U.S. Dist. LEXIS 92665, at *23–25 (D. Nev. May 27, 2020).

⁴²⁸ See *Mullins v. Collins*, 218 F. Supp. 3d 488, 490–91, 495 (S.D. W. Va. 2016).

⁴²⁹ See *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 985–86, 1001 (E.D. Mich. 2012).

⁴³⁰ *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008); *Fleming v. Gutierrez*, No. 13-CV-222, 2014 U.S. Dist. LEXIS 183748, at *33–35 (D.N.M. Sept. 12, 2014), *appeal dismissed as moot*, 785 F.3d 442 (10th Cir. 2015).

⁴³¹ *Harlan v. Scholz*, 866 F.3d 754, 755–56, 761 (7th Cir. 2017); *Gustafson v. Ill. State Bd. of Elections*, No. 06 C 1159, 2007 U.S. Dist. LEXIS 75209, at *3–6, *36–39 (N.D. Ill. Sept. 30, 2007).

⁴³² See *supra* note 396. Compare *Big Spring v. Jore*, 109 P.3d 219, 220, 224, 226–28 (Mont. 2005), with *State ex rel. League of Women Voters v. Herrera*, 203 P.3d 94, 95, 101 (N.M. 2009).

⁴³³ 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.), *aff'd*, 463 F.3d 604 (7th Cir. 2006); *Barber v. Bennett*, No. CV-14-02489, 2014 U.S. Dist. LEXIS 165748, at *11–12 (D. Ariz. Nov. 27, 2014); see also *Miller v. Treadwell*, 736 F. Supp. 2d 1240, 1244–45 (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 Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019).

⁴³⁴ See, e.g., *NEOCH IV*, 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 (6th Cir. 2016); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 836–37 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

⁴³⁵ See, e.g., *ACLU v. Santillanes*, 546 F.3d 1313, 1324 (10th Cir. 2008). *But see* *DNC v. Bostelmann*, No. 20-cv-249, 2020 U.S. Dist. LEXIS 102410, at *19–20 (W.D. Wis. June 10, 2020).

⁴³⁶ See, e.g., *Democratic Party v. Va. State Bd. of Elections*, No. 13-CV-1218, 2013 U.S. Dist. LEXIS 151713, at *1–2, *4–5 (E.D. Va. Oct. 21, 2013).

Thus, notwithstanding the Supreme Court's admonition that its analysis in *Bush* was "limited to the present circumstances,"⁴³⁷ both federal and state courts have applied and enforced the Uniformity Principle across a wide variety of contexts.

III. *Bush v. Gore* and Judicial Relief in Election Cases

Bush's Uniformity Principle may be an obstacle when courts craft relief in constitutional cases concerning elections. Typically, a court must tailor relief to redress the injuries suffered by the plaintiffs in a case.⁴³⁸ A few courts have held, however, that granting relief in election cases just to specific plaintiffs—particularly when it affords them extra opportunity to vote or a greater likelihood of having their ballots counted—can itself violate equal protection restrictions. Though the matter is far from settled, the Uniformity Principle may compel courts to grant broader relief in election cases than either traditional principles of equity or Article III requirements would otherwise permit them to. Alternatively, the principle might require courts to order more creative forms of relief than simply suspending a particular legal requirement only for certain voters.

The Sixth Circuit's early rulings in the *Northeast Ohio Coalition for the Homeless v. Husted (NEOCH II)*⁴³⁹ case exemplify the difficult problems that injunctions applicable only to certain voters in election-related litigation may cause.⁴⁴⁰ In 2010, the Ohio Secretary of State entered into a consent decree with NEOCH, an advocacy group, requiring election officials to count certain provisional ballots that failed to comply with state law.⁴⁴¹ Ohio law specified that a provisional ballot could be counted only if the voter cast it in the correct precinct and submitted an accurate and complete affirmation form.⁴⁴² The consent decree nevertheless required election officials to count provisional ballots from voters who: (1) were in the correct polling location; (2) confirmed their identity by using the last four digits of their social security number ("SSN-4 voters"); and (3) due to poll worker error, cast the ballot in the wrong precinct within that polling location ("right-location, wrong-precinct" ballots).⁴⁴³

⁴³⁷ *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

⁴³⁸ Morley, *Disaggregating Nationwide Injunctions*, *supra* note 32, at 17; Morley, *De Facto Class Actions?*, *supra* note 32, at 550–54.

⁴³⁹ 696 F.3d 580 (6th Cir. 2012) (*NEOCH II*).

⁴⁴⁰ *Id.* at 580.

⁴⁴¹ *Id.* at 584.

⁴⁴² *Id.*

⁴⁴³ *Id.* Although the parties disputed the scope of the injunction, the Sixth Circuit ruled on appeal that it applied only to provisional ballots that were cast at the correct polling location. *Id.* at 590. The consent decree also required election officials to count provisional ballots from SSN-4 voters if the

In 2012, a union sued, claiming that the consent decree violated equal protection restrictions by requiring ballots cast in violation of state law to be counted only if they were from SSN-4 voters.⁴⁴⁴ The union argued that anyone who voted in the wrong precinct within the correct polling location should, in effect, be able to take advantage of the consent decree by having their provisional ballots counted. NEOCH separately moved the district court to modify the consent decree to apply to all voters in order to eliminate any such equal protection concerns.⁴⁴⁵ The Sixth Circuit held that limiting the consent decree to right-location, wrong-precinct ballots from only SSN-4 voters violated *Bush's* Uniformity Principle.⁴⁴⁶ By requiring election officials to count only certain voters' ballots cast in violation of state law, the consent decree valued their votes more than others.⁴⁴⁷ The court concluded that right-location, wrong-precinct provisional ballots from all voters had to be counted for any races in which the voter was entitled to participate, unless the state could show that a "recalcitrant" voter intentionally voted in the wrong place.⁴⁴⁸

accompanying affirmation form was incorrect or incomplete due to poll worker error. *Id.* As discussed below, the district court later vacated that part of the injunction, since there was no evidence in the record that errors or omissions on affirmation forms were attributable to poll workers rather than the voters themselves. *SEIU, Local No. 1 v. Husted*, 906 F. Supp. 2d 745, 759 (S.D. Ohio), *stayed in part on other grounds*, 698 F.3d 341 (6th Cir. 2012).

⁴⁴⁴ See *SEIU, Local 1 v. Husted*, 887 F. Supp. 2d 761 (S.D. Ohio 2012), *aff'd in part and rev'd in part sub nom. NEOCH II*, 696 F.3d 580. The district court in this case agreed that limiting the consent decree to SSN-4 voters violated *Bush's* Uniformity Principle. *Id.* at 794.

⁴⁴⁵ See *Ne. Ohio Coal. for the Homeless v. Husted (NEOCH I)*, No. 06-CV-896, 2012 U.S. Dist. LEXIS 94086, at *13 (S.D. Ohio July 9, 2012), *aff'd in part and rev'd in part sub nom. NEOCH II*, 696 F.3d 580. The district court did not address the request at that time, however. *Id.* at *67.

⁴⁴⁶ *NEOCH II*, 696 F.3d at 598, 604 ("[T]he consent decree likely violates the equal protection principle recognized in *Bush v. Gore*."); see also *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 238 n.17 (6th Cir. 2011) (declining to address constitutionality of the consent decree).

⁴⁴⁷ *NEOCH II*, 696 F.3d at 598.

⁴⁴⁸ *Id.* at 599. The court went on to hold that the consent decree's requirement that election officials count provisional ballots with incomplete or erroneous affirmation forms only from SSN-4 voters raised similar equal protection concerns. *Id.* at 604 ("This discrepancy appears to create a *Bush v. Gore* problem. Similarly, the consent decree standing on its own also raises *Bush v. Gore* issues by virtue of treating some provisional ballots differently than others."). The district court, however, had not expressly addressed that issue. The Sixth Circuit therefore remanded the case without ruling on that issue so that the district court could consider it in the first instance. *Id.* On remand, the district court vacated the part of the consent decree requiring that provisional ballots with deficient affirmations be counted. *SEIU, Local No. 1 v. Husted*, 906 F. Supp. 2d 745, 759 (S.D. Ohio), *stayed in part on other grounds*, 698 F.3d 341 (6th Cir. 2012). The district court explained that the plaintiffs were not entitled to such relief because there was no evidence in the record that deficient affirmations ever resulted from poll worker error rather than voter error. *Id.* at 757-58. The Equal Protection Clause allowed the state to refuse to count ballots that did not comply with state law due to the voter's own mistakes. *Id.* at 758.

The plaintiffs then moved to clarify and modify the consent decree to require the state to count yet another category of provisional ballots that violated state law.⁴⁴⁹ Ohio law required the affirmation forms accompanying provisional ballots to specify the type of identification the voter had used, such as a driver's license or the last four digits of their social security number.⁴⁵⁰ The plaintiffs sought an order requiring election officials to count provisional ballots even when the accompanying affirmation forms lacked this information.⁴⁵¹ The district court held that, since state law made poll workers responsible for recording a voter's method of identification on the affirmation form, the consent decree required election officials to count provisional ballots from SSN-4 voters where the poll worker had failed to do so.⁴⁵² The court went on to discuss how the Sixth Circuit's recent ruling clarified that *Bush's* Uniformity Principle prohibited courts from applying special voting rules just to certain voters.⁴⁵³ It therefore expanded its order to require election officials to count provisional ballots

At the same time, the district court issued an injunction concerning yet another type of provisional ballot: those cast at the wrong precinct within the wrong polling location. *Id.* It held that there was "no logical or legal rationale" to count provisional ballots that had been cast at the wrong precinct within the correct location due to poll worker error, while refusing to count provisional ballots cast at the wrong precinct within the wrong location due to such errors. *Id.* at 750. The Sixth Circuit stayed the order. *Husted*, 698 F.3d 341. It held that the state was likely to succeed in demonstrating that the law was constitutional as applied to wrong-location, wrong-precinct voters. Unlike right-location, wrong-precinct voters, voters who arrive at the wrong location do so at least partly due to their own error, rather than solely due to poll worker error. *Id.* at 344 ("[A] voter who fails to utilize these tools and arrives at the wrong polling location cannot be said to be blameless in the same way as a right-place/wrong-precinct voter."). Additionally, allowing people to vote at the wrong location undermined the state's precinct-based voting system to a greater degree than allowing them to vote at the wrong precinct within the correct location. *Id.* at 344–45. Thus, the balance for wrong-location, wrong-precinct voters was quite different from that for right-location, wrong-precinct voters. The Sixth Circuit concluded by adding that the district court should not have changed the rules for the impending election so close to Election Day, after early voting had started. *Id.* at 346.

⁴⁴⁹ *SEIU, Local 1 v. Husted*, No. 12-CV-562, 2012 U.S. Dist. LEXIS 162015, at *10 (S.D. Ohio Nov. 13, 2012), *stayed sub nom.* *Ne. Ohio Coal. for the Homeless v. Husted (NEOCH III)*, No. 12-4354, 2012 U.S. App. LEXIS 26926 (6th Cir. Nov. 16, 2012).

⁴⁵⁰ *Id.* at *11–12, 16.

⁴⁵¹ *Id.* at *10.

⁴⁵² *Id.* at *17. The court further ruled that the new affirmation form that the Secretary had developed improperly shifted responsibility to record a voter's method of identification from poll workers to the voters themselves. *Id.* It also held, as an alternative basis for its judgment, that declining to count provisional ballots based on state officials' failure to complete that part of the affirmation form would violate substantive due process. *Id.* at *26–28.

⁴⁵³ *Id.* at *29.

from any voter whose affirmation form failed to specify the type of identification they used.⁴⁵⁴

The Sixth Circuit stayed this ruling.⁴⁵⁵ It held that state law did not require election officials, rather than the voters themselves, to record the type of identification that voters used on the affirmation forms.⁴⁵⁶ And, in any event, sovereign immunity generally precluded federal courts from enforcing state law against state officials.⁴⁵⁷ The court further opined that the original consent decree had been issued to make it easier for homeless people without identification to vote.⁴⁵⁸ Requiring voters to record their type of identification—which could include the last four digits of their social security number—on their affirmation forms did not undermine that purpose.⁴⁵⁹

The Sixth Circuit reiterated the district court's concern that an injunction requiring election officials to count provisional ballots with incomplete affirmation forms exclusively for SSN-4 voters would raise equal protection problems.⁴⁶⁰ Rather than justifying the district court's sweeping relief, however, the Sixth Circuit suggested that such concerns warranted even greater caution in granting an injunction. The court tersely declared:

Even if such poll worker omission to record identification information was deemed to violate the consent decree, the proper remedy for such a violation would not include an injunction that creates an equal protection violation and builds on that violation by imposing the more sweeping relief of expanding the consent decree and the scope of those it benefits. The district court's order improperly expands the class of voters it was intended to cover and the types of provisional ballot issues it was meant to address.⁴⁶¹

This part of the Sixth Circuit's opinion acknowledges two important facts that are seemingly in tension with each other. On the one hand, suspending statutory ballot-counting requirements only for certain voters likely violates *Bush's* Uniformity Principle. On the other hand, expanding relief to all voters may often be a disproportionately overbroad remedy that interferes with a state's law more extensively than necessary to protect the plaintiffs' rights. Moreover, a federal court may lack Article III jurisdiction to grant such extensive relief; the Sixth Circuit pointed out that the plaintiffs likely lacked standing to assert the rights of all voters

⁴⁵⁴ *Id.* at *19–20, *29–30. (“Since Directive 2012-54 violates the Consent Decree and the Court must enjoin Directive 2012-54, as it applies to SSN-4 voters, the Secretary’s application of the Directive to non-SSN-4 voters creates a *Bush v. Gore* violation of Equal Protection.”).

⁴⁵⁵ *NEOCH III*, No. 12-4354, 2012 U.S. App. LEXIS 26926, at *2 (6th Cir. Nov. 16, 2012).

⁴⁵⁶ *Id.* at *8.

⁴⁵⁷ *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)).

⁴⁵⁸ *Id.* at *9.

⁴⁵⁹ *Id.* at *8.

⁴⁶⁰ *Id.*

⁴⁶¹ *NEOCH III*, 2012 U.S. App. LEXIS 26926, at *10–11.

throughout the state.⁴⁶² Unfortunately, the court did not suggest what type of remedy would have been more appropriate to balance these competing concerns, had some form of relief been appropriate.

The US District Court for the Northern District of Georgia expressed similar equal protection concerns in *Democratic Party of Georgia v. Crittenden*.⁴⁶³ In a previous case, the court had ordered election officials within one particular county to accept absentee ballots on which the voter had failed to write his or her correct birth year.⁴⁶⁴ The *Crittenden* Court expressed concern that the state's other counties would continue to exercise discretion over whether to accept such ballots.⁴⁶⁵ The court did not make a merits determination of whether the Constitution or federal law required election officials to count absentee ballots with erroneous or omitted information. Instead, "for the sake of statewide uniformity and assurance that all absentee mail-in ballots are equally treated," it ordered the Georgia Secretary of State to ensure that all absentee ballots that were "rejected solely because of an omitted or erroneous birth date" were counted.⁴⁶⁶

Conversely, rather than expanding the scope of an injunction beyond the particular plaintiffs in a case to avoid violating the Uniformity Principle, some courts simply refuse to issue such limited relief. In *Friedman v. Snipes*,⁴⁶⁷ the plaintiffs were three voters who alleged that they had requested absentee ballots for a presidential election, but either never received them or received them too late.⁴⁶⁸ They sought an injunction requiring their County Supervisors of Elections to accept ballots from all domestic absentee voters from those counties, so long as their ballots were postmarked by the close of polls on Election Day and received by election officials within ten days of the election.⁴⁶⁹ That was the same deadline that state law established for military and overseas absentee voters.⁴⁷⁰

The US District Court for the Southern District of Florida rejected the claim, in part because the requested relief would create an equal protection violation. The court explained, "[T]he very relief requested by

⁴⁶² *Id.* at *11 ("In expanding the consent decree on the NEOCH plaintiffs motion, the district court granted relief to a group of people who are not before the court, who have not requested relief, and whose interests are not implicated in the NEOCH litigation.").

⁴⁶³ 347 F. Supp. 3d 1324, 1340–41 (N.D. Ga. 2018).

⁴⁶⁴ *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309, 1311 (N.D. Ga. 2018).

⁴⁶⁵ *Democratic Party*, 347 F. Supp. 3d at 1341.

⁴⁶⁶ *Id.*

⁴⁶⁷ 345 F. Supp. 2d 1356 (S.D. Fla. 2004).

⁴⁶⁸ *Id.* at 1358. The plaintiffs had included the Florida Secretary of State as a defendant, but dropped her from their request for a preliminary injunction for unspecified reasons. *Id.* at 1359 & n.4.

⁴⁶⁹ *Id.* at 1381.

⁴⁷⁰ *Id.* at 1369.

Plaintiffs, if granted, would amount to a denial of the equal protection rights of all domestic absentee voters who live outside of Broward and Miami-Dade counties.⁴⁷¹ Absentee ballots received within the ten-day window in Broward and Miami-Dade counties would be counted, but ballots received at the same time in other counties would not. “[G]ranting Plaintiffs’ requested relief would ensure the unequal application of the law to domestic absentee voters throughout the state—precisely the unequal treatment against which the Constitution was designed to protect.”⁴⁷²

Likewise, in *Fair Elections Ohio v. Husted*, as discussed earlier,⁴⁷³ the deadline for requesting absentee ballots under Ohio law was the Saturday before Election Day.⁴⁷⁴ The law contained an exception allowing people to request absentee ballots after that deadline if they, or their children, were unexpectedly hospitalized.⁴⁷⁵ A plaintiff group sued under the Equal Protection Clause, arguing that people who were unexpectedly arrested after the deadline should similarly be able to request absentee ballots. The court rejected the claim, holding among other things that such an injunction would “exacerbate” equal protection concerns.⁴⁷⁶ It explained that people other than prisoners might be unexpectedly prevented from going to the polls on Election Day.⁴⁷⁷ “If the Court were to issue the injunction requested by Plaintiffs and extend the absentee ballot request deadline only as it applies to prisoners, the Court might actually create an equal protection violation”⁴⁷⁸

Thus, at the very least, both litigants and courts must consider the Uniformity Principle in determining the proper scope of relief in election litigation.⁴⁷⁹ It remains unclear whether the principle prohibits courts from issuing injunctions that enforce the voting rights only of the particular plaintiffs in the cases before them. Conversely, awarding broader relief may contravene Article III’s justiciability restrictions, traditional equitable principles, and many of the other considerations that make

⁴⁷¹ *Id.* at 1380.

⁴⁷² *Id.* at 1381–82.

⁴⁷³ See *supra* notes 180–87.

⁴⁷⁴ No. 12CV797, 2012 U.S. Dist. LEXIS 161614, at *6 (S.D. Ohio Nov. 1, 2012).

⁴⁷⁵ *Id.* at *5.

⁴⁷⁶ *Id.* at *65–66.

⁴⁷⁷ *Id.* at *66.

⁴⁷⁸ *Id.* at *66–67.

⁴⁷⁹ Cf. *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798, 799 (Ark. 2002) (noting, without adjudicating, the argument that a court order extending the hours for only certain polling places would violate equal protection); *Black Voters Matter Fund v. Raffensperger*, No. 20-cv-01489, 2020 U.S. Dist. LEXIS 75880, at *9–10 (N.D. Ga. Apr. 30, 2020) (holding that “providing postage to some voters” as the result of a court order issued after absentee voting had begun would not violate the *Bush* Uniformity Principle, but “could yield a measure of disparity” that would be against the public interest).

nationwide and statewide defendant-oriented injunctions so problematic.⁴⁸⁰

IV. The Uniformity Principle and the Selective Expansion of Voting Rights

Bush's Uniformity Principle requires that all voters participating in an election be given substantially equal opportunities to cast votes and have them be counted. Under this principle, disparities among voters which give some people an advantage in voting or having their votes counted likely violate the Equal Protection Clause. Another line of equal protection cases dating back to the Civil Rights Era, however, provides that the government may selectively make voting easier for some groups of voters, even if it excludes other, similarly situated people in the jurisdiction from such opportunities. This principle originated in the US Supreme Court's 1964 ruling in *Katzenbach v. Morgan*.⁴⁸¹ Under *Katzenbach*, the government's decision to expand voting opportunities only for certain groups of people is subject only to rational basis scrutiny.⁴⁸² These conflicting lines of authority have led to confusion and inconsistencies among lower-court rulings applying the Uniformity Principle—particularly cases involving challenges to state restrictions on absentee and early voting.

In *Katzenbach*, the Court rejected an equal protection challenge to section 4(e) of the Voting Rights Act.⁴⁸³ That provision barred states from applying literacy requirements for voting to anyone who had completed the sixth grade in a school in Puerto Rico school where the language was not English.⁴⁸⁴ At the time, Congress had not yet prohibited literacy requirements, and New York required voters to be literate.⁴⁸⁵ Several New York voters challenged section 4(e), arguing among other things that it violated the Equal Protection Clause by imposing different voting requirements for different New York residents.⁴⁸⁶ Those who were illiterate in English but had attended sixth grade in Puerto Rico were permitted to

⁴⁸⁰ See Morley, *De Facto Class Actions?*, *supra* note 32, at 449–503.

⁴⁸¹ 384 U.S. 641, 643 (1966) (citing 42 U.S.C. § 1973b (e) (1964) (current version 52 U.S.C. § 10303 (4)(e))).

⁴⁸² *Id.* at 657.

⁴⁸³ *Id.* at 643 n.1.

⁴⁸⁴ *Id.* at 643.

⁴⁸⁵ The Supreme Court had upheld the constitutionality of literacy requirements in *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51–52 (1959) (“The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. . . . [I]n our society where newspapers, periodicals, books, and other printed material canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.”).

⁴⁸⁶ *Katzenbach*, 384 U.S. at 656.

vote, while all other illiterate voters—including those educated in New York or a foreign country—were prohibited from voting.

The Supreme Court rejected this argument. It declared that section 4(e) did not “unconstitutionally den[y] or dilut[e] anyone’s right to vote but rather . . . extends the franchise to persons who otherwise would be denied it by state law.”⁴⁸⁷ Since the statute was a “reform measure aimed at eliminating an existing barrier to the exercise of the franchise,” rather than a restriction on voting rights, the classifications it drew were subject only to rational basis scrutiny.⁴⁸⁸ The Court explained that, under the rational basis test, Congress need not “strike at all evils at the same time.”⁴⁸⁹ Rather, “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”⁴⁹⁰ The Court went on to speculate about the range of possible legitimate considerations that might have led Congress to grant relief to people educated in Puerto Rican schools.⁴⁹¹

The Court went on to apply this approach in *McDonald v. Board of Election Commissioners*.⁴⁹² The plaintiffs were pretrial detainees in the Cook County jail who argued that Illinois’s absentee voting law violated the Equal Protection Clause.⁴⁹³ The law allowed voters to cast absentee ballots only if, among other things, they were unable to vote in person because they were physically incapacitated or absent from the county on Election Day.⁴⁹⁴ The plaintiffs argued that it was unconstitutionally arbitrary to allow voters who were “incapacitated” by physical disability to receive absentee ballots, but not those who were incapacitated by incarceration.⁴⁹⁵ And it was similarly arbitrary to allow Cook County residents who were detained in other counties or states to cast absentee ballots (since they were absent from Cook County on Election Day), while prohibiting those detained within Cook County itself from doing so.⁴⁹⁶

The Court held that the case did not involve “the fundamental right to vote,” but rather “a claimed right to receive absentee ballots.”⁴⁹⁷ It explained, “[T]he absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not

⁴⁸⁷ *Id.* at 656–57.

⁴⁸⁸ *Id.* at 657.

⁴⁸⁹ *Id.* (quoting *Semler v. Dental Exam’rs*, 294 U.S. 608, 610 (1935)).

⁴⁹⁰ *Id.* (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

⁴⁹¹ *Id.* at 657–58.

⁴⁹² 394 U.S. 802, 806 (1969).

⁴⁹³ *Id.* at 803.

⁴⁹⁴ *Id.* at 803–04.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 807.

themselves deny appellants the exercise of the franchise.”⁴⁹⁸ Thus, restrictions on eligibility for absentee voting are subject only to rational basis scrutiny.⁴⁹⁹ The Court held that the state could validly allow only certain groups of voters to cast absentee ballots even though there were “many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible.”⁵⁰⁰ It concluded by stating that Illinois should be commended for making voting easier for some people, even though the legislation could have gone further.⁵⁰¹

Morgan and *McDonald* draw the questionable distinction between laws that selectively extend the franchise or voting opportunities to only certain people, and laws restricting the franchise or voting opportunities. The Court did not seriously contend with the fact that both types of statutes lead to the same result: only certain people within the electorate receive favorable treatment with regard to voting. Whether that outcome is achieved by selectively extending special protections for voting rights to certain favored groups, as in *Morgan* and *McDonald*, or instead restricting the franchise for others, seems primarily a matter of statutory phrasing that should carry little weight.

Moreover, the Court’s rational-basis approach to selective expansions of voting rights makes it easier for political parties in power to give their supporters disproportionate advantages in voting. The discretion to confer extra voting rights or opportunities only on certain segments of the electorate gives legislators a way of unfairly attempting to entrench themselves in power. Finally, it is difficult to square *Katzenbach’s* and *McDonald’s* toleration of disparate voting rules for different groups within the electorate with *Bush’s* Uniformity Principle, which prohibits “arbitrary and disparate” treatment of different voters within the same electorate.⁵⁰² When some voters are granted extra protection for their voting rights or opportunities to vote, they are not participating in the election “on an equal basis with other citizens in the jurisdiction.”⁵⁰³

Bush’s Uniformity Principle arguably reflects greater distrust of Congress and legislatures to fairly regulate elections.⁵⁰⁴ This could reflect in part rising political polarization toward the end of the twentieth

⁴⁹⁸ *McDonald*, 394 U.S. at 807–08.

⁴⁹⁹ *Id.* at 809 (holding, with regard to absentee voting, that “statutory classifications will be set aside only if no grounds can be conceived to justify them”).

⁵⁰⁰ *Id.* at 809–810.

⁵⁰¹ *Id.* at 811.

⁵⁰² *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

⁵⁰³ *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

⁵⁰⁴ I am grateful to Professor Rick Pildes for making this observation.

century.⁵⁰⁵ Professor Michael Kang contends that, since the end of the Cold War, hyperpartisanship has “infected both parties’ attitudes toward election administration Lawmakers more aggressively changed election rules affirmatively to boost their side and depress the other.”⁵⁰⁶ Many jurisdictions’ ability to implement such changes was enhanced when *Shelby County v. Holder*⁵⁰⁷ plunged federal preclearance review into limbo.⁵⁰⁸

Political parties’ increased focus on changing election rules to achieve partisan goals may have led courts to view those rules more suspiciously and impose more exacting scrutiny. Professor Rick Pildes has suggested that *Bush’s* Uniformity Principle itself may have arisen from the Court’s “structural concern for partisan capture of election processes.”⁵⁰⁹ Only a few years earlier, in *U.S. Term Limits, Inc. v. Thornton*,⁵¹⁰ the Court had held for the first time that the Elections Clause contains implicit restrictions to prevent partisan manipulation.⁵¹¹ And after *Bush*, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁵¹² the majority held that a state constitution may transfer the authority to draw congressional district lines from a state’s institutional legislature to an independent redistricting commission.⁵¹³ In doing so, it criticized the “conflict of interest inherent in legislative control over redistricting.”⁵¹⁴

While *Rucho v. Common Cause*⁵¹⁵ rejected political gerrymandering claims as nonjusticiable, the Court still acknowledged that “[e]xcessive partisanship in districting leads to results that reasonably seem unjust”

⁵⁰⁵ See Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011) (“American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization.”).

⁵⁰⁶ Michael S. Kang, *Voting Rights from Judge Frank Johnson to Modern Hyperpolarization*, 71 ALA. L. REV. 793, 808 (2020).

⁵⁰⁷ 570 U.S. 529 (2013).

⁵⁰⁸ *Id.* at 556.

⁵⁰⁹ Richard Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 49 (2004); see also Richard H. Pildes, *Disputed Elections*, in *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000* 69, 84 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002).

⁵¹⁰ 514 U.S. 779 (1995).

⁵¹¹ *Id.* at 833–34 (declaring that the Elections Clause is “not a source of power to dictate electoral outcomes” or “to favor or disfavor a particular class of candidates”).

⁵¹² 576 U.S. 787 (2015).

⁵¹³ *Id.* at 824. The US Constitution’s Elections Clause grants the authority to regulate the “Manner” in which congressional elections are held—including the power to draw congressional district lines, see *Smiley v. Holm*, 285 U.S. 355, 366, 372–73 (1932)—specifically to the “Legislature” of each state, rather than to the state as an entity. U.S. CONST. art. I, § 4, cl. 1.

⁵¹⁴ *Arizona Indep. Redistricting Comm’n*, 576 U.S. at 821 (quoting Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1808 (2012)).

⁵¹⁵ 139 S. Ct. 2484 (2019).

and are “incompatible with democratic principles.”⁵¹⁶ Thus, the Court’s election law rulings over the past few decades largely reflect increasing discomfort with allowing political entities to exercise primary control over the electoral process.⁵¹⁷ From that perspective, *Bush’s* Uniformity Principle—which makes it harder for legislatures or election officials to single out particular groups for favorable treatment—may seem quite attractive. During the Civil Rights Era, in contrast, the Court would have been more willing to view measures providing additional voting opportunities in certain places or to particular groups as commendable attempts to reduce barriers to voting.

The unresolved tension between these competing lines of authority has led to inconsistencies and confusion among lower-court opinions, particularly when it comes to early and absentee voting. Applying *Katzenbach* and *McDonald*, lower courts have rejected equal protection challenges to restrictions on absentee voting⁵¹⁸ and disparities among counties in the availability of early voting.⁵¹⁹ For example, as discussed earlier,⁵²⁰ in *Paher v. Cegavske*, the US District Court for the District of Nevada held that, in the context of statewide primary elections, it was permissible for only one county in the state to automatically mail absentee ballots to all absentee voters and deputize field registrars to pick them up.⁵²¹ The court emphasized that election officials “are not constitutionally prohibited from making voting easier,” even selectively.⁵²² The Equal Protection Clause does not prohibit a county from “mak[ing] it easier or more convenient” for people in one county to vote, so long as it “does not have any adverse effects on the ability of voters in other counties to vote.”⁵²³

On the other hand, other jurisdictions have held that the Uniformity Principle requires equal treatment of voters, even regarding early and absentee voting.⁵²⁴ In *Obama for America v. Husted*, for example, the Sixth

⁵¹⁶ *Id.* at 2506 (quoting *Arizona Indep. Redistricting Comm’n*, 576 U.S. at 791).

⁵¹⁷ See Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 90–92 (2016).

⁵¹⁸ See, e.g., *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004); *Suydam v. Town of Rumford*, No. 15-cv-00203, 2015 U.S. Dist. LEXIS 72723, at *8–9 (D. Me. June 4, 2014); *Fair Elections Ohio v. Husted*, No. 12CV797, 2012 U.S. Dist. LEXIS 161614, at *10–12 (S.D. Ohio Nov. 1, 2012).

⁵¹⁹ See, e.g., *Gustafson v. Ill. State Bd. of Elections*, No. 06C1159, 2007 U.S. Dist. LEXIS 75209, at *36–39 (N.D. Ill. Sept. 30, 2007).

⁵²⁰ *Supra* note 293–302.

⁵²¹ No. 20-cv-00243, 2020 U.S. Dist. LEXIS 92665, at *6 (D. Nev. May 27, 2020).

⁵²² *Id.* at *3.

⁵²³ *Id.* at *24.

⁵²⁴ See, e.g., *Democratic Party of Ga. v. Crittenden*, 347 F. Supp. 3d 1324, 1341 (N.D. Ga. 2018) (ordering all counties within the state to accept absentee ballots on which the voter had written the wrong birth year, but only because a court had previously ordered one county to do so); *Bryanton v.*

Circuit simply ignored *Katzenbach* and *Morgan*, despite repeated citations to it in the briefs.⁵²⁵ In that case, through a series of legislative amendments, the Ohio legislature had adopted a statutory scheme allowing only military voters to vote in person over the three days immediately before Election Day.⁵²⁶ President Barack Obama's campaign committee argued that the Equal Protection Clause prohibited the state from granting special voting privileges only to members of the military. The Sixth Circuit agreed, holding that the state did not have a valid interest in allowing members of the military to vote in person over the weekend before Election Day without also letting the general public do so, as well.⁵²⁷ It emphasized that non-military voters also faced the possibility of last-minute emergencies. "At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters"⁵²⁸

Without addressing *Morgan* or *McDonald*, the Sixth Circuit added:

Equally worrisome would be the result if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges. Partisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents.⁵²⁹

The Supreme Court has not yet resolved the tension between its rulings in *Katzenbach* and *McDonald* on the one hand, and *Bush* on the other. These conflicting lines of authority are most likely to impact the continued validity of for-cause absentee voting. Currently, approximately fourteen states have excuse-based absentee voting, in which only certain groups of voters may cast absentee ballots.⁵³⁰ Both federal law and many

Johnson, 902 F. Supp. 2d 983, 989 (E.D. Mich. 2012) (holding that different counties could not use different forms for requesting absentee ballots); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004) (holding that the Equal Protection Clause required election officials to apply the same deadline for absentee ballots to all voters participating in a statewide election); *Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684, 706 (W.D. Pa. 2003) (holding that the Equal Protection Clause prohibited different counties from applying different rules for third-party absentee ballot harvesting).

⁵²⁵ See, e.g., Reply Br. of Intervenor Defs.-Appellants Mil. Grp., at 8, 9, 18, Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012).

⁵²⁶ *Husted*, 697 F.3d at 427.

⁵²⁷ *Id.* at 436.

⁵²⁸ *Id.*

⁵²⁹ *Id.* at 435.

⁵³⁰ See, e.g., ALA. CODE § 17-11-3 (2019); ARK. CODE ANN. § 7-5-402 (2020); CONN. GEN. STAT. § 9-135 (2020); DEL. CODE ANN. tit. 15, § 5502 (2012); IND. CODE ANN. § 3-11-10-24 (West 2019); KY. REV. STAT. ANN. §§ 117.077, 117.085 (West 2002); LA. STAT. ANN. § 18:1303 (2018); MASS. GEN. LAWS ch. 54, § 86 (2020); MISS. CODE ANN. § 23-15-715 (2020); MO. ANN. STAT. § 115.277 (West 2020); N.H. REV. STAT. § 657:1 (2019); N.Y. ELEC. L. § 8-400 (LexisNexis 2020); S.C. CODE ANN. § 7-15-320 (2014); TENN.

states also offer special voting opportunities for members of the military and overseas citizens,⁵³¹ as well as emergency services workers.⁵³² And, more broadly, some states delegate substantial authority to county and local officials to decide the availability of early voting opportunities.⁵³³ Vigorous enforcement of *Bush's* Uniformity Principle and rejection of *Katzenbach* or *McDonald* would likely require invalidation of a wide range of fairly common voting statutes, as well as more centralized state-level control over the electoral process.

Conclusion

To the extent the Supreme Court attempted to limit its ruling in *Bush v. Gore* to the 2000 election, it has largely failed. To the contrary, dozens of federal and state courts have cited *Bush* over the past two decades as establishing an equal protection Uniformity Principle for elections. The principle prohibits election officials from affording materially different treatment to voters participating in the same election that substantially impacts their opportunity to either cast a ballot or have it accepted as valid. Courts have applied the principle across a wide variety of contexts, including where states accorded differing numbers of votes to each voter, applied disparate voting rules to different voters participating in the same election, or allowed local jurisdictions to adopt voting systems with substantially different error rates. Plaintiffs have been least successful when challenging various “matching” requirements, such as signature, identification, or record matches; disparities in the availability of absentee voting or early voting; and restrictions on discretionary procedures for the restoration of felons’ voting rights.

The Uniformity Principle has also played an important role at the remedial stage of several election cases. Some courts have invoked it as the basis for extending relief to voters beyond the particular plaintiffs in a case. In other cases, the court denied relief in part because granting an

CODE ANN. § 2-6-201(2017); TEX. ELEC. CODE ANN. § 82.001 (West 2019); W. VA. CODE ANN. § 3-3-1 (LexisNexis 2020).

⁵³¹ See, e.g., Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), Pub. L. No. 99-410, 100 Stat. 924 (1986), amended by Military and Overseas Voter Empowerment Act (“MOVE Act”), Pub. L. No. 111-84, tit. V, subtitle H, §§ 575–89, 123 Stat. 2190, 2318–35 (2009) (codified as amended at 52 U.S.C. § 20302 (2018)).

⁵³² See Matthew Catron, *Absentee Voting in Case of a Personal Emergency*, NAT’L CONF. OF STATE LEGIS. (Mar. 18, 2020), <https://perma.cc/4FTR-383G>.

⁵³³ See, e.g., *Gustafson v. Illinois State Board of Elections*, No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209, at *19, *35 (N.D. Ill. Sept. 30, 2007) (upholding disparities among counties for early voting opportunities); cf. *Harlan v. Scholz*, 866 F.3d 754, 756–57 (7th Cir. 2017) (upholding disparities among counties in same-day voter registration activities).

injunction to only certain voters would raise serious constitutional questions.

The Court itself has yet to revisit *Bush's* Uniformity Principle or offer any further insight into its scope. The principle directly conflicts with another line of authority dating back to the Supreme Court's rulings in *Katzenbach v. Morgan* and *McDonald v. Board of Election Commissioners*, which held that laws selectively protecting voting rights or extending voting opportunities exclusively for certain groups of voters are subject only to rational basis scrutiny. Whether *Bush* or *Katzenbach-McDonald* ultimately prevails will determine whether states may continue to exercise broad discretion over absentee and early voting, and the extent to which they must centralize control over the electoral process. Requiring substantially equal treatment of all voters in the electorate can reduce partisan manipulation and bolster both the actual and apparent fairness of the electoral process. Yet such uniformity can make it more difficult, costly, and burdensome for states to attempt to respond to the unique burdens that particular groups, such as members of the military or emergency responders, face in attempting to vote.