SO LET IT BE WITH US: REALIGNING RECOUNT LAWS WITH AMERICAN DEMOCRACY

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INTRODUCTION

> This has been an extraordinary election. But in one of God's unforeseen paths, this belatedly broken impasse can point us all to a new common ground, for its very closeness can serve to remind us that we are one people with a shared history and a shared destiny. Indeed, that history gives us many examples of contests as hotly debated, as fiercely fought, with their own challenges to the popular will. Other disputes have dragged on for weeks before reaching resolution. And each time, both the victor and the vanquished have accepted the result peacefully and in a spirit of reconciliation. So let it be with us.[1]

The integrity of the United States' electoral system is the very bedrock of its democracy.[2] Politicians campaign for office, they engage in debate with their opponents, and citizens flock to the polls.[3] Votes are counted, the losing candidate concedes, and there is a peaceful transition of power.[4] For as long as this country has held elections, the public has counted on this process and trusted its legitimacy.[5] Unfortunately, recent years have seen a serious degradation of that trust as citizens are increasingly unwilling to accept the results of elections.[6] If this trend continues, American democracy is at risk; without trust in the system, the country is more vulnerable than ever to a complete collapse.[7] Thomas

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[1] Al Gore Jr., Vice President of the U.S., 2000 Election Concession Speech at 00:03:43 (Dec. 13, 2000), https://www.americanrhetoric.com/speeches/algore2000concessionspeech.html [https://perma.cc/LB9E-U9YT].

[2] *See* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN ix (2012).

[3] *See generally* EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES (2024).

[4] *See generally* HASEN, *supra* note 2.

[5] *Id.*

[6] *Id.* at 191 ("The past Voting Wars has made partisans less likely to trust the results of a close election and more likely to believe that litigation could succeed in reversing the losing candidate's fortunes.").

[7] *Id.* at 189

> We are left with a small but real risk that another presidential election will be close enough to go into overtime in our lifetimes. And just as we would prepare for the law risk of a catastrophic meltdown at a nuclear power plant, we should prepare for the low risk of a catastrophic meltdown of our electoral system.

Id.

Jefferson was clear when he declared this country's independence from British tyranny that the American government derived its "just powers from the consent of the governed[.]"[8] Without electoral integrity, the consequences are dire.[9] Richard Hasen spells out the outcome, writing that "[a] lack of faith in elections becomes a self-fulfilling prophecy that undermines faith in democratic government itself."[10]

Something must change. America's struggle with electoral integrity is not a new one; it has and continues to reckon with an array of issues like voter suppression, accusations of voter fraud, and disenfranchisement that dull the brilliance of the electoral system and sow mistrust.[11] However, this Comment is not about voter suppression laws. It is not about the inflammatory and inaccurate sensationalist cries about voter fraud. And it is not about voter disenfranchisement. Other authors have written eloquently and extensively about all three subjects, but this Comment elaborates on a subject on which comparatively little ink has been spilled.[12] While America's electoral process faces these and many other pressing issues, this Comment focuses narrowly on how Americans resolve elections that are too close to call and the democratic values that should drive those processes. Hotly contested elections are not new, but the country's approach to them has varied significantly over the years.[13] The pressure cooker of election season is always on the precipice of erupting as ballots are finally counted.[14] This intense, high-stakes environment demands

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[8] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[9] *See generally* HASEN, *supra* note 2, at ix.

[10] *Id.* at ix.

[11] *See generally* FOLEY, *supra* note 3.

[12] *See generally* BARBARA MCQUADE, ATTACK FROM WITHIN: HOW DISINFORMATION IS SABOTAGING AMERICA (2024); *see also* MICHAEL GRAFF & NICK OCHSNER, THE VOTE COLLECTORS: THE TRUE STORY OF THE SCAMSTERS, POLITICIANS, AND PREACHERS BEHIND THE NATION'S GREATEST ELECTORAL FRAUD (2021); GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA (2020); STACEY ABRAMS ET AL., VOTER SUPPRESSION IN U.S. ELECTIONS (Jim Downs ed., 2020); JOHN FUND & HANS VON SPAKOVSKY, WHO'S COUNTING?: HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK (2012); LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD (2010); RICHARD K. SCHER, THE POLITICS OF DISENFRANCHISEMENT: WHY IS IT SO HARD TO VOTE IN AMERICA? (2010); SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2007).

[13] *See generally* FOLEY, *supra* note 3.

[14] *Id.*

that states have a clear, reliable process in place ready to handle issues that arise. While they do not comprise the entirety of the dispute resolution process, recount laws are in dire need of reform to align with democratic values.

The current state of the law in the United States governing recount procedures is fundamentally inconsistent with the values that drive our elections. Democracies survive longer when constitutions are reinforced by unwritten democratic norms.[15] It is essential to reform our recount laws to promote the free and fair elections upon which the country's very foundation rests. Indeed, the very notion of "free and fair elections . . . ""rapidly loses its meaning when the results of such elections" can be easily cast aside.[16] As they stand today, recount laws can potentially degrade confidence in the integrity of the American electoral system.[17] The system is not perfect, and it would be a fool's errand to believe that a democratic scheme as vast and complicated as America's could create a solution that would make everyone happy. Democracy does not require "universal acceptance of the legitimacy achieved through the operation of a fair vote-counting process pursuant to the rule of law, but instead widespread acceptance of this legitimacy."[18] In a constitutional crisis, the only thing that stands between American democracy and its fall to a dictator might be a recount. The people must widely trust the recount results to prevent such an unthinkable outcome.

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[15] STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 8 (2018).

[16] Ibrahim J. Gassama, *Ballots and Bullets: The Right to Democratic Governance in International Law After the Egyptian Coup*, 32 WIS. INTL. L.J. 621, 673 (2014).

[17] *See* PRINCIPLES OF ELECTION L. II § 205, cmt. a (AM. L. INST. 2019) (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.") [hereinafter *Principles of Election Law II*]. Thus, one of the foundational principles guiding the development of election law must be to foster the public perception in the legitimacy of the electoral process, which in turn requires a perception that the resolution of vote-counting disputes is based upon nonpartisan adjudication pursuant to the rule of law.

[18] *Id.*

This Comment argues that recount laws do not do enough to promote a consensus strong enough to avoid complicating the peaceful transition of power and propose a framework for statewide reforms. Despite their increasing importance in federal elections, state recount laws are currently too inconsistent, opaque, and subjective.[19] Although federal law now requires recounts to be completed by a safe harbor deadline, there are very few guidelines for how states can and should conduct recounts.[20] This is a broken system, and Americans have to live with the "biennial anxiety over whether the next meltdown is imminent."[21] This Comment proposes several reforms that would not only make recounts more consistent across the country but also better promote the democratic values of transparency, accountability, efficiency, and impartiality. Part I offers background on recounts in America and explores the legal authority that governs them. Part II provides a theoretical framework for the democratic values that enable elections to function and offers examples of past recounts where those values are implicated. Part III offers a series of proposals that state legislatures should consider adopting to better align their recount procedures with democratic ideals. Part IV considers the possibility of federal reforms and concludes.

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[19] *See* David O'Brien, *Reconsidering the Presidential Recount System*, FAIRVOTE (Aug. 22, 2018), https://fairvote.org/reconsidering_the_presidential_recount_system/ [https://perma.cc/43FS-6WPV]

[20] *See* Drew Penrose, *Federal Standards for Presidential Recounts Needed*, FAIRVOTE (Nov. 30, 2016), https://fairvote.org/federal_standards_for_presidential_recounts_needed/ [https://perma.cc/DJ63-DHY8].

[21] Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CAL. L. REV. 1075, 1075 (2010) (reviewing HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009)).

I. BACKGROUND

A. Recounts in America

This Comment uses the American Law Institute's definition of recount, which is "a reexamination and retallying of ballots initially counted and reported as part of preliminary returns."[22] Recounts are administrative procedures that occur near the end of the electoral process—after the canvassing of returns but before the results of an election are officially certified.[23] After the ballots have been counted and the results announced, some states provide mechanisms for ballots to be counted again, either automatically or by request of an interested party when the difference in votes between candidates is within a margin of error.[24] Ideally, recounts should "achieve maximum accuracy without sacrificing other important values."[25] Recounts rarely change the results of an election, but they can and often do stir the public's interest and invite increased scrutiny.[26]

During the election of 2000, the word "recount" entered the vocabulary of the collective American consciousness for perhaps the first time in living memory.[27] Everyone was glued to their televisions, waiting with bated breath for the final decision of who would be the next President of the United States.[28] Would it be Governor George W. Bush or Vice President Al Gore? The country had to wait thirty-six days for Bush to be declared victorious.[29] The

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[22] *See* PRINCIPLES OF ELECTION L. III § 301(n) (AM. L. INST. 2019) [hereinafter *Principles of Election Law III*]

[23] FOLEY, *supra* note 3, at 410.

[24] *Id.*

[25] *Principles of Election Law II*, *supra* note 17, at § 204, cmt. a.

[26] *See* Will Mantell, *Recounts Rarely Change the Outcome of Elections*, *New Report Confirms*, FAIRVOTE (Oct. 28, 2024), https://fairvote.org/press/recounts-report-2024/ [https://perma.cc/RAD6-84JS].

[27] *See* HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 20 (2003).

[28] *Id.*

[29] *Id.* at 151.; Steve Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 FLA. STATE U.L. REV. 425 (2001); Stephen Battaglio, *TV Coverage of Bush v. Gore Is a Scary Reminder of What Can Go Wrong on Election* Night, L.A. TIMES (Aug. 14, 2020, 7:39 AM), https://www.latimes.com/entertainment-arts/story/2020-08-14/democratic-convention-republican-biden-trump-bush-gore-election-florida-recount [https://perma.cc/Q8Q2-DWVL].

period between Election Day and the safe harbor deadline saw a litigious whirlwind barrel through Florida.[30] Concessions were made and rescinded, recounts were started and stopped, and court rulings were filed and overturned. Florida's recount laws found themselves at center stage for well over a month, and the American people found them wanting.[31]

Florida is not the only state with recount laws that have inspired floods of litigation, but it is the one that received the most press coverage.[32] Following the year 2000, there have been at least 36 other statewide recounts, but the implementation of those recounts was anything but consistent.[33] Many states have laws that trigger automatic recounts when the vote margin is a certain percentage, but they are not often clear on how such recounts are to be conducted.[34] Other statutes require a recount to be requested by a certain deadline.[35] Sometimes, they are required to be counted by hand or by machine.[36] Sometimes, it can be a mix of both, varying by county.[37] A sample of votes can be recounted in some cases.[38] Recounts themselves can be recounted.[39] Nine states decline to provide guidelines for requested recounts at all. There can be distressingly little oversight on how counties conduct recounts, and the amount of publicly available information is minimal for those elections that the media did not sensationalize.[40] Although it is rare for the recount (or, in some cases, recounts) to

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[30] *See* GILLMAN, *supra* note 27, at 68.

[31] *Id.*

[32] *See generally* FOLEY, *supra* note 3.

[33] DEB OTIS, FAIRVOTE, AN ANALYSIS OF STATEWIDE ELECTION RECOUNTS, 2000-2023 (2023) https://fairvote.org/report/election-recounts-2024/ [https://perma.cc/7FJ7-AEGP].

[34] *Election Recounts*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/election-recounts [https://perma.cc/2LV7-A8ZT] (last updated Nov. 8, 2024); *see also* Alexandra Just, *Trumping Unmeritorious Election Contests: The Need for Uniform Election Contest Laws in the Wake of 2020 Election Litigation*, 62 U. LOUISVILLE L. REV. 167, 175 (2023).

[35] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 35; Just, *supra* note 35, at 177.

[36] *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 35; *see* Just, *supra* note 35, at 183.

[37] *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 35; *see generally* Just, *supra* note 35.

[38] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 35.

[39] *See* GILLMAN, *supra* note 27, at 57.

[40] *See id.*

change the outcome of an election, there may be a growing trend of candidates using recounts as political tools.[41] By December 2020, former President Trump filed more than fifty ultimately unsuccessful lawsuits, refusing to accept the results of the election.[42]

B. Federal Law

There are several federal laws that govern how to handle election contests, and the first was passed in the aftermath of the Election of 1876's constitutional crisis that left Rutherford B. Hayes as the nineteenth President of the United States.[43] In that election, Samuel Tilden won the popular vote but lost the electoral college by the smallest margin in history—185 to 184.[44] Congress was sent two slates of electors and had to decide which one was valid—one left Tilden the winner and the other mandated a Hayes victory.[45] To decide, Congress "decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices."[46] With Commission members divided on party lines, Justice Bradley cast the deciding vote for Hayes amidst "vociferous attacks" from angry partisans.[47] This method of resolving an electoral dispute was dissatisfying to the public and

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[41] *But see* Just, *supra* note 35, at 179-80 (noting that recounts are more likely to change the results of an election than election contests, which are commonly dismissed "due to insufficient grounds for contest, mootness, laches, and waiver and estoppel.").

[42] Pete Williams & Nicole Via y Rada, *Trump's Election Fight Includes over 50 Lawsuits. It's Not Going Well.*, NBC NEWS (Nov. 23, 2020, 8:02 AM), https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289 [https://perma.cc/LW8L-2CDL]; *see generally*, *e.g.*, Trump v. Kemp, 511 F. Supp. 3d 1325 (N.D. Ga. 2021); *see also* Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814 (D. Mont. 2020); Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

[43] *See* FOLEY, *supra* note 3, at 117-149.

[44] *See* MICHAEL F. HOLT, BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876 173 (2008); *see also id* at 258, (breaking down the final vote of electoral college in Table 8 of 185 to 184).

[45] Bush v. Gore, 531 U.S. 98, 156 (2000) (Breyer, J., dissenting).

[46] *Id.*

[47] *Id.*

undermined trust in the electoral process.[48] As Justice Breyer remarked in his *Bush v. Gore* dissent:

> [T]he participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.[49]

Bradley decided that "it is the business and the jurisdiction of the State to prevent frauds from being perpetrated in the appointment of its electors, and not the business or jurisdiction of the Congress[,]" decrying that Congress could not assess the underlying accuracy of state election returns even if there is proof of widespread fraud.[50]

Although many were understandably perturbed by Bradley's decision, Congress formally resolved the election dispute with the Compromise of 1877 (also known as "the Corrupt Bargain"), which resulted in the withdrawal of federal troops in the South and the end of Reconstruction.[51] Because of the blatant partisanship in the decision-making body, Democrats spent Hayes' presidency calling him "Rutherfraud" or "His Fraudulency."[52] In addition to the widespread allegations of fraud, the dispute was lengthy, only resolving two days before Inauguration day.[53] Cognizant of the problems the debacle revealed, Congress passed the Electoral Count Act of 1877, or the ECA.[54] The ECA set an optional safe harbor deadline—the time when states had to have their election results certified—for six days before electors meet.[55] The safe harbor is "a promise that partisanship in Congress will not override

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[48] *See* FOLEY, *supra* note 3, at 144 ("That he happened to be a Republican and, for all four states, broke the tie in favor of Hayes, was too much for Democrats to accept as an exercise of impartial adjudication.").

[49] *Bush*, 531 U.S. at 157 (Breyer, J., dissenting).

[50] FOLEY, *supra* note 3, at 133.

[51] *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT 115, 129-30 (1994).

[52] *Principles of Election Law III*, *supra* note 22, at § 304, reps.' note b.

[53] FOLEY, *supra* note 3, at 139, 141.

[54] John L. Tripoli, *The Resilience of Our Republic: The Tests in 1876 and 2020, the Electoral Count Acts and a Look Ahead,* 46 PA. LAW. 42, 45 (2024).

[55] *Id.*

whatever the state determines about its own electoral votes[,]" but it had no enforcement mechanism.[56]

Congress's attempt to remedy the systemic flaws in the electoral process that the 2000 Florida recount exposed to the American people was similarly toothless.[57] In 2002, they passed the Help Americans Vote Act, or HAVA.[58] HAVA provided funding for new voting machines and made slight adjustments to the state balloting process.[59] Crucially though, HAVA lacked an enforcement mechanism—it did not even fund the Election Assistance Commission that it created.[60] HAVA also ignored the issues of underfunding, poorly-trained administrators, and partisan hijacking that fueled social and political unrest in Florida.[61]

Despite HAVA's passage in 2002, the ECA sat on the books, untouched in its archaic language, for 145 years.[62] Some scholars argued that the law itself was unconstitutional.[63] It was only after the chaos of the 2020 election and the January 6th insurrection that Congress decided to update it to provide more clarity.[64] The Electoral Count Reform and Presidential Transition Improvement Act of 2022, or the ECRA, made the safe harbor deadline mandatory.[65] Now, states must complete all election procedures and certify their electors "exactly five weeks after the day immediately following Election Day in November."[66] The law prohibited state legislatures from changing the law after elections and provided procedures to resolve disputes about election certification in courts.[67] The legislation encourages states to update

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[56] *Principles of Election Law III*, *supra* note 22, at intro. note, *Congressional "Safe Harbor" provision*.

[57] *See* GERKEN, *supra* note 21, at 2-3

[58] *Id.* at 14; *see generally* Help America Vote Act, 36 U.S.C. §§15601-15612 (2002).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *See generally* Cass R. Sunstein, *The Rule of Law v. "Party Nature": Presidential Elections, the Constitution, the Electoral Count Act of 1887, the Horror of January 6, and the Electoral Count Reform Act of 2022*, 103 B.U. L. REV. 1171 (2023).

[63] *See generally* Vasan Kesavan*, Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1653 (2002).

[64] Sunstein, *supra* note 62, at 1171.

[65] *Id.* at 1179.

[66] FOLEY, *supra* note 3, at 404.

[67] *Id.*

their election laws to align with the deadline, many of which have.[68] The ECRA did a great deal to reduce the potential for chaos.[69] It attempted to limit "any partisan mischief that any members of Congress might perpetrate in future presidential elections."[70] The ECRA also "explicitly provides for a special federal-court procedure before a panel of two circuit and one district judges, including an expedited direct review in the Supreme Court, if the state governor has failed to certify the appointment of the state's electors by the specified deadline…."[71]

Yet, the revised law does not do enough. Through the law was passed after an insurrection tried to subvert a fundamental democratic process, "it remains true that for most of American history fear was an insufficient motivation to overcome the desire for power with regard to what institution of government should have the last word in determining and declaring the winner of a presidential election."[72] States' current systems leave far too much uncertainty at how America will handle the next election that is *too close to call*. Despite reforms, the ECRA leaves the states to their own devices when it comes to resolving electoral disputes; their determinations about their electors are conclusive.[73] The legislation identified state governors as responsible for certifying the state's electors, consolidating power, and eliminating the possibility of several officials trying to send different electoral slates to Congress.[74] It also provided for expedited judicial review for aggrieved presidential candidates.[75] In a direct response to the January 6 insurrection at the United States Capitol, the ECRA

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[68] Trevor Potter, *Certification Laws in Red, Blue and Purple States Keep Elections Secure*, CAMPAIGN LEGAL CTR. (Oct. 30, 2024), https://campaignlegal.org/update/certification-laws-red-blue-and-purple-states-keep-elections-secure [https://perma.cc/QGZ2-MQHG].

[69] *See* Sunstein, *supra* note 62, at 1171, 1174.

[70] FOLEY, *supra* note 3, at 10.

[71] *Id.* at 405.

[72] *Id.* at 10.

[73] Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RES. L. REV. 27, 55 (2022)

[74] Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, LAWFARE (July 24, 2022, 4:09 PM), https://www.lawfaremedia.org/article/correcting-misconceptions-about-electoral-count-reform-act [https://perma.cc/N253-58WT].

[75] *Id.*

clarifies that the role of the Vice President is ministerial and lacks any determinative power over electors.[76]

One of the ECRA's key reforms is to "take[] steps to further bind states to their own law, and thus reduc[ing] the risks of ex post political maneuvering within states."[77] However, key terms like "regularly given" votes are not defined, allowing far too much room for interpretation on what should and should not be counted.[78] That is the real issue here: recounts can be lengthy, and can be lengthened even further with litigation. There is an actual risk that some states may not meet the certification deadline and trigger another constitutional crisis, opening "Pandora's Box". Such a crisis could dually weaken the nation and invite enemies foreign and domestic to take advantage of the social unrest and government disarray.[79]

II. DEMOCRATIC VALUES IN ELECTION DISPUTES

In Aaron Sorkin's award-winning masterpiece of a television show, *The West Wing,* President Josiah Bartlet remarks that "fidelity to freedom and democracy is the code of our civic religion[.]"[80] If that's true, then the first commandment of such a religion is to protect the sanctity of our elections. In a bid to inspire voters, the media and politicians on both sides of the aisle are emphatic that democracy is on the line every election cycle.[81] When a voter enters the polling booth, they are affirming their dedication to democracy and its accompanying values. They are putting their faith in the process, believing that state and federal legislators will conduct elections that promote equality, prioritize integrity, and provide finality.

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[76] Mark Caleb Smith, *The Electoral Count Reform Act of 2022, Explained*, DISPATCH (Oct. 25, 2024), https://thedispatch.com/article/the-electoral-count-reform-act-of-2022-explained/ [https://perma.cc/L6LM-AT4K].

[77] Sunstein, *supra* note 62, at 1178.

[78] Thomas "T.J." Kingeter, *The Electoral Count Act: "Regularly Given," the Denominator Problem, and the 101st Vote*, 53 SETON HALL L. REV. 905, 906 (2023).

[79] Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237, 259 (2001).

[80] *The West Wing: In the Shadow of Two Gunmen: Part I* (NBC television broadcast Oct. 4, 2000).

[81] Larry J. Martin, *The Elephant ... and Donkey in the Room*, 97 WIS. LAW. 7 (2024).

In the current "hyper-partisan political atmosphere," disputed federal elections are becoming more contentious, and along with them comes a "dangerous corrosion of public faith in electoral outcomes."[82] Past American elections have seen sharp, decisive victories, but "the narrowness of election margins across virtually the entire nation now makes clear how subtle nuances of election administration threaten to alter political outcomes."[83] Florida's recount debacle of the 2000 election provided a reason to pay attention to those nuances.[84] The infamous hanging chads, butterfly ballots, and the uncertainty in how recounts were to be conducted made many Americans realize just how ill-prepared the State's legislature was for such a close contest.[85] Florida is not the only state with vaguely-defined recount procedures.[86] The chaos of unspecific recount laws attempts to mask unequal treatment of voters' ballots, a troubling lack of transparency, undue discretion from partisan officials, and, at times, breathtaking incompetence by election officials. Without realigning laws to correct the failure to democratic values, the country risks seeing the collapse of democratic government entirely. Plato was right when he pointed out that a major flaw of democracy was the inherent risk "that a skilled demagogue could exploit freedoms, particularly freedom of speech, to seize power."[87] If all the votes are not properly certified by the ECRA's deadline, unclear recount procedures could create the perfect habitat for that skilled demagogue to become a dictator and degrade American democracy. If all that stands between the American public and a dictatorship are state recount laws, then states have a moral imperative to make them as clear and democratic possible.

Issues of electoral integrity are not new; examples span from "progressive attempts to clean up machine politics in Tammany Hall and fraud at the ballot box" to "practices of voter suppression and racial discrimination" to "the notorious problem of hanging

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[82] HASEN, *supra* note 2, at x.

[83] Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 787-88 (2009).

[84] *See id.* at 791.

[85] *See generally* GILLMAN, *supra* note 27, at 26.

[86] *See generally* FOLEY, *supra* note 3.

[87] MCQUADE, *supra* note 12, at 168.

chads and faulty voting machines in Florida. . . ."[88] Because "expectations of electoral integrity are not frozen in time," challenges that arise in modern times cannot be solved with the solutions of the past.[89] Instead of relying on their laws and constitutions to maintain the integrity of their electoral systems, democracies should instead look to "the basic nuts-and-bolts conditions required to achieve minimal standards of electoral integrity. . . ."[90] While there is no single source to look to that will lay out a universally agreed-upon canonical democratic theory, this Comment proposes that recount laws are failing to uphold the values of equality, transparency, non-partisanship and impartiality, competence, and finality.

A. Equality

In its 1964 decision, *Reynolds v. Sims,* the Supreme Court codified the principle of "one person, one vote" into constitutional law.[91] This case involved legislative reapportionment, but was clear that "in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters . . . ."[92] The *Bush v. Gore* Court drew heavily on *Reynolds,* finding that to properly determine voter intent, the Florida recount needed to be "confined by specific rules designed to ensure uniform treatment."[93] Applying the Equal Protection clause, the Court ruled that "[h]aving 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."[94] Having 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" certainly qualifies as arbitrary and disparate.[95]

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[88] Pippa Norris, *The New Research Agenda Studying Electoral Integrity*, 32 ELECTORAL STUD. 563, 566 (2013), https://www.sciencedirect.com/science/article/pii/S0261379413001157 [https://perma.cc/B5CE-T3SL].

[89] *Id.* at 567.

[90] *Id.*

[91] Reynolds v. Sims, 377 U.S. 533, 558 (1964).

[92] *Id.* at 560.

[93] Bush v. Gore, 531 U.S. 98, 106 (2000).

[94] *Id.* at 104-05.

[95] *Id.* at 106.

The Tilden-Hayes affair of 1876 had already exposed "an unbridgeable gap [that] can sometimes exist between a fair counting and a fair casting of ballots."[96] Thus, to ensure that ballots get equal treatment, states should prepare their ballots in a way that directs the voter to a clear and unambiguous declaration of intent as well as a recounting process that is just as certain. Legislative schemes that allow different counties in the same state the discretion to choose how to count ballots in a recount are inconsistent with equality. The consistency issues between counties were not unique to Florida. Within individual states, recount "procedures and equipment vary from county to county," meaning that "voters' chances of casting a vote in a statewide election that will actually be counted are ""wildly unequal."[97] Unfortunately, the decentralization of electoral management means that "citizens' fundamental voting rights are not consistently applied across all jurisdictions."[98] The current mix of laws and misplaced discretion allow too much room for voters' ballots to be counted unequally.

B. Transparency

Transparency is one of the most fundamental democratic values, if only because it permits monitoring compliance with democracy's other fundamental commitments.[99] Indeed, it is "a key pillar of a functioning democracy."[100] Because of this, recount procedures should be open to both the public and the press to observe "so that their legitimacy can be assessed and verified."[101] Recent American history has seen examples of recounts that upheld the value of transparency and recounts that have not, and the differences are striking.

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[96] FOLEY, *supra* note 3, at 282 (emphasis omitted).

[97] HASEN, *supra* note 2, at xi.

[98] PIPPA NORRIS, WHY AMERICAN ELECTIONS ARE FLAWED (AND HOW TO FIX THEM) 61 (2017).

[99] FOLEY, *supra* note 3, at 392; *see generally Principles of Election Law II*, *supra* note 17, at § 202.

[100] Rebecca Green, *Rethinking Transparency in U.S. Elections*, 75 OHIO ST. L.J. 779, 780 (2014).

[101] *Principles of Election Law II*, *supra* note 17, at § 202, cmt. a.

All eyes were on Minnesota's Senate race between Republican Norm Coleman and Democrat Al Franken as final vote tallies rolled in for the 2008 election.[102] Turnout was massive and the stakes were high: a Franken victory would give the Democrats a 60-person Senate majority, which is enough for cloture.[103] On Election Night, Coleman led by just 215 votes, a small enough margin to trigger an automatic recount.[104] Minnesota was prepared; the Secretary of State's office published a narrative that made clear that it explicitly designed with the goals of accuracy and transparency in mind.[105] They took transparency seriously, televising every step of the State Canvassing Board's proceedings so that anyone in the world could view them.[106] They took care to project

> . . . images of each disputed ballot . . . so that viewers both in the room and at home could see the appearance of the ballot for themselves and thus judge whether they believed the Board treated the ballot fairly in deciding whether to count the ballot and, if so, for which candidate.[107]

Minnesota's dedication to transparency even extended to the seven-week trial that decided an issue of double-counting votes; it became "the first fully televised trial in the history of Minnesota . . . ."[108] The recount, lauded as scrupulously fair, managed to do something rare: it reversed the outcome of the election.[109] With about 500 votes as the deciding factor, the election went "from

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[102] *See* Jay Weiner, *This Is Not Florida: The Franken-Coleman Recount: A Historic Recount Serves as a Case Study*, 12 INSIGHTS ON L. & SOC'Y 16, 16 (2012) .

[103] *Id. See Cloture*, BLACK'S LAW DICTIONARY (12th ed. 2024) (Cloture is defined as "the procedure for ending debate in a legislative body and calling for an immediate vote."); *see also About Filibusters and Cloture*, SENATE.GOV, https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm [https://perma.cc/K888-2UEZ] (last visited May 2, 2025) ("In 1975[,] the Senate reduced the number of votes required for cloture from two-thirds of senators voting to three-fifths of all senators duly chosen and sworn, or 60 of the 100-member Senate.").

[104] *Id.* at 16-17.

[105] *2008 State Recounts*, OFF. MINN. SEC. STATE, http://www.sos.state.mn.us/elections-voting/election-results/2008/2008-general-election-results/2008-state-recounts/ (last visited Dec. 13, 2024).

[106] JAY WEINER, THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT 114-15 (2010).

[107] *Principles of Election Law II*, *supra* note 17, at § 202, cmt. a.

[108] WEINER, *supra* note 106, at 162-63.

[109] Weiner, *supra* note 102, at 17.

Coleman ahead by 215 votes to Coleman behind by 312 votes."[110] Al Franken was sworn in as Minnesota's newest Senator eight months after Election Day.[111]

While Minnesota's State Canvassing Board should be congratulated for conducting such a transparent election, they did so at the sacrifice of efficiency. Between the recounts and the legal proceedings, the 2008 Minnesota Senate race took thirty-five weeks to resolve.[112] By contrast, the 2000 Florida election took only thirty-six days to resolve the issue of whether Al Gore or George Bush would become the next President of the United States.[113] These two elections are not completely analogous; there is a great deal more urgency in a Presidential election than in a Senate race. A Senate seat can sit vacant for extended periods of time, while the Oval Office must always be occupied.[114] Still, Florida could have learned a lot from Minnesota's transparent proceedings. Instead of broadcasting every step of the process to the public, Miami-Dade's County Canvassing Board "conducted its proceedings behind closed doors."[115] The secrecy of their proceedings caused Florida's already simmering populace to erupt into a raging boil, leading to the infamous Brooks Brothers Riot.[116] Angry right-wing protestors in polos laid siege on the Canvassing Board, evading security and keeping members of the Board trapped in the downtown Miami

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[110] *Id.*

[111] *Id.* at 16.

[112] WEINER, *supra* note 106, at 3-4.

[113] HASEN, *supra* note 2, at x.

[114] *See Principles of Election Law II*, *supra* note 17, at § 206, cmt. c (discussing the need for a provisional executive in gubernatorial elections when a recount dispute persists after the inauguration day)

> The office of chief executive cannot remain vacant while a dispute over counting ballots remains unresolved. Consequently, if on the date for inaugurating the new governor the winner of the election has not been conclusively determined, the power of the office will need to be exercised one way or another in the interim.

Id. In turn, this same reasoning applies to presidential elections, which explains the urgency inherent in recount proceedings.

[115] *Id.* at § 202 cmt. a.

[116] Edward B. Foley, *The Founders'* Bush v. Gore*: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 75 (2010).

building.[117] Those who found themselves in the throng of red-faced Republicans were threatened, harassed, and assaulted.[118] Board members feared for their lives, and the Democratic Party chairman was chased from the building amid shouted requests to have him arrested.[119] Voices in the mob were heard screaming things like "no justice, no peace!" and "the whole world is watching!"[120]

Obviously, the Brooks Brothers riot is an extreme example of the perils of opaque recount proceedings. That does not mean that, under the right conditions, a lack of transparency could not once again lead to violence. Transparency must, however, "be carefully calibrated; greater transparency does not always lead to greater legitimacy. . . . History teaches that too much transparency in the voting process carries risk and undermines the legitimacy of outcomes."[121] There is such thing as too much transparency. Thus, to obtain the benefits of it, state legislatures should think carefully about how to provide the public and the press enough access to hold election officials accountable, but not too much as to disrupt and cast doubt upon the process.

C. Non-Partisanship & Impartiality

Rampant partisanship is a scourge on election administration, but intense partisan animosity is on the rise.[122] Many state and local election officials are beholden to a certain political party, which exacerbates concerns about election legitimacy. The United States is unique in this regard; it is "almost alone among mature democracies in allowing the foxes to guard the henhouse."[123] That "Democrats and Republicans, acting from their own views of the public interest, tend to administer elections differently" is not a

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[117] Chris Lehmann, *How the "Brooks Brothers Riot" Set the Stage for Insurrection*, NATION (Aug. 4, 2022), https://www.thenation.com/article/politics/brooks-brothers-riot/ [https://perma.cc/7XMT-EKEY].

[118] *Id.*

[119] *Id.*

[120] JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION 156 (2001).

[121] Green, *supra* note 100, at 781.

[122] *See* LEVITSKY & ZIBLATT, *supra* note 15, at 168.

[123] HASEN, *supra* note 2, at xi; *see also* GERKEN, *supra* note 21, at 15.

secret.[124] Partisan officials can seize for themselves a large amount of discretion in resolving election disputes if state law allows. Although Republican offenders are perhaps the most well-known, members of both parties are "guilty of manipulating the political and legal processes to partisan advantage" and "entertain[ing] conspiracy theories that at some point lose contact with reality."[125]

This was certainly true for Katherine Harris, Florida's Secretary of State during the 2000 recount, whose actions put the excessive deference the law gave politicians at the forefront of the nation's attention.[126] Harris, who had served as Bush's election campaign committee chair in Florida, was the face of the recount.[127] She was neither subtle nor circumspect with the fact that she was operating under a Republican agenda or that she was enjoying her newfound celebrity. [128]Some argue that Harris took the ambiguity in the Florida statute as blanket permission to reject anything that went against her candidate's interest.[129] She utilized her discretion to delay the recount as long as she could by refusing to extend Florida's deadline for certifying election results and later refusing to accept the results of hand recounts.[130] Despite the Florida Supreme Court's order that Miami-Dade County resume recounting,[131] Harris's decisions were discretionary.[132] The 2008 docudrama *Recount* satirizes the arbitrariness of Harris's

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[124] HASEN, *supra* note 2, at xi.

[125] *Id.* at xii.

[126] *See* GILLMAN, *supra* note 27, at 49.

[127] RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY 54 (2020); Harriet Alexander, *Katherine Harris, the Controversial Face of the Bush-Gore Recount, on how History is Repeating Itself this Election,* INDEP. (Nov. 27, 2020, 9:01 AM), https://www.the-independent.com/news/world/americas/us-election-2020/katherine-harris-recount-florida-secretary-of-state-election-b1759360.html [https://perma.cc/B7QM-S4QM]; *see also* GILLMAN, *supra* note 27, at 34-35.

[128] Michael S. Rosenwald, *How Katherine Harris became a celebrity during the 2000 recount in Florida*, WASH. POST: RETROPOLIS (Nov. 6, 2020), https://www.washingtonpost.com/history/2020/11/06/katherine-harris-florida-recount-bush-trump/ [https://perma.cc/AX36-K65B].

[129] Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1429 (2001).

[130] *See* George L. Priest*, Reanalyzing* Bush v. Gore*: Democratic Accountability and Judicial Overreaching*, 72 U. COLO. L. REV. 953, 977 (2001).

[131] *See* Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000), *rev'd and remanded sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

[132] HASEN, *supra* note 2, at 25.

discretionary rulings, having Laura Dern's Harris justify not accepting ballot returns after Florida's deadline because "the law says [there] has to be a hurricane."[133] By consulting with the Bush campaign for direction in how to exercise her discretion, Harris committed " a flagrant breach of professional ethics."[134] Although Harris had the discretion to accept late returns for any reason, she decided not to do so and the courts got involved – first the Florida Supreme Court and then the SCOTUS, which stopped manual recounts.[135] Maintaining schemes where partisans like Harris hold the reigns of elections means "suspicions of their motives are inevitable[.]"[136]

The value of impartiality arrives on the heels of non-partisanship, but is especially important because many election disputes divided down party lines find their resolutions in courts.[137] Although "the American constitution gives state and local officials primary responsibilities for administering elections. . . . "'[T]he decentralized structure hinders the implementation of effective electoral reforms across the whole country. . . ."[138] Because of the power they wield, election officials should be both impartial and independent so that "the process and results are . . . trusted as credible, transparent, and fair."[139] Katherine Harris's partisanship was blatant; it was one of the reasons why Gore supporters like Spike Lee, cried "We Wuz Robbed."[140]

People can and have called Katherine Harris a lot of things, but not many have dared to try and call her independent. The perception of independence may very well be "the single most crucial test of the soundness of electoral governance arrangements."[141]

Underlying the need for non-partisanship and impartiality is the requirement that "the counting of ballots should be scrupulously fair to both sides involved in the electoral competition.

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133 RECOUNT (HBO 2008).
134 FOLEY, *supra* note 3, at 313.
135 *See* GILLMAN, *supra* note 27.
136 HASEN, *supra* note 2, at 8.
137 *Id.*
138 NORRIS, *supra* note 98, at 53-54.
139 *Id.* at 57.
140 FOLEY, *supra* note 3, at 403.
141 NORRIS, *supra* note 98, at 60.

The government officials and institutions involved in the counting of ballots should neither be nor appear to be favoring one side or the other in the implementing of the ballot-counting rules and procedures."[142] Thus, it is equally important to avoid actual favoritism as it is to prevent the perception of it.[143] That perception breeds disinformation and it is sabotaging America, attacking it from within.[144]

The First Amendment makes combatting disinformation tricky, especially in a digital age.[145] The First Amendment's freedom of speech is incredibly important in election administration because it helps hold officials accountable and helps minimize unfair partisanship.[146] Yet, it can also minimize the trust in democracy. People who lack faith in officials "are more apt to believe lies about them. While checks on power ensure the health of a democracy, loss of all trust is debilitating."[147] Media scrutiny has a great deal to do with this loss of faith, spreading those lies and creating echo chambers that make it hard to spread the truth. The press should continue to play a role in checking authorities to ensure partisan biases do not sacrifice elector integrity, but novelty bias makes it difficult for the public to see or hear anything but the controversial reports.[148] Instead of hearing stories about hardworking election officials who go above and beyond the call of duty, the news reports stories about the Katherine Harrises of the world. The only way to fix that is to give the media fewer Katherine Harrises. States can achieve this by working hard to create nonpartisan, impartial election boards that can root out the people who give Americans a reason to distrust the system.

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[142] *Principles of Election Law II*, *supra* note 17, intro. note ("The principles set forth in this Part are designed to prevent that kind of inappropriate official favoritism in the vote-counting context and, just as importantly, to avert the public perception that such favoritism occurred.").

[143] *Id.*

[144] *See* MCQUADE, *supra* note 12, 11-12.

[145] *Id.* at 133-35.

[146] *Id.* at 149.

[147] *Id.*

[148] *Id.* at 151.

D. Competence

Election workers hold the fate of the Country in their hands. Or, rather, in the case of Kathy Nickolaus, in her laptop.[149] Nickolaus, a Republican, was the head election official during Waukesha County, Wisconsin's recount of their 2011 recount of its Supreme Court election between Assistant Attorney General JoAnne Kloppenburg and Supreme Court Justice David Prosser.[150] Because she had stored the county's election results on her laptop, she accidentally forgot to include 14,315 votes from Brookfield County to her total.[151] This snafu prompted cries for a recount and Democrats and Republicans alike "gear[ed] up for a long and bitter fight."[152] Despite their willingness to enter the ring, the recount barely altered the results and Prosser still won.[153]

Admittedly, errors of Nickolaus's magnitude seem rare, but incompetence is still a growing concern for election workers, who are generally overworked, underpaid, and poorly trained.[154] Richard Hasen calls electoral incompetence one of "four of the principle dangers facing American elections and democracy . . . ."[155] Cuyahoga County, Ohio showed a much larger pattern of incompetence, dating back to 1972 when "sixteen polling places did not open on Election Day for the presidential primaries and a court had to order an additional day of voting."[156] Notably in 2004, the same county saw lazy employees rigging a recount because "they didn't want to bother conducting it."[157] In their 2018 recount, Broward County, Florida officials missed the submission deadline, did not count all the ballots, and mishandled and/or comingled ballots.[158] Brenda Snipes, the elections supervisor, chalked the problems down as human error and admitted that "some staffers

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149 HASEN, *supra* note 2, at 119.

150 *Id.* at 2.

151 *Id.*

152 *Id.*

153 Larry Sandler, *Let's Look at Wisconsin's Recent History with Recounts*, MILWAUKEE MAG. (Nov. 4, 2020), https://www.milwaukeemag.com/lets-look-at-wisconsins-recent-history-with-recounts/ [https://perma.cc/63NJ-QXN5].

154 HASEN, *supra* note 127, at 7.

155 *Id.* at 6.

156 HASEN, *supra* note 2, at 117.

157 *Id.*

158 HASEN, *supra* note 127, at 50.

were 'not as well trained as some others.'"[159] In 2006, Ohio's Secretary of State demanded the resignation of the entire election board after workers "lost 70 computer memory cards containing voting records. . . ."[160]

In fairness to Broward County election officials, the vast majority of them likely acted as competently and professionally as they could, given their resources. However, when a race is close enough to warrant a recount, workers in targeted counties will face more scrutiny – attention focuses "on the weakest link in the system."[161] Most election workers are hardworking and dedicated, doing a thankless job with almost no institutional support or training.[162] The scrutiny that falls on them is not fair. The issue lies with the "decentralized and highly partisan nature of American electoral administration" that gives local officials far too much discretion in determining aspects of the recount process.[163]

There is a longstanding issue with professionalism in electoral administrations.[164] Due to how decentralized electoral authority can be, recounts can mean that "accountability is diluted across multiple levels of government."[165] Even though this problem is easily identifiable, remedying it is like cutting off the heads of a hydra. Getting rid of one incompetent or unprofessional election official means little when there are two more elsewhere to root out and remove. Fixing the competence issue in election administration means burning the stumps, or rather, making changes to the system itself.

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159 *Id.*

160 GERKEN, *supra* note 21, at 2-3.

161 HASEN, *supra* note 127, at 59.

162 *See generally* MCQUADE, *supra* note 12, at 269 (discussing the need of funding for election administration to educate workers and finance better security to protect election workers from threats, harassment and physical harm).

163 Norris, *supra* note 88, at 568.

164 *See* NORRIS, *supra* note 98 at 52 (States election administrators should hold trainings on "professionalism so that staff have the training, expertise and resources to manage tasks well.").

165 *Id.* at 23.

E. Finality

No law requires losing candidates to concede at the end of an election, but formal concessions have remained a closely held, United States tradition since 1896, when William Jennings Bryan conceded to William McKinley.[166] Bryan congratulated President-Elect McKinley, remarking that "we have submitted the issue to the American people and their will is law."[167] William Jennings Bryan understood the importance of the finality of American elections. The tradition he started was the electoral equivalent of shaking hands with the winning competitor on the sports field or in a chess match and saying "good game." Acknowledging defeat carries no legal weight, but it is "crucial for demonstrating 'a continuing commitment to peaceful transitions of power'" and "signal[ing] to supporters that they need to join the defeated candidate in accepting the loss."[168]

Concessions follow an established pattern, beginning with a statement of defeat, continuing with a call to unite, moving to a celebration of democracy, and concluding with a vow to continue fighting.[169] No matter how hotly contested an election, once the dust has settled and the votes have been counted, the loser is expected to reassure the country of the validity of the results and the continued functioning of democracy.[170] This American tradition is the ceremonial end of the period of political warfare, the epilogue to a Shakespearean drama.[171] The concession "pronounces the scale of

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[166] Amy McKeever, *No Modern Presidential Candidate Has Refused to Concede. Here's Why That Matters*, NATIONAL GEOGRAPHIC (Nov. 8, 2020), https://www.nationalgeographic.com/history/article/no-modern-presidential-candidate-refused-to-concede-heres-why-that-matters [https://perma.cc/H2GD-MB3N]; *see also* Meilan Solly, *Why Defeated Presidential Candidates Deliver Concession Speeches*, SMITHSONIAN MAG. (2020), https://www.smithsonianmag.com/smart-news/why-defeated-presidential-candidates-deliver-concession-speeches-180976252/ [https://perma.cc/9S54-KXJT] (last visited Dec. 13, 2024).

[167] Solly, *supra* note 166.

[168] *Id.*

[169] Joe Richman & Nellie Gilles, *How to Lose an Election: A Brief History of the Presidential Concession Speech*, NPR (Nov. 2, 2020, 4:01 PM) https://www.npr.org/2020/11/02/929085584/how-to-lose-an-election-a-brief-history-of-the-presidential-concession-speech [https://perma.cc/4L47-XBHN].

[170] *See generally id.*

[171] *Id.*

the tragedy, and how by bearing witness, the community can heal the wounds and restore harmony."[172]

Every losing presidential candidate since Bryan has conceded to their opponents.[173] In especially contentious elections, candidates have at times done so begrudgingly, ungraciously, and even petulantly, but they always accepted defeat before the results were certified.[174] That tradition came to a grinding halt in 2020 when President Donald Trump refused to concede his defeat and continued to insist—well into Joe Biden's presidency—that, due to unsubstantiated allegations of fraud, the election results could be overturned and he reinstalled in the Oval Office.[175] This break in established custom severely damaged the perceived integrity of the electoral system. The Guardian reported that, as of January 2024,"more than a third of US adults believe Joe Biden was not legitimately elected president in 2020" and "thirty-six percent say that they do not accept Biden's win."[176] Four years passed, and the results of the 2020 election were still not perceived as final. That kind of election denialism is unprecedented.[177]

Trump and his legal team have used every tactic imaginable to draw out this election dispute.[178] Claiming that the election was stolen from him remains a key talking point in his platform, feeding the idea that any loss for him, no matter what the facts were, was the result of cheating, or otherwise indicative of fraud.[179] Georgia saw several recounts in that election. The first count confirmed Joe Biden as the victor and Raffensperger certified the results.[180] However, Trump requested another recount be conducted, this time

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[172] *Id.*

[173] McKeever, *supra* note 166.

[174] *Id.*

[175] FOLEY, *supra* note 3, at 396.

[176] Martin Pengelly, *More than a Third of US Adults Say Biden's 2020 Victory Was Not Legitimate*, GUARDIAN (Jan. 2, 2024), https://www.theguardian.com/us-news/2024/jan/02/poll-biden-2020-election-illegitimate [https://perma.cc/VCQ5-2KBR].

[177] FOLEY, *supra* note 3, at 413.

[178] *See generally* FOLEY, *supra* note 3, ch. 13.

[179] *Id.* at 351-54.

[180] *Here's a timeline of events leading up to Donald Trump's indictment in Georgia,* AP NEWS, https://apnews.com/article/trump-indictment-georgia-election-timeline-1e2b18188035b46218ab887bc0580ac2 [https://perma.cc/5WAX-CD4V] (last updated Aug. 14, 2023, 10:34 PM) [hereinafter *Georgia Indictment Timeline*].

by machine.[181] Again, Biden was certified as the winner.[182] Raffensberger certified the election for Biden for the final time on December 7.[183]

Despite this, Trump refused to gracefully accept the will of the people of Georgia, doggedly insisting that he won decisively and having his surrogates double down even when doing so seemed absurd.[184] For example, Trump's now-disbarred personal attorney, Rudy Guiliani, falsely claimed before Congress that poll workers were sneaking in ballots and tampering with voting machines in another attempt to overturn the election results (those poll workers sued Guiliani for defamation, and after a jury trial, Guiliani is now responsible for paying the verdict of $148 million).[185] Sidney Powell, another Trump-affiliated lawyer, recently pled guilty to several misdemeanors related to election interference in Georgia after spreading baseless conspiracy theories.[186] She was the mouthpiece of the movement alleging that Dominion Voting Systems rigged the election against Trump.[187]

These persistent election fraud allegations were made possible in part by the lengthy recount process, which took a combined total of 19 days.[188] Since Georgia has no deadline for when a recount must be completed, a campaign could theoretically continue to request recounts in different formulations and hold the vote certification hostage in Georgia.[189] This ambiguity in the law speaks to the idea that recounts in their current state can be used as political tools when states lack clear standards. The potential for weaponizing recount procedures exists anywhere in the country,

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[181] *Georgia Indictment Timeline*, *supra* note 180.

[182] *Id.*

[183] *Id.*

[184] FOLEY, *supra* note 3, at 354-361.

[185] *Id.*; *See also* Philip Marcelo, *Rudolph Giuliani Disbarred as Court Finds He Lied about Trump's Election Loss*, AP NEWS, https://apnews.com/article/giuliani-new-york-disbarred-81b327f9ab1f98548cb888f8e652c9a8 [https://perma.cc/5LLB-F3PX] (last updated Jul. 2, 2024, 6:48 PM).

[186] Kate Brumback, *Sidney Powell Pleads Guilty in Georgia Trump Election Case* AP NEWS, https://apnews.com/article/sidney-powell-plea-deal-georgia-election-indictment-ec7dc601ad78d756643aa2544028e9f5 [https://perma.cc/6ZYB-MKUY] (last updated Oct. 19, 2023, 5:10 PM).

[187] *Id.*

[188] *Georgia Indictment Timeline*, *supra* note 180.

[189] *Id.*

that a mechanism meant to ensure democratic values could be corrupted by political cunning is unacceptable.

Donald Trump's refusal to reinforce the finality of the election after several recounts, a whirlwind of unsuccessful litigation, and pervasive inflammatory rhetoric had catastrophic consequences: the January 6, 2021 insurrection.[190] Given the lack of finality regarding the election's outcome, it came as no surprise that the transition of power from the Trump administration to the Biden administration was anything but peaceful.[191] While a candidate is perfectly within their rights to contest the results of elections, the electoral process should not support a system that drags out uncertainty and breeds distrust. Recount laws should reinforce the finality of elections, not give losing candidates more ammunition to contest it. Thus, the finality of elections depends on having recount procedures and other election dispute mechanisms that the American people can trust. January 6 shook the nation.[192] The country "needs to rehabilitate its compliance with [the] basic standard of peaceful acceptance of electoral outcomes decided pursuant to the rule of law."[193] After a recount, candidates and the American people should feel comfortable accepting those results. Concessions simply reinforce trust in the process. As one Wisconsin election official put it, recounts should "help[] people sleep better at night . . . . They never have the feeling of 'if only.'"[194]

III. STATE REFORM PROPOSALS

The aftermath of the 2000 and 2020 elections laid bare for the American people the dire need for electoral reform. However, America's "unusual combination of partisanship and localism not only results in a poorly run system, but makes change hard to come by."[195] Reform efforts have either been ignored, debated, or gutted of their effectiveness by partisan politics.[196] This process goes largely unnoticed by the voter, who "[has] only a haphazard sense

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190 FOLEY, *supra* note 3, at 410.
191 *Id.*
192 *Id.*
193 *Id.* at 26.
194 Sandler, *supra* note 153.
195 GERKEN, *supra* note 21, at 4.
196 *Id.*

of how well elections are run."[197] What the voter does know, however, is whether he feels like he can trust the system. Fostering trust in the system should be the absolute bare minimum standard for democracy. Yet, "we neglect virtually every aspect of the process by which ballots are cast and counted."[198] Reforms are needed to, not only convince the American people that the electoral process is just and fair, but also to reaffirm the bedrock democratic values that are needed for the system to not just function, but thrive.

Therefore, Part III of this Comment proposes a series of reforms for state governments to take into consideration which would realign the recount process with the fundamental, democratic values upon which the country was founded. While many of these reforms would benefit the entirety of the election dispute resolution process, their effects on recounts and public perception are significant and noteworthy. Overall, these proposals are meant to protect the integrity of both elections and the counting process. Alvarez and Hall liken election integrity to the chain of custody that must be preserved to introduce a physical piece of evidence in court.[199] With the goal of uniform treatment in mind, states should develop standard operating procedures "to ensure that whenever critical actions and tasks are undertaken, the individuals at the scene know how to handle the item in question and the process for ensuring that the item is not in some way compromised."[200] The following are proposals that states can and should make to better preserve that chain of custody.

A. Build Statutory Deadlines into Law

More than half of states set no strict deadline for when a presidential recount must be completed.[201] State laws should have built-in timelines ensuring that, during presidential and gubernatorial elections, election results must be certified before a certain deadline. For presidential elections, all the recount work

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[197] *Id.*

[198] *Id.* at 15.

[199] *See* R. Michael Alvarez & Thad E. Hall, *Building Secure and Transparent Elections through Standard Operating Procedure*s, 68 PUB. ADMIN. REV. 828, 828 (2008), https://www.jstor.org/stable/25145670 [https://perma.cc/EV4X-F9HN].

[200] *Id.* at 829.

[201] *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 35.

must be done by the ECRA's safe-harbor deadline. Meeting the deadline is "necessary for a state to obtain the benefit of the congressional pledge"[202] to honor the results of a disputed election as conclusive.[203] Several states have recount statutes that others should use as a model. Virginia imposes no deadlines on recounts outside of qualifying that presidential recounts must adhere to the federal safe harbor deadline.[204] Adding this caveat to its vague recount laws makes Virginia's rules vastly more desirable than most other states. Thus, when considering timelines, the ideal recount provision would be similar to Ohio's, which says that the deadline for a recount to be completed is 10 days after the request,[205] but that in presidential general elections, the recount must be complete no later than six days before the electoral college meets.[206] This language echoes the ECRA's and provides a structure that promotes a timely process. Since the office of governor cannot be left vacant while a lengthy process tries to resolve an election, gubernatorial recounts should likewise comply with state statue to ensure that they adhere to a strict timeline, as well.

B. Remove Ambiguity from Recount Statutes

States should adopt the American Law Institutes' proposed statute to ensure maximum clarity in election statutes before elections occur. The need for such clarity is widely agreed upon, yet many states have not yet taken action to "prescribe as clearly, precisely, and comprehensively as possible the specific rules and procedures for counting those ballots. . . . "[207] Though states have the right to count their ballots in a manner of their choosing, there still must be uniformity throughout that jurisdiction. This Comment does not propose that states adopt any particular type of voting technology or specific recounting method. Rather, it urges states to clearly describe recount procedures of their choice before

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[202] *Principles of Election Law III*, *supra* note 22, intro. note, *Congressional "Safe Harbor" provision*.

[203] *Id.*

[204] VA. CODE ANN. § 24.2-801.1(E).

[205] OHIO REV. CODE ANN. § 3515.03.

[206] *Id.* at § 3515.041.

[207] *Principles of Election Law II*, *supra* note 17, at § 201(a).

the election to not only assure election officials of their course of action in the event of a dispute, but also to minimize their discretion. This helps ensure that everyone's vote is counted equally. Regardless of a state's chosen recount process, having it codified into law avoids ambiguity, vagueness, and gaps in coverage.[208] Unambiguous statutes also create fewer opportunities for recount procedures to be challenged in court; the common sense-interpretation of the law will almost certainly prevail.[209] Unambiguous laws also help to maximize election legitimacy.[210] Minnesota's Secretary of State did well to clarify their well-defined laws in 2008, publishing "a recount guide containing pictures with examples of how different types of ballot markings should be treated."[211]

C. Create Transparent, Independent Electoral Management Bodies

Its lack of independent administrative agencies is one of the many things that makes America an outlier in its electoral scheme. Seventy percent of countries have elections managed by an entity separate from their governments.[212] Many of them have "transferred responsibilities for election management from government departments to legally independent administrative agencies, with chief executives composed of experts or partisan members, which operate at arm's length from the executive."[213] Pippa Norris succinctly describes the benefits of such a system, writing:

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[208] *See id.* at § 201, cmt. a.
[209] *Id.*
[210] *Id.* at § 201, cmt. c.
[211] FOLEY, *supra* note 3, at 325.
[212] NORRIS, *supra* note 98, at 57.
[213] *Id.* at 58.

> The main advantage of the agency model is that by insulating electoral officials from outside pressures, this helps to curb any potential conflict of interest, partisan meddling, and the abuse of power by external forces, especially where it is suspected that the electoral arbitrator is biased toward incumbent politicians, political parties, the governing party, or powerful elites. By delegating responsibility for electoral administration to independent agencies, politicians agree to abide by the rules, strengthening the credibility of the electoral process.[214]

The members of such tribunals should be chosen carefully; electoral system's success depends "not only [on] the institutional structures that individual officeholders inhabit but also the personal character and degree of ethical virtue possessed by those individual officeholders."[215] Minnesota employed such a system during its 2008 Senate recount through its three-judge tribunal.[216] The Minnesota Supreme Court chose one judge affiliated with each major political party and one affiliated with the state's Independence Party, creating "a tribunal that the public could, and did, trust to dispense justice fairly to both candidates."[217] Crucially, the presence of the Board meant "there was no risk of inconsistent or variable standards applied at the local level that would affect a ballot's ultimate treatment in the recount" because each candidate had a chance to view and challenge every ballot, and the same three-judge panel reviewed every challenge.[218] These three judges took their jobs seriously. Despite their different political backgrounds, they "decided collegially to conduct themselves in a manner to maximize the perception of nonpartisanship. All of the opinions they released were without dissent."[219] The panel's "unanimity was key to their rulings being accepted as impartial and fair."[220] Members of election tribunals should be chosen with that kind of uniformity. Ideally, states should strive to emulate the

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[214] *Id.* at 59-60.

[215] *Principles of Election Law II*, *supra* note 17, at § 205, reps.' note c; *see e.g.,* Neil S. Siegel, *After the Trump Era: A Constitutional Morality for Presidents and Members of Congress*, 107 GEO. L. J. 109 (2018).

[216] FOLEY, *supra* note 3, at 323-24.

[217] *Id.* at 324.

[218] *Id.* at 325.

[219] *Principles of Election Law II*, *supra* note 17, at § 205 reps.' note c.

[220] FOLEY, *supra* note 3, at 331.

transparency and impartiality of Minnesota's 2008 recount but on a truncated timeline.

In Presidential Elections, this adjudicative body should review all disputed ballots to ensure "uniform treatment of equivalent ballots, thereby avoiding the problem that arose in *Bush v. Gore* of locally disparate treatment."[221] Like Minnesota in 2008, this review should be televised or streamed live so that the public is not kept in the dark about what is happening, minimizing the potential for another Brooks Brothers Riot.

D. Create a Sole Forum for Adjudicating Disputes in Presidential Elections

While the above reforms minimize the need for judicial intervention, it would be unreasonable to assume that the courts will no longer need to play a crucial role in recount disputes. To minimize the disruption of repeated litigation and forum shopping, as seen in previous recounts, States should appoint a Presidential Election Court. The American Law Institute proposes a suitable model. Before an election, states should identify three members of their judiciary that they will call upon to decide election disputes that make it to the courts.[222] Identifying jurists before the election prevents partisans from complaining about the members after the fact. It also gives the members an opportunity to "develop expertise and otherwise prepare for the adjudicatory role they may be called upon to play."[223] This prevents the need for "on-the-job training in the fast-paced, high-stakes litigation" that would occur if states waited until the need arises for a court to hear an election dispute.[224] The decisions of this special court should be appealable to the state Supreme Court.[225]

The American Law Institute proposes a simple way for these members to be selected: have the states' Chief Justice select three state judges, just as they do for other special-purpose courts.[226] States could also, however, choose to extend the selection process to

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[221] *Principles of Election Law III*, *supra* note 22, at § 308, reps.' note.
[222] *See generally id.* at § 304.
[223] *Id.* at § 304, cmt. a.
[224] *Id.*
[225] *See generally id.* at § 309.
[226] *Id.* at § 304(a).

retired judges or even other qualified public officials, so long as they keep impartiality and efficiency in mind.[227] Citizens should see those chosen as highly impartial; only those with "impeccable reputations" should serve.[228] Ideally, the Chief Justice should choose a Democrat, a Republican, and an Independent or other non-partisan. The Democrat and Republican should "be perceived by both sides as equally loyal to their respective parties" but not be considered representative of them.[229] Their obligations should be to "adjudicate disputes fairly and impartially, without regard to party affiliation."[230] An alternative to the Chief Justice appointing the members of the court would be for him to delegate that authority to a nominating committee which would require unanimous consent for all three members of a panel.[231] Regardless of which specific scheme a state chooses to adopt, they should all consolidate the authority to decide election disputes into one body. Minnesota, Kansas, Virginia, North Dakota, Maryland, Iowa, and Connecticut all create election courts with similar characteristics to the American Law Institute's proposed scheme.[232]

CONCLUSION

Although the country has made strides forward in the past, "our democratic practices fall too short of our democratic ideals."[233] America's electoral system is always changing in ways big and small. Those changes may put the country's fragile democracy on shaky ground, but somehow, against all odds, it has always "managed to defy gravity."[234] Yet, when "Donald Trump and other MAGA Republicans have abused their trust as public servants to indoctrinate Americans into an election denial movement," the system has to respond.[235] Recounts already extend the period of uncertainty for voters, leaving them to wonder who won for longer. However, when candidates like Donald Trump abuse the court

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[227] *Id.* at § 304, cmt. b.
[228] *Id.* at § 304 cmt. d.
[229] *Id.* at § 304 illustration 2.
[230] *Id.*
[231] *Id.* at § 304 illustration 5.
[232] *Id.* at § 304 reps.' note a.
[233] GERKEN, *supra* note 21, at 15.
[234] LEVITSKY & ZIBLATT, *supra* note 15, at 1.
[235] MCQUADE, *supra* note 12, at 165.

system, file "scores of baseless lawsuits challenging election results across the country," and keep the news chattering about baseless fraud accusations, it is easy to ask why millions of Americans "were fooled by his deception."[236] As they stand, recount systems may not be strong enough to weather repeated assaults in this manner. However, if conducted fairly and equitably, recounts can and will increase perceptions of electoral integrity and preserve the legitimacy of the entire system. Ultimately, they provide a sense of finality the country never really got after the 2020 election.

Recent years have shown that the sense of finality that is so necessary to the peaceful transition of power is fading away at the "advent of election denialism."[237] The democratic values that govern the elections from the school boards to chief executives are under assault by claims of fraud and theft.[238] The high-pressure, winner-take-all, polarized environment of the aftermath of an election does not show off American's electoral system in its best light. The scrutiny that accompanies contested recounts and storms of litigation shows the foundational cracks in how states govern recounts. Unless legislators continue to work to keep election laws in line with democratic values, there is always the risk that the entire system could collapse.

While the majority of the power to govern recount laws lies with the states, Congress has some authority to act federally, and they have done so in the past. When they passed HAVA in the wake of the 2000 recount, Congress relied on the authority of the Elections Clause, which "gives Congress the power to impose minimal competency standards on states for the conduct of congressional elections."[239] Though HAVA provided money to upgrade election technology, it did little to address the process's underlying value-based issues surrounding integrity.[240] If it so chose, however, Congress could do more to regulate recounts in the same manner it protected voting rights with the passage of the 1993 National Voter Registration Act, or the NVRA.[241] There, Congress

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[236] *Id.*

[237] FOLEY, *supra* note 3, at 349.

[238] *Id.*

[239] Hasen, *supra* note 127, at 131.

[240] *Id.* at 17.

[241] *See generally* National Voter Registration Act, 52 U.S.C. §§20501-20511 (1993).

recognized the fundamental right to vote and, though it applies only to federal elections, requires states to establish procedures for certain methods of voting.[242] The "Time, Place, and Manner" clause of the Constitution provided the authority for the law even as the NVRA effectively changed the registration process for federal and state elections.[243] "Although state compliance with the NVRA has been mixed, voter registration has increased since Congress enacted it."[244] If the NVRA can standardize registration processes and voting lists, Congress could use the same authority to at the very least mandate that states impose some uniformity in how they conduct their statewide recounts. The federal government has the power to, if nothing else, tell the states that, as the Supreme Court decided in *Bush v. Gore,* they could no longer allow different counties and precincts to subject votes to "arbitrary and disparate treatment" under the Equal Protection Clause.[245]

Devising a system in which citizens can trust is imperative because it affects voter turnout; citizens that doubt the fairness of how elections work are far more likely to stay home from the polls than those with greater confidence in the system's integrity.[246] The electoral system is set up to be able to perpetuate itself. At the end of an election, opponents congratulate each other, accept the results, and get on with the business of governance. Ideally, members of opposing parties dust off their hands and let go of the heightened emotions election season inspires until it is time to do it all over again in the next election. If the country cannot respect the system enough to believe that not only election results are legitimate, but final, then the country never moves on. It stagnates. It withers. It dies.

Despite his disappointment with the Supreme Court's decision in *Bush v. Gore,* Vice President Al Gore knew that. The Court's decision is not what finally allowed the country to settle, to put down their pitchforks and reunite with friends across the aisle. It was Gore's concession. There, he graciously acknowledged his

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[242] *Id.* at § 20503(a).

[243] Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 755-756 (2016).

[244] *Id.*

[245] Bush v. Gore, 531 U.S. 98, 104-05 (2000).

[246] NORRIS, *supra* note 98, at 45.

defeat. Even though he disagreed with the decision and was tempted to listen to his advisors and keep fighting, he pushed his feelings aside and did what he needed to do in service of American democracy. Reminding the people that in every past disputed election, "both the victor and the vanquished have accepted the results peacefully and in a spirit of reconciliation. So let it be with us."[247] Americans need to hear these words more than ever now that faith in democratic institutions is eroding. [248] But they alone may not be enough. In a contested election, the people need more assurances that they can trust the results of an election. That's why states should reform their recount laws to build statutory deadlines into law, remove ambiguity from statutes, create independent electoral management bodies, and consolidate judicial power into one body for presidential elections. These reforms are only a start but will go a long way toward dispelling the creeping mistrust in elections that is poisoning political rhetoric. It will not be an easy task but it is a necessary one if democracy is to be preserved. Gore's concession was almost a prayer, asking the American people to respect the electoral system and with it, its underlying values. Equality. Transparency. Impartiality. Competence. Finality. Let them all be with us.

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[247] Al Gore, *supra* note 1.

[248] MCQUADE, *supra* note 12, at 158, 176, 222.