

The 2000 election generated the most famous Supreme Court decision of recent times. *Bush v. Gore: The Question of Legitimacy*, a collection of essays edited by Bruce Ackerman, will lead almost every reader to conclude that *Bush v. Gore* was wrongly decided, or worse. In fact, much worse. Eleven of the thirteen essays were written by liberal academics who denounce the decision in terms that range from harsh to hysterical. And neither of the two essays by conservatives unequivocally defends the decision's legality. Surprising as it may be to outsiders, the book is a pretty fair reflection of the academic literature, which is large and growing. Indeed, I know of only one law review article defending the legal merits of the Court's opinion. I wrote that article, and its most salient feature may be how singular it has proved to be.<sup>1</sup>

As everyone knows, the Supreme Court's decision in *Bush v. Gore* came at the end of a complex and multifaceted process of legal and political maneuvering, much of which involved the intricacies of Florida election law. For present purposes, however, one can get by with a very brief summary.

After the initial count of the ballots, which had Bush ahead by a small margin, and an automatic recount authorized by state law, which also gave Bush a small lead, Gore asked for additional recounts by local election officials in four heavily Democratic counties. Overruling Florida's Secretary of State, the Florida Supreme Court granted an extension of time for these recounts to be conducted, but two of the counties failed to meet the new, court-ordered deadline. The Secretary of State then declared Bush the winner of Florida's electoral votes, and Gore filed a lawsuit contesting the outcome. He made a number of demands, all of which were rejected by the trial court. Three of those demands, however, were ultimately granted by a 4-3 vote of the Florida Supreme Court, which ordered the trial court to take the following steps:

- Add at least 176 votes to Gore's total, based on the Palm Beach County recount, whose results were not reported to the Secretary of State before the court-ordered deadline.
- Add 168 votes for Gore to the vote totals, based on an *uncompleted* recount conducted in Miami-Dade County that had begun with the more heavily Democratic precincts in that jurisdiction.
- Conduct a manual recount of 9,000 Miami-Dade "undervote" ballots, which Gore claimed might shift the statewide totals in his favor.<sup>2</sup>

The Florida Supreme Court also provided for one more form of relief, which Gore had *not* requested:

- Conduct a statewide recount of the "undervote" ballots in each county.

The U.S. Supreme Court reversed the Florida court, holding that this four-part order (whatever its merits may have been

as an interpretation of state law) violated the Equal Protection Clause. Without concluding that any one element was constitutionally fatal, the Court held that the combination of the following facts prevented the order from satisfying "the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to vote.

- Varying standards for determining a voter's intent had been employed by the counties in which manual recounts had been held, and at least one county changed its standard repeatedly during the recount. Nor had any provision been made for a uniform standard in the statewide recount of undervotes.
- Unlike the recounts in the Gore-selected counties, which had included all ballots, the statewide recount was limited to "undervotes," and did not even include the analytically indistinguishable "overvote" ballots.
- Partial results from the uncompleted recount in Miami-Dade had been used to credit one candidate with additional votes, and the Florida court evidently contemplated the future use of partial recounts.
- The statewide recount was being conducted by untrained personnel, unguided by objective standards for identifying legal votes, and observers were not permitted to make contemporaneous objections.

The Court relied for its decision primarily upon *Reynolds v. Sims* (1964) and related cases. The essence of the Court's argument was that these vote-dilution cases prohibit a state from arbitrarily treating ballots differently depending on where they are cast. Acknowledging that it is impossible to treat every ballot or every voter absolutely identically in all respects, the Court concluded that the recount ordered by the Florida court was permeated with avoidable and unjustified nonuniformity, in violation of the prohibition on vote-dilution articulated in *Reynolds*.

### **An Affront to the Rule of Law?**

The two most powerful essays in this collection are by Charles Fried and Bruce Ackerman.<sup>3</sup> Let me begin with Professor Fried, whose contribution appears at the beginning of the volume. Professor Fried contends that *Bush v. Gore* was a reasonable decision, about which reasonable people may disagree. When one recalls that the Court rested its decision on the Equal Protection Clause, it should be apparent why this is a very easy position to defend. Because all laws treat some people differently than others, and because the Court decided long ago that the equal protection of the laws means the protection of equal laws, the jurisprudence of equal protection has become a never-ending exercise in drawing judicially-created lines between permissible and impermissible forms of inequality. Almost any equal protection decision can therefore be defended, or criticized, with some sort of reasoned argument.

Rather than rehearse the arguments here, suffice it to say that lots of people have defended the equal protection holding in *Bush v. Gore*. Of the sixteen judges who reviewed the equal protection claim in this case, ten of them agreed that the challenged recount order in Florida violated equal protection (three members of the Florida Supreme Court and seven members of the U.S. Supreme Court). Even the liberal academics who appear in the Ackerman volume are split on this issue, with several of them agreeing that the Court's equal protection holding is at least defensible.

Consistent with his claim that this was a decision about which reasonable people can disagree, Professor Fried devotes himself to skewering a number of the many irresponsible and unreasonable attacks that have been made against the Court. He does this quite effectively, but most readers will probably forget just how effectively by the time they have waded through the twelve succeeding essays. For once, it was apparently not an advantage to get the honor of the lead position in a collection of essays.

This may not matter much, however, because Professor Fried does *not* skewer the Court's critics on the crucial point. The most serious "rule of law" charge that the liberals make in this volume is that a narrow 5-4 majority wrongly forbade the Florida Supreme Court to conduct a new recount using procedures consistent with the equal protection holding announced in *Bush v. Gore*. On this question about the remedy in the case, the liberals are united in denouncing the Court's decision as completely indefensible. Professor Fried himself calls this "the most vulnerable part of the Court's opinion," and he seems to suggest that his mind is open to the possibility that what the Court did was unlawful.

Unlike Professor Fried, I believe that the charge against the Court on this issue is sufficiently serious to require a judgment about its validity. If the Court had no legal basis for its remedial order, then the Court's critics have a real case for advocating drastic *political* action in response. That case is made most effectively by Professor Ackerman, whose strongest arguments may be summarized as follows. The 5-4 split in this case is the same 5-4 split reflected in a well-known series of federalism cases that have bitterly divided the Court. These cases may be the leading edge of an important shift in constitutional law, but that shift will almost certainly not occur if even one member of the "federalist five" is replaced by a new Justice who joins the four dissenters. Those five therefore had a strong motive for ensuring that a conservative Republican President will make the next appointments to the Court, and their blatantly illegal decision in favor of Bush, we are told, strongly served their interest in protecting and extending their ideological legacy.

Accordingly, says Professor Ackerman, just as Congress prevented Andrew Johnson from appointing any Justices—on the ground that he became President by an act of John Wilkes Booth, rather than of the American electorate—so too should the Senate refuse to confirm any new Justices until after the people have selected a president in a

less questionable election in 2004.

In one sense, this is a powerful argument. I suspect that many members of the Federalist Society would agree that if the Supreme Court had issued a blatantly illegal decision that gave the presidency to Hubert Humphrey, it would have been appropriate for the Senate to wait for another election before confirming replacements for Earl Warren, John Harlan, Hugo Black, and Abe Fortas.

The strength of this argument depends largely on the premise that *Bush v. Gore* was blatantly illegal, and the Ackerman volume as a whole makes the premise appear all but self-evident. The liberals in this volume agree that *Bush v. Gore* was a lawless decision, and neither of the conservative contributors disputes the claim that the Supreme Court usurped the Florida court's right to attempt a recount using constitutionally permissible procedures. If the Supreme Court committed such a usurpation, it would be difficult indeed to defend it against the charge of lawlessness.

Fortunately, this charge is false, for it attributes to the Court an order that nowhere appears in its opinion. Unfortunately, however, the charge has been repeated so many times, and with such self-assurance, that it threatens to become the accepted interpretation of the case. It is therefore of some importance to refute it.

The roots of the attack on the Court's remedy lie in the dissenting opinions of Justices Souter and Breyer, who wanted to remand the case to the state court for a new recount. The Souter/Breyer approach, however, was *legally untenable*, and for exactly the reasons given by the majority. On December 11, just one day before the decision in *Bush v. Gore*, the Florida Supreme Court had issued an opinion in a different case arising from the Florida election controversy. In that opinion, the Florida court had *repeatedly* indicated that state law required that manual recounts be completed in time for the state to take advantage of a federal "safe harbor" statute that purported to give conclusive effect to the state's choice of electors if the election controversy was resolved by December 12.<sup>4</sup>

Thus, the Florida Supreme Court had already concluded, *as a matter of state law*, that recounts had to be concluded by December 12. Whatever the merits of this interpretation of the Florida election statutes, it was the interpretation adopted by the Florida Supreme Court only one day before the decision in *Bush v. Gore*. Thus, if the U.S. Supreme Court had remanded the case on December 12 with instructions or encouragement to conduct a recount under constitutionally adequate procedures, as Souter and Breyer advocated, it would have been ordering or inviting the Florida court to violate Florida law *as construed by the Florida Supreme Court*. The U.S. Supreme Court simply had no grounds for doing that because the ensuing violation of state law would not have been dictated by any requirement of federal law.

It is true that the Florida court's discussion of the binding nature of the December 12 deadline came in a case involving a different part of the Florida election code than the part that gave rise to *Bush v. Gore*. But the Florida court's

December 11 opinion made it plain that this should make no difference at all:

As always, it is necessary to read all provisions of the [Florida] elections code in *pari materia*. In this case, that comprehensive reading *required* that there be time for an elections contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate *the outside deadline* set forth in [the federal “safe harbor” statute] of December 12, 2000.<sup>5</sup>

Furthermore, it would be extremely strange to suppose that the Florida court issued its December 11 opinion without considering the obvious implications for the case that was at that very moment pending before the U.S. Supreme Court. The Florida court’s decision below in *Bush v. Gore* itself, moreover, referenced the federal “safe harbor” statute, without mentioning any alternative possible deadlines.<sup>6</sup> The U.S. Supreme Court simply had no basis at all for inferring that some deadline other than December 12 would be applicable under state law to the litigation in *Bush v. Gore*.

Still, one might say, the Supreme Court should at least have remanded the case to the Florida court so that it could reexamine the state law question itself. Perhaps that court would have concluded that state law ultimately subordinated the December 12 deadline to the goal of obtaining a constitutionally acceptable hand recount.

Fair enough. *But that is exactly what the Supreme Court did.* Contrary to repeated assertions in the Ackerman volume and elsewhere, the Supreme Court did *not* forbid the Florida court from attempting to conduct a statewide recount under constitutionally permissible standards. That would have been the effect of a judgment that reversed the Florida court and remanded with instructions to dismiss the case. But the Court did *not* order the case dismissed. Instead, it reversed and remanded with instructions “for further proceedings not inconsistent with this opinion.” And the Florida court could indeed have ordered a new recount without acting inconsistently with the Supreme Court’s opinion.

The only statement in the Supreme Court’s opinion that might even conceivably be considered “inconsistent” with a new recount is the following:

Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER’s proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an “appropriate” order authorized by Fla. Stat. § 102.168(8) (2000).

It is true that this statement assumes that Florida law hadn’t changed between December 11 and December 12, and it assumes that the December 11 opinion meant what it appeared to say. But this statement does not purport to *forbid* the Florida court from concluding on remand that the U.S. Supreme Court had misinterpreted the statements it made on

December 11. The Supreme Court’s statement, for that matter, does not purport to forbid the Florida court from overruling its own December 11 interpretation of Florida law.

Thus, as a legal matter, the Florida court was indeed left free to order the sort of recount that Justices Souter and Breyer suggested. It is no doubt true that the Supreme Court’s failure to make this fact explicit left many readers with the impression that the Court did not “want” to see another attempt at a recount. And it may even be true that the Justices anticipated this effect. But the Court had no legal duty to remind the Florida judges of their power to interpret, or reinterpret, Florida law.

Gore’s lawyers reportedly drafted a brief for the Florida court making exactly this argument, though a political decision was made not to file it.<sup>7</sup> And, unlike the law professors who have stubbornly refused to recognize that the Supreme Court said exactly what it said, and not something else, two of Gore’s lawyers have publicly acknowledged that the Court’s opinion did *not* foreclose the Florida court from ordering a new recount. David Boies acknowledged this in response to a question from the audience at a Cardozo Law School symposium on April 26, 2001. And Ronald Klain made a similar acknowledgment in response to a question that I posed to him at the Federalist Society’s National Lawyers Convention on November 17, 2001.<sup>8</sup> Both of them also indicated that they believed (what I think it entirely reasonable to believe) that the Florida court would have been unlikely to take advantage of its power to order a new recount, but that is very different from claiming that the Supreme Court had taken this power away.

It is a sad commentary on the state of legal academia that these two politically active practicing lawyers—who lost their case, let’s recall—have been able and willing to acknowledge a plain and important truth that has been mysteriously invisible to so many prominent law professors. In the end, there is no good reason for the Senate to treat President Bush’s Supreme Court nominees any worse than those of other Presidents. But there may be a good reason for the Senate to exercise a great deal of caution in dealing with law professors who claim to offer expert and disinterested legal advice. Especially when they puff themselves up as guardians of the “rule of law.”

### A “Political Question”?

A separate theme in the Ackerman volume is that the Supreme Court should never have decided *Bush v. Gore* at all. This theme takes two forms: a legal argument and a kind of “judicial restraint” argument.

The legal argument is presented by the other conservative represented in this volume, Steven Calabresi. The overall theme of his essay is that our culture has become too willing to accept judicial intervention in the political process, and that the public was regrettably content to let state and federal judges decide who would become president. This is an important point. During the 2000 controversy, there did seem to be remarkably few public challenges to the assumption that the courts should have the final word on the out-

come of the election. (*But see* Nelson Lund, Supreme Court's Not the Last Word, New York Post, December 4, 2000, at 31; Nelson Lund, Courts Don't Own the Law, New York Post, November 20, 2000, at 29.) Professor Calabresi goes astray, however, when he says that it is "quite clear-cut" that *Bush v. Gore* was legally nonjusticiable under the applicable precedents.

Professor Calabresi cites two cases. First, in (*Walter*) *Nixon v. United States* (1993), the Court held that a challenge to the Senate's conviction of an impeached judge was nonjusticiable because the Constitution left the Senate to decide how to conduct trials of impeachment. This decision might be a relevant precedent if *Bush v. Gore* had overturned a decision that Congress had made in the exercise of its Twelfth Amendment powers. *Bush v. Gore*, however, neither overturned any decision by Congress nor imposed any limits on Congress' prerogatives under the Twelfth Amendment.

Professor Calabresi next turns to *Baker v. Carr* (1962). Ironically, it is this case that first held vote-dilution claims (the same kind of claim at issue in *Bush v. Gore*) to be justiciable. Professor Calabresi, however, relies on a different part of Justice Brennan's opinion. In dictum, the Court said that all of the cases previously found to be nonjusticiable contained at least one of six features. These features were described in very general terms, and Professor Calabresi argues that they can all be found in *Bush v. Gore*. Whatever the merits of his analysis may be as an abstract matter, however, *Baker's* dictum was irrelevant in *Bush v. Gore* because the Court had previously held that challenges to a state's method of choosing presidential electors *are justiciable*.

In *McPherson v. Blacker* (1892), the Court reviewed a challenge to Michigan's use of electoral districts to choose presidential electors. The Court held:

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress.

But the judicial power of the United States extends to all cases in law or equity arising under the constitution and laws of the United States, and this is a case so arising . . .

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.<sup>9</sup>

The Court went on to resolve several constitutional questions, including questions arising under the Fourteenth

Amendment, the same constitutional provision invoked in *Bush v. Gore*.

Professor Calabresi does not discuss *McPherson v. Blacker*. But its holding was well-known to all the Justices and all the litigants in *Bush v. Gore*. Only a few days before that decision, the Supreme Court had *unanimously* relied on *dicta* in *McPherson* when it vacated an earlier decision of the Florida Supreme Court in a different case arising from the disputed election.<sup>10</sup> None of the parties and none of the Justices could seriously have denied that the *McPherson* holding applied in *Bush v. Gore*. And none of them did.

Perhaps aware of the futility of maintaining that *Bush v. Gore* was nonjusticiable under the governing precedents, several other contributors to this volume contend that the Court exercised bad judgment in agreeing to review the case. Although their arguments take somewhat different forms, the most common version essentially argues that *Bush v. Gore* is just one more manifestation of the Rehnquist Court's outrageous "activism." This Court does not have sufficient respect for democratic institutions, we are told, and the five Justices in the *Bush v. Gore* majority simply repeated an offense of which they have been habitually guilty, especially in that notorious series of federalism decisions that I referred to earlier.

Most members of the Federalist Society are probably very tired of being lectured to by the left on the meaning of "true conservatism." We've all been taunted repeatedly with the one-way ratchet that requires "genuinely conservative" courts to devote themselves to the preservation of Warren and Burger Court decisions that overturned centuries of precedent and countless decisions by elected officials throughout the nation. I guess we're now going to have to get accustomed to hearing another variation on this theme: that a few small and hesitant efforts by the Court to identify the Constitution's limits on federal legislative power (few of which have overturned any judicial precedents at all) somehow manifest a hubristic contempt for democracy.

In any event, whatever validity there may be in the left's objections to some of the Court's recent federalism decisions, it takes a special kind of chutzpah to find contempt for democratic institutions in *Bush v. Gore*. This decision did not overturn any decision by any elected body. Instead, it invalidated an order issued by a subordinate court. During the election dispute, moreover, that subordinate court had persistently refused to defer to Florida's elected Secretary of State and to decisions by elected officials on county canvassing boards. This subordinate court had also dismissed the work of the Florida legislature as "technical statutory requirements," and used its "inherent" powers to issue orders that the legislature never authorized. Nor did *Bush v. Gore* prevent the Florida legislature from intervening in the election dispute, or tell the U.S. Congress that it must stay out of the dispute. Accusing the *Bush v. Gore* Court of contempt for democracy is akin to claiming that governmental suppression of political speech during election campaigns advances the values of the First Amendment.



---

## Conclusion

The unanimity with which the left has condemned *Bush v. Gore* was predictable, for it is consistent with an ingrained tradition of evaluating legal decisions on the basis of their political effects. And the overwhelming dominance of the left in American law schools all but guaranteed that the Court would be vilified by the professoriate for its decision in this case.

What is surprising is how many prominent conservative professors have rushed to condemn the Court's legal analysis. It is actually something of a coup for Professor Ackerman to have found in Professor Fried one academic unwilling to do so, for he is very unusual in this respect. Some conservatives have dismissed the equal protection holding out of hand, though none of them has explained why it is so obviously wrong. Others have criticized the remedial part of the opinion, though none of them has shown that the Court actually did forbid the Florida court to attempt a constitutionally adequate recount on remand. Some have invoked the political-question doctrine, though without confronting *McPherson*. Others have argued that the decision was politically ill-advised, though without explaining why the Court should have taken political considerations into account at all. It is true that some of these conservatives have defended the *result* in *Bush v. Gore*, but they have often done so on political grounds that are not much more than mirror images of the left's political objections to the decision.

The Federalist Society was founded twenty years ago to promote an alternative to the left's politicized approach to legal analysis. The collection of essays reviewed here may serve as a reminder of why the Society came into existence. But the academic right's response to *Bush v. Gore* should call into question our prospects for success. The Court could easily have ducked this case, and thereby saved itself a lot of grief. Instead, five Justices courageously applied the law without regard to the political abuse that they had to know would soon be aimed their way, just as we've been saying they should for the past two decades. When you look at what they've gotten for their trouble, you have to wonder how long they can be expected to keep it up.

---

## Footnotes

<sup>1</sup> Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 Cardozo L. Rev. 1219 (2002).

<sup>2</sup> "Undervotes" are ballots on which a counter did not detect any choice for the office of President. Similarly, "overvotes" are ballots on which a counter detected more than one choice for President, and thus registered no vote.

<sup>3</sup> Professor Fried invited me to comment on a prepublication draft of his chapter, and his chapter refers approvingly to my Cardozo Law Review article.

<sup>4</sup> *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So.2d 1273, 1289 (2000); *id.* at 1285-86 & n. 17; *id.* at 1290 n.22; *id.* at 1291. The Florida court had repeatedly made the same point in its initial opinion in the case as well. See 772 So. 2d 1220, 1237, 1239, 1239-40.

<sup>5</sup> 772 So.2d at 1290 n.22 (emphasis added).

<sup>6</sup> 772 So.2d at 1248.

<sup>7</sup> Washington Post Political Staff, *Deadlock: The Inside Story of America's Closest Election* 233-35 (2001).

<sup>8</sup> See 3 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 80-

81 (August 2002).

<sup>9</sup> 146 U.S. 1, 23-24 (1892).

<sup>10</sup> *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000).