# THE VOTE

## BUSH, GORE & THE SUPREME COURT

EDITED BY CASS R. SUNSTEIN & RICHARD A. EPSTEIN

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# Introduction

## Of Law and Politics

CASS R. SUNSTEIN

On January 20, 2001, Chief Justice William H. Rehnquist administered the traditional oath of office to George W. Bush, the forty-third president of the United States. Always an extraordinary national event, this ceremony had a unique twist: what ultimately assured the election of George W. Bush was a 5–4 decision by the Supreme Court of the United States.

The Supreme Court's decision in *Bush v Gore* surely counts as the most controversial judicial decision in several decades. In the fullness of time, the decision is likely to rank among the most controversial decisions in the entire history of the Supreme Court.

The Court's decision is controversial for two reasons. First, it effectively ended the long struggle over the Florida vote, on which the presidential election ultimately turned. And second, people continue to disagree sharply about whether the result can be justified. Most of those who agree with the Court tend to emphasize the perceived need to respond to illegitimate action by the Florida Supreme Court and also to put an end to a controversy that was threatening to spiral out of control. Many of those who are unconvinced by the Court's rationale have accused the Court of acting on a partisan basis, and not like a court of law at all. Apart from the controversy, the Court's decision raises a host of fascinating questions for the future, involving the nature of the ideal of political equality—and the question whether existing practices, in the United States and elsewhere, serve or violate that ideal.

The essays in this book are written by many of the nation's leading figures in the fields of constitutional and electoral law. The authors offer a remarkably wide range of perspectives on the Court's decision in *Bush v Gore* and the numerous puzzles it

raises. Some of the authors condemn the Court's decision as an egregious abuse of power. Others sharply disagree, urging that the Court's decision can be supported on legal grounds. Still others are not sure of its legal basis, but insist that the decision made pragmatic sense because it prevented a volatile situation from spiralling out of control. Some authors emphasize what they see as the great promise, for the future of voting rights, of the Court's ruling under the equal protection clause. Other authors view the Court's ruling as ominous, portending excessive federal intervention into the domain of the states.

My purpose in this introduction is twofold. In order to provide general background for the discussion to follow, I offer a general chronology of the events in *Bush v Gore,* with a quick glance at the legal issues. Also for general background, I offer some few words on a large puzzle: the fact that reactions to the Court's division are sharply divided, among specialists and nonspecialists alike, on political grounds. To oversimplify: Gore supporters tend to think that the Court was wrong, even ludicrously wrong; Bush supporters tend to think that the Court's decision was defensible, right, perhaps even heroic. If there is a distinction between law and politics, how can this be? What, if anything, does the Court's remarkable decision tell us about legal reasoning and about the division between politics and law?

But let us begin by seeing exactly what happened.

## CHRONOLOGY

The presidential election of 2000 was held on November 7, 2000. Shortly before 8 P.M., the networks made a dramatic announcement: on the basis of exit polls, it was clear that Gore had won Florida. At 9:30 P.M., Bush told the networks, in no uncertain terms, that they had been mistaken. The outcome in Florida was unquestionably crucial because early returns suggested that, with Florida in hand, Gore was overwhelmingly likely to become the next president. Shortly before 10 P.M., the networks moved Florida into the undecided column. At 2:15 A.M. on November 8, the networks started to call Bush the winner in Florida, and hence in the electoral college. Fifteen minutes later Gore telephoned Bush to concede. At 3:45 A.M., Gore called Bush again, retracting his concession. Fifteen minutes later the networks retracted their claim that Bush had won, again putting Florida in the undecided column.

So much for November 7 and 8. What happened in the next five weeks is much more complicated.

In the initial battle, the Gore team sought to prevent a certification of the vote for Bush, whereas the Bush team, thinking that Bush had won every reasonable count, sought a prompt certification on his behalf. November 9 saw an automatic machine recount, required by Florida law, of all Florida ballots, producing a lead for Bush of less than three hundred votes.[1] At that stage, Gore's lawyers called for hand recounts in four crucial Florida counties, urging that the secretary of state not certify the Florida vote until the hand recount was completed.

On November 11, Bush's lawyers sought an injunction in state court to stop the hand counts; the injunction was denied on November 13. On the same day, Katherine Harris, Florida's secretary of state, insisted that state law imposed a deadline of November 14 for county returns—meaning that no votes submitted by the counties after that date would be counted in the Florida vote. Harris simultaneously announced a three-hundred-vote lead for Bush and insisted that she would not include hand-counted ballots in the final tally. Harris's announcements were viewed with skepticism, and worse, in some quarters, especially because she was not only a Republican, but also an active participant in the 2000 presidential campaign for Bush. Gore representatives urged that Harris had interpreted the law in an unmistakably partisan manner.

This was the starting point for a continuing struggle between the secretary of state and the Florida Supreme Court. Initially, Gore lost his action against the secretary of state in the trial court, but on November 17, the Florida Supreme Court unanimously ordered Harris not to certify a winner until "further order from this court." On November 20, that same court unanimously ruled that manual returns must be accepted from the four disputed counties. The court's rulings were viewed with skepticism, and worse, in some quarters, especially because the justices had generally been appointed by Democratic governors (of the seven justices, six had been Democratic appointees, and the seventh was a compromise choice). Bush representatives urged that the court had not followed the law, but changed it—in an unmistakable suggestion that partisanship had played a crucial role in the court's decision.

On November 22, Bush authorized an appeal to the United States Supreme Court. Bush's lawyers made three arguments. First, they contended that the Florida court had changed the law of Florida, in violation

1. According to an unofficial count by the Associated Press.

of a federal statute, 3 USC § 15, which, they said, required a state's electoral votes to be chosen in accordance with law enacted "prior to" the election. Second, they contended that by changing the law of Florida, the Florida Supreme Court had violated the federal Constitution—in particular, Article 2, Section 5, which, they argued, required the state legislature, and not the state judiciary or even the state constitution, to establish the rules governing the selection of electors. Third, they contended that the standardless hand recount would violate the due process and equal protection clauses. Most observers believed that the United States Supreme Court would refuse to involve itself in the proceedings. But on November 24, the Supreme Court granted certiorari, limited to the first two questions raised by Bush.

On November 30, a whole new institution became involved, as a legislative committee in Florida urged the Florida legislature to meet in special session in order to appoint its own slate of electors. On December 4, a unanimous Supreme Court vacated the decision of the Florida Supreme Court, but did so in a narrow ruling that resolved very little. In a nutshell, the Supreme Court suggested that a change in legislatively enacted law would be unacceptable, but remanded to "clarify" whether the Florida Supreme Court really sought to interpret that law or instead relied on the state constitution to change it.

On the same day, a lower court judge in Florida refused to require a manual hand-count of votes in the four disputed counties. On December 8, the Florida Supreme Court, by a slim 4–3 majority, reversed the lower court and ordered immediate recounts of votes in the state. The court also concluded that 383 votes would have to be added to Gore's total, reducing Bush's lead to a mere 154 votes. At this point, matters seemed quite chaotic and unsettled. It was most unclear what would ultimately happen in the Florida recount.

At this stage, the United States Supreme Court asserted itself. On December 9, the Court issued a stay, by a 5–4 vote, effectively stopping the manual counting in Florida. The dramatic, election-ending 5–4 ruling in *Bush v Gore* came just three days later, on December 12. Gore conceded the election to Bush on December 13.

## LAW OR POLITICS?

One of the most striking features of the decision in *Bush v Gore* is the much-remarked fact that the most conservative justices made up the five-person majority, with the least conservative justices constituting the four-

person minority. Before and after the Court's final decision, it was easy to detect a similar division within the nation.

People who supported Gore, or who identified themselves as left of center, tended to be enraged by the Supreme Court's involvement; people who supported Bush, or who identified themselves as right of center, tended to approve of it. A similar division could be found over assessments of the Florida Supreme Court. Observers who supported Bush tended to think that the Florida court had not interpreted Florida law, but instead changed it. Observers who supported Gore tended to think that the Florida court had acted well within the legitimate bounds of interpretation. Of course, few of these people were experts in Florida law. But the same pattern seems to have held among those who knew nothing about Florida law and those who studied it in some detail.

Much the same division can be found in the essays in this book. Of course, there are exceptions and qualifications. But in general, there is, even among the academics represented here, a clear and sharp difference between Gore supporters, or left-of-center people, and Bush supporters, or right-of-center people: the former are generally skeptical of the Court's decision, whereas the latter think, broadly speaking, that it was correct. How can we account for this?

The most natural way would be to acknowledge the enduring truth in the view conventionally associated with the legal realist movement of the 1930s: the line between legal judgment and political judgment is far from crisp and simple. At least where the legal materials leave gaps, people will do what they like, on political grounds. In *Bush v Gore,* perhaps the legal materials left gaps, and thus people did what they liked, on political grounds. A more elaborate and appealing view of the situation is set out in Ronald Dworkin's conception of law as "integrity."[2] In Dworkin's view, legal reasoning consists of an effort to put the preexisting legal materials in the "best constructive light." Where the materials leave gaps, those engaged in legal reasoning try to make the materials seem sensible and rational by knitting them together into what is (to them) an appealing pattern. If this is what legal reasoning is, different people will disagree about what makes for an appealing pattern, and that disagreement will be reflected in different judgments about what the law is.

But there is a special problem for *Bush v Gore:* it seems obvious that if

2. Ronald Dworkin, *Law's Empire* (1985).

the parties were reversed, we could not possibly have seen the overall pattern of reactions found within the Supreme Court, among general observers, and among the contributors to this book.

Suppose, for example, that there is a parallel world, one culminating not in *Bush v Gore,* but in *Gore v Bush.* Here is what happened in that world: Gore won the initial count in Florida, but Bush challenged the count, with a plausible argument that a manual recount would show that Bush, not Gore, was the real winner. The secretary of state, a high-level official in the Gore campaign, refused to allow the manual recount. But the Florida Supreme Court, consisting of Republican nominees, rejected the secretary of state's decision, agreeing with Bush. And so on.

Is it even possible to maintain that in the parallel world the same people would have the same reactions to *Gore v Bush* as to *Bush v Gore*? Is it not more likely that a majority of the observers would shift position? Is it unfair to suggest that more than half of United States Supreme Court justices, and more than half of academic commentators, would shift position as well?

I am not sure of the answers to these questions. But I am sure that, at the very least, most people's reactions to *Gore v Bush* would be very different from their reactions to *Bush v Gore*—and hence that judgments about this case have a great deal to do with the identity of the parties. This may be less obvious for legal specialists than for nonlawyers, but it is certainly true for specialists, too. At the very least, this fact seems to be an embarrassment for those who believe in the separation between law and politics.

To understand what is going on here, I would like to venture, very briefly and tentatively, what might be called a *neorealist account of legal judgment.* The core of the account is that in certain cases, people's initial evaluations dominate their ultimate judgments, and their initial evaluations are highly emotional. Often the relevant emotion involves indignation or outrage. Take, for example, another high-profile legal dispute: whether President Clinton had committed an impeachable offense. The Congress was split down the middle on that issue, with party identification being a near-perfect determinant of people's votes. It defies belief to think that we would have seen the same pattern of evaluations if President Clinton had been a Republican.

In the impeachment case, legal evaluations were greatly affected by an intense emotional reaction, in the form of either "It's outrageous that a president of the United States has committed such acts" or, in-

stead, "It's outrageous that Kenneth Starr's investigation has gone so far with essentially private misconduct." Now it is important to be careful with the idea of "emotions" here. With respect to law, as elsewhere, emotions are not cognition-free. They are based on and surrounded by thoughts—in the case of impeachment, thoughts about the character and performance of President Clinton. What is crucial is that an emotional reaction tends to dominate people's reaction to the topic at hand, dampening their responsiveness to other considerations, even making it hard for people on both sides to answer this question: What would I think if the person alleged to have committed these acts were someone of a different political party? What would I think if the parties were reversed? The difficulty of answering such questions is a characteristic feature of emotional reactions to certain political and legal events, and it ensures that the relevant judgments will be more or less impervious to further thinking.

There are three other factors here. First, when like-minded people talk with one another, they tend to move toward extremes.[3] If three members of a group tended to think that the Florida Supreme Court was stealing the election from George W. Bush, their discussions would push them toward a more extreme version of what they already thought. The effect would be heightened if such people thought of themselves as alike along some dimension: Republican, liberal, conservative, and so forth. At the same time, people engaged in deliberation are not likely to be much moved by people who disagree with them *if* those people can be said to fall in a different social category. Deliberating Republicans are not likely to be moved by deliberating Democrats, or vice versa, even if the same arguments might have some appeal if labels were not assigned to those who make those arguments. I speculate that in *Bush v Gore,* and in other cases involving politically charged legal questions, like-minded people, including like-minded judges and specialists, fortified one another's opinions, thus contributing to the neorealist model that I have outlined.

Second, it is well established that while people care about fairness, their judgments about what is fair are systematically self-serving and hence biased. When an observer favors one or another side in a sport-

3. See Roger Brown, *Social Psychology* (2d ed 1986); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes,* 110 Yale LJ 71 (2000)

ing event, in politics, or in law, his prejudices greatly affect his judgments about what is right. Where legal materials are ambiguous, a similar effect is at work: judgments about what is fair, and about what is lawful, will partly be a function of what is in people's interests, broadly understood.

Now one of the purposes of legal reasoning, and even of the ideal of the rule of law, is to quiet the intense emotional reactions that often crowd out other factors. Perhaps we can see the ancient image of justice, equipped with blindfold, as a signal that certain considerations—above all, the identity of the parties—are not a legitimate basis for judgment. And it seems clear that well-trained lawyers and judges are, as a rule, less susceptible to emotions of this kind. But they are not entirely impervious to them, and in politically charged cases, justice is not blind in the least.

Third, people are subject to confirmation bias, in the sense that when they hear two contending sides in an argument, they will often be fortified in their preexisting belief, thinking that the debate has only served to confirm what they thought before.[4] For example, people who favor capital punishment are likely, after hearing arguments for and against capital punishment, to be fortified in their belief, because they will see the strength in the arguments on their side and stress the weaknesses in the opposing position. To the extent that Gore supporters were able to talk to Bush supporters, and vice versa, the discussion might well have failed to break down disagreements, partly because positions had become congealed when like-minded people spoke, at first, largely with one another. Judges and academics, like ordinary people, are not immune from confirmation bias.

I think that these factors were extremely important in the debate over *Bush v Gore* and that initial emotional reactions drove people's ultimate judgments about the law, including the judgments of Supreme Court justices and academic commentators. Perhaps outsiders to the national debate—in Europe? in Canada?—can escape some of the relevant pressures. Perhaps the perspective of time will help.

## CONCURRENCES AND DISSENTS

I now offer a brief outline of the papers to come.

Richard Epstein offers an examination of the two major grounds on

4. Charles Lord, Lee Ross, and Mark R. Lepper, *Biased Assimilation and Attitude Polarization*, 37 J Personality & Soc Psychol 2098, 2102–4 (1979).

which the United States Supreme Court overturned the decision of the Florida Supreme Court in *Bush v Gore*. He first argues that the equal protection rationale, which commended itself to the five justices, was deeply flawed in relation to past cases. In Epstein's view, the most that the rationale could do was to demand equal standards across different precincts. But it could not compel the adoption of any single standard and thus required a remand to the Florida Supreme Court for a determination of how the votes would come out. But the second argument, involving the allegedly unconstitutional deviation from Florida law by the Florida Supreme Court, is far stronger. Epstein explores these points in some detail as they relate to both of the Florida court's decisions.

Elizabeth Garrett argues that there was a unique need for judicial restraint in *Bush v Gore* because of the inherent conflict of interest that the Supreme Court justices faced. In her view, this conflict makes *Bush v Gore* different from the election law cases and political process cases in which the Court has intervened often. Garrett focuses on the first opinion remanding the case and the decision to stay the recount, arguing that both were unnecessary and shaped the resulting decisions in ways that have opened the Court to charges of partisanship. She also argues that judicial restraint was appropriate in this context because this was a dispute that should have been resolved by Congress. Garrett disagrees sharply with those who argue that the Court saved us from a political or constitutional crisis. Such claims reveal a distaste for politics that is unfortunate and unwarranted. In her view, the nation would have been better served in this matter by the House and Senate, the politically accountable branches, than by the unelected Supreme Court.

Samuel Issacharoff urges that it is possible to measure the constitutional pedigree of *Bush v Gore* apart from the partisan issue of who won and who lost the 2000 election. In his view, *Bush v Gore* is the most dramatic departure from the Supreme Court's historic reluctance to enter the political fray or to proclaim the winner or loser of a specific election. Issacharoff measures the Supreme Court's recent handiwork against the arguments made for circumventing the political question barrier in the 1960s. Looking at the arguments that paved the way for courts to compel reapportionment and redistricting, he identifies two key features of those cases. First, the Court's successes in the political arena were always premised on clear constitutional commands, most notably the one-person, one-vote rule of reapportionment. Second, the Court intervened when it became apparent that there

was no other institutional actor capable of providing redress. Measured against this two-part template, *Bush v Gore* is wanting on both counts. The core argument is not that courts may not intervene in highly charged political disputes, but that there are times when they should not. The final conclusion is that *Bush v Gore* is symptomatic of an insufficient commitment to modesty in the exercise of judicial power, much as argued by Justice Breyer in dissent in *Bush v Gore*.

Pamela Karlan suggests that *Bush v Gore* should be seen as part of the "newest" equal protection doctrine, which, in her view, reflects the Supreme Court's mistrust of almost all other actors in the political process. In Karlan's view, *Bush v Gore* fits with a number of other recent cases that attempt to protect the structure of voting without protecting either individual rights or the rights of members of disadvantaged groups. Karlan objects that the equality problems emphasized by the Court were far less serious than the equality problems that a manual recount promised to cure. She concludes that the Court is using equal protection to produce less, not more, in the way of equality and democracy.

Michael McConnell contends that the highly dubious decisions of the Florida Supreme Court put the United States Supreme Court in an awkward position. He argues that the seven justices of the Court were right to find that the standardless recount would violate the Fourteenth Amendment, but he objects to what he sees as the legal incorrectness and questionable judicial statesmanship of the 5–4 split on the issue of remedy. He contends that if the five justices in the majority had joined Justices Souter and Breyer to require a remand under strict constitutional standards, the outcome would have been more legitimate. McConnell emphasizes that the unequal treatment of identical voters was indeed a constitutional problem, and in his view, it would not be particularly unattractive to extend the Court's holding so as to ban vote-counting systems that are not uniform.

Frank Michelman asks whether, in retrospect, one could have predicted how the majority of justices would rule since, at any point in the proceedings and with the full support of their dissenting colleagues, they might have restrained or withdrawn the Court from any substantial involvement in the election. Those who find the majority opinion predictable, he argues, must be imputing to the majority either a plainly illicit or a conventionally inadmissible kind of motivation for this, or any, exercise of publicly entrusted judicial power. Those who are surprised by the majority's action should reconsider their own view of the Court's role in our national governance.