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Bushed and Gored

A Brief Review of the Initial Literature

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THE RESOLUTION OF the 2000 presidential election by the U.S. Supreme Court's decision in *Bush v. Gore* (531 U.S. 98 [2000]) generated an extraordinary outpouring of literature in a very short period of time. Like the event itself, these writings are complex, acrimonious, and filled with foreboding about the state of U.S. politics. Even a seasoned observer can be overwhelmed and perplexed by this torrent of prose, whereas a more casual reader may feel, literally, "bushed" and "gored." These initial writings are nevertheless important because they reveal much about the controversy itself and lay the foundation for the broader literature that will follow.

This book is a step in the development of such a broader literature, focusing on the long-term consequences of *Bush v. Gore* for the law and politics. In general, these essays reflect two themes that underlie the initial writings. First, what is the probable impact of this decision on the legitimacy of the U.S. Supreme Court as the final arbiter of political disputes? And second, what is the probable impact of this controversy on the legitimacy of U.S. politics in general?

A brief review of the initial literature is thus in order (for another review, see Garrett 2003). For ease of presentation, we will restrict ourselves to books published in 2001 or 2002. Here, three rough distinctions are helpful: *reportage* (how was the disputed election resolved?), *polemics* (was the resolution a positive or negative development?), and *scholarly analyses* (what did the resolution mean?). After considering each of these elements, we can place the present essays in proper context.

REPORTAGE

The 2000 election's controversial ending was not entirely unprecedented in U.S. history, but no one involved could remember the most similar previous contest, the 1876 election (for a good overview of contested elections, see Heumann and Cassak 2003). That nearly everyone was shocked by the closeness of the popular vote, the multiple failures of election administration, the thirty-six-day struggle over the disputed ballots in Florida, and the intervention of the U.S. Supreme Court culminating in *Bush v. Gore* is hardly surprising. The rapid pace of these unusual events left even the participants confused. As a consequence, a cottage industry emerged to describe these happenings, including instant analyses, reporting compendia, and summary narratives.

INSTANT ANALYSES

For about one-quarter of a century students of U.S. politics have benefited from a genre of books published within months of presidential elections, offering an instant analysis of the election results (by academic standards anyway). Typically written by a team of scholars and intended primarily for classroom use, these books are often well done and serve as the starting point for more detailed scholarship. Several of these books were published after 2000, and two stand out with regard to the unusual end of the campaign.

The Perfect Tie, by political scientists James Ceaser and Andrew Busch (2001), is to date the best short account of the 2000 presidential campaign. Ceaser and Busch catalogue the confluence of factors that produced a very competitive presidential campaign, which generated a very close vote, and, in turn, caused the postelection controversy. Indeed, the even division of the electorate is essential to understanding the disputes that followed—a fact frequently overlooked or downplayed in other parts of the initial literature. Simply put, the 2000 election was too close to call and any attempt to do so was bound to raise legitimacy questions.

The authors describe the unexpected postelection events as follows:

Americans awoke on November 8 to discover that a new campaign was just getting under way, one that would last five weeks and have as many ups and downs as the original campaign itself. There were two major questions at that moment that no one could answer: who would win, and who would decide who would win. (171)

This postelection campaign by the major candidates was indeed unprecedented, and the “perfect tie” begat what might be called a “politics of improvisation.” Ceaser and Busch offer a useful list of the major power centers that structured this postelection campaign, including the national political climate, local election officials, state and federal courts, and the state and

national legislatures. According to Ceaser and Busch, the postelection period was a drama in fourteen acts, and their account reveals how the decisions by the Bush and Gore campaigns (as well as a wide range of other actors) led ultimately to the U. S. Supreme Court.

Also worth mentioning is *Overtime!*, edited by political scientist Larry Sabato (2002a). Like the other instant analyses, this collection includes several insightful and informative essays, including Sabato's (2002b) own overview of the elections "The Perfect Storm: The Election of the Century," and Diana Owen's (2002) fine description and critique "Media Mayhem: Performance of the Press in Election 2000." But the most interesting contributions are by the lawyers central to each of the postelection campaigns. In "The Labor of Sisyphus: The Gore Recount Perspective," Gore's chief legal advisors—Ronald Klain and Jeremy Bash (2002)—describe their four-point legal strategy: demanding a complete tally of the ballots; challenging election officials in court; finding a legal basis for a statewide recount; and focusing on four key counties (162–63). Meanwhile in "A Campout for Lawyers: The Bush Recount Perspective," Bush legal counsel George Terwilliger (2002), describes the rival strategy, which included an appeal to the U.S. Supreme Court from the beginning. These essays reveal how each legal team sought to bring some strategic order to the politics of improvisation and in the process pressed the fine line between law and politics.

REPORTING COMPENDIA

The instant analyses relied heavily on newspaper reporting for their raw material, and several major newspapers published compendia of their reporting on the postelection campaign. The most comprehensive is *36 Days: The Complete Chronicle of the 2000 Presidential Election Crisis* from the *New York Times* (Brinkley et al. 2001). As befits the national "newspaper of record," this book provides the reader with a detailed record of the chaos of the postelection campaign and documents the politics of improvisation. Many of the entries are the original news stories, analysis, and commentary. Typical is chapter 33, *Bush v. Gore*, which covers the oral arguments before the U.S. Supreme Court on December 10. This chapter begins with a brief introduction, followed by an article on each campaign's legal brief, an analysis of the high court's credibility, and an op-ed piece criticizing the court's intervention.

Another compendium, *Democracy Held Hostage* by the *Miami Herald* (Merzer et al. 2001:vii), describes itself as "the complete investigation of the 2000 Presidential Election including the results of the independent recount." The *Herald* is located near the epicenter of the Florida ballot disputes and this book is especially instructive on the various problems of election administration, including the infamous butterfly ballot, the variety of chads associated with punch-card ballots, undervotes (where no presidential preference was

recorded), overvotes (where more than one presidential preference was recorded), and the irregularities in voter registration rolls. This background is invaluable in understanding the legal disputes behind *Bush v. Gore*.

Democracy Held Hostage (Merzer et al. 2001) also includes a report of one of the two media-sponsored recounts of the Florida ballots. Conducted by the accounting firm of BDO Seideman, this study concluded that Bush would probably have won the election if the U.S. Supreme Court had not stopped the recount of undervotes in *Bush v. Gore*. The investigation also allowed for a range of hypothetical scenarios that were not a part of the case before the high court. Some of these scenarios produced a Gore victory by a small margin. This analysis revealed a “fascinating irony”: if the Bush team had gotten the standards it wanted, they might well have lost the election. Likewise, if the Gore team had been successful in obtaining the standards it advocated, it would have been defeated. Thus, the politics of improvisation apparently occurred in the absence of good information about the pattern of balloting.

The other media-sponsored ballot investigation, conducted by the National Opinion Research Corporation (NORC) at the University of Chicago, produced similar conclusions: if just the disputed undervotes were counted, Bush would have prevailed. But under various scenarios where all undervotes and overvotes were counted across the entire state of Florida, Gore would have edged ahead by tiny margins (see Toobin 2001, 278–80). The NORC study produced an online record of the ballots, allowing generations of scholars to review the ballots themselves and make up their own minds (see NORC Florida Ballots Project, www.norc@uchicago.edu). Worth noting, however, is that the results of both ballot investigations were well within the margin of error of studies of this kind (for details on the ballot counts, see Watson 2004).

Thus, we may never know for certain who really “won” the Florida presidential balloting. The campaign was simply too close, the election machinery too flawed, and the legal maneuvering too complex. However, one can hazard a general conclusion based on these ballot studies. On Election Day more Floridians seemingly went to the polls intending to support Gore than Bush. However, numerous impediments, from the “butterfly ballot” (Brady 2001, 65–66) to voter incompetence (Sabato 2002b, 116–17), prevented this intention from being clearly recorded at the polls. Many of these impediments were not subject to a judicial remedy (Greene 2001, 56–69), but where they were justiciable and pursued in court, Bush most likely would have prevailed. Whether ultimately correct, this conclusion illuminates a key feature of the postelection campaign: Gore’s supporters were convinced that they had really won at the ballot box, whereas the Bush backers were equally sure that the law was on their side.

The *Washington Post* (Nakashima et al. 2001) also produced a reporting compendium entitled *Deadlock: The Inside Story of America’s Closest Election*.

Deadlock is a synthesis of the *Post*'s published material, including insights and assessments from the reporters who covered the postelection campaign. Written in a discursive style, this account focuses on the key characters with special attention to their attitudes, motives, and feelings. A good example is chapter 7, "End Game," which covers the crucial days leading up to the *Bush v. Gore* announcement. From Bush and Gore through their attorneys and advisors to judges and justices, the book reveals something of how the real politicians operated in the politics of improvisation. *Deadlock* suggests that through a combination of clever decisions and miscalculations, the campaign extended the perfect tie to the very last vote in the final decision-making forum. (Indeed, if one adds the votes on the final Florida and U.S. Supreme Court decisions in *Bush v. Gore*, the tally is 8 to 8).

SUMMARY NARRATIVES

The instant analyses exchange detail for overview, while the reporting compendia make an opposite trade-off. The summary narratives fill a niche between the two, offering a rich description of the postelection campaign tied together by a single theme. The cost is, of course, the bias of the writer because any theme requires imposing a point of view on the complex post-election campaign. Here two books stand out because of the care and skill of the writers.

The Accidental President, by journalist David Kaplan (2001), explains (in the subtitle) "how 413 lawyers, 9 Supreme Court Justices and 5,963,110 Floridians (give or take a few) landed George W. Bush in the White House." The author strings together a series of well-crafted vignettes, told with style and wit. Kaplan adds some new information not found in the other sources, but more important, he binds together existing material in a cogent fashion. The theme is contingency: the close contest and ballot mess meant that the election literally could have gone either way. Thus Bush became president by accident—but the same would have been true for Gore had he prevailed. Or as the author notes:

A lucky tactical call here, a confusing ballot here. . . . A broken constitutional system, a broken electoral system, a broken kind of journalism—slightly different turns in the road might have cast destiny the other way. The various media-sponsored recounts showed as much. (5)

For Kaplan (2001) the role of contingency does not remove the obligation of moral agency from the actors involved. On the contrary, moral choices are all the more important when faced with tough decisions under difficult circumstances. In this regard, Kaplan is especially hard on the U.S. Supreme Court and *Bush v. Gore*. In his view, the majority of the justices did not meet the test set before them. Thus, the biggest accident of 2000 was the

lack of moral sense in high places. Kaplan believes this accident extends to a host of liberals and conservatives who looked to an unelected judiciary to resolve political disputes. As he concludes:

It is a weak society, afraid of its own representative democracy, that countenances the court to resolve its hardest choices—whether they are about abortion or the presidency. . . . While politics may be messy it is a mess born of the people and the choices they make. Democracy can defend itself. In a republic, under a constitution, we should rarely need to be saved from ourselves. (301)

Journalist and legal commentator Jeffrey Toobin's *Too Close to Call* (2001) offers another take on the postelection campaign. This book is superbly written and is by far the best read of the initial literature. The book accepts the postelection campaign as inherently political and then sets out to answer the question this assumption begs: why did one side prevail and not the other? Toobin's answer is straightforward: Bush and his supporters "wanted" the victory more. He claims:

The Republicans were more organized and motivated, and also more ruthless, in their determination to win. From the very beginning, the Democratic effort was characterized by hesitancy, almost a diffidence, that marked a clear contrast to the approach of their adversaries. In a situation like this, where the results were long in doubt, the distinctive attitudes made an important difference. (7)

This "passion gap" resulted from a combination of political circumstances as well as the character of the candidates. Although Toobin is quite critical of *Bush v. Gore*, the decision itself was anticlimactic, having been produced by the Bush team's greater commitment to winning. In the end, the politicians with the most ruthless temperament prevailed. Although this conclusion is critical of Bush and Republicans, it is also a criticism of Gore and the Democrats.

Two conclusions emerge from this review of the reportage. First, accepted electoral procedures failed to produce a winner in 2000, casting doubts on the legitimacy of the political process—and all the institutions that sought to remedy the situation, including the U.S. Supreme Court. Put another way, the lack of procedural legitimacy stacked the deck against everyone involved. Extraordinary leadership was needed to rise to this challenge. Second, the reporting itself surely contributed to the sense of crisis in the postelection campaign.

POLEMICS

Even a casual reader will notice some political bias in the reportage reviewed here. The news media was among the major political actors in the postelec-

tion campaign, but its biases were diverse and frequently offsetting. As a consequence, the reportage tends to understate the fierce passions of the post-election campaign. In this regard, the polemical literature is well worth reading. Here, too, a threefold division is useful: alleged plots, punditry, and apologetics.

ALLEGED PLOTS

One of the staples of U.S. political discourse is the allegation of political plotting, a perfectly natural activity in a democratic society rendered sinister by the ill will of the plotters. Some plots are conspiratorial and others brazen, some occur in high places and others down in the shadows. But all plotters can be hated not because of what they did or attempted, but because of their bad character. Such thinking stretches across the political spectrum and regularly influences the arguments of political elites—even scholars and journalists. The initial literature contains numerous well-done books in this genre, encouraged by the perfect tie and the politics of improvisation. Although they add an occasional fact overlooked or underappreciated by the reportage, they mostly interpret the record from the perspective of ideology and outrage. Thus, these books reveal much about the perspective of the combatants in the postelection campaign.

Some observers perceived a plot by Gore and the Democrats, a point of view expressed in journalist Bill Sammon's (2001) well-written account *At Any Cost: How Al Gore Tried to Steal the Election*. Sammon's central premise is that Gore wanted to win so badly that he would do (almost) anything to achieve that end. Indeed, Gore's "scorched earth philosophy" extended to many other Democrats and accounts for their unwillingness to accept Gore's defeat at the polls, despite finishing second in every single recounting of the votes that occurred. The plot included Sammon's liberal colleagues in the media. In fact, the liberal interpretation of the postelection campaign draws a special ire. An example is this comment on *Bush v. Gore*:

All seven remaining justices . . . confirmed Bush's claim that the Constitution had been violated. Breyer was a Clinton appointee and a personal friend of Al Gore and yet he could not ignore the obvious—the recounts were a sham. . . . Still, the Democrats and the press stubbornly refused to portray the Supreme Court's ruling as a 7-to-2 decision . . . [t]he myth was already taking root. The landmark ruling in *Bush v. Gore* would forever be described by Democrats and the press as a 5-4 vote. It allowed them to characterize Bush's victory as much more slender, his legitimacy as that much more tenuous. (255)

Much of the bitterness on the right arose from the perception that the Gore Democrats and their liberal allies were without principle.

Of course, other observers perceived a plot by Bush and his associates, a view expressed in Douglas Kellner's (2001) avuncular *Grand Theft 2000: Media Spectacle and a Stolen Election*. A professor of communications, he has a decidedly negative view of Bush:

By "Grand Theft 2000," I mean that a crime of the highest magnitude was carried off by the Bush machine, that the presidency was stolen, that U.S. democracy was undermined, and that the hard right were able to seize control of the state apparatus and public policy. (xv)

Prime evidence was the Bush "machine's" tenacious opposition to recounts at every step of the way. Kellner also includes the "mainstream media" as one of the culprits, especially television, for having "aided and abetted" the plot. Anyone who watched the relentless hours of television coverage of the post-election events might well sympathize with his critique of the electronic media, regardless of their political perspective. Note how Kellner handles the interpretation of *Bush v. Gore*:

As the commentators tried to make sense of the document . . . James Baker came on and in an astonishingly brief statement indicated that the Bush camp was gratified that by a seven-to-two vote the U.S. Supreme Court had found constitutional problems with the recount. Baker then turned and quickly walked away, nervous eyes darting from one side to another, an election thief disappearing into the night. Following Baker's lead, as always, the Republican spinners would tout the seven-to-two clause of the ruling, whereas in fact it was a five-to-four decision. . . . (102)

For some observers, the justices of the U. S. Supreme Court itself were part of the plot, a point illustrated in Vincent Bugliosi's (2001) passionate *The Betrayal of America*. Bugliosi, a former prosecutor and best-selling author, accuses the justices of treason for the "unpardonable sin of being a knowing surrogate for the Republican Party instead of being an impartial arbiter of the law" (41). Although he admits that the justices' behavior did not "fall within the strict language of treason, the essence of treason, clearly, is . . . doing grave and unjustifiable harm to this nation, which the justices surely did by stealing the office of presidency for the candidate of their choice" (115). Here, too, conservative interpretations of *Bush v. Gore* excite a special response:

Many conservatives have referred to Supreme Court decision as a 7-2, not a 5-4 decision because Justices Souter and Breyer also found problems with the lack of a uniform standard. But this is hogwash. The decision was 5-4. . . . Though Souter and Breyer did find equal protection problems . . . [t]hey voted simply to remand the case back to the Florida Supreme Court. . . . (109)

Thus, much of the anger on the left came from the assumption that the Bush Republicans and their conservative allies were corrupt.

Some observers saw plots by *both* candidates, a point made in *Down & Dirty: The Plot to Steal the Presidency* by journalist Jake Tapper (2001). A writer for *Salon*, his stream-of-consciousness account of the postelection campaign might have been subtitled “politicians behaving badly.” For example:

Certainly George W. Bush and his minions did everything they could to stand in the way of anyone . . . trying to get at the bottom of whom tax-paying, God-fearing, Americans voted for. . . .

Was the Gore team any better behaved? With two exceptions, no. Generally, the Democrats were just as disingenuous, just as power thirsty, and just as hypocritical. . . . (473)

This bad behavior extends to the U.S. Supreme Court in *Bush v. Gore*, “There was even, I suppose, a time when conservatives would rather have lost a close, hotly contested presidential election, even against a person and a party from whom many feared the worst, than advance judicial imperialism . . .” (471). But there was more than enough blame to go around, “We, as Americans, are to blame for what happened in Florida. Whomever you think the subtitle of the book applies to, we are the ones who let him try to steal a presidency” (479). Although Tapper appears to have the most sympathy for Gore, his real complaint is the universal power seeking in U.S. politics, a tendency especially evident in the postelection campaign. One suspects that millions of Americans shared this distaste.

These books display the deep hostility aroused by the postelection campaign and its architects. No doubt this antipathy was rooted in the political divisions that created the perfect tie and necessitated the politics of improvisation in the first place. But the unusual circumstances of the postelection campaign caused this acrimony to blossom. Once the expected boundaries of electoral combat were crossed, the worst fears—and perhaps secret dreams—of many observers were unleashed. The involvement of the U. S. Supreme Court was central to these unusual circumstances, and hence *Bush v. Gore* was bound to be unusually controversial. One suspects that the allegations of plotting would have been much the same if the results of the decision had been reversed.

PUNDITRY

Much of the passion generated by the postelection campaign appeared in the columns of pundits, published in newspapers and magazines. Although such writings were often influenced by the allegation of plots, most sought to demonstrate the incorrectness of their opponents rather than simply apply such an assumption to postelection events. The best of this punditry is collected in

Bush v. Gore: The Court Cases and the Commentary edited by columnists E. J. Dionne and William Kristol (2001). As with much of the rest of the literature, the book is organized by date, and the contents are carefully balanced between liberal and conservative voices. This book presents a useful history of elite debate during the postelection campaign, and in addition, a compendium of liberal and conservative thought on the politics of improvisation.

A few examples from the book are helpful in understanding the politics of *Bush v. Gore*. From early in the postelection campaign, Noemie Emery of *the Weekly Standard* offers a cogent summary of the partisan differences in the chapter, "First Principles in Florida," noting that Republicans are "the party of law and objective reality, against the party of intent and feeling," the Democrats (Dionne and Kristol 2001, 237). A few pages later, Harold Meyerson of *L.A. Weekly* does a nice job of describing this difference in "W. Stands for Wrongful." He notes:

Two contradictory lessons, then, are emerging from November's presidential election. One, in view of the excruciating closeness of the contest, is that every vote counts. The other, propounded by conservative jurists at play in the fields of 18th-century law and values, is that it's not even the case that any vote counts. Or at least, that there's no constitutional right to vote for president." (142)

Near the end of the volume, Nelson Lund, also of the *Weekly Standard* commends the *Bush v. Gore* majority for its courage to do the right but unpopular thing (319), whereas Jeffrey Rosen of the *New Republic* argues that the high court committed "suicide" by making a decision that commanded so limited respect.

Judging by this collection, conservative pundits were less doctrinaire in their appraisal of *Bush v. Gore* with several raising serious questions about the logic of the decision and the wisdom of its conclusion (for example, see essays by Michael McConnell, 289–92, and John DiIulio, 321–23). Liberal pundits were uniformly harsher in their condemnation and less willing to note weaknesses on their side of the argument (see Randall Kenndy, 336–38, and Mary McGrory, 294–95). This difference may reflect the fact that Bush prevailed and the text of the hastily written decision was, in fact, problematic. (Nearly all pundits found the decision to be poorly written, and in addition, three areas were universally seen as controversial: the absence of a remedy in the Supreme Court's order to end the recount; the emphasis on December 12 as a deadline; and the conclusion that the lack of uniform standards in the recount violated the equal protection provision of the U.S. Constitution.)

However, a deeper division appears to be at work. Conservative pundits tended to see the judiciary as just one branch of government, frequently at odds with the other branches. Thus, the U.S. Supreme Court was just one actor in an inherently messy business. In contrast, liberals saw the judiciary,

and the U.S. Supreme Court in particular, as the superior branch of government, charged with bringing order to the political process. Indeed, much of the liberal vitriol directed at the High Court reflects the fact that these expectations were not met. In the end, Bush and his allies may have had an advantage because of the greater reverence Gore and his supporters had for the judiciary.

APOLOGETICS

In some sense, all polemicists are apologists for their side of an argument. But some writers take on the task of making a case in a comprehensive fashion, seeking to persuade rather than proclaim. The best apologists speak to three audiences simultaneously: potential converts, opponents who need to be confronted, and the faithful who need to be fortified. The last audience gives apologetics an unusual element of truth telling. The initial literature includes two apologists that are well worth reading.

On the conservative side is *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* by Richard Posner (2001), a federal appeals court judge and law professor. The book reads rather like a Brandeis brief with a heavy dose of social science to bolster the case. Indeed, his statistical analysis of the Florida balloting makes an independent contribution to understanding the controversy.

Posner's (2001) defense of *Bush v. Gore* is based on legal pragmatism: the U.S. Supreme Court did what was necessary to resolve a difficult political problem before it became a constitutional crisis. In his view, the Supreme Court majority was especially concerned with eliminating the disorder created by the politics of improvisation. The irregularities in the Florida balloting and the state court rulings threatened to undermine further the legitimacy of the electoral process and even faith in the judiciary itself. Posner argues that the case joins a long line of tough but necessary decisions made by the high court. In short, the justices made the best of a bad business, and although they might have done a better job, they perpetrated no injustice.

Central to Posner's (2001) apology is the centrality of law to the electoral process. He argues that the dispute in Florida was not primarily about facts, but about the law, because it is law that converts ballots cast into votes counted for a candidate. In this regard, he is especially critical of the Florida Supreme Court's 4–3 ruling that was under appeal in *Bush v. Gore*. He notes:

[T]he Florida supreme court's abrogation of the discretionary authority that the state legislature had unmistakably vested in the state and local election officials furnished a plausible ground for concluding that the state supreme court had violated the requirement of Article II of the U.S. Constitution that each state's Presidential electors be appointed in the manner directed by the state legislature. (3)

And in his view, the Florida high court did so in defiance of the U.S. Supreme Court that had vacated its previous ruling by a unanimous vote. (He does, however, temper his criticism of the Florida decision on pragmatic grounds.)

Posner (2001) is far more critical of the reaction of law professors to *Bush v. Gore*. He finds their training and expertise inadequate, much of their criticism specious, and their motives highly suspect. He notes, "If the critics are right that *Bush v. Gore* is a political decision, the Justices can reply to the critics, with equal truth, *tu quoque*, your criticisms are politically motivated" (208). Posner doubts very much that the decision was made for narrow partisan reasons, and he believes that had the litigants been reversed, the high court would have made the same pragmatic decision, and ruled for Gore.

However, Posner (2001) admits that political considerations of a different sort were a factor in the decision:

Only the naïve believe that ideology plays no role in constitutional adjudication at the Supreme Court level. . . . Close beneath the surface of the legal issues in the post-election litigation are intertwined issues of personal responsibility, demotic power, government paternalism, and judicial discretion that divide the left and right. (176–77)

The conservative majority might well have been mindful of what kinds of justices the two presidential candidates were most likely to nominate to be their colleagues or replacements. After all, Gore had attacked some of the justices by name during the campaign and Bush had praised them. Posner recognizes that these possibilities generated fierce criticism of the court.

Such politics helps explain the many weaknesses Posner (2001) sees in the decision itself. Indeed, he joins many liberal critics in questioning the lack of remedy in the case—namely, that the decision did not remand the case back to the Florida Supreme Court with instructions to conduct a legal recount, but instead simply ended the recounts entirely. Also he is quite critical of the equal protection argument employed in the decision (that differences in voting counting standards in Florida counties violated the equal protection provision of the U.S. Constitution), arguing that it is inconsistent with precedent. Thus, Posner recognizes that the inadequacies of the decision itself pose a problem for conservatives who would defend the Supreme Court. He concludes that *Bush v. Gore* is an example of a case where a better argument exists for the result than was offered in the majority opinion.

On the liberal side is *Supreme Injustice: How the High Court Hijacked Election 2000* by Alan Dershowitz (2001), a law professor and legal commentator. Although this book is an attack on *Bush v. Gore*, it is also an apology for liberal view of the case. As the title reveals, Dershowitz partakes of the invective common to alleged plots and punditry, but his systematic approach marks the book as a broader critique of the U.S. Supreme Court

and the judiciary's political role. The book reads both like a legal brief and passionate courtroom oratory.

Dershowitz's (2001) perspective is summarized in the opening paragraph:

The five justices who ended Election 2000 by stopping the Florida recount have damaged the credibility of the U.S. Supreme Court, and their lawless decision in *Bush v. Gore* promises to have a more enduring impact on Americans than the outcome of the election itself. . . . [T]he unprecedented decision of the five justices to substitute their political judgment for that of the people threatens to undermine the moral authority of the high court for generations to come. (3)

He begins his case with a candid assessment of the litigation that produced *Bush v. Gore* (noting for instance, that the Gore campaign was more interested in counting Democratic voters rather than all the votes in Florida). Unlike Posner, he thinks that the Florida Supreme Court made a reasonable decision, doing "what state courts do" in sorting out state law. Dershowitz then takes up the arguments in *Bush v. Gore* item by item and finds them to be wanting. For instance, he regards the decision as contradictory and illogical, and the equal protection argument to be entirely specious because of its inconsistency with the previous positions of the conservative justices.

Based on these criticisms, Dershowitz (2001) can only conclude that the decision was made for partisan reasons. He admits that proving the motives of a judge is extremely difficult, and accordingly, he conducts a thorough review of the political biases of the *Bush v. Gore* majority—an analysis worthy of a political consultant or a lobbyist. Dershowitz believes, contra Posner, that these justices would not have decided the decision in favor of Gore if the circumstances have been reversed. Thus, there was nothing pragmatic about the decision. His evaluation is blunt:

In this respect, the decision in the Florida election case may be ranked as the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliation of the litigants. This was cheating, and a violation of the judicial oath. (174)

This evaluation differs from the denunciations of other liberal polemicists in several respects. First, it follows from a particular vision of how judges are supposed to behave and not the particular decision: *Bush v. Gore* was not just an *incorrect* decision it was an *improper* one. In this regard, Dershowitz (2001) argues that the justices should be disciplined for their misbehavior, essentially arguing that the U.S. Supreme Court should not be the final arbiter of political disputes. The clear implication is that judges are unavoidably political and that their politics must be judged as good or bad. Here,

again, Dershowitz disagrees with Posner: the judiciary should not be a practical problem solver, but an articulator of principles.

Dershowitz (2001) is keenly aware that liberal judges have often practiced similarly unprincipled politics, arguing that *Bush v. Gore* can be thought of as the “wages of *Roe v. Wade*,” the controversial abortion rights decision widely criticized for its inadequate reasoning. Here he is worth quoting at length:

The lessons of *Roe v. Wade* and *Bush v. Gore* are not easy to distill, but at bottom they represent opposite sides of the same currency of judicial activism in areas more appropriately left to the political processes. Courts ought not to jump into controversies that are political in nature and capable of being resolved—even if not smoothly or expeditiously—by the popular branches of government. Judges have no special competence, qualifications, or mandate to decide between equally compelling moral claims (as in the abortion controversy) or equally compelling political claims (counting ballots by hand or stopping the recount because the standard is ambiguous). Absent clear governing constitutional principles (which are not present in either case), these are precisely the issues that should be left to the rough-and-tumble of politics rather than the *ipse dixit* of five justices. (194)

Indeed, the “rough-and-tumble of politics” has come to the high court:

Finally, the liberals were shocked into the realization that they had lost the Supreme Court. Not only was it no longer “theirs,” but it was squarely in the hands of their political and ideological enemies. The Supreme Court was now a full-fledged activist, right-wing, Republican court. (197)

Thus, pursuing their political goals via the judiciary is now difficult for liberals, and they must seek other avenues.

Two conclusions can also be drawn from the polemical literature. First, *Bush v. Gore* was associated with deep and bitter divisions based on principle and about the nature of law and democracy. Given the breakdown in election procedures in the 2000 election, these divisions posed a potential threat to the legitimacy of the Supreme Court and politics in general. Extraordinary leadership was needed to have a reached consensus under these circumstances. Second, the polemicists themselves often contributed to these bitter and nearly unbridgeable divisions.

SCHOLARLY ANALYSES

A final element of the initial literature is the scholarly analyses of *Bush v. Gore*. Although a firm distinction is not made between these and the other writings, the goals and methods of scholars differ from journalists and advo-

cates. At this writing, the scholarly analysis of *Bush v. Gore* is in its infancy, but three types of works are worth noting: legal analysis, narrow institutional analysis, and broad institutional analysis.

LEGAL ANALYSIS

Lawyers and legal scholars took an immediate interest in *Bush v. Gore* and the surrounding litigation. Indeed, lawyers and law school professors were in the thick of the reportage and polemics. However, these analysts displayed the special expertise of legal scholars most completely in a spate of articles on the decision itself, the concurring and dissenting opinions, and their implications for common law. Two edited books have collected some of the best of this work.

Lawyers are by profession advocates, and so it is hardly surprising there is a polemical element in these writings. The more polemical of the two collections is *Bush v. Gore: The Question of Legitimacy*, edited by Bruce Ackerman (2002), one of the fiercest critics of the decision. However, the book contains a wide variety of perspectives, focused on two questions: did *Bush v. Gore* undermine the rule of law, and if so, what can be done to restore it?

The first two essays set the tone of the book. Charles Fried (2002), a former U.S. solicitor general, offers a spirited defense of the decision, concluding that many critiques of the decision are unreasonable. Although Fried is quick to admit that the decision's logic was less than impressive on key points, he argues the decision was reasonable on the question of election deadlines and the novel use of the equal protection doctrine. Thus, the decision did not threaten the rule law but rather affirmed it. Jed Rubenfeld (2002), the U.S. Representative to the Council Europe, offers a cogent rebuttal. He makes much of the arbitrary way the high court handled the question of election deadlines and is hostile to the equal protection argument in the case. However, Rubenfeld does not blame Bush for the decision, putting the responsibility for one of the "worst decisions ever rendered" squarely on the shoulders of the Supreme Court majority. (Margaret Radin [2002] offers an especially cogent argument that the decision undermined the rule of law.)

For the decision's defenders, such as Fried, the High Court's legitimacy arises largely from the *results* of cases, whereas for the critics, the Supreme Court's legitimacy is rooted in the *rationales* for the cases. Two other chapters help illuminate this distinction. Laurence Tribe (2002), who assisted the Gore campaign in the litigation, describes how the television coverage of the postelection campaign gave the High Court majority a false sense of crisis, motivating the majority to an unnecessary intervention. Guido Calabresi (2002), a U.S. appeals court judge, offers three alternative ways that the justices might have resolved the case in a principled fashion, but none of which were followed in *Bush v. Gore*. If Tribe is correct, then the results of *Bush v.*

Gore might well be regarded as legitimate by a public in the grip of a false sense of crisis, but the Supreme Court erred in allowing this perception to influence its decision. If Calabresi is correct, *Bush v. Gore* inflicted an unnecessary wound on the Supreme Court's legitimacy because of its poor legal craftsmanship (a point Justice Breyer made explicitly in his dissenting opinion in *Bush v. Gore*).

Essays in the second half of the book ponder the future of judicial legitimacy in the wake of *Bush v. Gore*. One of the more fascinating essays is by Steve Calabresi (2002), a founder of the Federalist Society and a legal advisor to the Bush campaign. He is quite critical of the involvement of both the state and federal courts in the Florida ballot dispute, making a strenuous defense of the traditional view that judges should stay out of the "political thicket." Everyone would have been better off, he argues, if "that horrible partisan Katherine Harris [the Florida secretary of state] had prevailed without being challenged in litigation way back on November 14 when she first attempted to certify this election" (144). A disinterested observer might well wonder how such restraint might be instituted among judges and lawyers given the rival views of the law and the courts.

One answer comes from Bruce Ackerman (2002), who argues that the U.S. Senate should agree not to confirm any of U. S. Supreme Court nominees until after the 2004 election, at which time Bush would have legitimately won the presidency or another person would sit in the White House. In effect, then, the lack of judicial restraint calls for a strong political response. In this vein, Jack Balkin (2002) offers a useful exposition of the probable impact of the decision on the politics of the courts.

The politicizing of the courts is a topic taken up in the less polemical of the two collections, *The Vote: Bush, Gore & the Supreme Court*, edited by Cass Sunstein and Richard Epstein (2001). The introduction poses this question:

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? (2)

The book's essays provide a wide variety of answers to this question. The overall impression is that the authors see an important distinction between law and politics, and seek to clarify it. Good examples are the essays by the editors.

Richard Epstein argues for law as a source of authority apart from political interests:

If constitutional law is politics by another name, then it makes no more sense to condemn the United States Supreme Court for its political

predilections than it does to condemn the Florida Supreme Court for its. All is politics and in that world rank alone becomes the sole arbiter of the truth. . . . Effective criticism of the United States Supreme Court necessarily depends, then, on a view of language that allows for us to recognize that legal interpretation at any level could be wrong, indeed so wrong as to count as an abuse of discretion for partisan political ends. (36)

The bulk of his essay is a rigorous legal analysis of the two principal grounds offered for *Bush v. Gore*, the equal protection argument central to the majority decision and the Article II argument Chief Justice Rehnquist advanced in the concurring opinion (namely, that the Florida Supreme Court had violated Article II of the U.S. Constitution by allowing the state courts, instead of the state legislature, to select Florida's electors). He concludes that the equal protection argument is deeply flawed, but that the Article II argument has merit, especially given the decision rendered by the Florida Supreme Court.

Cass Sunstein (2001) starts with a similar premise:

If the Supreme Court is asked to intervene in an electoral controversy, especially a presidential election, it should try to avoid even the slightest appearance that the justices are speaking for something other than the law. Unanimity, or near unanimity, can go a long way toward providing the necessary assurance. Whether or not this is possible, the court's opinion should be well-reasoned and rooted firmly in the existing legal materials. (221)

But he arrives at largely opposite conclusions. *Bush v. Gore* was a split decision, based on ideological differences, poorly reasoned, and with no basis in existing law. Particularly troubling was the fact that the high court did not remand the decision back to Florida because "the inequalities that the court condemned might well have been less serious than the inequalities that the recount would have corrected" (221). Sunstein notes a potential result its conservative authors did not anticipate: the novel equal protection argument may ultimately expand voting rights. This result is possible precisely because law can have an independent influence apart from the politics.

Other contributors are more skeptical of this kind of argument, including Samuel Issacharoff et al. (2001), who comment on the "political judgments" in the case, and Richard Pildes (2001) who considers the "constitutionalizing of the democratic process" in *Bush v. Gore*. This fascinating debate raises serious questions: Can legal reasoning survive the deep divisions evident among legal academics, let alone politicians? Was *Bush v. Gore* an unusual case where political pressure eroded legal reasoning or is it part of a broader trend that is undermining the legitimacy of the courts and the political process? The tentative answers to the first two questions appear to be "yes" and "maybe," respectively.

NARROW INSTITUTIONAL ANALYSIS

How exactly did *Bush v. Gore* come about and how can the operation of the judiciary help explain it? Several books offer answers to this question by describing how the judiciary operated in this case. Two primers are especially helpful. On the one hand, *When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000* by law professors Samuel Issacharoff, Pamela Karlan, and Richard Pildes (2001), is a primer on the legal background of the postelection litigation. The chapters cover the “federal interest” in election procedures, when the federal courts intervene, the state interest in federal elections, and possible remedies for defective elections. On the other hand, *Understanding the 2000 Election: A Guide to the Legal Battles that Decided the Presidency* by law professor Abner Greene (2001), covers the issues at stake. The section includes material on hand counts, Bush’s complaint against the Florida Supreme Court, the actions of the U.S. Supreme Court, other post-election law suits, and the possible role of legislative bodies in the matter. Taken together, these primers reveal why supporters and foes alike regarded *Bush v. Gore* as an extraordinary decision.

The most detailed account of judicial behavior in the postelection fray is *The Votes that Counted: How the Court Decided the 2000 Presidential Election* by political scientist Howard Gillman (2001). This well-written and amply researched book is by far the best account of the litigation that produced *Bush v. Gore*. Effectively employing the judicial process literature, Gillman traces the same chronological path as many of the other books, but with a detailed accounting of the activities of lawyers and judges. At many junctures, this account fills in the details of the reportage and connects the dots behind the polemics.

Chapter 6, “The Politics Behind the Votes that Counted,” is one of the most interesting in the book. Here Gillman sets out a framework for investigating the allegation of political motives behind the various court decisions, including the final decisions of the Florida and U.S. Supreme Courts. In many respects, this analysis offers a model for how to conduct such an inquiry by prescribing clear standards for assessing partisanship. However, readers may find a flaw in Gillman’s application of his own rules when he leaves out of his analysis the much-debated 7–2 holding in *Bush v. Gore*. Indeed, some cynics might conclude that academics are no more adept at counting votes than politicians or judges.

Gillman (2001) concludes there is plentiful evidence of politics in the path to *Bush v. Gore* exists and much of it brazenly partisan. However, he argues that this controversial decision is most likely to be a “relatively harmless self-inflicted wound” (199) on the high court’s legitimacy because of the prevailing political climate. A useful companion to Gillman’s work is *Superintending Democracy: The Courts and the Political Process*, edited by Christo-

pher Banks and John Green (2001). Of particular note is Banks's (2001) essay, "A December Storm over the U.S. Supreme Court," which applies a broader framework to the involvement of the judiciary in political questions.

BROAD INSTITUTIONAL ANALYSES

What impact is *Bush v. Gore* most likely to have on the law and politics? As we have seen, the initial literature is filled with strong, often ideological, claims, but short on systematic analyses. One early effort in this regard is *The Unfinished Election of 2000* edited by Jack Rakove (2001). Here an interdisciplinary team of scholars reviews what is dubbed "America's strangest election." The 2000 campaign is "unfinished," in two senses of the word: no clear winner emerged, and the underlying political forces are still in play. Thus, this election was the very definition of a "turning point" in national politics, but which way the nation will turn is unclear. This collection improves on the reportage by setting the postelection campaign, polemics and all, in a broader context.

What role did *Bush v. Gore* play in these strange circumstances? These authors offer three conclusions. First, the decision consolidated Bush's narrow Electoral College victory in an efficient fashion. The key factor was the tie at the ballot box, and given the array of Republican officeholders at the state and national level, Bush was likely to have prevailed even without *Bush v. Gore*. This conclusion is consistent with much of the reportage on the post-election campaign. Second, the bitter controversy provoked no sense of a constitutional crisis with the public. As one contributor notes:

Although the Republicans won and the Democrats lost, the losers did not resort to defiance or a refusal to cooperate. Thus, "the system worked." . . . Ordinary Americans apparently believe that achieving a vital purpose is more important than cleaving meticulously to formal procedures, especially when both sides in a conflict raise equally plausible arguments about "what the rule of law requires." They were therefore by and large satisfied that the process ended with closure. (Holmes 2001, 248)

This conclusion echoes Gillman's judgment and is consistent with Posner's (2001) judicial pragmatism. Third, the U.S. Supreme Court's intervention revealed the judiciary's capacity to act as a conservative force in political disputes. This conclusion echoes the evaluations of many liberal pundits and legal analysts, as well as Dershowitz's (2001) view on judicial politics. (For a fascinating discussion of the broader questions raised by the 2000 election see Crigler, Just, and McCaffery 2004.)

Taken together, these points suggest that in the wake of *Bush v. Gore* the legitimacy of the courts and politics will depend on how the Bush administration actually performs in office. And a critical factor to such performance

is the lessons learned from the events of 2000 by key political actors. This book explores this last point in some detail, seeking to explain the legal and political consequences of the decision, and by implication, the role of U.S. Supreme Court as the final arbiter of political disputes.

LEGAL CONSEQUENCES

The first section of this volume concerns the impact of *Bush v. Gore* on the law and the U.S. Supreme Court's legitimacy. In chapter 2, political scientist Christopher Banks reviews the "political question" doctrine after *Bush v. Gore*, concluding that the U.S. Supreme Court's behavior seriously undermined the idea of judicial restraint on political matters. Banks argues that the decision "foolishly risked the judiciary's institutional legitimacy." Whatever the impact of the decision on the broader political system, it will have a profound impact on the law itself. This chapter adds some depth and detail to a claim widely advanced in the initial literature.

Law professor Tracy Thomas draws a similar negative conclusion in chapter 3, where she reviews *Bush v. Gore*'s impact on the issue of remedy in the common law. One of the most controversial aspects of the case was the court's determination that the recounts could not continue. Thomas finds this aspect of the case especially troubling because it distorts the traditional understanding of remedy. Thus, she argues, *Bush v. Gore* is a dangerous precedent that may well undermine the rule of law and come back to haunt the high court in the future.

The next two chapters concern the novel use of the equal protection argument in *Bush v. Gore*. In chapter 4, political scientist Joyce Baugh evaluates the possibility that the case might expand voting rights litigation, an eventuality widely speculated on in the initial literature. She concludes that whether this result will be so is far from clear and that the case should be regarded as a poor precedent for such litigation. However, in chapter 5, law professor Daniel Tokaji offers a strong argument on how *Bush v. Gore* can have just this kind of impact. He argues that the opinion makes little sense in terms of the law of equal protection, but actually breaks new ground if viewed from a First Amendment perspective.

All of these chapters are in one way or another critical of *Bush v. Gore*, expanding on concerns widely raised in the initial literature. In chapter 6, law professor Ann Althouse takes a more sympathetic view of the decision and the courts that produced it. She seeks to evaluate deviations from judicial orthodoxy by reviewing one of the most contentious questions in the initial literature: did the majority in *Bush v. Gore* violate its own views of federalism by overruling the Florida Supreme Court? Althouse thinks otherwise, arguing that the decision fits well within the pragmatism that characterizes the Rehnquist Court's approach to federalism.

POLITICAL CONSEQUENCES

This volume's second section concerns *Bush v. Gore*'s impact on the performance and the legitimacy of the U.S. political system. The first two chapters concern the immediate impact of the decision on the executive branch. In chapter 7, political scientist Charles Jones argues that the split decision underlined the close political division in the electorate and further encouraged the Bush administration to follow a strategy of "competitive partisanship" once in office. As with much else associated with the 2000 campaign, this strategy shocked many observers who expected that the absence of an electoral mandate would encourage Bush to pursue a bipartisan strategy.

This theme is continued in chapter 8 where political scientists Brian Gerber and David Cohen review the Bush administration's governing strategy. They find that the Bush administration aggressively used orders within federal agencies to implement its agenda rather than seeking congressional approval. This approach is similar to competitive partisanship and arose from the same source: a closely divided public and a fiercely partisan Congress. Both chapters find that *Bush v. Gore* had much less of an independent effect on the legitimacy of the Bush administration than polemicists expected, but was in line with much of the initial institutional analysis. This conclusion does, however, reveal the indirect importance of the decision. One might conclude that with regard to the White House, possession of the office may be nine-tenths of legitimacy, if not the law.

The next two chapters address *Bush v. Gore*'s impact on the political process, and here, too, its impact is seen as largely indirect. In chapter 9, political scientist Donald Greco reviews one of the most widely anticipated effects of the postelection campaign: election administration reform. He describes initial steps taken at the federal level, such as the Help America Vote Act of 2002. However, he expresses some skepticism regarding the likelihood that state officials will aggressively pursue reform, noting that such officials often have strong incentives not to do so. The pattern of initial reform efforts in the states supports this skepticism.

In chapter 10, political scientist Andrew Busch considers the lessons presidential candidates and their associates are most likely to learn from the 2000 campaign and its resolution. An important lesson is straightforward: avoid close elections by running better campaigns, including strategy and tactics, such as getting out—and keeping out—the vote. But candidates will now need to plan on the possibility of a postelection campaign and one that involves access to extensive legal talent. Candidates may also review their messages with an eye to not offending judges that might review their case. Thus, the politics of improvisation are unlikely to reoccur in the near future.

Chapter 11, by political scientist John Maltese, turns to a direct effect of *Bush v. Gore* on politics, namely, its impact on the fate of Bush's judicial nominees. He points out that the politics of judicial nominees had already become highly contentious before 2000, but the decision made judicial appointments more salient, particularly any appointment Bush might make to the U.S. Supreme Court. After a careful review of the politics of judicial selection, Maltese concludes that *Bush v. Gore* contributed to a polarization that is most likely to continue for the foreseeable future. This prediction appears to have been borne out during the first years of the Bush administration. In this regard, the filibuster by Senate Democrats against Bush appeals court nominees Miguel Estrada and Patricia Owens is especially noteworthy (Hurt and Dinan 2003).

The final chapter considers the legitimacy question directly. Political scientist John Wells notes that the two most common sources of legitimacy—neutral procedures and substantive consensus—failed in the perfect tie and the chaos of the postelection campaign. Thus, that many observers predicted a constitutional crisis, and some even despaired for the future of U.S. democracy, is hardly surprising. However, Wells identifies a third source of legitimacy, “pragmatic legitimacy,” which allowed the nation to weather the strange election with a minimum of difficulty. In part, this situation reveals the character of the American citizenry, but it may also reflect a degree of good fortune.

Wells's analysis echoes many of the conclusions in the initial literature, but in doing so begs a critical question: what are the conditions that foster pragmatism and what conditions erode it? People and passions are the makers of politics, even a practical one that works after a fashion under difficult conditions. But institutions make such successes permanent in a large and diverse nation, and in the long run, procedures and principles may be required to legitimate effective institutions. In the end, of course, these are political questions where differences in interests and ideology can play a critical role. We hope that the essays in this book will help the readers draw their own conclusions on these matters.

In the final chapter, political scientists David Cohen and Christopher Banks provide a brief review of the conduct of the 2004 presidential election and sketch a preliminary assessment of legacy of *Bush v. Gore*. They use a popular movie, *Groundhog Day*, which involves the endless repetition of a day in the life of the main character until he becomes a better person, to describe the possibility of a continuing cycle of controversy in American elections. They note that one part of the legacy of *Bush v. Gore* is the encouragement of this cycle. But there is also the possibility that the decision will eventually contribute to the creation of a better electoral system, thus the breaking of the cycle of controversy. These possibilities call for continuing investigation of the impact of *Bush v. Gore*.

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