Learning to Live with
Bush v. Gore

Linda Greenhouse
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I did not choose the title for this article to signify that we have to learn to live with the results of the Supreme Court’s decision in a real-world sense – that particular reality will unfold over the next four years whether we like it or not. Rather, it seems to me that all of us who care about the Supreme Court must arrive at some understanding of *Bush v. Gore*, must incorporate it into the way we think about the Court, and then must live with that understanding as we return to the more mundane business of watching the Court from day to day. Thus: learning to live with *Bush v. Gore*. I’d like to offer some reflections on the case, and suggest at least one way of thinking about it within the larger framework of the Court’s approach to its work.

Just to reflect on where we’ve been: It’s hard to believe that more than six months have passed since that unbelievable night in mid-December when the Supreme Court of the United States decided the 2000 presidential election. No one who saw the scene will ever forget it – network correspondents fumbling in the wind and the dark with the slip opinion, hunting for the non-existent headnote, the non-existent list of justices who supported the majority holding, or indeed for a clear statement of the holding, cameras rolling, the country knowing only that something momentous had happened but still unsure what it was.

I didn’t see that scene myself – I was in a taxi, racing from the court back to my office to make an 11:00 p.m. deadline, reading the opinion by the cab’s overhead light in time to tell my editors that no, it wasn’t the 7-2 remand they were hearing about, but a 5-4 judgment for Bush, and that the election was finally over.

And so it was, but the debate certainly was...

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not, is not, and the continued lack of consen-
sus is striking, not only over whether the case
was correctly decided but also over whether it
was *legitimately* decided. As Professor Cass
Sunstein of the University of Chicago Law
School has put it: "Gore supporters tend to
think that the Court was wrong, even ludi-
crously wrong; Bush supporters tend to think
that the Court's decision was defensible,
right, perhaps even heroic."2 Polls taken since
the election tend to show that Professor Sun-
stein is correct. Public disagreement over the
legitimacy of the President, and of the Court's
decision in his favor, cuts deeply along lines
that track both party affiliation and race.

Lines are being drawn in legal academia as
well. I've been trying to keep up with the aca-
demic literature on the case that is beginning
to pour out of the law schools – and now that
summer vacation is upon us, I'm sure there
will soon be even more. Common ground is
evasive, but much of the professorial commen-
tary does at least lend itself to categorization.

I've developed my own typology of
responses to the decision, along these lines:

At one end of the spectrum are those I
would call the cheerleaders, those who defend
the decision as law, that is, not only was the
Court right to intervene in the case but the
equal protection holding was correct as a
matter of constitutional analysis. This group
appears to be quite small in number. Even
Charles Fried, the former solicitor general and
current Harvard Law School professor who is
one of the leading defenders of the Court's
post-election performance, brushes very
quickly over the majority's equal protection
holding and moves on to a defense of Chief
Justice Rehnquist's concurring opinion.3

Perhaps the majority opinion's leading aca-
demic defender is Professor Nelson Lund of
the George Mason University School of Law,
who has written that the equal protection
holding is an analytically solid one, firmly
anchored in the vote dilution precedents of the
Supreme Court.4 Professor Michael McCon-
nell, recently nominated to the 10th Circuit,
has written that the equal protection analysis
was correct, although he thinks the Court was
wrong to deny the remedy of a remand for a
continued recount.5

Much more numerous are the members of
my second group, what I will call the "the
Court took a bullet for the country" school –
that however problematic the equal protection
holding was an act of judicial statesmanship that saved the country
from judicial and political chaos. Leading
figures in this school are Judge Richard Posner
of the 7th Circuit, who declares in his most
recent book that "what the Court wrought
was, at the least, a kind of rough justice,"6 and
former judge Robert Bork, who wrote in *The
New Criterion*: "The Supreme Court, at consid-
erable cost to itself, saved us, at least moment-
arily, from a further precipitous decline in our
public morality." *Bush v. Gore*, he says, "was a
valiant effort, legitimate in law, to rein in
runaway political passions and a lawless state

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*The Vote: Bush, Gore and the Supreme Court* (forthcoming from University of Chicago Press,
Sept. 2001; available now at thevotebook.com).
p. 8.
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court those passions had captured.\(^7\) During a speech at the Economic Club of Grand Rapids, Justice Scalia referred, albeit somewhat obliquely, to the decision in terms that put him in this camp. He said the Court’s reputation should not be thought of as “some shiny piece of trophy armor” to be kept mounted over the fireplace. “It’s working armor and meant to be used and sometimes dented in the service of the public.”\(^8\)

Next there is what I call the “bad hair day” school, people who think that while the Court’s performance was unsound, it demonstrated not a basic flaw in the institution, but rather an understandable if perhaps regrettable response on the part of five justices to an almost overwhelming press of circumstances: the speed of events, the super-heated political climate, the problematic nature of the state court decisions, the justices’ social networks. Given all these factors, in this view, the justices in the majority could not help but respond in the way they did. A temporary lapse in judgment but nothing much deeper than that. Professor Sunstein subscribes to this view, which he calls (unsurprisingly) not the “bad hair day” theory but rather a “neorealist account of legal judgment.”\(^9\)

This is also a view that a number of people are clinging to in order to keep themselves from tumbling over the cliff into the final category, composed both of those I call the desperados – the newly disillusioned – and of the more cynical “I told you so” Critical Legal Studies types. Or maybe I should describe this as the “we are all Crits now” school. These are people who have concluded that far from being an aberration, Bush v. Gore instead reveals the nasty little secret that the Court is at heart a political institution whose members reach decisions not according to neutral principles but in the service of an ideological agenda.

For example, Bruce Ackerman of Yale Law School, one of the desperados, writes that although “this view goes against the grain of my entire academic career, which has been one long struggle against the view that law is just politics,” he has reluctantly come to hold it. “The Court has betrayed the nation’s trust in the rule of law,” he wrote in The American Prospect.\(^10\) Another of this group, David Strauss of the University of Chicago, writes that “the decision in Bush v Gore was not dictated by the law in any sense” and instead reflects a determination by the majority “to overturn any ruling of the Florida Supreme Court that was favorable to Vice President Gore.”\(^11\)

As you make your own way along the path of learning to live with Bush v. Gore, finding your place in my typology or creating a new category of your own, it might be useful to review a bit of the chronology of those amazing, action-packed 36 days and to focus on some aspects of the saga that look more significant on reflection than they might have looked when we were all living through it.

The first point I would make is that this was really an advocate’s case. I say that because there was so little obvious law to apply. In fact, when my husband and I first heard on the news on the Saturday after election day that a federal lawsuit had been filed in Miami to stop the initial, four-county recount, we downloaded the complaint from the internet. After reading the equal protection argument, we

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9 Sunstein, The Vote, supra note 2.
10 Bruce Ackerman, The Court Packs Itself, American Prospect, Feb. 21, 2001, p. 48.
wondered aloud to each other why Rule 11 would not apply to the pleading.¹²

When I think of the litigation that led up to Bush v. Gore, I picture a human wave attack of lawyers. Both sides were motivated by the unbelievable closeness of the initial vote tally – a difference of less than one one-hundredth of one per cent of the roughly 6 million votes cast, or, as several observers have put it, a margin of victory that was less than the margin of error – and enabled by a complex and ambiguous state election law that appeared to allow for numerous points of entry through which disappointed candidates might challenge the results.

Not surprisingly, the Gore forces used every means they could to keep the count going, and the Bush forces, in their effort to hold the line at their hair's-breadth victory, threw whatever legal theory anyone could think of up against the wall to see which ones might stick. No one who is being at all candid could assert with a straight face that before this litigation, they had heard of the Electoral Count Act, Title 3, Chapter 1, Section 5, of the U.S. Code, or of McPherson v. Blacker, the 1892 decision that was the Supreme Court’s only application of the second clause of section one of Article II of the U.S. Constitution.¹³ That is the clause that provides that each state shall appoint electors “in such manner as the legislature thereof may direct.” And needless to say, the notion that variations in the way the more than 3,000 counties in the United States handle elections and count votes could possibly make out an equal protection violation was hardly a widely held view at the start of the post-election period.

When I say it was an advocates’ case, I don’t necessarily mean that advocacy won it for George Bush. There is a school of thought that says the justices knew what they wanted to do and didn’t need to be persuaded so much as they needed a legal vehicle, something that sounded like a federal question, to carry them from there to here. If this is true, then it was the singular accomplishment of the Bush legal team to offer a choice of vehicles, none of which on their face was particularly obvious or even plausible.

The litigation that eventually became Bush v. Gore proceeded on many simultaneous tracks. Or maybe a better image is a giant checkerboard, with pieces moving in all directions and jumping over one another through the state and federal systems. It would take a full-length book (and there are plenty already) to reconstruct the roughly two-dozen separate pieces of litigation. The field-marshall skill involved on both sides in simply keeping on top of all the cases was impressive. I’ll limit myself to trying to put the Supreme Court phase into a bit of perspective.

The first challenge for the Bush forces, perhaps the dispositive challenge, was persuading the Court to take the case – that is to say, the first case, Bush v. Palm Beach County Canvassing Board. It’s easy to overlook that first case, and the opaque, unanimous per curiam with which it was decided, but on reflection it is clear that it played a very important role in the way matters unfolded.¹⁴

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Bush v. Palm Beach County Canvassing Board was an appeal from the Florida Supreme Court’s November 21 decision that added 12 days to the deadline for certifying the vote. The Florida court thus enabled manual recounts to continue in the four counties whose results were challenged by Vice President Gore, violated 3 U.S.C. § 5. This formerly obscure federal law, the Electoral Count Act, was passed by Congress in the wake of the Tilden-Hayes debacle of 1876. It provides that electors chosen under state laws in effect on the date of the election are not subject to challenge in Congress as long as any dispute over their selection is resolved at least six days before the date set for the counting of electoral votes – in this instance, December 12.

The second question presented for cert was whether in extending the certification deadline, the Florida Supreme Court had supplanted the legislature’s role in violation of Article II, Section 1, clause 2 of the U.S. Constitution, which requires states to appoint Presidential electors “in such manner as the legislature thereof may direct.”

I certainly plead guilty to being one of many who assumed the Court would run as fast as it could from this first cert petition, filed late on the afternoon of November 22, Thanksgiving eve. The case presented three questions for cert. The first asked whether the Florida Supreme Court’s decision of the day before, extending the deadline for certifying the election result to allow manual recounts to continue in the four counties whose results were challenged by Vice President Gore, violated 3 U.S.C. § 5. 

*Palm Beach Canvassing Board v. Harris*, 772 So. 2d 1220 (Fla. 2000).

16 The Supreme Court filings in the election cases are posted on the Court’s web site, www.supremecourt.us.gov, although this is not readily apparent; click on “what’s new” on the site’s home page. The briefs are also available on the FindLaw site at http://supreme.lp.findlaw.com/supreme_court/docket/2000/dec2000.html.
The third question raised an equal protection issue: whether the selective recounts violated either equal protection or due process.

The Court promptly granted the first two questions, denied cert on the third, and added its own question, addressed to an eventual remedy: “What would be the consequences of this Court’s finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5?” This added question suggested that 3 U.S.C. § 5 was playing a central role in the Court’s deliberations. It did for a time, but turned out to be something of a blind alley and ultimately was not the basis for the decision in Bush v. Gore. In retrospect, it appears that the Court was mistaken in its initial understanding of the Electoral Count Act as a statute that could be judicially enforced, as opposed to an offer to the states of a “safe harbor” for electors chosen according to its terms. In any event, cert was granted on November 24 and argument was set for December 1.

The unanimous per curiam that issued in Bush v. Palm Beach County Canvassing Board on December 4, three days after the argument, was as unrevealing as the order granting cert. Both masked profound divisions within the Court. The Court vacated the Florida Supreme Court decision to extend the certification deadline on the ground that “there is considerable uncertainty as to the precise grounds for the decision,” telling the Florida court to explain how its holding took account of Article II and 3 U.S.C. § 5. The significance of this opinion, indeed, the status of the case itself, was unclear at the time the Court ruled. The protest phase of the post-election period had ended and Bush had been certified the winner by 537 votes. The whole case appeared at that point to have been overtaken by events.

Thus, even those justices who had deep misgivings about the Supreme Court’s entire role were able to agree to the per curiam in the hope and expectation that the case, and most likely the election itself, was over.

But it was not to be quite so simple. The “contest” phase of Gore’s post-election challenge was proceeding through the state courts. On December 8, without addressing the remanded decision, a divided Florida Supreme Court ordered a state-wide recount of the “undervotes” – those ballots that had failed on the machine count to show a choice for President. The court also ordered several hundred votes from incomplete recounts in Palm Beach and Miami-Dade Counties to be counted for Gore.

The Bush lawyers immediately filed a stay application at the Supreme Court. Over four dissents and with Justice Scalia’s instantly famous concurring opinion, the Court treated the emergency application as a petition for cert and granted it, with argument set for fewer than 48 hours away. Justice Scalia justified the stay of the then-ongoing recount as necessary to avoid irreparable harm to Governor Bush. The new recount was “casting a cloud upon what he claims to be the legitimacy of his election,” Justice Scalia said. This was a problematic definition of irreparable injury, and in retrospect, of course, it is clear that the party who suffered irreparable harm from the stay was Vice President Gore.

The new cert petition reprised the three earlier questions for cert: Article II, 3 U.S.C. § 5, and equal protection. This time the equal protection argument was aimed at what the “question presented” called the “post-election judicially created selective and capricious recount procedures that vary both across counties and within counties in the
state of Florida.” It was evident during oral argument on December 11 that equal protection was now the horse to ride. After the case was argued and submitted, the debate within the Court was over what the remedy should be for the equal protection violation that seven members of the Court had identified – albeit perhaps *arguendo* on the part of two of the justices.20

What to say about the equal protection holding? This is how the *Bush v. Gore* per curiam opinion put it for the majority: “When a court orders a statewide remedy, there must be a least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” What the precise injury was, who had suffered it and how – who had standing, in other words – we were not told by justices who usually have a great deal to say about standing.

In any event, the five-member majority concluded that time had run out. The Florida legislature, the majority said, intended to meet the December 12 deadline for giving the state’s electors the “safe harbor” of 3 U.S.C. § 5. The basis for this conclusion is not completely clear. The Court apparently was referring to a rather oblique passage in an opinion the Florida Supreme Court had issued some hours earlier, on December 11, responding to the remand of the previous week.21 In its 6-1 per curiam, the Florida court said:

> [B]ased upon our perception of legislative intent, we have ruled that election returns must be accepted for filing unless it can clearly be determined that the late filing would prevent an election contest or the consideration of Florida’s vote in a presidential election. This statutory construction reflects our view that the Legislature would not wish to endanger Florida’s vote not being counted in a presidential election.

The Florida court explained its decision in a footnote, saying that any determination of a reasonable time for completing a manual recount “must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state’s dispute concerning its electors in order for that determination to be given conclusive effect in Congress.”

This decision, which was the Florida Supreme Court’s substitute for the decision that *Bush v. Palm Beach County Canvassing Board* had vacated, looked back to the initial, “protest” phase of the litigation, not to the “contest”-related issues that were now before the justices in *Bush v. Gore*. It is far from clear that the Florida court thought it was announcing an authoritative construction of the 3 U.S.C. § 5 question for which the five majority justices cited it. The U.S. Supreme Court, in other words, had only a very questionable basis for concluding that the Florida Supreme Court, if given the choice, would have chosen the safe harbor instead of as complete a recount as possible. But in any event, the majority proclaimed that there was no purpose to be served by giving the Florida Supreme Court another chance to sort this out.

One often-heard critique of *Bush v. Gore* now is that the Court in effect set up the Florida court with a pincer movement of the two *Bush* opinions. First there was the opinion strongly suggesting that Article ii of the Constitution meant the Florida Supreme Court would be out of line in adding anything to the state election statutes that was not already there, and then there was the final decision holding that the absence of judicially-imposed uniform vote-counting standards amounted to an equal protection violation – a result all the more

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21 Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1273 (Fla. 2000).
problematic in light of the fact that the Article
ii analysis suggested by Bush v. Palm Beach
County Canvassing Board turned out to
command no more than three votes in Bush v.
Gore.

Perhaps one of the oddest elements of Bush
v. Gore, as well as its greatest understatement,
was the majority’s explanation of why the
holding would apply to this case and this case
alone. "Our consideration is limited to the
present circumstances, for the problem of
equal protection in election processes gener-
ally presents many complexities." In effect, this
statement gave Bush v. Gore the weight of an
unpublished opinion, at most an equal protec-
tion holding for a class forever to be limited to
one member. This aspect of the holding has
certainly provided ammunition for those
cynics who see it as proof of the outcome-
determinative nature of the decision.22

So – are we all Crits now? What are even
the non-cynics among us to make of this
tale? Even having lived through it, as we all
did, the whole sequence of events seems so
implausible. The Rehnquist Court, defender
of states’ rights, turning the Supreme Court
of the United States into a kind of super-
election commission for the state of Florida?
How do we reconcile what we observed with
what we thought we knew? How do we live
with Bush v. Gore?

One way to understand the decision is as a
manifestation and extension of recent trends
on the Supreme Court, as an example of the
kind of judicial triumphalism that has led
this Court to engage in a pitched multi-front
battle with Congress over the boundaries of
congressional authority to set federal policy
and to makes its policy choices binding on
the states. A strong case can be made that
the Court in the last five or six years has
moved beyond the exercise of the power of
judicial review to the wholesale substitution
of its own policy views for those of the
legislature. This has been most obvious in a
series of recent decisions holding that Con-
gress lacks authority to apply various federal
laws to the states, whether as an aspect of
11th amendment state immunity, of 10th
amendment reserved powers, or, most trou-
bling, of limits on Congress’s power to enact
legislation under Section 5 of the 14th
amendment. Wielding as a kind of tactical
nuclear weapon the “congruence and propor-
tionality” standard for Section 5 first
announced in City of Boerne, the 1997 decision
that invalidated the Religious Freedom Rest-
oration Act,23 the Court has found, for
example, that Congress lacks authority to
abrogate state immunity from the employ-
ment provisions of the Americans With
Disabilities Act. This highly significant
development, unthinkable when the ADA was
enacted in 1990, was all the more startling for
the fact that by the time the Court
announced it in Board of Trustees v. Garrett
earlier this term, it had come to appear all
but inevitable.24

This is not the place to discuss the Court’s
ongoing federalism revolution, and certainly
the Court’s urge toward judicial supremacy is
nothing new, as Robert Jackson noted in his
powerful account of the court-packing
episode.25 The point is that what in the cur-
rent context has often been described simply
as a states’ rights revolution is really something
even more profound, a separation of powers

22 For the status of unpublished opinions and the perils of citing them, see Sorchini v. City of Covina, 250
F.3d 706 (9th. Cir. 2001) (per curiam).
revolution that results almost always in the Supreme Court having the last word.26

How does *Bush v. Gore* fit into this? Pamela Karlan of Stanford points out that with respect to equal protection, the Court has been developing a model of "structural" equal protection with which *Bush v. Gore* is strikingly congruent. In its recent redistricting, or "wrongful districting," cases, Karlan notes, the Court has invoked equal protection principles not to protect a discrete or disfavored minority group, but to "regulate the institutional arrangements" for the conduct of democratic politics according to the Court’s own vision of what those arrangements ought to be.27

In 1993, the Court decided the first of the *Shaw v. Reno* line of cases, giving birth to a new equal protection claim. This was the claim of white citizens, who with the exception of Hawaii form a majority in every state and every state legislature, to injury from being placed by such a legislature in a district drawn with the goal of increasing representation of those not in the majority.28 Until the first *Shaw* case, voters in the position of the white plaintiffs in North Carolina’s 12th Congressional District were not thought to have standing to bring such a generalized political grievance before the federal courts.29

As Karlan cogently explains, the *Shaw* plaintiffs’ claim that the Court recognized is not really one of equal protection in a classic sense but rather is a complaint on the level of "metagovernance" – a claim about "the rules by which the democratic political processes are structured."30 And who better, evidently, to decide the merits of such a claim than the Supreme Court: not the state legislatures themselves (judicial triumphalism trumps federalism, after all); not Congress, which wrote and amended the Voting Rights Act of 1965; and not the executive branch, which enforced it. Democratic self-governance, whether in the conduct of elections or the drawing of district lines, is messy, unpredictable, sometimes distasteful, and in any event highly inefficient when compared with a court that is available to do the job instead. And the court knows best.

The election in Florida would have sorted itself out somehow, quite possibly on the floor of Congress, and quite likely by the eventual election of George W. Bush. It would have been a somewhat unnerving but indisputably powerful civics lesson in the strength of our democratic institutions. But the Supreme Court instead delivered a different lesson, a powerful lesson of its own and one that we would not have expected from these particular justices: that in a test of democratic self-governance, the Court has the last word and the Court knows best. Watch what we do, not what we say, and you too can learn to live with *Bush v. Gore*.  

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30 Karlan in *The Vote*, supra note 27.