

Courts and the Making of Public Policy

Bush v. Gore and the 2000 US Presidential Election

A Case Study of the Role of Courts
in Political Disputes

Steven R. Shapiro

The Foundation for Law, Justice and Society
in affiliation with
The Centre for Socio-Legal Studies,
University of Oxford

www.fljs.org



Executive Summary

- The US Supreme Court's decision in *Bush v. Gore*, which effectively ended the 2000 presidential election, provoked a profound national debate about the role of the judiciary in resolving political disputes and raised still lingering questions about the Supreme Court's credibility as a nonpartisan institution.
- The Supreme Court's intervention in the 2000 presidential election was unique in American history. Until 2000, the Court had never been involved in a presidential vote count.
- The Court's decision to halt the ongoing and potentially dispositive recount in Florida was unnecessary, and its reasons for doing so were unpersuasive. The fact that the Court's decision in *Bush v. Gore* was decided by a narrow 5–4 majority, divided along the Court's conservative–liberal axis, lent support to the claim that the outcome was result-oriented and ideologically driven.
- The majority in *Bush v. Gore* invited this criticism for several reasons. Its decision was a departure from the Court's traditional practice of allowing vote-counting disputes to be resolved at the local level. Its intrusion into the details of Florida's recount was inconsistent with the Court's then-prevailing philosophy in favour of state's rights. Its concern about equal voting rights was selective. It expressed no concern, for example, about the use of different voting machines with different records for accuracy throughout Florida and the nation. It complained about the lack of standards governing the recount but gave the Florida courts no opportunity to remedy the problem. And, it specifically declined to announce any general principle of law beyond the result in this particular case.
- The lesson to be drawn from *Bush v. Gore* is not that electoral disputes, even presidential election disputes, are beyond judicial competence. Elections are partisan contests governed by what should ideally be nonpartisan rules. Courts have a role in enforcing those rules to ensure a fair election. But courts must exercise that authority carefully and wisely. *Bush v. Gore* failed that test.

***Bush v. Gore* and the 2000 US Presidential Election**

A Case Study of the Role of Courts in Political Disputes

As George W. Bush approaches the end of his presidency, the United States Supreme Court has not yet emerged from the shadow of its decision in *Bush v. Gore*, 531 U.S. 98 (2000), eight years ago, to halt a Florida recount that might have produced – we will never know – a different presidential outcome if allowed to continue. The Court's engagement in the 2000 presidential election was unprecedented and led to a profound national debate about the proper role of the judiciary in resolving political disputes.

In my opinion, the Court was wrong to get involved in the 2000 presidential election when it did. Once it became involved, it reached the wrong result. But I also believe we would be drawing the wrong lesson from history if we now concluded that courts should never become involved in electoral controversies, including presidential elections, under any circumstances. The problem with *Bush v. Gore* is that the Court was widely perceived to be playing electoral politics rather than refereeing the process.

The US presidential election system

Notwithstanding the Supreme Court's intervention, George Bush still received fewer votes nationwide than his Democratic opponent, Al Gore. Presidential elections in the United States, however, are not decided by popular vote but by the Electoral College, a curious feature of the US Constitution designed to ensure that the residents of small states have a say in the election of the nation's chief executive. Otherwise, it was feared, presidential candidates would focus their attention on the largest states and presidential policies would reflect a similar bias.

Under the Electoral College system devised by the framers, therefore, each state gets a number of votes equal to the total number of its

representatives in Congress (House and Senate). Washington, DC, which does not have voting representatives in Congress, is also allotted three votes in the Electoral College. The winner of the presidential election is the candidate who wins a majority of the 538 electoral votes. And, because electoral votes are awarded on a winner-takes-all basis in nearly every state, it does not matter whether a presidential candidate wins a particular state by one vote or one million.

As a result, presidential elections are conducted on a state-by-state basis and, as we saw in 2000, presidential candidates can win a majority of the electoral vote even if they do not win the popular vote. That, in turn, has given rise to the concept of 'battleground states'. Presidential candidates in the United States now spend less time and energy in states where the outcome seems certain, no matter how large those states may be, and more time in states where the outcome is uncertain, even if only a few electoral votes are at stake.

George Bush is not the first person in American history to become president after having lost the popular vote. It happened in 1824, 1876, and 1888. But George Bush is the first American president whose election was decided by the Supreme Court. Alexis de Tocqueville once famously said: 'There is hardly a political question in the United States which does not sooner or later turn into a judicial one' (de Tocqueville 1969). Yet, until the 2000 election, the Supreme Court had never interposed itself so forcefully into presidential politics.

Courts in the United States are given enormous authority. As in most democratic societies, US judges are empowered to interpret laws adopted by the

legislature. They are also empowered to invalidate laws adopted by the legislature if those laws are deemed inconsistent with the overriding principles set forth in the US Constitution. How and when courts should exercise that authority is the central question of US constitutional theory.

The simple assertion that constitutional adjudication and democratic self-governance are fundamentally inconsistent ignores the fact that the Constitution itself is an expression of popular will about the structure of government and the nation's most enduring values that can be amended, albeit with difficulty, if it is no longer serving its intended purpose. At the same time, the credibility of judicial decision making depends on the perception that it is more than simply partisan politics through other means. And, of course, partisan passions and suspicions are never more aroused than when the outcome of a presidential election is in doubt.

Supreme Court intervention in the 2000 election

Until 2000, the United States Supreme Court had never gotten involved in the actual counting of votes in a presidential contest. In the 2000 election, the Supreme Court issued two decisions within eight days. The first decision, *Bush v. Palm Beach Canvassing Board*, 531 U.S. 70 (2000), was issued on 4 December. By then it was clear that Al Gore had won the national popular vote. It was also clear that neither Bush nor Gore had an Electoral College majority without Florida, and the Florida election was still unresolved nearly a month after election day. When the Florida votes were first counted on 7 November, Bush was ahead by 1784 votes out of nearly six million votes cast. The closeness of the vote produced an automatic machine recount under Florida law, which further reduced the margin. Gore then sought a manual recount in four Florida counties. That effort was short-circuited by Florida's chief election officer, a Republican, who refused to allow additional time to submit the results of any manual recount. After the Florida Supreme Court overruled her decision, extending the time to certify election results until 26 November, the Bush

campaign asked the United States Supreme Court to intervene, arguing that Florida's Supreme Court had improperly changed the rules in the middle of the election. The US Supreme Court did not rule on the merits of that claim. But, in a unanimous decision, it sent the case back to the Florida Supreme Court, asking it to explain further the basis for its decision.

Meanwhile, the electoral skirmishing continued in Florida. Four days later, on 8 December, the Florida Supreme Court ordered an even broader manual recount throughout the state, noting that the partial recounts that had been conducted so far had produced a net gain of several hundred votes for Gore, although not yet enough to change the result. The Bush campaign immediately returned to the United States Supreme Court. Its decision in *Bush v. Gore*, issued on 12 December, ordered an end to the Florida recount. Because Bush was still ahead at the time, he was declared victor in Florida and, by virtue of that victory, awarded the presidency. This time, however, the Supreme Court's decision was not unanimous. Instead, the Court divided, 5-4.

There were six separate opinions. The majority concluded, in an unsigned opinion, that the manual recount ordered by the Florida Supreme Court was unconstitutional because it offered no guarantee that disputed votes – epitomized by the famous punch card ballots and 'hanging chads' that left the voter's intent ambiguous – would be evaluated on the basis of uniform criteria and thus counted equally. The majority further concluded that there was no time left to correct that problem because 12 December, the date of the US Supreme Court's decision, was also the last day for the state to certify its results to the Electoral College and have them treated as conclusive by Congress under federal law, a 'safe harbour' that Florida clearly wanted to claim. In a concurring opinion, Chief Justice Rehnquist criticized the Florida Supreme Court for improperly usurping the constitutionally assigned role of the state legislature in setting the election rules.¹

1. Chief Justice Rehnquist's opinion was joined by Justices Scalia and Thomas but not by Justices O'Connor and Kennedy, the other two members of the majority.

The four dissenters each wrote their own opinions but agreed on three essential points. The Florida Supreme Court had not overstepped its bounds by interpreting the state's election laws; rather, interpreting laws enacted by the legislature is a quintessential judicial task. The crucial date for completing the vote count was not 12 December but 18 December when the Electoral College met. By that reckoning, there were six days left to complete the task. And, finally, to the extent that there were legitimate concerns about counting votes equally (two dissenters thought there were and two thought there were not), they should have been resolved by sending the case back to Florida with instructions to develop uniform standards for those counting the votes.

The response to *Bush v. Gore*

Al Gore quickly announced that he would accept the Court's decision, which ensured that the resolution of one political crisis did not precipitate another. But the inauguration of George W. Bush as the forty-third president of the United States did little to abate the harsh and continuing criticism of *Bush v. Gore* as a decision that was based more on politics than law. Some of that criticism comes from political partisans and may be predictable on that account. But other critiques cannot be so easily dismissed. Speaking with more sorrow than anger, Justice Stevens ended his dissent in *Bush v. Gore* with the following observation:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law. (531 U.S. at 542)

At a minimum, the majority's decision in *Bush v. Gore* invites a skeptical response for several mutually

reinforcing reasons. First, it marked a dramatic departure from traditional practice. The fact that a presidential election was at issue admittedly raised the stakes, but election recounts are routine in America and they are just as routinely resolved at the state level for the simple reason that even federal elections are generally administered by the states under our constitutional system. The majority recognized as much when it stressed the significance of Florida's legislative deadlines for certifying the election results.

Second, a defining creed of the Rehnquist Court, which decided *Bush v. Gore*, was its belief that too much power had gravitated from the states to the federal government. Thus, in a series of decisions challenging legal axioms that had been broadly accepted since Roosevelt's New Deal, the Rehnquist Court limited the ability of the federal government to protect civil rights and regulate commerce, while simultaneously providing the states with expanded immunity against individual lawsuits alleging violations of federal law. However else *Bush v. Gore* is characterized, it is hard to describe a US Supreme Court decision arbitrating a dispute between Florida's courts and legislature over the meaning of state law as a victory for state's rights.

Third, to the extent that the majority decision in *Bush v. Gore* was driven by a genuine federal concern, it was ostensibly the concern that everyone's vote be counted equally. There is no doubt that is a valid concern under the federal Equal Protection Clause. Indeed, the Supreme Court transformed American political life in 1964 when it ruled that legislative districts must be roughly equal in population in order to assure the principle of 'one person, one vote' (*Reynolds v. Sims*, 377 U.S. 533 [1964]). For better or worse, that principle has never been extended, either before or since *Bush v. Gore*, to the casting or counting of votes. To choose one obvious but telling example, each county in Florida was authorized to design its own ballot and choose its own voting machine during the 2000 elections. Some of the ballots were more confusing than others; some of the machines were more accurate than

others. Yet, the majority in *Bush v. Gore* expressed no concern about that inequality at the same time that it ordered an end to the Florida recount in order to protect, it said, equal voting rights.

Fourth, the role of the Supreme Court is to establish principles that apply beyond the facts of the particular case. Legal principles are intended to be generally applicable. The majority in *Bush v. Gore*, however, candidly acknowledged that it was resolving the case without announcing any larger legal principle. 'Our consideration is limited to the present circumstances', it wrote, 'for the problem of equal protection in election processes generally presents many complexities' (*Bush v. Gore*, 531 U.S. at 109). That concession inevitably fuelled the charge that the majority's decision was result-oriented, with the desired result being the election of George Bush.

Fifth, the Court's remedy was disproportionate to the problem it had identified. If the constitutional error lay in the failure to articulate a single standard for judging the voter's intent when manually recounting paper ballots that might have 'hanging chads' or smudged pencil marks, the Court could either have articulated that standard itself or ordered the Florida Supreme Court to do it on remand. It chose not to do so based on a 12 December deadline that the dissent convincingly argued was optional rather than mandatory. The majority also overlooked the fact that the Florida recount, although conducted statewide, was being supervised by a single judge who, one can reasonably assume, would have applied the same standard to any disputed ballots brought to his attention.

Sixth, an ideologically divided Supreme Court divided along ideological lines in deciding *Bush v. Gore* by a 5-4 vote. Ideological labels often represent an oversimplification of the Supreme Court's internal dynamics. Nonetheless, it was widely reported and generally understood that the five members of the Supreme Court regarded as conservative had voted for Bush and the four members of the Supreme Court regarded as either liberal or moderate had voted for Gore.² In *Bush v. Palm Beach Canvassing Board*, the Court had crafted a narrow decision

designed to achieve unanimity in what every Justice clearly understood was a politically charged context. In *Bush v. Gore*, that consensus unravelled and the resulting ideological fissure was interpreted by many as a partisan political one.

When should courts intervene in political disputes?

Even with hindsight, it is difficult to assess what, if any, institutional damage the Supreme Court suffered as a result of *Bush v. Gore*. There have been published accounts of personal strains within the Court, but it is almost impossible to know whether those accounts are accurate and, if so, whether those strains persist (Toobin 2008). Among many elites, both inside and outside the legal profession, there is a frequently expressed view that the Court's decision tarnished its reputation and squandered its credibility, but that view is not reflected in public opinion polls, which suggest that the Supreme Court's standing with the general public is not significantly different now than it was before *Bush v. Gore*. Supreme Court confirmation battles have become increasingly partisan and bitter, but that phenomenon predates *Bush v. Gore*, even if the decision lent support to those who see the judiciary as just another partisan battleground.

It may be more fruitful, then, to ask a different question. In a constitutional democracy, when does a political dispute become a legal dispute that the courts can and should resolve? In the United States, the Supreme Court has attempted to answer that question by developing what is known as the 'political question' doctrine (*Baker v. Carr*, 369 U.S. 186 [1962]). This is a self-imposed doctrine of judicial restraint that cautions against judicial involvement in disputes that are constitutionally committed to another branch, or disputes that lack judicially manageable standards.

2. These labels do not correspond to partisan affiliation.

The Supreme Court that decided *Bush v. Gore* consisted of seven members appointed by Republican presidents and only two members appointed by Democratic presidents. However, two of the Republican appointees, Justices Stevens and Souter, had long since realigned with the Court's moderate wing.

An argument can be made that presidential election disputes are constitutionally committed to Congress, which must ratify the Electoral College results and choose a president if no candidate has received a majority of Electoral College votes (US Constitution, Art. II, Sec. 7, cl. 3).³ But the fact that the Constitution designates Congress as the, 'Judge of the Elections, Returns, and Qualifications of its own Members', (ibid. at Art. I., Sec. 5, cl. 1) did not prevent the Supreme Court from ruling that Congress must seat an elected representative who meets the minimum qualifications of age, citizenship, and residency (*Powell v. McCormack*, 395 U.S. 486 [1969]). Nor did it prevent the Supreme Court from setting constitutional rules for legislative districting. Moreover, it is unlikely that anyone would have objected if the Supreme Court had reviewed evidence that minority voters were being systematically excluded from the polls during a presidential election.

More generally, election disputes have never been treated as categorically beyond judicial review. Election day disputes are common in the United States, and local courts routinely review applications from individual voters denied the right to vote. On occasion, judges may order the polls to stay open longer than originally scheduled if there is an unexpected backlog of voters. Those disputes have not been regarded as judicially unmanageable, nor is it difficult to imagine a set of standards that might have guided Florida officials during the manual recount that the Supreme Court ultimately ended. The majority in *Bush v. Gore* did not claim otherwise. To the contrary, it faulted the Florida Supreme Court for its failure to articulate those standards in advance and to rely, instead, on a general instruction to determine the voter's intent, subject to oversight by a single judge assigned to supervise the recount process.

Accordingly, the Supreme Court had jurisdiction to decide *Bush v. Gore* if it wanted to do so. However, the fact that the Supreme Court can act does not mean that it must act. Unlike lower courts, the Supreme Court has virtually unlimited discretion over its docket. And, as Justice Louis D. Brandeis once said in describing the Supreme Court (and Justice Breyer reiterated in his dissent in *Bush v. Gore*): 'The most important thing we do is not doing' (Bickel 1962).

By ending the election before all the votes were counted, and in the face of undeniable electoral irregularities, the Supreme Court fed the perception that it had taken the election away from the voters. Having gotten involved, the Supreme Court then wrote an unpersuasive opinion.

Elections are partisan contests governed by what should ideally be nonpartisan rules. Courts have a role in enforcing those rules to ensure a fair election. But to avoid the charge of partisanship, they must act carefully and wisely. Unfortunately, in *Bush v. Gore*, the Supreme Court did neither.

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3. If the House of Representatives is called on to select the president, each state delegation gets one vote, again to assure a meaningful role for the small states.

The Foundation

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Steven R. Shapiro is the Legal Director of the American Civil Liberties Union (ACLU), a non-profit organization founded in 1920 and dedicated to preserving civil liberties in the United States. The ACLU has more than 500,000 members nationwide and filed a brief with the US Supreme Court in *Bush v. Palm Beach Canvassing Board*, one of the cases discussed in this paper.

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or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD
T · +44 (0)1865 284433
F · +44 (0)1865 284434
E · info@fljs.org
W · www.fljs.org