The Professors and *Bush v. Gore*

by Peter Berkowitz and Benjamin Wittes

"You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt," warned the great American jurist Learned Hand (1872–1961). "I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that, when the final count is made, it will be found that the impairment of his powers far outweighs any possible contribution to the causes he has espoused."

One need not share Learned Hand's drastic view to appreciate that political engagement by scholars runs the risk of betraying intellectual integrity. Scholars have a vital role in democratic debate, but to perform it properly they must exercise a certain restraint. Americans today confront a range of complex public-affairs issues—from the economic consequences of law and government policies to the practical effects and moral implications of cloning and stem cell research—that can be understood only with the help of expert knowledge. In trying to come to reasoned and responsible judgments about such matters, citizens depend upon scholars to marshal relevant facts and figures, to identify the more and less likely consequences of law and public policy, and to clarify the moral principles at stake. But deference to expert knowledge depends in part on public confidence that scholars will honor their obligation to separate the pursuit of truth from political advocacy and personal advantage. When scientists wade into the public debate over stem cell research, for example, we expect, above all, that they will give a fair and accurate account of the facts. This is not to say that scholars cannot express opinions. It means rather that their first obligation is to speak the truth. Scholars are paid to not rush to judgment. If one scholar violates this obligation, the authority of the rest is compromised, and the public is invited to view all scholars as no different from the seasoned spinners and polished operators and purveyors of the party line who crowd our public life.

Restraint may be hardest when justice is at stake. For legal scholars, the risk is especially acute when they weigh in on a controversial case while they are serving as consultants to a party to the controversy, or take an unyielding stand before partisan fires have cooled. In recent years, law professors have assumed a higher profile in public debates, and scholarly restraint has steadily declined. No longer confined to the pages of professional journals, law professors now appear regularly as pundits on TV and radio shows. Their new prominence dates at least to 1987,

Tempers were running high throughout the nation last December when police were forced to separate angry supporters of George W. Bush and Al Gore outside the U.S. Supreme Court.

when, amid an uprising in the legal academy, the testimony of eminent law professors in the bitter Senate confirmation hearings of Supreme Court nominee Robert Bork was nationally televised. A decade later, legal academics found a new stage with the O. J. Simpson trial, and they really hit their stride with the Kenneth Starr investigation and the impeachment and Senate trial of President Bill Clinton. Few of them performed admirably during those public spectacles. But this past winter, with the Florida election controversy, members of the legal academy, in their role as public intellectuals, reached a distressing new low in the exercise of scholarly restraint.

Although the war over Florida's 25 electoral votes was waged on many fronts, the decisive battles occurred in courts of law. Following the blunders by the television networks in calling the Florida vote on the evening of November 7, 2000, and up through the U.S. Supreme Court's dramatic intervention five Tuesdays later, on December 12, the Bush camp and the Gore camp, an army of pundits, Florida lawyers, and an ample supply of law professors from around the country struggled to make sense of the legal wrangling in Florida. There were disputes about the legality of the notoriously confusing butterfly ballot in Palm Beach County, the legality of conducting manual recounts in some counties and not others, the legality of varying standards for interpreting chads in manual recounts (dimpled chads, dangling chads, chads through which light passes), the legality of excluding recounts finished after the statutorily imposed deadline, the legality of improperly completed overseas absentee ballots

in Martin and Seminole counties, the legality of excluding recounts completed after the deadline imposed by the Florida Supreme Court, and a host of other questions of law. These disputes culminated in two controversial Florida Supreme Court decisions, which were celebrated by Democrats as vindications of the will of the people and denounced by Republicans as acts of judicial usurpation.

Partisan rivalry quickly turned to bitterness and anger in Florida, and people on both sides passed beyond the limits of political civility. There is surely something to be said for controversy in a democracy that worries about the fading political engagement of its citizens. Yet when the case passed to the highest court in the land, citizens had every right to expect that at least one group would maintain a degree of calm and dispassion: the scholars who serve as our national interpreters of the law. But *Bush v. Gore* provoked from the legal academy a response that was without precedent. Never before had a decision of the Supreme Court been subjected by large numbers of law professors to such swift, intense, and uncompromising denunciation in the popular press as greeted the December 12, 2000, ruling that effectively sealed Governor George W. Bush's victory in the presidential election. No doubt the professors' fury, which has yet to abate, tells us something about *Bush v. Gore*. It also tells us something important about the professors' understanding, or rather misunderstanding, of the public responsibilities of intellectuals.

Many aspects of the Court's 5–4 decision in *Bush v. Gore* and the Florida election controversy that it brought to an end should disturb the democratic conscience. Despite a certain skepticism about the use of the equal protection clause of the 14th Amendment, and a pronounced aversion to constitutional innovation, the U.S. Supreme Court's five conservative justices expanded equal protection doctrine and offered a novel reading of Article II, section 1, of the Constitution, which provides that each state shall appoint presidential electors "in such manner as the Legislature thereof may direct." Even if one allows that the recount ordered by the Florida Supreme Court violated equal protection guarantees (as seven of nine justices of the U.S. Supreme Court and three of seven judges of the Florida Supreme Court said), the Court's justification for halting the recount rather than directing the Florida court to continue it on the basis of constitutionally appropriate standards (as the two dissenting justices on the U.S. Supreme Court who acknowledged equal protection problems with the Florida recount wished) has the appearance of a technical legal trap being sprung. The evidence indicates that a disproportionate number of African American voters in Florida saw their votes spoiled. There is good reason to believe that on November 7, 2000, a majority of Florida voters cast their ballots *intending* to vote for Vice President Al Gore. All nine justices of the U.S. Supreme Court, moreover, faced a conflict of interest in deciding *Bush v. Gore*: The new president would very likely have the opportunity to nominate their new colleagues (or their successors). In addition, the Florida election controversy raised divisive political questions that the Court might have been wise to leave for resolution to Florida and, ultimately, to Congress.

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The foregoing are serious matters, and they demand careful public consideration. The problem is that much that has been written about *Bush v. Gore* by law professors in their role as public intellectuals has not advanced that kind of careful consideration. Instead, it has muddied the waters and stirred more partisan ire. Far from counteracting the public's tendency to collapse the legal dimension of the controversy into the political, many scholars have encouraged it. The two dimensions can—and must—be separated.

The overarching *political* question was whether the electoral system, in Florida and in the nation, reflected the will of the people. The fundamental *legal* question was whether the Florida Supreme Court's two critical decisions, on November 21 and December 8, complied with the requirements of American constitutional law. (In the first case, in a lawsuit brought by Vice President Gore, the Florida Supreme Court overruled a lower Florida court and extended by 12 days the deadline for protesting election returns and for officially certifying the results; on December 8, again in a lawsuit brought by the vice president, it overruled a lower Florida court and ordered as part of Gore's contest of the official certification a statewide manual recount of undervotes.) The U.S. Supreme Court was called upon to resolve *only* the legal dispute—the constitutionality of the conduct of the Florida Supreme Court.

THE OVERARCHING POLITICAL QUESTION WAS WHETHER THE ELECTORAL SYSTEM, IN FLORIDA AND IN THE NATION, REFLECTED THE WILL OF THE PEOPLE.

To listen to the nation's preeminent constitutional theorists tell it, *Bush v. Gore* was an obvious outrage—nothing less than a politically driven repudiation of democracy and the rule of law. In the months immediately following the decision, Bruce Ackerman, a professor of law and political science at Yale University and one of the nation's most prominent legal intellectuals, spoke for a substantial majority of law professors when he issued the brutal judgment—in agreement, he plausibly argued, with Justice John Paul Stevens's dissent—that the majority opinion was "a blatantly partisan act, without any legal basis whatsoever." Leading conservative professors of constitutional law were not much heard from, and they were comparatively measured in their statements: By and large they found in *Bush v. Gore* a reasonable though flawed ruling. Two days after the decision, University of Utah law professor Michael McConnell argued in the *Wall Street Journal* that the Court was correct to conclude that the "manual recount, as ordered by the Supreme Court of Florida, would be unconstitutional," but he found the "question of remedy" to be "the troubling aspect of the decision." Conservatives, however, form only a small fraction of the legal professoriate. The great majority of their fellow law professors who spoke out on *Bush v. Gore* followed Ackerman and other leaders in pouring scorn on it:

- Vanderbilt University law professor Suzanna Sherry maintained in the *New York Times* that "there is really very little way to reconcile this opinion other than that they wanted Bush to win."

- Harvard University law professor Randall Kennedy proclaimed in the *American Prospect* that *Bush v. Gore* was a "hypocritical mishmash of ideas," and that "the Court majority acted in bad faith and with partisan prejudice."

- University of Texas law professor Sanford Levinson asserted in the *Nation* that "*Bush v. Gore* is all too easily explainable as the decision by five conservative Republicans—at least two of whom are eager to retire and be replaced by Republicans nominated by a Republican president—to assure the triumph of a fellow Republican who might not become president if Florida were left to its own legal process."

- American University law professor Jamin Raskin opened an article in the *Washington Monthly* by describing the case as "quite demonstrably the worst Supreme Court decision in history," and proceeded to compare it unfavorably with the notorious *Dred Scott* decision.

- A total of 554 law professors from 120 American law schools placed a full-page ad in the *New York Times* on January 13, 2001, declaring that the justices had acted as "political proponents for candidate Bush, not as judges. . . . By taking power from the voters, the Supreme Court has tarnished its own legitimacy."

- Harvard University law professor Alan Dershowitz asserted in *Supreme Injustice: How the High Court Hijacked Election 2000* that "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."

The gravamen of the complaint was that the five conservatives on the Court—Chief Justice William Rehnquist, and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas—hypocritically threw overboard their long-held and repeatedly affirmed judicial philosophy of restraint, deference to the states, and a preference that the political process, rather than the courts, resolve disputes. In a breathtakingly important case, one in which that philosophy would have guided them to a correct result, they betrayed their principles. They energetically extended the equal protection clause of the 14th Amendment, they failed to defer to the Florida Supreme Court's interpretation of Florida law, and they aggressively intervened in the political process before it had a chance to play itself out. According to the Court's accusers, the majority's rank partisan passion was the only explanation for this egregious betrayal. And the damage, they contended, would be considerable: *Bush v. Gore* would undermine the legitimacy of the Bush presidency—and of the Court itself.

If these charges are true, then *Bush v. Gore* deserves the opprobrium that law professors have showered upon it. Yet the scholarly critics generally seemed to regard the truth of their assertions as too obvious to require sustained evidence or argument, if they considered evidence or argument necessary at all. In fact, the careful study they failed to carry out before announcing their verdict shows that not a single one of their charges is obviously true, and that all, quite possibly, are false.

We do not mean to pass judgment on the ultimate correctness of the Court's decision. The case, which is complicated and raises a variety of multilayered questions of fact and law and politics, will be debated for years to come. Indeed, our aim is to defend the case's difficulty against those scholars who, sadly, insist that there is virtually nothing to understand about *Bush v. Gore* that cannot be summed up with the term *partisanship*. The scholars' hasty accusations of gross politicking may apply with more obvious justice to the accusers themselves than to the Court majority whom they convict.

Recurring defects in the legal academy's initial reaction to *Bush v. Gore* can be seen in the public pronouncements of three of its most eminent constitutional theorists: Ackerman, Cass Sunstein, and Ronald Dworkin.

Even those scholars whose public utterances were relatively responsible could be found making flamboyant assertions supported only by their authority. In the *Chronicle of Higher Education* (Jan. 5, 2001), for example, University of Chicago law professor Sunstein declared that future historians would conclude that the Court had "discredited itself" with its "illegitimate, unprincipled, and undemocratic decision." We do not know what factors caused Sunstein to come to this harsh conclusion, because in his brief article he provided no arguments to support it. Nor did Sunstein mention that only three weeks earlier he had taken a much more measured view. On December 13, the day after the case was decided, Sunstein told ABC News reporter Jackie Judd that the opinion "was a stabilizing decision that restored order to a very chaotic situation." On the same day on National Public Radio, Sunstein observed: "The fact that five of them [the justices who signed the majority opinion] reached out for a new doctrine over four dissenting votes to stop counting—it's not partisan, but it's troublesome." While he did not "expect the Court to intervene so aggressively," Sunstein allowed on NPR that its decision may have provided "the simplest way for the constitutional system to get out of this. And it's possible it's the least bad way. The other ways maybe were more legitimate legally but maybe worse in terms of more chaotic." Many months later, in the *University of Chicago Law Review*, Sunstein attempted to synthesize these two seemingly irreconcilable views. His more detailed analysis of the case, however, falls far short of supporting the inflammatory language he used while the controversy was still hot.

A more troubling characteristic of the assaults on the Court was the tendency to misstate matters of fact and law. In the *New York Review of Books* (Jan. 11, 2001), New York University law professor Dworkin offered a high-minded warning against "reckless accusations" of partisanship: "It is, after all, inherently implausible that any—let alone all—of them [the five- member majority] would stain the Court's reputation for such a sordid reason, and respect for the Court requires that we search for a different and more creditable explanation of their action." In "sorrow," however, Dworkin concluded that the "implausible" charge was correct—because "the legal case they offered for crucial aspects of their decisions was exceptionally weak." Yet in his essay, Dworkin failed even to restate accurately the legal case the majority offered, and without meeting that minimal requirement he never fairly engaged the majority's reasoning.

The defects in Dworkin's approach begin with a tendentious characterization of events:

> The conservatives stopped the democratic process in its tracks, with thousands of votes yet uncounted, first by ordering an unjustified stay of the statewide recount of the Florida vote that was already in progress, and then declaring, in one of the least persuasive Supreme Court opinions that I have ever read, that there was not time left for the recount to continue.

Whether the U.S. Supreme Court "stopped the democratic process in its tracks" depends in part on whether the two Florida Supreme Court rulings—of November 21 and December 8—that were guiding the process in Florida were lawful and democratic. A scholar might responsibly criticize the Court by showing that the two rulings were indeed lawful and democratic. But Dworkin examined neither of them.

If you believe—as three dissenting members of the Florida Supreme Court argued in that body's 4–3 decision on December 8—that the majority's ruling departed substantially from the legislative scheme in place on November 7 for resolving election disputes, created serious equal protection problems, and provided a remedy that was inherently unworkable and hence unlawful, the U.S. Supreme Court's action begins to look very different. One might reasonably conclude that, far from having "stopped the democratic process in its tracks," the Court rescued it.

Dworkin's contention that the recount was stopped with "thousands of votes still uncounted" obscures the fact that Florida's ballots were actually counted twice, by machines, as required by Florida law in close elections (where the margin of victory is 0.5 percent or less). At the same time, his anodyne reference to "the statewide recount of the Florida vote" glosses over the dubious parameters of the manual recount actually ordered by the Florida Supreme Court. It was not a *full* manual recount of the presidential vote. Nor was it a full manual recount of undamaged ballots that failed to yield a valid, machine-readable vote for president, as would appear to have been required by the Florida Supreme Court's own principle that *all* votes should be counted in pursuit of a "clear indication of the intent of the voter."

Rather, the Florida court ordered a manual recount of a subset of the so-called nonvotes, the *undervotes*, which are ballots (estimated to number about 60,000) with no machine-readable vote for president. Despite the objections raised by Florida chief justice Charles T. Wells in his dissent, indeed without explanation, the majority excluded from the recount *overvotes*, an entire class of undamaged ballots (estimated to number about 110,000) that were invalidated because machines detected multiple votes for president. And yet, like the undervotes, they too may have contained (and we now know did contain) discernible choices.

Dworkin also misstates the majority's holding, though he claims it was "quite simple." The U.S. Supreme Court, Dworkin incorrectly argues, held that the Florida recount violated equal protection only because it failed to establish a uniform and specific standard for determining in the recount whether a ballot revealed a voter's clear intention. In fact, the Court identified *four* discrete features of the manual recount ordered by the Florida Supreme Court that raised equal protection problems. In addition to the one Dworkin mentions, the Court singled out problems with the arbitrary exclusion of overvotes, the inclusion in the results of an uncompleted recount in Miami-Dade County, and the use of untrained and unsupervised personnel to conduct the statewide recount.

Having failed to mention three of the four problems that *taken together*, the Supreme Court held, violated the fundamental right to vote protected by the equal protection clause of the 14th Amendment, Dworkin never reached the central question: whether, as the majority concluded, the Florida recount in its various features violated the principle articulated in *Reynolds v. Sims* (1964) that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Though in the end, and for reasons that are not altogether clear, Dworkin allows that the Court's equal protection holding was "defensible," he insists that the controversial remedy, which he also misstates, was not. In Dworkin's understanding, the U.S. Supreme Court halted the Florida recount by adopting a "bizarre interpretation" of the intention of the Florida legislature expressed in the state's election law. The question concerned the state's approach to the December 12 federal "safe-harbor" deadline (Title III, section 5, of the U.S. Code), which provides that in counting electoral votes, Congress will not challenge presidential electors if states appoint them by the safe-harbor date and on the basis of laws in place before the election. As Dworkin correctly notes, adherence to the federal safe-harbor law is not mandatory—if Florida wished to put its electoral votes at risk by failing to meet the December 12 deadline, it was free under federal law to do so. But, according to Dworkin, the Court read into the Florida statutory scheme a legal obligation to meet the "safe-harbor" deadline and then, "in violation of the most basic principles of constitutional law," imposed that interpretation of Florida law on the Florida Supreme Court.

But the majority argued that in addressing the question of remedy it was giving effect to the Florida Supreme Court's interpretation of Florida law:

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

In other words, the majority claimed that the Florida Supreme Court *itself* had interpreted Florida law as imposing the December 12 deadline. Indeed, the Florida Supreme Court appears to affirm that deadline as many four times in its December 11 opinion (which it issued in direct response to the U.S. Supreme Court's request on December 4 for clarification of the grounds for the Florida Court's November 21 decision). But Dworkin never examines the December 11 opinion.

In fashioning its remedy, the majority plausibly claimed to rely upon and defer to the Florida Supreme Court's interpretation of Florida law. In fact, it was the remedy contemplated by the dissents of Justices Stephen Breyer and David Souter, and endorsed by Dworkin himself, that very likely would have involved the Court in repudiating the Florida Supreme Court's reading of Florida law. To be sure, even notable defenders of the U.S. Supreme Court's opinion regard the remedy as its weakest link, but to be fairly criticized it must first be correctly understood.

Perhaps the most serious infirmity in the law professors' response to *Bush v. Gore* was the tendency, under the guise of legal analysis, to abandon legal analysis. In contrast to Sunstein and Dworkin, Ackerman did not so much as pause in his attack to caution against premature accusations of partisanship. His verdict in the *American Prospect* (Feb. 12, 2001) was uncompromising: "Succumbing to the crudest partisan temptations, the Republicans managed to get their man into the White House, but at grave cost to the nation's ideals and institutions. It will take a decade or more to measure the long-term damage of this electoral crisis to the Presidency and the Supreme Court—but especially in the case of the Court, *Bush v. Gore* will cast a very long shadow."

As Ackerman explained in an article that appeared almost simultaneously in the *London Review of Books* (Feb. 8, 2001), the trouble with the 2000 election began with "the gap between the living and written Constitutions." Under what Ackerman derisively calls "the written Constitution," the president is selected by the Electoral College, which gives smaller states disproportionate representation. But "the living Constitution"—which is nowhere written down or codified—rejects that unjust formula, having "created a system in which Americans think and act as if they choose their President directly." Because Gore won the popular vote, "George W. Bush's victory is entirely a product of the federalist bias inherited from 1787." For Ackerman, *Bush v. Gore* was part of the vast right-wing conspiracy, and, he declared in the *American Prospect*, it called for drastic countermeasures:

"When sitting [Supreme Court] justices retire or die, the Senate should refuse to confirm any nominations offered up by President Bush."

Ackerman is far clearer regarding what should be done about the Court's perfidy than he is about what exactly was wrong with the justices' work. Whereas in the *American Prospect* he accuses the Court of acting lawlessly, in the *London Review of Books* he accuses it of foolishly applying the wrong law—the law that actually exists (the written Constitution), rather than the one he believes time has made more relevant (the living Constitution). At other times in the same article, Ackerman argues only halfheartedly that the Court incorrectly applied the "written Constitution." He concedes in the *London Review of Books* that there were strong pragmatic reasons for the Court to get involved: "If one is haunted by the specter of acute crisis, one can view the justices' intervention more charitably. However much the Court may have hurt itself, did it not save the larger Constitutional structure from greater damage? Perhaps." He even goes so far as to acknowledge, without actually engaging the legal arguments of the majority or of the dissenters, that the Court's central holding, which he misstates much as does Dworkin, was correct: He says that he does "not challenge [the Court's] doctrinal conclusion."

In the end, Ackerman's problem is not that the Court intervened, but that it did so on Bush's behalf rather than Gore's: "The more democratic solution would have been . . . to stop the Bush brothers from creating Constitutional chaos by submitting a second slate of legislatively selected electors. The court could have taken care of all the serious difficulties by enjoining [Florida governor] Jeb Bush not to send this slate to Congress."

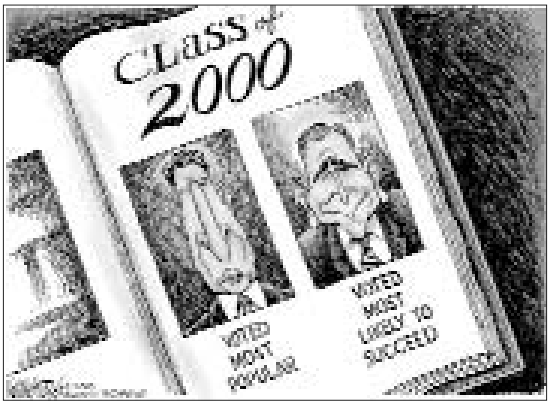
Leave aside the considerable legal difficulties in Ackerman's call for the Court to issue an injunction that was not requested by any party to the litigation against other persons and entities that were also not parties to the litigation. The larger problem is that he would have had the Court issue orders to elected state officials based on a nonexistent document (the living Constitution), to whose authority neither Bush nor Gore ever appealed, to protect a recount that he admits violated the law the justices were sworn to uphold. What, one wonders, is democratic or lawful about that?

Of course, it is possible that while the critics failed to state accurately the arguments in *Bush v. Gore*, their basic charge—that the Supreme Court undermined its legitimacy by riding roughshod over its own principles to reach a purely partisan conclusion—is still correct. Yet even a brief examination of those principles—an examination that none of the major critics offered the public in conjunction with their harsh condemnations—and reflection on the critics' premises and predictions reveal that the law professors' prima facie case against the decision is at best a caricature.

Consider first the gross oversimplification in the charge that *Bush v. Gore* violated the majority's core jurisprudential commitments. The Supreme Court's conservatives have indeed shown a commitment to ruling generally on the basis of

explicit textual statements and well-settled precedents rather than abstract values thought to be implicit in the constitutional text and previous opinions. These conservatives have also displayed an instinct to avoid unnecessarily interfering in state court matters, and a readiness to recognize zones of state authority in which Congress is forbidden to tread. The solicitude for state power is particularly visible in habeas corpus litigation, where the Court has been increasingly reluctant to allow federal courts to second-guess state convictions. It can also be seen in the Court's insistence that Congress's power to regulate interstate commerce has limits, and in its expansive interpretation of state immunity against suits conferred upon state governments by the 11th Amendment. However, the majority's federalism is scarcely recognizable in the crude version of it that law professors constantly invoke against *Bush v. Gore*.

In no sense does the modern conservative vision of federalism contend that state action—including state court action—is not subject to federal court review for compliance with the federal Constitution. In fact, the conservative justices often vote to reverse state supreme court holdings on grounds that they offend federal constitutional imperatives. Only six months before *Bush v. Gore*, the same U.S. Supreme Court majority reversed the New Jersey Supreme Court's decision that the Boy Scouts could not discriminate on the basis of sexual orientation. The state court had held that the Boy Scouts were a public accommodation within the meaning of a state anti-discrimination law; the Supreme Court said that the law, so interpreted, violated the Boy Scouts' First Amendment right of expressive association. The parallel with *Bush v. Gore* is exact: The Supreme Court invalidated a state court interpretation of state law on the ground that what state law required offended the federal Constitution.

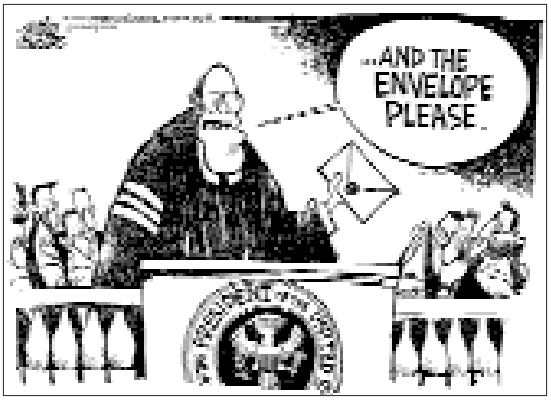


Nor is it true that the Court's conservatives were uniformly hostile to applying the equal protection clause to strike down state actions before *Bush v. Gore*. In a series of voting rights cases beginning with the 1993 decision in *Shaw v. Reno*, the same five justices relied on the equal protection clause to strike down legislative districting schemes motivated primarily by racial considerations. The conservative justices have also used the equal protection clause to rein in affirmative action programs. To be sure, the conservative interpretation of this clause is different from the liberal one, and in critical respects it is less expansive. It still serves, however, for the conservatives as a constraint on state action, and it is by no means obviously inconsistent with the holding the Court majority issued in *Bush v. Gore*.

In addition, Chief Justice Rehnquist's concurring opinion, which argued that the Florida court changed the state's election laws in violation of Article

II, section 1 of the Constitution, has been criticized as hypocritical. Conservatives, the criticism goes, profess to respect state court holdings on state law, yet in this instance the chief justice—and Justices Scalia and Thomas, who joined him—dissected the Florida court's interpretation of Florida's election statutes. Again, however, conservatives, and certainly the Court's three most conservative justices, do not argue that the deference owed to state courts on matters of state law entitles states to violate the federal Constitution. From the conservatives' point of view, Article II, section 1 of the Constitution, which declares that a state shall appoint presidential electors "in such manner as the legislature thereof may direct," provides an explicit textual obligation on the part of the state courts to interpret—rather than rewrite or disregard—state law concerning presidential elections.

The willingness of the conservatives to review state supreme court interpretations of state law is particularly evident in cases involving the takings clause of the Fifth Amendment, which forbids government seizures of private property without just compensation. In 1998, for example, the Court ruled that interest on clients' money held by their lawyers constituted "private property" for purposes of the takings clause. This contradicted the view of Texas property law taken by the Texas Supreme Court, which had promulgated a rule under which interest from trust accounts was used to pay for counsel for indigents. In another case, the Court said it reserved the right to examine the "background principles of nuisance and property law" under which a state supreme court determined that the state can restrain uses of private property without compensating property owners. In one case, Justices Scalia and O'Connor even dissented from a denial of certiorari on grounds that the Court should not be too deferential to state court interpretations of state law in takings matters. "As a general matter," Justice Scalia wrote, "the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings . . . neither may it do so by invoking nonexistent rules of state substantive law." The opinion in *Bush v. Gore* is based on the same principle: While the Court owes great deference to the Florida Supreme Court's view of Florida law, that deference ends where federal law requires the Court to ensure that state supreme courts have reasonably interpreted state law.



The larger point is not that the majority opinion and concurrence in *Bush v. Gore* were perfectly consistent with the conservatives' judicial philosophy. Whether they were is debatable. As we have noted, there is certainly some-

thing unexpected in the majority's willingness to expand equal protection doctrine and in the concurring justices' novel Article II argument. But noting those oddities, and appreciating the novel circumstances in which they arose, should be the start of the discussion, not the end of it.

Consider next the accusation that in *Bush v. Gore* the conservative majority was driven by a self-interested political motive: A conservative president would appoint like-minded jurists to the Supreme Court. The critics' failure to properly engage the Court's reasoning suggests that partisan corruption on the justices' part was not the scholars' sad conclusion, as they claim, but rather their operative premise from the beginning. But it is a dogmatic and dangerous premise, especially for intellectuals engaged in shaping public opinion. For one thing, it obviates the need for careful evaluation of legal arguments, converting them, before examination, from reasons to be weighed and considered into rationalizations to be deflected and discarded. And the premise is easily turned against its user. It is not difficult to identify potent partisan interests driving the scholarly critics of *Bush v. Gore*. Many were stalwart supporters of the Clinton administration, and many keenly favored Gore for president. Were Gore appointing federal judges, many would have significantly improved their chances of placing their students in prestigious judicial clerkships, as well as of disseminating their constitutional theories throughout the judiciary.

Consider finally the prediction that *Bush v. Gore* would gravely damage President Bush's and the Court's own legitimacy. That claim is subject to empirical testing. And the tests prove it false—that is, if legitimacy is regarded as a function of public opinion. By April 2001, after his first 100 days in office, President Bush enjoyed a 63 percent overall approval rating in a *Washington Post*-ABC News poll. In response to the question "Do you consider Bush to have been legitimately elected as president, or not?" fully 62 percent answered affirmatively. That was actually a small increase over the 55 percent who regarded Bush's election as legitimate in the immediate aftermath of the Court's decision. Bush's popularity will wax and wane like any other president's, but he does not seem to have legitimacy problems.

Nor has the Court itself fared badly in the public's eye. The Pew Center for the People and the Press has been measuring the Court's approval rating since 1987. In that time, the rating has fluctuated from a low of 65 percent in 1990 to a high of 80 percent in 1994. In January 2001, the Court's favorability rating stood at 68 percent. Three months later, it stood at 72 percent. More interestingly, the Court was viewed favorably by 67 percent of Democrats.

The continued high opinion of the Supreme Court is consistent with other surveys that straddle the date of the Court's action. The Gallup Organization, for example, asked people immediately after the decision how much confidence they had in the Court. Forty-nine percent of Americans had either "a great deal" or "quite a lot" of confidence, up slightly from the 47 percent who expressed such confidence the previous June. Both the Pew and Gallup polls suggest that the partisan composition of the support changed somewhat following the Court's action, with Democratic confidence declining and Republican increasing. That shift, however, does not constitute a national legitimacy crisis,

any more than conservative disaffection with the Warren Court did during the 1960s. The Court has enjoyed a remarkably stable level of public confidence and trust over a long period of time.

The academics worrying themselves about the crisis of the Court's legitimacy present as a sociological claim what is really normative criticism: The Court deserves to lose the public's confidence, or, put differently, as a result of *Bush v. Gore* the Court has lost legitimacy in the eyes of the majority of academic pundits (namely, themselves) whom the public ought to follow. The Rehnquist Court's "loss" of legitimacy among leading constitutional theorists might be more troubling if it had ever enjoyed such legitimacy. But despite all the expressions of concern for the Rehnquist Court's standing following its December fall from grace, it is hard to find any evidence that the Court's more prominent scholarly critics ever held it in much esteem. Sunstein, whose writings on the Court reflect a complicated relationship, is an exception. But Ackerman and Dworkin certainly are not. Even before *Bush v. Gore*, their work dripped with disdain for the conservative majority, whose legitimacy they discovered only when they felt at liberty to say that it had been lost for good.

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Bush v. Gore was a hard case. The Court confronted novel and difficult legal questions, both parties made plausible arguments, the political stakes loomed large, partisan passions ran excruciatingly high, and the controversy deeply implicated fundamental concerns about justice and democratic self-government. Reasonable people may differ over whether *Bush v. Gore* was correctly decided. But the charge that the decision is indefensible is itself indefensible. That this untenable charge has been made by legal scholars repeatedly and emphatically, and with dubious support in fact and law, is an abuse of authority and a betrayal of trust. If scholars do not maintain a reputation for fairness and disinterestedness, their own legitimacy may well suffer grievously in the eyes of the public, and so could American democracy.

When scholars address the public on matters about which they are expert, the public has a right to expect that the scholars' reason, not their passion, is speaking. Because liberal democracy is grounded in the rule of law, and because law is a technical discipline—the resolution of whose cases and controversies often involves the interpretation of arcane statutes, the mastery of voluminous case law, the understanding of layers of history, and the knowledge of complicated circumstances—the public is particularly dependent on scholars for accurate and dispassionate analysis of legal matters. Those scholars who assume the office of public intellectual must exercise a heightened degree of care and restraint in their public pronouncements.

Scholarly restraint—so lacking in the aftermath of *Bush v. Gore*—is indeed compatible with lively participation by scholars in democratic debate. By putting truth before politics, out in public as well as inside the ivory tower, scholars make their distinctive contribution to that precious public good, reasoned and responsible judgment. ❑