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Section 3: Legacy of Bush v. Gore

Institute of Bill of Rights Law, William & Mary Law School

LEGACY OF BUSH V. GORE

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COURT ESCAPES BY DUBIOUS MEANS

Legal Times

December 11, 2000

Stephen J. Wermiel

This article was written after the U.S. Supreme Court's initial decision, Bush v Palm Beach County Canvassing Board vacating the election ruling of the Florida Supreme Court and remanding the case back to Florida. The article analyzes only this first action by the high court on December 4, 2000, not the second, lengthy decision issued on December 12, 2000, Bush v. Gore.

Seeking a way out of the Bush-Gore presidential dispute, the U.S. Supreme Court last week reached deep into its bag of procedural tricks and came up with an obscure device that provided more of a political than a legal escape.

Pundits rushed to put the best face on the Court's action. "A triumph for good sense and even for the rule of law," declared University of Chicago law professor Cass Sunstein in The New York Times. The justices "put Florida's Supreme Court on notice: There is adult supervision," proclaimed columnist George Will in The Washington Post.

But when held up to the light, the Court's decision is exposed for what it truly is: a barely legitimate way to appear to do nothing and yet still discard the Florida Supreme Court's Nov. 21 decision.

At first glance, it's hard to find fault with the U.S. Supreme Court's seven-page opinion. The justices made it seem quite logical, even routine and mundane, that they would vacate the decision of the state supreme court and send the case back to clarify what role, if any, the Florida Constitution played in that ruling. The unsigned action by the justices cites their 1940 decision in Minnesota v. National Tea Co. as support for vacating and remanding, as if this precedent is one that lawyers with any exposure to the Supreme Court have at their fingertips.

A brief look at reported decisions of the U.S. Supreme Court paints a very different picture. The vacate-and-remand procedure in Minnesota v. National Tea (a dispute over taxes on chain stores) is a rarely used, highly controversial device. There are very few occasions when the Court has disposed of a case by relying on this precedent. In nearly every previous instance, the justices were deeply divided over the propriety of the procedure. Consider a few curious details:

Although opinions by Chief Justice William Rehnquist and Justice Antonin Scalia have discussed Minnesota v. National Tea on two occasions in recent years, the last time the Court actually dispatched a fully briefed and argued case under this precedent was 1965 (Department of Mental Hygiene of California v. Kirchner).

In the 60 years since it was issued, Minnesota v. National Tea has been used to dispose of only seven argued cases and four cases before they were argued_ until last week. Of those 11 cases, there was at

least one dissenting vote in all but one 1951 case.

In the 1983 case of Michigan v. Long, Justice John Paul Stevens suggested in his dissenting opinion that Minnesota v. National Tea had been overruled.

Even the author of Michigan v. Long, Justice Sandra Day O'Connor, criticized the vacate-and-remand device as "unsatisfactory both because of the delay and decrease in efficiency of judicial administration . . . and, more important, because these methods of disposition place significant burdens on state courts to demonstrate the presence or absence of our jurisdiction."

The closest analogous procedure arises in criminal cases. In California v. Krivda (1972), which was not cited last Monday, the justices vacated and remanded a criminal case so that a lower court could clarify whether it had relied on defendants' rights in the U.S. Constitution or on similar provisions in a state constitution. This maneuver was repeated often between 1972 and 1983, but has been dormant for the last 15 years. Indeed, Justice Rehnquist, before he became chief justice, criticized Krivda in a 1978 dissent, noting, "By vacating the judgment below, this Court is taking from appellants the normal burden of demonstrating that we have jurisdiction and placing it" on the state court (Philadelphia Newspapers Inc. v. Jerome).

If these points are not enough to make you wonder about the Supreme Court's unusual action in the election case, consider the strongest criticism of the vacate-and-remand procedure. In December 1952, with a young Rehnquist serving as one of his law clerks, Justice Robert Jackson wrote a dissent in Dixon v. Duffy:

Both the wisdom and the legality of this policy toward the highest court of a state appear dubious to me. What we are doing, in essence, is to vacate a state court judgment, not because it is found to be inconsistent with federal law, but because the state court has not told us, with an acceptable degree of formality, what reasons led to rendering it. . . . Doubt of our jurisdiction is no reason for exercising it; quite the contrary is the rule.

The Minnesota v. National Tea decision did little to reassure him, Justice Jackson wrote, because it included "no examination of the Court's power to vacate."

Apparently the only real attempt to examine that power was by Justice Scalia in Stutson v. United States (1996). In a dissent, he referred to the Court's "limited power to vacate without first finding error below." He explained that the vacate-and-remand procedure "originates in the special needs of federalism" to avoid "the risk of improperly reversing a judgment based on state law." But even Scalia said that this policy has been "largely supplanted."

So how could the Court rely on this obscure, perhaps overruled precedent that was neither cited nor argued by any lawyer in the case? The absence of a sound legal explanation leads to the conclusion that it was a political escape.

The Court had other options. After hearing argument, the justices could have dismissed the case as "improvidently granted" because it was not clear if there was a federal issue to decide. But that would have left the Florida Supreme Court decision in place--a solution clearly untenable to some of the justices.

The Court could also have kept the case and certified a question to the Florida Supreme Court. Once that court answered the question, the U.S. Supreme Court would have ruled or dismissed the petition. But this approach would not have given the justices a way out, either for those who didn't want to hear the case in the first place or for those who became convinced during briefing and argument that they could not resolve the dispute.

While the Court may have taken the case with the goal of providing "adult supervision," by turning to Minnesota v. National Tea the justices appear to have been playing games with the law.

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Disgrace

The New Republic

December 25, 2000

Jeffrey Rosen

On Monday, when the Supreme Court heard arguments in Bush v. Gore, there was a sense in the courtroom that far more than the election was at stake. I ran into two of the most astute and fair-minded writers about the Court, who have spent years defending the institution against cynics who insist the justices are motivated by partisanship rather than reason. Both were visibly shaken by the Court's emergency stay of the manual recount in Florida; they felt naive and betrayed by what appeared to be a naked act of political will. Surely, we agreed, the five conservatives would step back from the abyss.

They didn't. Instead, they played us all for dupes once more. And, by not even bothering to cloak their willfulness in legal arguments intelligible to people of good faith who do not share their views, these four vain men and one vain woman have not only cast a cloud over the presidency of George W. Bush. They have, far more importantly, made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor.

This faith in law as something more than politics has had powerful opponents throughout the twentieth century. For everyone from legal realists and critical race theorists to contemporary pragmatists, it has long been fashionable to insist that the reasons judges give are mere fig leaves for their ideological commitments. Nevertheless, since its founding, The New Republic has resisted this cynical claim. From Learned Hand and Felix Frankfurter to Alexander Bickel, the editors of this magazine have insisted that, precisely because legal arguments are so malleable, judges must exercise radical self-restraint. They should refuse to second-guess the decisions of political actors, except in cases where constitutional arguments for judicial intervention are so powerful that people of different political persuasions can readily accept them. This magazine has long argued that the legitimacy of the judiciary is imperiled whenever judges plunge recklessly into the political thicket. And this has led editors of different political persuasions to oppose the judicial invalidation of laws we disagreed with as well as those we supported--from Progressive-era labor laws to the New Deal administrative state to laws restricting abortion and permitting affirmative action. In all these cases, we argued that judges should stay their hand. Our views about judicial abstinence have been those of Oliver Wendell Holmes: "If my fellow citizens want to go to hell, I will help them," he said. "It's my job." But in Bush v. Gore, as in Dred Scott and Roe v. Wade, the justices perceived their job differently. They foolishly tried to save the country from what they perceived to be a

crisis of legitimacy. And they sent themselves to hell in the process.

The unsigned per curiam opinion in Bush v. Gore is a shabby piece of work. Although the justices who handed the election to Bush--O'Connor and Kennedy-- were afraid to sign their names, the opinion unmasks them more nakedly than any TV camera ever could. To understand the weakness of the conservatives' constitutional argument, you need only restate it: Its various strands collapse on themselves. And, because their argument is tailor-made for this occasion, the conservatives can point to no cases that directly support it. As Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer wrote in their joint dissent, this "can only lend credence to the most cynical appraisal of the work of judges throughout the land."

What, precisely, is the conservatives' theory? "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another," they declare. The citation is Harper v. Virginia Board of Elections, the case that invalidated the poll tax in 1966 on the grounds that it invidiously discriminated against the poor. But there is no claim here that Florida's recount law, shared by 32 other states, discriminates against the poor. Indeed, Florida argued that its scheme is necessary to avoid discrimination against the poor, because a uniform system of recounting that treated the punch-card ballots used in poor neighborhoods the same as the optically scanned ballots used in rich ones would systematically undercount the votes of poorer voters. By preventing states from correcting the counting errors that result from different voting technologies, the conservatives have precipitated a violation of equal treatment far larger than the one they claim to avoid.

"The fact finder confronts a thing, not a person," write the conservatives in a clumsy and perverse inversion of the famous line from Reynolds v. Sims, the great malapportionment case, which noted that "legislators represent people, not trees." But things do not have constitutional rights; people have constitutional rights. It is absurd to claim that the "right" of each ballot to be examined in precisely the same manner as every other ballot defeats the right of each individual to have his or her vote counted as accurately as possible. Were this theory taken seriously, many elections over the past 200 years would have violated the equal protection clause, because they were conducted using hand counts with different standards. The effect of the majority's whimsical theory is to fan the suspicion, which now looks like a probability, that the loser of both the popular vote and the electoral vote has just become president of the United States. At least the ballots can sleep peacefully.

The conservatives can rustle up only two cases that purportedly support their theory that Florida's recount scheme gave "arbitrary and disparate treatment to voters in its different counties." (Both were written in the 1960s by liberal activist Justice William Douglas, which must have given the conservatives a private chuckle.) The first case, Gray v. Sanders, held that Georgia's county-based scheme of assigning votes in the Democratic U.S. senatorial primary discriminated against voters in urban counties, whose votes were worth less than those in rural counties. The same logic, applied to this case, would hold that the Florida legislature could not adopt a county-based scheme for assigning votes in presidential

elections. But this conclusion is completely inconsistent with the conservatives' earlier argument, the one that emboldened them to stop the manual recount in the first place: that Article 2 of the Constitution allows the Florida legislature to structure its presidential electing system however it chooses. The second case, Moore v. Ogilvie, held that applying "a rigid, arbitrary formula to sparsely settled counties and populous counties alike ... discriminate d against the residents of the populous counties of the State in favor of rural sections." That case, in other words, does not support the conservatives' claim that ballots in rural and urban counties must be counted and recounted in precisely the same manner. It suggests the opposite.

The reason the conservatives can find not a single precedent to support their equal protection theory is because the theory is made up for this case only. But the damage is not so easily limited. The Supreme Court has called into question not only the manual-recount procedure adopted by the legislature of Florida but our entire decentralized system of voting--in which different counties use different technologies to count different ballots designed differently and cast at different hours of the day. In addition to throwing the presidential election and destroying the legitimacy of the Supreme Court, Bush v. Gore will spawn an explosion of federal lawsuits after every close election, lawsuits arguing that different counties used different ballot designs and voting systems and counted the ballots in different ways.

In this way, Bush v. Gore is a ludicrous expansion of cases like Shaw v. Reno, in which the same five-member conservative majority, led by the addled and uncertain Sandra Day O'Connor, held that federal courts must second-guess each legislative exercise in state and federal redistricting to decide whether or not race was the "predominant purpose" in drawing district lines. The idea that this usurpation of our democratic electoral system by the federal judiciary has been precipitated by a group of conservatives who once posed as advocates of judicial restraint and champions of state legislatures can only be met with what the legal scholar Charles Black called the sovereign prerogative of philosophers: laughter.

But the majority asks us not to worry about the implications of its new constitutional violation. "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities," the justices write. It certainly does. But a mobilized nation is now far less likely to tug its collective forelock and wait for the preening O'Connor and Kennedy to sort out the confusion on our behalf. We've had quite enough of judicial saviors.

In a poignant attempt to split the difference between the two camps, Justices Breyer and David Souter tried to prevent the Court from destroying itself. They agreed that applying different counting standards to identical ballots in the same county might violate the equal protection clause, and they proposed sending the ballots back to Florida and letting its courts apply a uniform counting standard. But their attempt at statesmanship was crudely rejected by O'Connor and Kennedy, which left Breyer and Souter with their hands extended, played for dupes like everyone else who naively believed the conservatives were operating in good faith. "Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. Sec. 5," O'Connor and Kennedy wrote in the tortuous punch line of their opinion,

"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." With this feint at deference to the state court at precisely the moment there was nothing left to defer to, the jig was up. O'Connor and Kennedy had converted the Florida court's passing reference to the federal law telling Congress which electoral slate to count in the event that a controversy was resolved before December 12 into a barrier, now mysteriously embedded in state law, that prevented the Florida Supreme Court from completing manual recounts after December 12. And for the Court to announce this rule at ten o'clock at night on December 12, after having stopped the count two precious days earlier, only added to the gallows humor.

It will be impossible to look at O'Connor, Kennedy, Scalia, Rehnquist, and Thomas in the same light again, much as it was impossible to look at President Clinton in the same light after seeing him exposed in the Starr Report. But this time the self-exposure is also a little bracing. Conservatives have lectured us for more than 30 years about the activism of the Warren and Burger Courts. Those tinny and hypocritical lectures are now, thankfully, over. By its action on December 12, the Supreme Court has changed the terms of constitutional discourse for years to come. Just as Roe v. Wade galvanized conservatives a generation ago to rise up against judicial activism, so Bush v. Gore will now galvanize liberals and moderates for the next generation. But, unlike the conservative opponents of Roe, liberals must not descend to the partisanship of the current justices; they must transcend it. The appropriate response to Bush v. Gore is not to appoint lawless liberal judges who will use the courts as recklessly as the conservatives did to impose their sectarian preferences on an unwilling nation. The appropriate response, instead, is to appoint genuinely restrained judges, in the model of Ginsburg and Breyer, who will use their power cautiously, if at all, and will dismantle the federal judiciary's imperious usurpation of American democracy. Those of us who have consistently, if perhaps naively, opposed liberal and conservative judicial activism throughout the years can now point to Roe and Bush as two sides of the same coin. (How fitting that Bush is now a dubious president and a dubious precedent.)

In his dissent in Casey v. Planned Parenthood, the abortion case that reaffirmed Roe in 1992, Scalia recalled the portrait of Chief Justice Taney that hangs in the Harvard Law School library. Taney had led a bitterly divided Supreme Court to strike down the Missouri Compromise; but, instead of saving the nation from its partisan divisions, his reckless intervention precipitated the Civil War:

There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the luster of his great Chief Justiceship came to be eclipsed by Dred Scott cannot help believing that he had that case--its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation--burning on his mind. I expect that two years earlier he, too, had thought himself "calling the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." It is no more realistic for us in this litigation, than it was for him in that, to think that

an issue of the sort they both involved ... can be "speedily and finally settled" by the Supreme Court.... Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

Who would have dreamed that in describing Taney's portrait Scalia imagined his own?

BUSH v. GORE: A Special Report; Election Case a Test amd Trauma for Justices

The New York Times

Tuesday, February 20, 2001

Linda Greenhouse

The last time the justices of the Supreme Court appeared together in public was at the inauguration of President George W. Bush, their presence on the platform providing the starkest reminder possible of the court's extraordinary role in deciding the outcome of the 2000 election.

In recess since that wintry afternoon, the court as an institution has been all but invisible. But the justices themselves have been busy. Across the court's ideological spectrum, in ways both subtle and direct, they have been reaching out to reassure the public -- and perhaps each other -- that all is well at the court despite the bitter words spoken and deep divisions revealed by the 5-to-4 vote in Bush v. Gore.

From Justice Stephen G. Breyer's remark to a law school audience in Lawrence, Kan., that the explanation for the decision "isn't ideology and it isn't politics" to Justice Antonin Scalia's comment to law students in San Diego that "if you can't disagree without hating each other, you better find another profession other than the law," the justices are behaving almost like survivors of a natural disaster who need to talk about what happened in order to regain their footing and move on.

Justice Ruth Bader Ginsburg, speaking at the University of Melbourne Law School in Australia, in no way receded from her view that the decision was seriously misguided. But both for her foreign audience and for the domestic one to which the court's press office distributed her text, she offered a measured and nuanced account of the context in which the election controversy reached the court and of the belief among respected opinion leaders that a national crisis required the court's intervention.

As the justices have made their rounds of law school forums and civic events, their eagerness to discuss the court's current mood has not, unsurprisingly, been matched by a willingness to reveal the internal deliberations over the 20-day period in which the court received, accepted and decided the Bush legal team's two appeals from consecutive rulings of the Florida Supreme Court.

The justices regard the deliberations of "the conference" -- the nine meeting alone behind closed doors -- as close to sacrosanct. They met privately, without even their law clerks present, three times on the election cases, and details of those conversations remain private.

Consequently, any effort to construct a narrative of those 20 days encounters substantial gaps and intriguing unanswered questions.

Nonetheless, it has been possible through reporting at the court and a close

rereading of the court's opinions during the period to gain fresh insight into some central moments in the all-consuming event. It was a drama that from the beginning generated more internal conflict than was generally known and that ended with the exhausted justices working into the night, drawing their window blinds against the penetrating glare of the television satellite trucks that ringed the court as the country waited to learn whether the 2000 presidential election was finally over.

In their public remarks, justices from across the divide of the decision have sent a twofold message: first, that the court was engaged in an appropriately judicial act rather than an illegitimately political one (significantly, this message was delivered by the Bush v. Gore dissenters); and second, that despite their sharp disagreement, the justices can still get along and their institutional bond remains strong. Indeed, not three weeks after the Dec. 12 decision, Justice Scalia and his wife, Maureen, joined Justice Ginsburg and her husband, Martin, for a New Year's Eve dinner, a tradition the two ideologically opposite justices have maintained for years.

The imperative of moving on to the next case is a powerful one at the court, and there is little doubt as the court reconvenes Tuesday that the justices' view is on the cases that lie ahead rather than on the trauma they are working to put behind them.

But 10 weeks after Bush v. Gore, the full extent of that trauma, both for the court and for the justices as individuals, is nonetheless coming into some focus.

Throughout the period, events moved so quickly that only in retrospect have some elements become clear; for example, that the opaque unanimous opinion by which the court decided the first appeal was intended as a considerably sharper warning to the Florida Supreme Court than its mild language and bland tone suggested.

And it is also obvious now that there was a general misreading of the justices' initial decision in the first appeal to discard the Bush legal team's equal-protection challenge to the Florida recount. That claim, based on the argument that a partial recount in only four counties violated the 14th Amendment by weighting some votes more than others, was then still pending in a companion case before a federal appeals court. The justices' decision to delete the equal-protection issue from the first Bush appeal reflected a conclusion that the question was not yet ripe for review rather than that it was uninteresting or irrelevant.

In fact, during the argument in the second case, two of the justices who eventually dissented, Justice Breyer and Justice David H. Souter, became close allies and tried to build a strategy for rescuing the recount based on the expressed equal-protection concerns of one justice, Anthony M. Kennedy. But Justice Kennedy instead became the co-author of the majority decision that rejected further counting.

Whether Justices Breyer and Souter ever had a realistic chance of turning the outcome around, and how close they might have come, remain unanswered questions. While the Gore lawyers had hoped to sway both Justice Kennedy and Justice Sandra Day O'Connor, two Stanford graduates who often find themselves allies on the more moderate end of the court's dominant conservative wing, it appears that Justice O'Connor did not waver in her position against recounts.

While it is already fading into a single seamless blur, the Supreme Court's involvement in the election proceeded in a series of discrete steps. There were two separate cases. The first, Bush v. Palm Beach County Canvassing Board, was an appeal from the Florida Supreme Court's decision to order a 12-day extension for certifying the results of recounts in four counties. It was argued on Dec. 1 and decided three days later with a unanimous decision that told the Florida court to do a better job of explaining its rationale for the extension.

The second case, Bush v. Gore, was an appeal from the Florida Supreme Court's decision ordering a statewide recount of the "undervotes," ballots that machines had read as indicating no presidential choice. Argued on Dec. 11, it was decided late the next night by a 5-to-4 decision declaring that the lack of uniform standards for counting the votes made the recount unconstitutional.

The majority said there was no time to send the case back for a better recount because it was already Dec. 12, the date set by federal election law by which electors had to be chosen if their right to cast their state's electoral votes was to be immune from challenge. With the dissenters arguing vainly that the only deadline that mattered was the Dec. 18 date for casting electoral votes, and with Vice President Al Gore trailing by a few hundred votes, the contest for Florida's decisive 25 electoral votes was over.

Based on the best available information, and in some instances on a new reading of the court's published opinions in light of that information, what follows is a chronological account of how the Supreme Court came to decide the presidential election.

Opening the Floodgate

When the court announced on the day after Thanksgiving that it would hear the first Bush appeal, surprising nearly all who had assumed the justices would do their best to stay away from a politically charged case that appeared completely grounded in state law, there was considerable speculation about what lay behind the decision. The announcement was unsigned and gave no indication of the vote. The votes of four justices are required to accept a case. There was no way to tell whether the court was divided on the wisdom of granting the case or whether perhaps the court as a whole, sensing that the problem in Florida might be spinning out of control, had concluded that it was prudent to intervene sooner rather than later.

It is now known that the court was sharply split. The move to hear the case, driven by the justices who eventually ruled in Mr. Bush's favor, foreshadowed and helped shape the later division on the court, a division that the intervening unanimous decision papered over even more thinly than it appeared to at the time.

While the Bush team did not bring the case to the court until Nov. 22, the justices were hardly oblivious to what was taking place in Florida. The state-court struggle over the partial recount and its timetable had already spilled over into federal court, where the Bush lawyers had raised objections based on the constitutional guarantees of equal protection and due process. That drew the justices' attention by positioning the dispute as one of constitutional dimension, and therefore potentially within the Supreme Court's jurisdiction, as opposed to a state-law question of the procedures for conducting a recount, an

issue that would remain the province of the Florida court system.

As the federal case moved quickly up the judicial ladder, one justice who watched with particular interest was Justice Kennedy. As circuit justice for the United States Court of Appeals for the 11th Circuit, he has administrative responsibility for emergency cases reaching the court from federal and state courts in Georgia, Alabama and Florida.

Named to the court by President Ronald Reagan in 1987 to fill a seat left open by the failure of Robert H. Bork's nomination, Justice Kennedy occupies a central and somewhat ambiguous position on the court. Despite Justice Kennedy's strong opposition to policies that take race into account in redistricting or public contracting, his votes to reaffirm the right to abortion and to strike down an anti-gay provision of the Colorado Constitution have nonetheless made him an object of suspicion among conservatives

In the court's previous term, Justice Kennedy had written the majority opinion in a Hawaii case that raised equal-protection concerns about a special-election system there. The equal-protection argument in the Bush team's federal case caught Justice Kennedy's attention.

As it happened, appeals in both the federal and state cases reached the court simultaneously on Thanksgiving eve. But the federal case was procedurally unattractive because the appeals court had not yet ruled. The Bush lawyers were asking the justices to skip over the appeals court and address the refusal of a federal district judge in Miami, Donald M. Middlebrooks, to stop the recount. Although the Supreme Court has the authority to intervene at this stage, it rarely does.

The state case, by contrast, was ripe for review. The Florida Supreme Court had issued a definitive ruling the day before to extend the certification deadline by 12 days so that the recounts sought by the Gore team in four counties could be completed. That unanimous decision by a state court the justices knew well for its liberal leanings struck some justices as a partisan effort to manipulate the rules in order to bring about a Gore victory.

The justices who became the dissenters in Bush v. Gore assumed the court would stay away from the Florida election. They were startled to learn from a memorandum that circulated shortly before the justices met on the day after Thanksgiving to discuss the appeals that the votes were there to take the state court case. The eventual dissenters' objections were unavailing, and the discussion turned to which issues the court was prepared to consider.

The appeal from the state court decision also included an equal-protection claim, although as something of an afterthought compared with the central role for equal protection in the federal case. The main questions in the appeal were, first, the meaning and enforceability of a federal law offering a state's electors a "safe harbor" from later challenge if they are chosen by procedures in effect before Election Day; and second, whether the state court's decision extending the vote-counting deadline had unconstitutionally supplanted the role of the Legislature.

Despite their interest in the equal-protection issue, the justices decided to excise it in order to allow the federal appeals court to consider it in the more fully developed context of the federal

case. The federal appeal, in turn, was denied "without prejudice," a signal that the disposition was essentially procedural and an invitation to the Bush lawyers to present the question again later.

In retrospect, it is tempting to conclude that the initial fateful decision to hear the first case made the eventual outcome all but inevitable, that a narrow majority had set the court on a path from which there was no other logical exit unless the Florida Supreme Court itself backed down. That view is held in some quarters at the court, but it is not the only view; like much about the election cases, even in the simplest narrative form, perspectives differ and considerable ambiguity remains.

A Winner With a Grievance

In any event, even as the court braced itself for the Dec. 1 argument in the first case, the picture on the ground in Florida was changing rapidly. The extended recount period ended on Nov. 26 with Mr. Bush still ahead. The Florida secretary of state, Katherine Harris, declared him the winner, leaving him in an odd position as a Supreme Court appellant. As a practical matter, Mr. Bush could claim no injury from the decision he was appealing. Under Florida election law, the "protest" phase for challenging the vote count was now over. One question obviously on the justices' minds during the first argument was whether the case still mattered.

The argument itself did not dispel the doubts about the appeal's continued relevance, a fact that may have made it easier for the court to reach a compromise in the form of the unsigned six-page opinion issued midmorning on Monday, Dec. 4. The ruling vacated the Florida Supreme Court's Nov. 21 decision and instructed the state court to demonstrate it had taken proper account of certain statutory and constitutional provisions governing federal elections.

Decoding a 9-to-0 Ruling

Opacity may have been the price of unanimity; in retrospect, it is clear there was a rather strong message contained within the cryptic opinion and that the court's queries to the Florida justices reflected more than an abstract interest in the outcome. But the pace of events in Florida was such that some justices who retained strong doubts about whether the court should be in the case at all could at least take cold comfort from the growing assumption that the election would be over before the case could come back to haunt the Supreme Court again.

That assumption appeared to be validated when, within hours, Judge N. Sanders Sauls of the state circuit court in Tallahassee issued a sweeping rejection of Mr. Gore's challenge to Mr. Bush's certified victory. But late in the week, the Florida Supreme Court weighed in again, not only reversing Judge Sauls but also ordering a statewide recount of the undervotes to begin the next day.

The breadth of that decision was startling, and even some justices who eventually ruled that the recount should go forward were momentarily taken aback. To the eventual majority, the decision was not only startling, but wrong. As Justice O'Connor was to indicate by her questions from the bench, it appeared that the state court had willfully ignored a clear warning to reverse course. She is a tough and active questioner, a stickler for procedure who does not hide her displeasure when she suspects a lawyer, or a lower court, of cutting corners. A former majority leader of the Arizona State Senate, Justice O'Connor, a

Republican, is the only current justice to have held elective office.

Within hours of the state court's ruling on Friday, Dec. 8, the Bush team had filed both an appeal and a request for a stay of the imminent recount. The endgame had begun, and tightly packed into the next four days would come moments of high drama and emotion.

The eventual dissenters expected the court to hear the appeal swiftly, but the decision to stop the recount in the meantime came as a shock. The tension and anger that the court had managed to contain under a veneer of civility erupted for all to see. There were now, openly, two sides, and the vote was 5 to 4.

The pace of events, already scarcely believable by the Supreme Court's stately standards, was to become amazingly compressed: state court decision Friday afternoon; Supreme Court appeal filed Friday night; case accepted Saturday; briefs due Sunday; argument Monday; decision Tuesday. No one had seen anything like it. By the time three New York University Law School professors arrived at the court on Tuesday morning to interview law clerks for teaching positions, complete exhaustion had set in, and some clerks who had not canceled their long-scheduled appointments slept through them.

The justices met early on Saturday to consider the stay application and the appeal. The recount had just begun in Florida, but it was soon clear that the majority at the court had the votes to stop it. Chief Justice William H. Rehnquist, along with Justices Scalia, Kennedy, O'Connor, and Clarence Thomas, all voted to grant the stay.

On the other side was Justice John Paul Stevens, the senior associate justice and, at 80, the oldest member of the court. A Republican, named to the court by President Gerald Ford, he had become in many respects the most liberal justice and, on his side of the court, the most outspoken. Justices Souter, Breyer and Ginsburg voted with him.

Like Justice Stevens, Justice Souter, a former attorney general and state supreme court justice from New Hampshire, was a lifelong Republican who found that his party's center of gravity had shifted uncomfortably to his right. Justices Ginsburg and Breyer, President Bill Clinton's two appointments, were judicial moderates, both former law professors and federal appeals court judges whose instincts were to search for compromise rather than confrontation.

But there was to be no compromise at this point. Justice Stevens wrote a sharp three-paragraph dissent from the stay. The majority had "acted unwisely" to "stop the counting of legal votes," Justice Stevens said. The other three signed the dissent.

While a published dissent from an order like a stay is unusual, this one had the effect of goading Justice Scalia into doing something even more unusual, publishing a defense of the stay. The recount had to be stopped because it threatened ireparable harm" to Mr. Bush, Justice Scalia said, "by casting a cloud on what he claims to be the legitimacy of his election."

No one on Justice Scalia's side signed his opinion; some questioned the wisdom of publishing it and further revealing the court's internal conflict. If any one justice was to have made such a public statement, Justice Scalia, who relishes intellectual combat and has never been known to pull

punches, was certainly the most likely candidate.

The absence of other signatures on the Scalia opinion made him appear to be the driving force behind the court's action, but that was not the case. Although his role was less visible, Chief Justice Rehnquist took an active part from the beginning in shaping the court's response to the events in Florida. Approaching his 29th anniversary on the court, with nearly 15 years as chief justice, he runs the court with a firm hand and views stepping up to the big cases as part of his institutional responsibility. But in the end, he tried and ultimately failed to speak for the court in this case.

Following the vote on the stay, the dissenters were shaken and demoralized, fearful that the court, having so narrowly dodged a bullet by managing to turn out a unanimous opinion the previous weekend, was about to do itself great harm. The court is not a place where people casually drop in to one another's offices to chat, but the dissenters reached out to one another for moral support. A consolation was that Justice Scalia had taken the bait of the Stevens dissent, perhaps giving the public a warning of what now seemed an inevitable outcome.

A Rationale for Mistrust

With the case set for argument, each side faced a challenge. For the dissenters, the question was whether there was any strategy by which they could split the majority and get the recount going again. For the majority, the deep mistrust they shared of the Florida Supreme Court's motives was not matched by an agreed-upon view of where exactly, as a legal matter, the state court had gone wrong. The majority had a conclusion in search of a rationale.

The equal-protection issue was before the court again, but it had evolved into something new. The question was no longer whether it was constitutional to recount votes in some counties and not others, but whether it was constitutional to count votes by standards that differed from county to county. This evolution gave Justice Breyer something to work with. If a lack of uniform standards was the problem, the solution was obvious: establish a standard, or instruct the Florida court to set one, and start counting.

During the argument on Monday morning, it was evident that Justice Breyer, joined by Justice Souter, was offering this option in an effort to sway Justice Kennedy and perhaps Justice O'Connor. Both had expressed some uncertainty about the other legal theories behind the Bush appeal. But they gave no indication during the argument of being receptive to Justice Breyer's approach. The question was whether the Florida Supreme Court could be trusted to supervise a recount under any circumstances. It appears that for Justice O'Connor, the answer was decidedly no. Justice Kennedy came more slowly and ambivalently to the same conclusion. There would be no more counting.

Even if Justice Kennedy had been open to Justice Breyer's persuasion, it is not clear what would have happened next. Justices Ginsburg and Stevens did not agree that the recount as ordered by the Florida court posed a problem of constitutional dimension. For them, therefore, there was no need for a remand or for new standards. Whether to join a compromise that took such a need as its starting premise was a decision they ultimately did not have to confront because the compromise did not gel.

'Loser Is Perfectly Clear'

Although the outcome was clear by Monday night, the justices' work was not done. Justice Stevens drafted a dissenting opinion whose bitter words became the most widely quoted language from any of the opinions. The majority's position "can only lend credence to the most cynical appraisal of the work of judges throughout the land," he wrote, adding: "Although we may never know with complete 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." Justice Stevens left Washington for his second home, in South Florida, as he had long planned for the year-end recess that was supposed to be under way.

Justices Breyer and Ginsburg signed the Stevens dissent while each offering an individual view as well. (While Justice Ginsburg's opinion drew considerable notice for its omission of the adverb "respectfully" from the closing "I dissent," that was a choice, it was pointed out, that she frequently made for economy of style rather than to convey a particular level of anger.)

Justice Souter did not sign. He wrote his own dissent and also signed the major portion of the Ginsburg and Breyer dissents. While Justice Souter's writing style can be convoluted, in this instance it was so direct as to be almost conversational, his anger controlled but his extreme disappointment evident. "I write separately only to say how straightforward the issues before us really are," he said.

Photographs taken later of the justices as they drove out of the building's underground garage showed Justices Scalia and Breyer looking grim but determined, while Justice Souter looked hollow-eyed and ashen.

Throughout the building, justices worked into the night. The Supreme Court building is constructed around four interior courtyards, with the chambers arrayed around the outer perimeter, facing the street. The bright lights from the television networks' satellite trucks, mounted on high poles, shone into the justices' windows. Some found the harsh light unnerving, while to others, the public spotlight seemed somehow appropriate, given the gravity of the public's business being conducted inside. Supreme Court police officers made their rounds, advising justices and law clerks to draw the blinds in case someone tried to take pictures through the windows.

Majority but Not a Monolith

On the majority side, Chief Justice Rehnquist circulated an opinion that had the support of Justices Scalia and Thomas. It said that in ordering the recount, the Florida Supreme Court had unconstitutionally displaced a role reserved for the state legislature and had ignored the Florida Legislature's desire to give the state's electors the benefit of the "safe harbor" against later challenge on the floor of Congress that federal law offered to slates of electors chosen by Dec. 12. (While 20 states failed to meet the Dec. 12 deadline for submitting slates of electors without any jeopardizing their votes in the Electoral College, the outcome of the election in those states was not disputed. In Florida, by contrast, Republican legislative leaders had announced plans for a special session to choose the Legislature's own slate of Bush electors.)

But although intended as a majority

opinion, the chief justice's opinion failed to get the support of Justices Kennedy and O'Connor. They drafted their own opinion, concluding that the standardless recount violated the guarantee of equal protection. Their opinion later caused some confusion by its reference to "seven justices of the court" who "agree that there are constitutional problems with the recount." That was true, but it was also beside the point, because by then the only question was whether there was a remedy for those problems, in the form of a restructured but continuing recount. On that question, the vote remained 5 to 4.

A Singular Case

It is not clear from the face of the Kennedy-O'Connor opinion, labeled only "per curiam," or "by the court," what disagreement they had with the Rehnquist opinion. In the first argument, Justice Kennedy had questioned whether the safe-harbor provision was legally enforceable.

For Justice O'Connor, the broadly worded Rehnquist opinion may have violated her rule that the court should decide cases on the most narrow ground possible. The holding of the per curiam was as narrow as possible, "limited to the present circumstances," it said.

In order to permit the majority to speak with one voice, the chief justice and his two allies joined the Kennedy-O'Connor opinion. In language that was perhaps the result of negotiations between the majority's two factions, the opinion contained an unusual declaration that the principle it established was in effect a ticket for this train only.

"Our consideration is limited to the present circumstances," the opinion said, adding with considerable understatement, "for the problem of equal protection in election processes generally presents many complexities."

The outcome was clearly one of convenience rather than the opening shot in a Rehnquist court equal-protection revolution. In fact, the most telling measure of whether the court has really put the election trauma behind it may be whether any dissenter is sly or mischievous enough to cite Bush v. Gore to bolster an equal-protection argument in a future case.

THE MAJORITY 5

WILLIAM H. REHNQUIST: Tried and failed to get a majority for broader grounds for overturning the Florida Supreme Court.

ANTONIN SCALIA: Of the five justices who voted for the stay that stopped the recount, he alone explained his reasoning in an unusual concurring opinion.

SANDRA DAY O'CONNOR: Despite the Gore lawyers' hopes that she might be open to a compromise, she did not waver in her view that there could be no more vote counting.

ANTHONY M. KENNEDY:
Disappointed the dissenters' hopes that he might he open to a remand to permit continued vote-counting under a defined standard.

CLARENCE THOMAS: Stalwart and silent member of the majority.

4 THE DISSENTERS

JOHN PAUL STEVENS:
Most outspoken of the dissenters, he objected to the stay in a strong dissenting opinion.

STEPHEN G. BREYER: Tried to use his agreement that the recount was flawed as a basis for a compromise that could permit the flaws to be fixed and the count to resume.

DAVID H. SOUTER:
Justice Breyer's ally in failed compromise effort.

RUTH BADER GINSBURG: Saw no constitutional problem with the recount and no reason to take the case out of the Florida court's hands. (pg. A18)

"The Court's Role in the 2000 Election" Chart shows the order of events for the 2000 Election.

NOV. 21 -- Florida Supreme Court lets recounts proceed in four counties.
NOV. 22 -- Bush appeals to United States Supreme Court.
NOV. 24 -- Supreme Court accepts appeal.
DEC. 1 -- Case is argued.
DEC. 4 -- Supreme Court unanimously decides to vacate Florida decision, asking for better explanation of ruling.
DEC. 8 -- Florida Supreme Court overturns lower court decision and orders statewide recount of ballots for which machines had registered no choice for president.
DEC. 9 -- Justices accept Bush appeal and, by 5-to-4 vote, also grant Bush request to stop the recount in the meantime.
DEC. 10 -- Both sides file briefs.
DEC. 11 -- Case is argued.
DEC. 12 -- The court rules, 5 to 4, that recount as structured by Florida Supreme Court is unconstitutional and that there is no time to fix it.
DEC. 13 -- Vice President Gore concedes.

Curious Fallout From Bush v. Gore

The New York Times

Wednesday, July 4, 2001

Alan M. Dershowitz

The final months of the Supreme Court term that ended last week brought a spate of unexpected decisions and unusual voting lineups. The decisions can best be understood against the backdrop of this term's most controversial decision, Bush v. Gore -- the decision that handed the presidency to George W. Bush.

The heavy criticism of this ruling as an exercise in partisan politics seems to have stung the court. In reaction, several justices may have tried to save their legacy and prove their nonpartisanship by moderating their views -- which led to a term of unpredictable decisions.

Suddenly this term, Justice Antonin Scalia abandoned his long-held disdain for privacy rights. In Kyllo v. United States, he wrote, in a 5-to-4 decision, that the police may not use a thermal imaging device that can detect marijuana growing in a home. This decision was especially surprising since this technology rarely intrudes on the privacy of anyone except marijuana growers, who use very high intensity lamps.

Equally surprising in this case was the dissenting vote of Justice John Paul Stevens, who usually lines up with the court's liberals on criminal-justice issues. (The only predictable aspect of the Kyllo decision was that the majority was joined by Justice Clarence Thomas, who had expressed similar disdain for the privacy rights of likely criminals, but who almost always follows Justice Scalia.)

Justice Stephen Breyer, who can generally be counted on to favor a strict separation of church and state, joined conservative justices in ruling that a public school must open its doors to after-hours religious activities, if nonreligious programs are allowed. The decision was a victory for a national evangelical Christian group that had wanted to operate after-school Bible clubs for students.

And then there was Justice David Souter, normally sensitive to the need to control the discretion of police, writing a 5-to-4 majority opinion that sustained a full-blown discretionary arrest and search -- handcuffs and all -- of a Texas soccer mom, because her children were not wearing seat belts. Justice Sandra Day O'Connor, usually much more conservative in her rulings, wrote the dissent.

As surprising as these votes and decisions may be, they all show a common direction. Bush v. Gore seems to have exerted a gravitational pull toward the center for at least some of the justices.

Bush v. Gore was itself a stark example of unpredictability -- at least if one looked to the precedents of the court and the prior opinions of the individual justices.

If the 100 most experienced court watchers--conservatives, liberals and moderates-- had been given a hypothetical version of the facts of the Florida election case a year ago and asked to predict how

the justices would vote, few if any would have gotten it right. The decisions of the justices seemed to contradict their own prior opinions -- and to many these decisions seemed more consistent with the justices' own partisan preferences.

After the vociferous criticism of the justices -- especially but not exclusively those in the majority -- it is understandable that some might have been moved later in the term to take unexpectedly centrist positions. By making themselves less reliably predictable, they may seek to make their votes in Bush v. Gore seem less partisan.

Another factor may be the rumored retirement of Chief Justice William H. Rehnquist. Some justices may be positioning themselves for this spot -- knowing that whoever is nominated would probably face a protracted, partisan Senate hearing in which he or she would be expected to explain any extreme points of view. Indeed, Justice O'Connor has recently let it be known that now she is not planning to retire anytime soon, fueling speculation that she did not want her career to end on the heels of so questionable a ruling as Bush v. Gore.

There were, of course, some entirely predictable elements in the voting patterns of the justices. As usual, Justice Thomas voted very often with Justice Scalia, and Justice O'Connor and Justice Kennedy were the swing votes in many close cases. Also, the trend toward closer scrutiny of Congressional legislation that impinges on state prerogatives--the so-called federalism revolution -- continued unabated this past term. A 5-to-4 majority expanded states' immunity from federal power when it ruled that state employees cannot sue for damages for violations of the Americans With Disabilities Act.

Nevertheless, this past term provided many unexpected results. And while we can never know for sure what motivates individual justices, it seems likely that the impact of Bush v. Gore was not limited to ending the Florida hand count.