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WHAT IT REALLY MEANS TO SAY "LAW IS POLITICS": POLITICAL HISTORY AND LEGAL ARGUMENT IN *BUSH v. GORE*[*]

Peter Gabel[†]

INTRODUCTION

In the early afternoon of December 8, 2000—five weeks into the national debate about who had won the presidential election and four days before the United States Supreme Court settled the matter[1]—San Francisco's 24 Divisidero bus was making its way along its cross-town route. On the surface, everything seemed normal on that bus—the passengers isolated in their passive roles, staring blankly straight ahead or looking aimlessly out of their windows, each avoiding eye contact with the other, proceeding along on the conveyor belt of social alienation that has imprisoned so many of us so much of the time for the last twenty years.

Then suddenly a big guy in a brown leather jacket got on the bus at Haight Street and shouted, "The Florida

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† Peter Gabel is a law professor at New College Law School, a founder of the Critical Legal Studies movement, and author of THE BANK TELLER AND OTHER ESSAYS ON THE POLITICS OF MEANING (2000). An earlier version of this paper was presented at a panel of the Law and Interpretation Section of the Association of American Law Schools held in San Francisco, California in January, 2001. The panel was organized to discuss Steven L. Winter's then forthcoming publication of *A Clearing in the Forest: Law, Life, and Mind.* Brooklyn Law School Professor Gary Minda was Chair of the Law and Interpretation Section at the time.

[1] Bush v. Gore, 531 U.S. 98 (2000) (holding that standardless manual recounts violated the Equal Protection Clause of the Fourteenth Amendment).

Supreme Court decided for Gore 4–3!"[2] Instantly, people leaped out of their seats, threw their arms around each other and began dancing for joy, talking to each other and speculating with new hope that perhaps the forces trying to stop the Florida vote-count could be defeated. Eventually, everyone calmed down and took their seats, but they sat closer to each other than they had before and continued to talk, to connect, about the election.

Now that we are sealed in the Bush presidency, it is difficult to remember that in the six weeks between the first Tuesday in November and December 12, 2000, Something Happened.[3] The chaos of Election Night, the wrong calls of the networks, Gore's calling Bush to concede and then calling him back to retract the concession as last-minute Florida vote totals were phoned in to him in his car, Bush's all too human "Do what you gotta do" reply oddly undermining the soft-toned halo with which the media had just presidentialized his televised likeness as it sought to elevate him from mere personhood to George Walker Bush, Forty-Third President of the United States, and then the bafflement of the experts about what was to happen next and the inability of the television anchors to anchor anything—all of this accidentally but decisively disrupted the coherence of what was supposed to be an institutionalized political ritual of which we the people were supposed to be passive, numbly enthralled spectators, just as we had been of the debates and the political ads and the scripted role-behavior of the candidates leading up to the election. And with the dissolution of the object comes the dissolution of the subject—the inability of the election to unfold as "watched democracy," as a numerical activity of "counting to a result" that is the only unity that the common product of isolated and detached voters can have, suddenly and spontaneously released us en masse from our reciprocal disconnection as detached spectators and hurled us into a kind of disorganized and exciting engagement with each other.

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[2] Gore v. Harris, 772 So. 2d 1243 (Fla. 2000) (holding that Gore satisfied his burden of proof with respect to the Miami-Dade County Canvassing Board's failure to tabulate, and therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County).

[3] *See* JOSEPH HELLER, SOMETHING HAPPENED (1974).

Rather than being an external and alien process in which each of us watches who "the others" elect, with each of us being both observer and "one of the others" in our capacity as voters, the election suddenly became real because we became real. We suddenly became The People.

Today, so many months and so much history later, it is difficult to remember that at that moment, right below the surface, a majority of Americans really cared about the outcome of the election and could have been mobilized to insist that their democratic wish be respected. But that didn't happen. Instead, in part because of what Al Gore and his lawyers did, in part because of the success of twenty years of a conservative assault on our collective hopes and our willingness to believe in the possibility of a new and more connected social order, we succumbed in a resigned and depressive way to an outcome which was neither legitimate nor desired.

Understanding how we got into this mess is an urgent task if we are ever to rekindle hope for social change. As the media bows to Bush and the narrow parameters of the current conservative world-view, we have an obligation to not let the embers of our collective hope be extinguished. We need to understand exactly how we allowed ourselves to be disempowered, how we allowed the spirit expressed on that bus to disappear from public life and from our collective memory of what was really possible. That's why it's important to go back and understand the lost opportunity that was *Bush v. Gore*.[4]

Most Americans know that there was something wrong with what the Court did in *Bush v. Gore*,[5] the Supreme Court decision awarding the presidential election to George Bush. They know that we are supposed to be living in a democracy and that it just can't have been legally justified for the Court to have jumped in and peremptorily declared the winner before every reasonable effort had been made to count every vote in every instance where the intent of the voter could reasonably be determined. This widespread sense that the Court majority somehow abused its authority was intensified by the manner in

[4] 531 U.S. 98.
[5] *Id.*

which the Court intervened in the process—overturning the Florida Supreme Court's first seemingly reasonable and brief extension of the certification deadline on the basis of some rarified legal objection that nobody could understand,[6] and then a week later blocking a statewide manual recount of machine-rejected ballots on the basis of a completely different legal objection not even mentioned the first time they tried to stop the count from proceeding.[7] You didn't need to be a legal scholar to know that Justices Rehnquist, Thomas, Scalia, O'Connor, and Kennedy wanted to stop that vote-count and were intent on finding a legal justification for doing so no matter what. It is in fact almost impossible to reconcile the two Court interventions with each other or to find any legal authority for the election-terminating aspect of the final decision.[8]

Yet the meaning of what was "political" about *Bush v. Gore* is not that the Supreme Court failed to follow something called "the rule of law" that is not political. On the contrary. By going so far beyond the legitimate limits of constitutional interpretation, the Court made transparent what is usually mystified—the political nature of all legal reasoning. The political choices made by the Court were possible because Gore and his legal team chose to frame the issues in ways that reinforced a conservative political climate which had been building for the past thirty years. If we ever hope to move beyond that triumph of political conservatism, we need to fully understand how it has become embodied in law and how it manifests in politics. A perfect place to begin is to see how this conservatism shaped Gore's legal strategy and guaranteed its ineffectiveness—and why Gore and others around him couldn't understand how self-defeating that strategy was.

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[6] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

[7] *See generally* Bush v. Gore, 531 U.S. 98.

[8] *See* Bush v. Gore, 531 U.S. at 123. (Stevens, Ginsburg, & Breyer, J.J., dissenting).

I. VOTING RIGHTS, NOT STATES' RIGHTS

The core of the legal position chosen by Gore and his lawyers was their decision to base their argument for a manual recount in Florida on "states' rights" rather than on "voting rights."[9] From election night on, it was clear that Gore had won the popular vote by about 500,000 votes, a margin far greater than Kennedy's victory over Nixon in 1960 and greater than Nixon's victory over Humphrey in 1968. Gore had gained this popular democratic majority through the efforts of blacks, women, and working people who had come out to vote in large numbers between 5 p.m. and 8 p.m. all across the country. These constituencies had all won the right to vote through long and difficult struggles over the past 200 years. They did so in the name of the expansion of the ideal of popular democracy as the very foundation of what it means to be an American. Whatever criticisms and even cynicism these constituencies feel toward the American political system, if they share an idealistic belief about anything in their identification with being an American, it is that they've got the right to vote, that they fought for it, and that it's sacred.

Although the text of the Constitution itself does not guarantee the right to vote, the Fourteenth Amendment,[10] the Fifteenth Amendment,[11] the Nineteenth Amendment,[12] and the Twenty-Fourth Amendment,[13] as well as a long line of venerated Supreme Court cases interpreting them,[14] all affirm that the right to vote is the nation's most sacred political value. Even though the electoral college has retained its place as the means for selecting the president—a power granted to it in the eighteenth century when none of Gore's core constituencies had yet won the right to vote and when states had no obligation to (and sometimes did not) hold popular elections for president—the movement of the last 200 years has unquestionably been

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[9] *See* Brief for Respondent at 43-50, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949) [hereinafter Brief for Respondent].

[10] U.S. CONST. amend. XIV.

[11] U.S. CONST. amend. XV.

[12] U.S. CONST. amend. XIX.

[13] U.S. CONST. amend. XXIV.

[14] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970) (and cases cited therein).

toward the expansion of popular democracy carried out by universal suffrage as the basis of political legitimacy.

Against this backdrop, it seems clear that Gore's legal argument for supporting the Florida Supreme Court's decision to allow a manual recount, both in the first and second of his U.S. Supreme Court appeals,[15] should have been that the constitutional right to vote, and to have one's vote counted, is more important than more-or-less arbitrary state deadlines. The central argument of Lawrence Tribe and David Boies should have been to uphold the Florida Supreme Court on the grounds that their interpretation of conflicting Florida state laws—allowing the manual recounts called for in one statute over another statute imposing a deadline on submitting certified vote totals that would have made the manual recounts impossible—reflected not only a normal and inevitable responsibility of a state Supreme Court to resolve conflicts in state legislation, but also a responsibility that the Florida Court carried out in a manner consistent with the highest value of the Constitution of the United States—namely, that in a national presidential election especially, the right to vote and to have one's vote counted must take precedence over certification deadlines that have little practical or moral significance.[16]

This approach would have aligned Gore's political and moral claims with his legal claim and mobilized the constituencies that made up his popular majority. Gore would have been speaking before the Court in support of the universal voting rights of all of us in a democracy, including those of us in the other forty-nine states, rather than making

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[15] *See* Bush v. Gore, 531 U.S. at 98; *see also* Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 70.

[16] In failing to assert the centrality of the Constitutional right to vote in supporting the Florida Supreme Court's interpretation of state law, rejecting even the existence of a federal question and defending only the appropriateness of that Court's reliance on Florida's state-based right to vote in resolving the statutory conflict, the Gore argument presented an image of the U.S. Supreme Court as powerless to authoritatively declare the substantive moral correctness of the Gore position. Thus had the Florida Supreme Court decided for Bush, Gore's stance would have left the U.S. Supreme Court powerless to reverse on the basis of the moral pre-eminence of the constitutional right to vote. The mobilized political moment required Gore to affirm the Court's Constitutional authority to decide for him in the name of democracy and to make a "call" upon the moral and legal responsibility of the Justices to do so. *See infra* text accompanying notes 27-29.

an amoral argument in support of the right of the State of Florida to not be bound by any such compelling universal ethical claim. If he had done this, he would have spoken, for example, for me, one of millions of Nader supporters who voted for Gore at the last minute to keep Bush out of the White House. He would have acknowledged my stake, as a California Gore voter, in whether the manual recount in Florida took place. This was the time to act—at a moment when the right to vote had a genuinely utopian, Walt Whitmanesque, democratic resonance—when the whole country was on the edge of its seat over a matter suddenly filled with vital political and moral American importance.

Had Gore argued for voting rights instead of states' rights, he would have put the Supreme Court in the position of saying to Gore voters across the country, "No, you don't have the right to vote" because of some technical rule (whether that rule was Katherine Harris's deadlines or obscure federal statutory provisions). If Gore had argued for voting rights, the Court's reliance on technicalities would have been accorded little legitimacy in the face of everyone's common sense assumption that in electing a president, the right to vote should trump such trivialities.

But it didn't happen. Instead, something quite silly happened—namely, that with the entire country focused on what would be said before the Supreme Court, Gore's lawyers said something that nobody could understand. At the very moment when the simplest of arguments would have mobilized and united Gore's national base, his lawyers took a position before the Court that excluded all non-Florida voters, and was in any case incomprehensible to anyone except the lawyer/law-professor talking heads trying in vain to explain eighteenth- and nineteenth-century technicalities to a baffled population who thought this was about the right to vote.

Why? The answer to this question is the answer to the election itself, to why the Court thought it could get involved, why it did, and why it correctly sensed it could get away with even contradictory and irrational decisions to put the wrong man in office.

The answer is that over the course of the last twenty years, beginning with the collapse of the social movements of the 1960s and the election of Ronald Reagan, the Right has successfully and gradually capitalized on the doubt pervading the forces of social transformation in such a way as to make people lose faith in the existence of a hopeful and idealistic universal public sphere in which there is a "We"—an activist and more-or-less united public community—struggling for a better world against the fearful forces of the status quo.

II. THE REAGAN REVOLUTION

The heart of the Reagan Revolution was a sort of snapping or reversal of the public energy that had given rise to the Labor movement of the 1930s, the New Deal, and the multiple and overlapping movements of the 1960s (including the civil rights movement, the student/anti-war movement, the women's movement, the gay-and-lesbian movement, and multiple other transformative efforts). Although all of these movements continue to have positive effects on the larger society, in their universal "movement" dimension they had begun by the late 1970s to be pervaded by what I would call ontological doubt—by a rotating loss of faith or confidence in their capacity to fundamentally transform the world. The dynamics that brought about this worldwide loss of confidence are complex, and I have explored them elsewhere.[17] But conservatives in America, who had begun to really organize against the ideas—all of the ideas—of the Left following the defeat of Barry Goldwater in 1964, were able to seize on this collective doubt and turn it decisively to their advantage. To use a simple but compelling Freudian metaphor, they were able to turn the wrath of the cultural superego against the communal longings of the id.

In the public political sphere, their Revolution found its leader in the benign authoritarianism of Ronald Reagan who, in 1980, was able to unify two idealistic images to forge a new

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[17] *See* Peter Gabel, *How the Left Was Lost: A Eulogy for the Sixties*, *in* PETER GABEL, THE BANK TELLER AND OTHER ESSAYS ON THE POLITICS OF MEANING 78-82 (2000).

national and international hegemonic base. One was the utopian image of the nuclear family, immortalized in the historical sense of the word in Reagan's "Morning in America" ad that showed a mother holding her newborn baby and promising a restoration of the ideal love that conservatives associate with the family as the only safe location of social trust. The other was a declaration of ideological war against the Evil Empire, which in a formal sense referred to the Soviet Union but symbolically referred to the totality of the movements of the Left as the source of chaos, division, and profound psychic danger.

In the legislative sphere, the Revolution took the form of a new and intense opposition to the entitlement programs, whose expansion had begun with the triumph of the New Deal in the 1930s and had continued with the vast expansion of civil rights and social welfare programs born of the movements of the 1960s. Government as a carrier of collective hope and care was replaced by the "army of faceless bureaucrats" from whose coercive power "we" longed to be free again by "getting the government off our backs."

But it is in the legal sphere that we find the seeds of *Bush v. Gore*. While Reagan's election and persona represented the hot moment in which the energy that was the Sixties was reversed, the long-term legitimacy of Reagan's revolution required a much more drawn-out process of converting the initial hot political moment into a passively accepted legal order. This, in turn, required the gradual dismantling of the political assumptions that had for fifty years supported the progressive ideals of the activist New Deal state and replacing them with new conservative assumptions about the nature of "our constitutional democracy" and the meaning of "the rule of law" as seen through the lens of the new conservative worldview. Beginning in the late 1970s with the replacement of the Warren Court by the Burger Court, this shift in legal paradigm was gradually implemented over a period of more than twenty years through three principal doctrinal strategies.

The first of these was the resurgence of "the jurisprudence of original intention" as central to the process of constitutional interpretation. When I attended law school in

the years 1969 through 1972, lip service was always given to ascertaining the intent of the framers when interpreting the meaning of the Constitution, but the dominant consensus was that the intent-of-the-framers' view had long since given way to the idea that the Constitution was an "evolving document" that ought to reflect the progressive values inherent in the nation's developing conception of political morality. That the Commerce Clause and the Equal Protection and Due Process Clauses should be interpreted to require, or at least permit, collective governmental intervention in the service of a new, universally accepted conception of social justice was more or less taken for granted as the basis for requiring (or at least upholding) legislatively-enacted progressive governmental action. But following Reagan's election in 1980 and continuing with greater conviction after his re-election in 1984, conservatives—such as then-Attorney General Ed Meese and neo-conservative legal intellectuals throughout the legal academy and within the now established post-Goldwater think tanks like the Heritage Foundation, Stanford's Hoover Institute, and the American Enterprise Institute—decisively challenged this liberal orthodoxy, insisting instead that it was the Original Intent of the Founding Fathers, and not the views of random contemporary judges "applying their own moral opinions," that should guide the interpretive process.

The effect of this largely successful shift to Original Intent theory was to invoke the great Image of Paternal Authority to deny the existence of a universally shared, progressive public sphere that provided a political basis for left-liberal constitutional interpretation. Never mind that the drafters of the Constitution were mainly a group of twenty and thirty-year-olds whose consciousness was shaped in and by the eighteenth century; they were the "Founding Fathers" whose sanctity and eternal prescience could be resuscitated with such force that Reagan could openly ridicule anyone who spoke the "L-word" ("liberal," for those of you too young to remember) in support of the constitutionality of liberal entitlement programs or in support of, say, the public right of workers to picket on now properly re-privatized property of the owners of malls and shopping centers.

The second major shift in legal theory and doctrine occurred in the realm of so-called private law with the rise of the Law and Economics movement, providing a new rationale for limits on judicial and legislative decision making. Against the progressive claims emerging from the social political movements of the 1930s and the 1960s that human beings are bound together by communal, moral, and ethical values that must be central to the development of our legal culture, the Law and Economics movement emerged from the ascendant conservative intelligentsia. It has sought to empty legal doctrine of socially-binding moral content and aspirations by reinstating the primacy of the freedom of the isolated individual, who must be free to do whatever he or she wants unless he or she is paid for any legal constraints placed on that freedom by the community (now reduced to a mere collection of other isolated individuals).

Although the humanization of the image of the isolated individual as "he or she" has had ideological power, its true economic meaning has been to rationalize the unfettered expansion of global corporate power by serving as a cultural weapon in support of deregulation. And while in its technical aspects the Law and Economics movement has had only a limited direct effect on the discourse of judicial opinions (with notable exceptions such as Judge Richard Posner of the Seventh Circuit), it has become the dominant ideology in American law schools; it has provided the ideological foundation for near-universal pre-eminence of cost-benefit analysis in corporate and legislative decision making; and it has deeply influenced the increasing dissolution of the use of moral discourse in common-law decision making in such private law areas as contracts, torts, property, and corporations. In the context of the gradual legalization of the Reagan Revolution, it has contributed importantly to the disintegration of popular belief in the existence of a legally recognizable and public moral community by supporting the image that, apart from the sanctity of the private family and equally private religious affiliations, "we" are a nation of individuals legally bound each to the other only by money, by economic self-interest.

The third major doctrinal shift that has served to gradually legalize the Reagan Revolution—and the one of most direct relevance to understanding the Supreme Court's interpretive strategy in *Bush v. Gore* and to the political capacity of the Court majority to decide the 2000 election in the way that it did without a popular revolt—has been the rise of the "new federalism." Emerging originally in the jurisprudence of the Burger Court in the late 1970s[18] and with greater confidence following Reagan's first election, the new federalism has been, at one level, simply a return to giving much greater deference to states' rights in constitutional interpretation. But in a deeper sense, the doctrine signaled a shift in the official imagery within American legal culture of how "we" are politically constituted as "a people" within the meaning of the Constitution as an authoritative document, a shift to a kind of eighteenth-century idea of the nation as a confederation of sovereign and separate groupings (or states) who have reluctantly granted limited powers to the whole (the federal government).

Originally, of course, the states did emerge out of the colonies as organic groups divided from one another by geography, culture, religious conviction, economy, and even to some extent language. As such, they were understandably reluctant to subordinate their group integrity and sovereignty to a remote national government—that is, a remote national president, legislature, and court system—which, although in principle "representative" in nature, might well come to use its overarching power as the spokesperson for the United States to threaten the moral authority and self-sovereignty of each state.

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[18] I foretold the political meaning of the rise of the new federalism and its relationship to "legalizing" the Reagan Revolution in *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV 263 (1984), in which I wrote:

> The Court's aim is precisely to make the New Right constitutional . . . by reconstituting the existing hierarchy-system within an imaginary framework that conforms to a new 'intent of the framers.' For in the long run it is only by transforming the recent wave of right-wing activism into a passively accepted legal order that the new conservatism can become a genuinely dominant ideology in the way that democratic liberalism has been for most of our recent history.

Id. at 270 (emphasis in the original).

The role of the electoral college in selecting a national president, with its allocation of two senatorial votes to each state regardless of population and its guarantee of a disproportionate voice in presidential selection to smaller states, reflects precisely this concern (among other concerns, including a fear of popular democracy) about the potential "tyrannical" imposition of an alien national power upon the sovereign states who were the source of that power.

But the rise of the new federalism over the last twenty years has no authentic relationship to this historical reality of eighteenth-century life. Virtually no one today feels distinctively identified in the eighteenth-century sense with the state as one's organic group. On the contrary, the political history of the last 200 years has been the growing association of democracy with belonging to one nation, to one culturally diverse but nevertheless economically, politically, and culturally integrated group called the United States of America. Wars, technology, geographical mobility, immigration, the socio-economic development of an integrated capitalist market following increasingly uniform legal rules and norms, the development of national social movements transcending regions as well as states, and many other historical influences have forged a new and concrete historical reality that has decisively subordinated the state as the locus of group-identity and belonging to our national identity, to "being an American."

Thus we invest far more meaning in national elections than state elections and attribute far greater emotional and political importance to American citizenship than to often transient state citizenship. It would be absurd to claim that the core meaning of participation in our constitutional democracy today derives from our connection with the state-based identifications underlying the confederation-based conception of strictly limited federal power of 1789.

The rise of a new federalism which rests on this claim of state-based identifications as the basis of constitutional democracy must therefore be understood as a largely successful attempt to resuscitate the image of 1789 federalism and to imbue the image with the same mystique of cultural authority

that has been projected onto the Founding Fathers and the search for their Original Intent. These images draw their fantasy power from the rituals of our social conditioning since childhood, from the pledge of allegiance to the venerated annual telling of our origin story in childhood civics and American history classes, to the sanctified repetition of the names of the Founding Fathers (the side flap of my cereal box once boasted, "TOTAL™ brings you Founding Father James Madison"), to the awe and sense of idolatry attached to the Constitution itself as a hallowed document in a glass case whose ideas are somehow "above" those of us mere mortals who have followed those who penned them.

If we recall that what we are analyzing here is the legalization of a conservative revolution designed to reverse actual flesh-and-blood social movements aiming to give fundamentally new meanings to who "we" are, new meanings to the "constitution" of our political and moral bond, the use of authoritative cultural images that we have all been conditioned to feel we are supposed to invest with "belief" is the legal analogue to Reagan's "Morning in America" ad. In the context of the Reagan Revolution and its aftermath, these authoritative and reassuring images seized upon the anxiety that had come to pervade a real world beset by political/moral/cultural/generational/economic/racial/sexual conflict, especially as collective doubt came to corrode the idealism of the movement that had both generated this conflict through its transformative impulse and vision and given the movement in all its diversity its transcendent and hopeful unity. Because of their power in our shared cultural memory, these images can be and were appealed to in order to persuade "Americans" to come home.

In sum, the common aim of the resuscitation of Original Intent theory, the Law and Economics movement, and the new federalism has been to employ authoritative group fantasies about the origins of America (as the political group to which we each belong) in the service of erasing the constitutional legitimacy of a universal public sphere that leaders like Martin Luther King Jr. and the social movements of the 1930s and 1960s claimed was the very essence of true "constitutional"

politics. It was in that universal public sphere that moral questions about our common group life were and are contested. By mobilizing millions of people in the name of "We the People," social change movements became the living embodiments of democratic ideals as they physically and spiritually occupied this public sphere and challenged the political legitimacy of existing arrangements and constitutional doctrines by seeking to give them a new and progressive moral content.

III. THE COLLAPSE OF SOCIALISM

In its temporarily successful effort to reverse that energy, the central element of the conservative legal strategy has been to close down that public sphere. The core image of America projected by the new conservative legal order is that of an individualistic society characterized by a private sphere driven by material self-interest and a de-politicized public sphere comprised of morally unconnected and passive citizens, obedient and deferential to the strict authority of their Fathers. The significance of the "legal" character of this image is that calling it "Law" makes it "binding" on our collective national consciousness. Its gradual internalization has legitimized the privatization of American culture post-1980 and has contributed decisively to confirming the collective doubt to which I referred earlier, the sense that if you get involved and go out into public claiming your democratic authority to change the world, no one will be there for you because there is no longer any "there" there, no longer any "constitutional space" where Martin Luther King Jr. and millions of other Americans once stood.

To this legal history one other central fact must be added, an event that cleared the field for the more or less unchecked development of this conservative world view. That event was the collapse of the Soviet Union and socialism as an idea. For 150 years, the idea of socialism had been the dominant worldwide metaphor for the possibility of a fundamentally different world based on community rather than self-interest and the separation of self and other. Every

progressive social movement of the twentieth century in some way defined itself in relation to the idea of socialism because however much labor or women or the 1960s counter-culture or environmentalists or any progressive person agreed or disagreed with the specific tenets of Marx, socialism's basic affirmation that the world could and should be based on social connection and egalitarian community provided a crucial link between any particular progressive reform within the "whole world" of capitalism and the possibility of a radically different universal social vision and "whole world" toward which particular limited reforms were aiming.

In addition, the fact that the Soviet Union and the socialist bloc actually existed and had been able to mount a protracted long-term challenge to the capitalist ethos all over the world provided the idea of socialism with at least some embodied reality, however distorted, anti-democratic, and even brutal that reality was in its existing incarnation. As events have shown since the collapse of the Soviet Union in 1989, even the modern Democratic Party had depended since its origins in the New Deal on being able to define itself as the alternative, liberal-democratic path to the humane social vision to which socialism aspired. Without the moral ideal of community that socialism as a metaphor had come to stand for, and without being able to make the claim that it offers the gradual democratic path toward that ideal that is the correct alternative to totalitarianism, the Democratic Party has no anchoring moral world view to distinguish itself from the Republican's whole-hearted embrace of capitalist self-interest—except to appear to be the party of half-hearted capitalist self-interest, which is hardly the basis of a compelling moral and political vision that one can expect people to follow.

After Stalinism, Mao's cultural revolution, the Khmer Rouge, and the direct experience that millions of people had of the unsafe group dynamics that undermined the (otherwise wonderful, hopeful!) 1960s, nobody could believe any longer that seizing economic and political power from private individuals on behalf of the collective through some apocalyptic revolution could possibly lead to something better than the

lives we lead now, however isolated, alienated, and meaningless they often are. So by the early 1980s, the socialist idea had lost its capacity to serve as the unifying communitarian counter-vision that had made the Left a powerful and morally compelling force, and when the principal embodiments of "really existing socialism" vanished from the earth in 1989, the ideology of individualism appeared to have "won." The effect of this was both to give increased legitimacy to capitalism's economic, cultural, and political expansion on an increasingly global level and to greatly weaken the ability of the longing for community (a longing which exists in everyone) to even be seen or heard by the other, much less to be mobilized into a movement based on that longing that could enter public space and make moral claims on behalf of a universal, transformative alternative to an apparently vindicated conservative worldview.

The void left by the collapse of socialism as the dominant political metaphor for community intensified the ability of the American conservative legal intelligentsia to carry out its doctrinal disintegration of the constitutionally-binding public morality that the progressive movements of the 1930s and 1960s had fought for. There is no better testament to the effectiveness of their effort to gradually convert the Reagan Revolution into a new legal order supported by a new and widely accepted conservative "common sense" than the inability of Bill Clinton to make his long presidency stand for anything. Elected and enormously popular precisely because of his ability to recognize and validate our universal longing for community, a capacity that arose in significant part from the effect on him of the civil rights and other movements of his youth, Clinton was forced to rely throughout his presidency on personal charisma and polling data that demonstrated his "private" popularity among otherwise disconnected individual voters to enable him to survive politically in a public sphere totally dominated by his conservative opponents.

Bill Clinton embodied hope, idealism, and communal aspirations—as the cliché goes, "he made you feel cared about"—but he could not speak for this ideal and aspiration in the name of a coherent moral and political vision. That is why

the Right was able to crush his initially popular call for universal health care; he had no coherent social vision with which to fight for it in a public sphere now dominated by an individualist political world view, a worldview which the Clintons ended up deferring to by basing their legislative strategy on seeking support from the American Medical Association, the private insurance companies, and amoral, implausible claims of cost-efficiency.

Although things might have been different if Clinton had been able to imagine a new, emerging, spiritual-ecological-communal successor to the now-defeated Left and liberal materialist alternatives, he was, in the end, able to do no more than to cut his party's losses by rejecting the failed communal metaphors of the past ("the era of big government is over"). In an act of true political schizophrenia, he used his personal capacity to evoke warmth and idealistic hope in the service of expanding the globalization of capital and international trade agreements, like NAFTA, that consolidated the power of international, private corporate power. In response to the uninterrupted progress of the conservative ascendancy in the social, political, and legal sphere, he consistently took positions that actually accepted the conservative viewpoint and merely sought to restrain its influence, defending affirmative action, for example, with such morally toothless slogans as "mend it, don't end it," and signing the Republican welfare-reform bill in return for temporary concessions by the Right to ease their assault on remaining elementary legal protections for labor and the environment.

Increasingly during the course of his eight years in office, he was reduced to defining his legacy as "having presided over the greatest economic expansion in history," an expansion that demonstrated America's ability under his leadership to "compete and win in the world market." Taken as a whole, this record actually strengthened public acceptance of the continuing normalization of the Reagan Revolution, precisely because it showed that even a popular liberal Democrat seemed to accept the inevitability of its basic tenets, and even measured his own success by conservative "free market" criteria.

IV. THE WEIGHT OF HISTORY

By the time of the 2000 presidential election, the Democratic Party no longer felt capable of even appealing to its own constituencies on the basis of a progressive social vision. Having been forced to kneel at the Republican altar for so long, even former participants in the movements of the 1960s like Bill and Hillary Clinton abandoned the transformative convictions that had shaped them (and that were still visible in both of them as late as 1992), not because they no longer cared, but because they had nothing to say, no way to translate their social idealism into a new political idea.

Non-movement liberals like Al Gore, who were influenced by the 1960s but remained fundamentally loyal to mainstream political values, more fully retreated to the half-hearted conservative worldview. So 2000 found Gore running a presidential campaign that was merely a pragmatic "less bad than Bush" laundry-list of disconnected, centrist proposals, like prescription drug benefits for the elderly, increasing standardized testing to prepare the work force for the new global marketplace (but requiring fewer such tests than Bush), and touting "cost-effectiveness" and a greater ability to correctly "add up the numbers" as the basis for distinguishing his Social Security and Medicare proposals from those of Bush.

Behind the moral impotence of the Gore campaign was a now thoroughly conditioned acceptance that whatever transformative political ideals once defined his own life personally and the convictions of his party were now irrelevant. These ideals could no longer move "We the People" to leave their private houses and private self-interested concerns and enter the public sphere to provide a popular base for a contagious and winning campaign. As a result of this long process of devolution that I have described and the popular internalization of a politically passive, conservative political worldview, Gore rightly understood that while he might win the election by a lesser-of-two-evils campaign if he could get his already organized constituencies to get out and vote, he could not rely on anyone to be there for him if he invoked F.D.R., Martin Luther King Jr., and the great egalitarian and communal traditions of his party's past.

Thus when the amazing occurred on Election Day and woke up the American electorate from the now thoroughly legitimated and seemingly inevitable prisons of their private and isolated routines, Gore was ill-prepared to mobilize a suddenly intensely politicized national community. Like someone who hasn't gone to the gym for twenty years and is then suddenly expected to be in shape, Gore and his advisors were themselves so demobilized by twenty years of political and moral inactivity that they were incapable of grasping the opportunity that the accident of the election results and the ensuing six-week national debate about the meaning of democracy had handed to them. All over the country, friends were talking intensely on the phone and strangers were talking intensely on street corners about Florida and the right to vote and Katherine Harris's attempts to stop the vote count. High-school and college students actually focused for the first time in their lives on the electoral college and its ability to trump the popular vote, intensely discussing and struggling to understand the seemingly anti-democratic justifications for it.

Within a matter of days, a constitutional democracy that had come to see itself as but a collection of privatized, passive, and disconnected individuals suddenly emerged into a fledgling, but genuine, political community hurled into common public engagement by the threat that even the right to vote—the very foundation of American democracy won across centuries through an intense moral struggle and at the cost of many lives—might be denied in determining the outcome of a national presidential election whose democratic legitimacy is supposedly entirely based on it. Within a few days after November 7, and for a period lasting almost six weeks, Americans were galvanized by the one moral imperative and shared moral bond that even the most conservative government could not take away from them—the shared moral certainty that their government's legitimacy rests on the will of the people. While the act of voting every two or four years can often seem to the isolated individual like the most minuscule act of public self-assertion, the idea that the right to vote could be taken away was a challenge to the deeply held moral ideal of democratic self-determination. During the period from

November 7 until December 12, when the Supreme Court ended the matter, the challenge to that moral ideal was sufficient to allow the false "we" of a deferential and isolated people to begin to emerge into a real "we"—an active, collective presence ready to demand its sovereign birthright.

If we now see this dramatic period following November 7 in the historical context that I have described, we can understand the collective "political unconscious" underlying this drama as a struggle between conflicting impulses existing within each individual and the national community as a whole. One was the fearful impulse that had sought for twenty years to block the desire for social connection and for a just, egalitarian, and erotic community from again becoming a public force. The other was the utopian democratic impulse—the Walt Whitman impulse in "I Hear America Singing"—that was accidentally and spontaneously released by the closeness of the election and the controversy about how it would be resolved.

The fearful impulse was reflected in the frantic efforts by Katherine Harris, James Baker, and others to stop the Florida vote count immediately by strictly interpreting a trivial deadline for certification and by constantly repeating to a suddenly aroused and empowered national community the mantra that "there had already been recount after recount" in order to prevent the manual counting of uncounted votes. This fearful impulse also was reflected in the panicky assertion by some across the country, but especially those in the Bush campaign, that "we've got to know who our president is." I call these "fearful impulses" because they were plainly irrational—there was no pressing need to know the outcome; at stake was the outcome of a national presidential election, the most important single incarnation of our democratic process. In the past Congress has counted state electoral votes received as late as January 6 (the day of the counting).[19] The Constitution and federal law even provide for a custodial presidency by the Speaker of the House if there is a delay beyond January 20 in

[19] Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1421 n.55 (2001).

accurately determining a presidential election's outcome.[20] Florida's certification deadline was obviously intended merely to provide a uniform date to guide and coordinate in normal circumstances a schedule for statewide counts, rather than having some substantive importance that might justify certifying an inaccurate result.

But it was the palpable pressing need to "know who our president is" that best reveals the nature of the fear, a fear analogous to, say, "not knowing who our Founding Fathers are." It was the fear that the closure and de-politicization of public space that had been so central to the political imagery underlying the new Right's "constitutional interpretation" would be threatened the longer that the absence of a presidential authority figure left this public space open. This was especially true because the spontaneous release of the right-to-vote popular democratic impulse was creating a sense of passion and excitement with unknown consequences. Without quickly "installing a president" and normalizing the nation's political structure, no one could be sure what would bubble up in the vacuum. Thirteen-year-olds might start asking their parents just what the point of this electoral college is, and didn't Gore win the popular vote, and how can Katherine Harris claim to be objective when she was co-chair of the Florida Bush for President Committee, and what about those African Americans I heard were intimidated by the police? The longer the political space remained opened, the greater the risk to the legitimacy of a conservative world view that for twenty years had relied on the passive acceptance of paternal authority.

However, it was Gore, and not the Republicans, who posed the greatest obstacle to the success of the popular democratic impulse. Having long since left behind the days when he liked to smoke pot, grew his hair long, and went off with his girlfriend in a canoe on a 1960s-inspired journey in search of the meaning of life, Gore had run a campaign that remained well within the reigning conservative paradigm, offering no progressive moral vision of any kind. That in itself made it difficult to rally behind him in the post-election contest

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[20] 3 U.S.C. § 19(a) (2000).

as the idealistic champion of the people and of popular democracy. But what made the situation worse was that he had been so demobilized and co-opted by the devolution of idealism of the previous twenty years that he himself did not realize in the post-election period (and I'm sure could not believe or trust) that the people who generated his substantial popular vote majority were trying to cast off the enforced isolation and political inertia of those twenty years and mobilize to fight for him in the name of democracy, for the right to vote. Most Americans thought the Republican efforts to stop the recount were wrong, thought that Katherine Harris's repeated attempts to stop the count on the basis of a purported objective and neutral exercise of her discretion were patently absurd, and they believed that, with a fair and full count, Gore had probably won.

But instead of emerging publicly and speaking passionately on behalf of democracy to and for his own voters, a known majority of the country, Gore assumed the same posture as Bush, behaving like a remote presidential candidate, making occasional formal public statements at which he took no questions, insisting that the vote-count question was a legal matter to be handled by his lawyers and the courts, and otherwise holing-up in the vice president's mansion and allowing rare photo-ops of family touch-football games. Instead, he could have come out and thanked the working people and women and minorities who had poured out to vote for him after working all day in crucial cities like Philadelphia and Los Angeles and Miami, exercising their democratic right to vote for which men like Martin Luther King Jr. fought and for which so many had lost their lives. Had he linked their exercise of that right to his fight to have every vote counted in Florida, Gore would have seized the high moral ground, mobilized his constituencies, and thoroughly discredited the efforts of James Baker and the Bush team to use every method—including the threat of physical violence in the case of the Republican-organized riot outside the Miami-Dade county registrar's office—to impede democracy's most sacred principle. He also would have made the Florida state legislature's threatened decision to simply appoint a slate of

Bush electors, irrespective of the outcome of the popular vote, appear shamefully undemocratic, rather than being legitimate as technically legal under Article II, Section 1 of the Constitution.[21] By opting instead to try to "act presidential" and turn the whole matter over to highly paid lawyers, Gore sacrificed his chance to seize the moral initiative on a matter that he himself deeply believed in, and allowed the media to characterize him as no different from Bush, with both sides represented by an army of lawyers and both motivated simply by their own self-interest. He also left his popular majority rudderless while significantly marginalizing the political importance of his substantial popular-vote victory. By failing to see that his true political community were the actual people who had just voted for him, rather than the version of the people represented in the image of constitutional democracy prevailing in the now decisively dominant conservative world view, he actually created the conditions that legitimized his own defeat.

V. WHO ARE "THE PEOPLE"?

This last point deserves emphasis and provides us with the most important lesson to be drawn from the 2000 election regarding the relationship between politics and law. When the United States Supreme Court made its first intervention in deciding the outcome of the election by taking certiorari in *Bush v. Palm Beach County*,[22] it informed the lawyers for both sides that it wanted them to address the question of whether the Florida Supreme Court's first decision to extend the time for the initial recount through the Thanksgiving weekend violated either Article II, Section 1 of the U.S. Constitution or the series of federal statutes in Title 3 of the U.S. Code

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[21] U.S. CONST. art. II § I states:

> Each state shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of senators and representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an Office of trust or profit under the United States, shall be appointed an elector.

[22] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004 (2000).

governing the federal certification of state electors to the electoral college.[23] That request indicated that the Court majority intended to evaluate the legality of the Florida court's decision by measuring it against a version of how "the people" were "constituted" according to political values prevailing between 100 and 200 years ago.

In doing so, the Court was calculating, consciously or unconsciously, that the American people of today, who had just voted in a democratic election for the nation's highest office and had elected one candidate by a 500,000-vote majority, would nonetheless accept the legitimacy of a decision by the Court to decide the election in favor of the other candidate based on its interpretation of a version of the democratic will of the American people drawn from the legal materials of a much earlier and very different time. For example, the dates in the federal statutory provisions regarding certification of state electors, one of which the Court eventually used to award the presidency to Bush without allowing completion of the Florida vote-count, were based on how long it would take to deliver lists of electors from the several states by horseback to Washington D.C.[24] Similarly, the political values shaping the version of "the people" reflected in Article II Section 1—the basis for the Court's unanimous reversal of the Florida Supreme Court in the first case[25] and the concurring opinion by Justices Scalia, Thomas, and Rehnquist in the second case[26]—would have denied the right to vote to a very large percentage of Gore's voters.

The only reason that the Court majority felt they could take the risk of intervening on this basis was that they guessed, at the time of their first intervention, that they could use their fetishized legal authority as the supreme interpreters of the Intent of the Founding Fathers to superimpose their eighteenth-century version of the people on the people themselves, even though the real human beings comprising the people as a living, democratic, national community had just

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[23] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

[24] Larry Lipman, *Challenge Planned to Electoral College Congress to Make Count Official Today*, ATLANTA J. & CONST., Jan. 6, 2001, at A3.

[25] Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 76.

[26] Bush v. Gore, 531 U.S. at 112.

spoken. From the standpoint of any present-day understanding of the political meaning of popular democracy, it was ridiculous to assert that the Florida Supreme Court was prohibited from allowing a few extra days to obtain an accurate vote-count that would determine the outcome of a national election. Of course it was permissible, and even essential out of respect for the will of voters nationwide, to extend a more-or-less arbitrary counting deadline to figure out, in accordance with the statutorily expressed policy of the Florida legislature, which candidate the people of Florida had really voted for. Yet by channeling the political meaning of constitutional democracy into a legal framework drawn from an era when some states did not even allow popular votes in presidential elections, and by then commandingly posing supposedly knotty and abstract legal questions that "smuggled in" these antiquated political assumptions while appearing to be both rational and complex from a legal point of view, the Court majority guessed it could use its twenty years of accumulated conservative cultural capital to "awe" the people into another, imaginary, political world. Because the Supreme Court's authority is precisely to declare what political world is also the legal world, its opinion would be accepted as binding on the community as a whole.

Had Gore and his liberal lawyers been able to see and trust the reality of his own national democratic base—by speaking before the Court for them on the basis of the universal moral ideals of the present day embodied in the right of everyone to vote, and emphasizing in the name of leaders like Martin Luther King Jr. precisely the overturning of states' rights restrictions on that highest of democratic values that had marked the Court's jurisprudence since at least the Civil War—he might have mobilized his really-existing People in a way that would have overwhelmed the images of the "people" relied on by Bush and the Court majority. Against him, Gore, would have had the twenty years of loss of faith that would have made it difficult for his popular majority to believe there was still a hopeful public space to emerge into, and he would have had the media, which until such a popular democratic reality succeeded in emerging, would have projected the inevitability of the Court's image of Authority to speak for the

People (consider the media's fascination with the awesome architecture of the Supreme Court's chamber, the fact that we the people were going to be "allowed" for the first time to hear their allegedly devastating questioning of the lawyers, and the frantic scramble to get seats for the oral arguments in which the Great Ones would appear in their full regalia, emerging from their secret and sanctified private chambers where their supposedly majestic conversations about the nature of our constitutional democracy occur, conversations which the average persons actually constituting that democracy could certainly not understand). Overcoming the cultural power of these images would have been difficult; so long as the post-election contest remained mainly a media event in which people could only connect as a people by watching television, these images provided powerful psychological support for the twenty-years-in-the-making closure and even erasure of the popular-democratic space that the Gore majority would have to reclaim. But had he and Lawrence Tribe and David Boies stood up boldly in the name of Martin Luther King Jr. on behalf of the right to vote, I think the Gore forces would have succeeded in allowing the present reality of the people to defeat the long-dead version of the people on which the Bush forces and the Court's conservative majority depended.

But instead of standing up for voting rights, Gore and his lawyers meekly pleaded for states' rights,[27] the traditional Republican metaphor that has been used for centuries to deny working people, women, and African Americans the right to vote. Of course, in their public statements outside the legal sphere, Gore and his spokespeople did invoke the right to vote as the basis for their call for a full and fair Florida vote count.[28] But by severing this political claim from their legal claim, they decisively undermined their ability to claim that the right to vote was not just their view of the right principle to be followed, but was also the universally binding moral ideal that

[27] Brief for Respondent, *supra* note 9, at 50.

[28] Vice President Al Gore, News Conference on Florida Election Lawsuit (Nov. 28, 2000), transcript *available at* http://www.pbs.org/newshour/bb/election/julydec00/-fl_11-28.html.

the Court was obligated to recognize as binding upon a national community founded upon the will of the people.

So enveloped were Gore and his lawyers in their own belief in the power of the conservative worldview, so weakened was their conviction that there really was a People out here to support their own political viewpoint, that they allowed themselves to think that they had to argue from a position of weakness: to cling to the hope that by dutifully framing their legal argument in the antiquated version of the People that the Court majority had for so long successfully been constructing, they might have a chance of pleading with either Kennedy or O'Connor to vote with them and thus eke out a five-to-four victory on states' rights grounds. By doing so, they effectively limited the meaning of the legal debate to morally trivial, technical legal questions affecting only Floridians, and dissolved the emerging unity of their own national democratic base by depriving us of our ability to claim constitutional legitimacy—in the name of our own national democratic majority—to demand that the Florida vote count proceed.[29]

Once Gore and his lawyers deferred in this way to the conservative worldview and its version of who the People were, we were lost. Ironically, by the time the Court finally ended the election in its second decision on December 12, 2000,[30] the Court itself had to bow to the national popular pressure that had built up on its own on behalf of the pre-eminence of the right to vote over the six-week period of nationwide political debate and shifted its rationale from their initial strict reading of Article II, Section 1, to a rationale based on equal protection theory.[31] Undoubtedly, the Court majority knew that the two Court decisions read together were incoherent and unsupportable. But they also knew that there was no longer any possibility of a unified public majority empowered by a publicly articulated sense of constitutional entitlement that could do anything about it.

Even if Gore could not have changed the outcome of the Court decisions and of the election itself by uniting his political

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[29] *See* Bush v. Gore, 531 U.S at 98.
[30] *Id.*
[31] *Id.* at 103-10.

and legal claim under the transcendent banner of voting rights, he would, by doing so, have posed a powerful challenge with significant popular support to the long conservative assault on the very existence of a socially-connected, national community demanding legal recognition in the name of the highest of democratic values. Instead of the political demobilization and universal isolation that envelops and separates us from each other today, we and they would know that we exist, that we claim to be legitimately "constituted," and that by quite a large margin we had and have the votes.