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Mark S. Brodin

*Boston College Law School*, [brodin@bc.edu](mailto:brodin@bc.edu)

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# *Bush v. Gore*: The Worst (or at least second-to-the-worst) Supreme Court Decision Ever

Mark S. Brodin\*

“The presidential election process described by the original Constitution left it to each state to decide its electoral vote. No case, no precedent, no original understanding gave the Supreme Court the jurisdiction—the authority—to consider, much less condemn, the process that the Florida courts were following to decide Florida’s vote.”<sup>1</sup>

In the stiff competition for worst Supreme Court decision ever, two candidates stand heads above the others for the simple reason that they precipitated actual fighting wars in their times. By holding that slaves, as mere chattels, could not sue in court and could never be American citizens,<sup>2</sup> and further invalidating the Missouri Compromise, which had prohibited slavery in new territories, *Dred Scott v. Sandford*<sup>3</sup> charted the course to secession and Civil War four years later. By disenfranchising Florida voters and thereby appointing popular-vote loser George W. Bush as President, *Bush v. Gore*<sup>4</sup> set in motion events which would lead to two wars,<sup>5</sup> neither of which is successfully concluded over a decade later,<sup>6</sup> as well as an unregulated greed-fest on Wall Street that continues to unhinge our economic well-being.<sup>7</sup> As Professor Laurence Tribe, one of

\* Professor and Lee Distinguished Scholar, Boston College Law School.

<sup>1</sup> Anthony Lewis, *A Supreme Difference*, N.Y. REV. BOOKS, June 10, 2010, available at <http://www.nybooks.com/articles/archives/2010/jun/10/supreme-difference/?page=2>.

<sup>2</sup> As “beings of inferior order,” blacks “had no rights which the white man was bound to respect.” *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

<sup>3</sup> *Id.* at 393. The inexcusable judicial imprimatur on the American version of apartheid dubbed “Jim Crow,” *Plessy v. Ferguson*, 163 U.S. 537 (1896), relegated black Americans to a half-century of legalized second-class citizenship and worse, but precipitated no shooting war.

<sup>4</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>5</sup> While it is certainly possible that a President Gore would have initiated war against the Taliban in Afghanistan, it is unlikely in the extreme that he would have done so against Iraq, which had no connection to the 9/11 attacks, the *casus belli* for the former invasion. Indeed Gore was vocal in the opposition to the Iraq debacle from before its inception. See Al Gore, Former Vice President, Iraq and the War on Terrorism, Prepared Remarks for the Commonwealth Club of California (Sept. 23, 2002), available at <http://www.gwu.edu/~action/2004/gore/gore092302sp.html>; John Mercurio, *Gore Challenges Bush Iraqi Policy*, CNN.COM (Sept. 23, 2002), [http://articles.cnn.com/2002-09-23/politics/gore.iraq\\_1\\_gore-challenges-military-strike-military-action?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2002-09-23/politics/gore.iraq_1_gore-challenges-military-strike-military-action?_s=PM:ALLPOLITICS).

<sup>6</sup> The war in Afghanistan proceeds at full pace; and the recent withdrawal of combat troops has left Iraq in a highly precarious state. See Helene Cooper & Thom Shanker, *U.S. Embraces a Low-Key Response to Turmoil in Iraq*, N.Y. TIMES, December 25, 2011, at A1.

<sup>7</sup> Remarkably, Linda Greenhouse, long-time Supreme Court correspondent for the New York Times, now “describe[s] the decision not as a travesty or tragedy, but as a bad hair day. . . . [I]t was just something that happened, a weird gust of wind that blew through the

Vice President Gore's lawyers, observed with understatement recently: "Some wrongfully decided Supreme Court decisions can be belatedly righted. *Bush v. Gore* cannot."<sup>8</sup>

On election night 2000, the returns sent the weathervanes of political analysts spinning. At approximately 8 p.m., some TV networks declared Gore the winner by virtue of taking Florida's twenty-five electoral votes.<sup>9</sup> Two hours later, spurred by Republican-leaning FOX News,<sup>10</sup> the networks returned the state to the "undecided" column; and by early morning they had given the state, and thus the Presidency, to Governor Bush.<sup>11</sup> At one point in the flip-flops, Gore called Bush to concede. Later that night he called to take back his concession.

Although John F. Kennedy was elected in 1960 with a margin of only 112,827 votes, or 0.1 percent of the popular vote, Al Gore's lead of five times that number (.5 percent)<sup>12</sup> was thrown into dispute by the Electoral College results. Ground zero for the fierce post-election contest was Florida, where George Bush's brother Jeb sat as Governor, and his state campaign co-chair Katherine Harris was conveniently positioned as Secretary of State, the official vote counter. As the state-law mandated manual recounts in several counties were diminishing Bush's razor-thin lead (less than three hundred votes at one point), the dispute ended up in the state courts, ultimately resulting in a Florida Supreme Court decision (by a four-to-three majority) on December 8, 2000, ordering completion of the on-going recounts.<sup>13</sup> The Republican candidate filed an emergency application for a stay, which the United States Supreme Court (to

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court, as the divided justices responded on a visceral level to very different perceptions of the situation and the court's proper role." Linda Greenhouse, Op-Ed, *My Florida Recount Memory: Talking Justice*, N.Y. TIMES, Nov. 21, 2010, at WK10, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CE1DA123DF932A15752C1A9669D8B63>.

<sup>8</sup> Laurence H. Tribe, Op-Ed, *My Florida Recount Memory: Moving Forward*, N.Y. TIMES, Nov. 21, 2010, at WK10, available at <http://www.nytimes.com/2010/11/21/opinion/21florida.html?pagewanted=all> (emphasis added). In identifying *Bush v. Gore* as one of the worst products ever to come off the Supreme Court assembly line, I am in very good company. See, e.g., ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 174 (2001) (it "may be ranked as the single most corrupt decision in Supreme Court history"); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 141 (2007) ("The justices did almost everything wrong. They embarrassed themselves and the Supreme Court."); VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001) (the title says it all).

<sup>9</sup> DOUGLAS KELLNER, GRAND THEFT 2000: MEDIA SPECTACLE AND A STOLEN ELECTION 21 (2001).

<sup>10</sup> *Id.* at 23. George W. Bush's cousin was (wouldn't you have guessed it?) the Fox News director. *Id.*

<sup>11</sup> *Id.* at 22-23.

<sup>12</sup> See *Presidential General Election Results Comparison - National*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/compare.php?type=national&year=2000&f=0&off=0&elect=0> (last visited Mar. 3, 2012).

<sup>13</sup> *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000).

the shock of many observers)<sup>14</sup> both granted and treated as a petition for certiorari, which it also granted.<sup>15</sup>

The stay of the Florida court's mandate, issued on Saturday, December 9, was so extraordinary that Justice Scalia, acknowledging that "it is not customary for the Court to issue an opinion"<sup>16</sup> in such situations, nonetheless felt the need.<sup>17</sup> In it he asserted what must be the most bizarre finding of irreparable harm anywhere in the law books: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."<sup>18</sup> The "cloud" over his "legitimacy" was, in reality, that Bush may not have received enough actual votes to win! We usually call that losing the election.

As Stevens, Souter, Ginsburg, and Breyer complained in their dissent from the Court's order, this blatant repudiation of Florida's Supreme Court was a marked departure for a Court that thrived on federalism and state's rights rhetoric, and that "[o]n questions of state law, . . . [has] consistently respected the opinions of the highest courts of the States."<sup>19</sup> Moreover,

[c]ounting every legally cast vote cannot constitute irreparable harm. On the other hand, there is a danger that a stay may cause irreparable harm to respondents—and, more importantly, the public at large—because of the risk that the entry of the stay would be tantamount to a decision on the merits in favor of the applicants. Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election."<sup>20</sup>

But the worst was yet to come. The Court ordered that briefs be filed the following day, Sunday, and oral argument be heard on Monday.<sup>21</sup> Scalia was not going to allow any time for this extraordinary intrusion into the political process to percolate through the citizenry.

On Tuesday evening, December 12, the Court released an unsigned per curiam decision (joined by Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas).<sup>22</sup> Its premise was that the manual recounts ordered by the Florida Supreme Court lacked specific uniform standards for discerning "the intent of the voter," the benchmark set out in the controlling Election Code adopted by the Legislature.<sup>23</sup> Conveniently ignoring the fact that the state circuit court (as explicitly authorized by the Legislature) had already issued such guidance for applying the "voter intent" standard to the legendary

<sup>14</sup> The career clerk summoned by Justice Anthony Kennedy to discuss the *certiorari* petition did not even bring his pen and legal pad with him because he was so convinced that the petition would be denied. See TOOBIN, *supra* note 8, at 152.

<sup>15</sup> Bush v. Gore, 531 U.S. 1046 (2000).

<sup>16</sup> *Id.*

<sup>17</sup> "Scalia, who was itching to shut down the recount as soon as possible," even tried to convince his fellow justices to go on to summarily reverse the Florida Supreme Court, *without hearing any oral argument at all*. TOOBIN, *supra* note 8, at 162.

<sup>18</sup> Bush, 531 U.S. at 1046 (Scalia, J., concurring) (emphasis added).

<sup>19</sup> *Id.* at 1047 (Stevens, J., dissenting).

<sup>20</sup> *Id.* at 1047–48 (citation omitted) (internal quotation marks omitted).

<sup>21</sup> *Id.* at 1046.

<sup>22</sup> Bush, 531 U.S. at 100. Justices Stevens, Breyer, Souter, and Ginsberg all filed or joined dissenting opinions.

<sup>23</sup> *Id.* at 105–06 (internal quotation marks omitted).

hanging and dimpled chads,<sup>24</sup> the majority found a risk of “arbitrary and disparate treatment of the members of [the] electorate”<sup>25</sup> and so identified an Equal Protection Clause violation.

This was an argument the Bush lawyers threw in as an afterthought, devoting only three pages of their forty-two-page brief to it.<sup>26</sup> Moreover, it is a claim that Bush and Cheney had no standing to pursue, as it was the voters of Florida who were the real injured parties if indeed some ballots were not counted while similarly-situated ones were.<sup>27</sup> The one-person, one-vote precedents relied upon by the Bush lawyers, starting with *Reynolds v. Sims*,<sup>28</sup> were brought by residents, taxpayers, and voters challenging the various reapportionment schemes, not by the candidates. Moreover, Gore’s lawyers noted the cruel irony of Bush’s “request that this Court intervene in a state electoral process to ensure that votes are not counted,” which “turns [the voter dilution cases on their] heads.”<sup>29</sup>

<sup>24</sup> Brief of Respondent at 44a, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), 2000 WL 35546401. Bush lawyer Theodore Olson was flummoxed when asked repeatedly to articulate any more meaningful standards during oral argument. See Transcript of Oral Argument at 18–25, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), 2000 WL 1804429. Not surprisingly, he would simply give the sole responsibility for vote-counting to Secretary of State (and Bush campaign co-chair) Katherine Harris. See *id.*

<sup>25</sup> *Bush*, 531 U.S. at 105. The more obvious inequity, pressed by Gore’s counsel David Boies at oral argument, was the use of different voting machinery from county to county, as is typical around the states. Transcript of Oral Argument, *supra* note 24, at 72. Paper ballots here, optical readers there—all with different rates of errors. The majority expressed no concern about that matter, perhaps because it would have put all American elections in doubt. Theodore Olson moved the focus during his rebuttal to the lack of uniformity, from county to county, regarding the interpretation of punch card ballots. *Id.* at 74.

<sup>26</sup> TOOBIN, *supra* note 8, at 160. Gore’s lawyers characterized Bush’s argument on this point at the Florida Supreme Court as “one throwaway line.” Brief of Respondent, *supra* note 24, at 35.

<sup>27</sup> As the Florida Supreme Court recognized, “[t]he real parties in interest here . . . are the voters. . . . The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people.” *Gore v. Harris*, 772 So. 2d 1243, 1254 (2000). No Florida voter made such a claim in the litigation. Bush, as Vincent Bugliosi put it, “leaped in and tried to profit from a hypothetical wrong inflicted on someone else.” BUGLIOSI, *supra* note 8, at 42; see also *Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989) (unsuccessful black candidate did not have standing to challenge as discriminatory election results from manual recounts under Voting Rights Act).

If disappointed candidates for state office were allowed to use the Voting Rights Act to challenge the outcome of elections, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded.

*Wamser*, 883 F.2d at 623. Amazingly, the Gore lawyers failed to raise the standing issue in either their brief or oral argument. As a matter of justifiability, it should have been raised by the Court in any event. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 61 (5th ed. 2007). For a harsh, but justified, critique of the Gore legal team on the standing and equal protection points, see BUGLIOSI, *supra* note 8, at 68–73. For a compelling treatment of the obvious standing, ripeness, and political question doctrine barriers ignored by the Court, see Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001).

<sup>28</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>29</sup> Brief of Respondent, *supra* note 24, at 2 (emphasis omitted).

The Rehnquist Court, which Erwin Chemerinsky observed had only invoked the equal protection clause to strike down affirmative action programs benefitting minorities and women,<sup>30</sup> was now cynically employing it to disenfranchise voters, many of whom were black.

But even if there were arguably a constitutional violation, protocol and precedent would require remanding to the Florida courts for consideration of appropriate standards under state law. Instead, while the Per Curiam ends cynically by stating “the Supreme Court of Florida is reversed, and the case is remanded,”<sup>31</sup> it concludes three paragraphs before that *the deadline for completing the election had already arrived*.<sup>32</sup> The majority chose, in other words, to appoint George W. Bush President right then and there, making him the only candidate to ever achieve that lofty position by a one-vote margin.

The Court’s draconian remedy for what it alone perceived as a constitutional violation was, in short, to simply disenfranchise the victims. On this logic, the solution for the de jure segregation of public schools condemned in *Brown v. Board of Education* would have been to expel the black students. Having found unconstitutional the lack of uniformity in voting practices from one Florida county to another, the majority imposed those very results on the electorate, rather than allow the more accurate recount to continue. The transparent hypocrisy was mind-blowing.

Recognizing that insistence on uniform vote-tallying rules would invalidate results nationwide (where voting practices vary widely) in virtually every election, the majority hastened to add that “[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”<sup>33</sup> This was a one-day return train ticket—good only today.<sup>34</sup> Like the rest of *Bush v. Gore*, there is no precedent for a decision of the Supreme Court that comes with the warning label “NOT TO BE USED AS A PRECEDENT.”

Rehnquist, Scalia, and Thomas filed a concurring opinion invoking Article II, Section 1, Clause 2, and Title 3 U.S.C. § 5, both of which explicitly confer upon states the choice of presidential electors, but provide that it is the state legislature that should direct the manner in which they are selected.<sup>35</sup> The Florida Supreme Court, the three justices contended, had interfered in the Legislature’s rightful process. (That Court was dominated by Democrats, while the Legislature was firmly in the hands of Republicans). The three thus insisted that their decision “does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures.”<sup>36</sup> The

<sup>30</sup> Quoted in BUGLIOSI, *supra* note 8, at 45.

<sup>31</sup> *Bush v. Gore*, 531 U.S. 98, 111 (2000).

<sup>32</sup> *Id.* at 110.

<sup>33</sup> *Id.* at 109.

<sup>34</sup> See Adam Cohen, Editorial Observer, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES, Aug. 15, 2006, at A18. A Westlaw search reveals no Supreme Court citation to the case since it was handed down. Lower courts have not all followed the admonition. See, e.g., *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002) (relying on *Bush v. Gore* to find an equal protection violation in the use of different systems of vote counting, which resulted in dilution of African American and Hispanic votes).

<sup>35</sup> *Bush*, 531 U.S. at 111–22.

<sup>36</sup> *Id.* at 115 (emphasis omitted).

Court's ultra-conservatives, who never hesitated to defer to the state courts when it served their ideological agenda, found that position inconvenient in this controversy.

Reportedly, the five justices in the majority viewed the Florida Supreme Court's decision ordering the recount to continue as the work of Democratic hacks seeking to throw the election to Gore.<sup>37</sup> This was, ironically, just how they themselves would be viewed after the highly dubious ruling in favor of Bush—as Republican operatives loyally serving their Party's interests. A full-page advertisement in the *New York Times* on January 13, 2001, signed by 554 law professors, protested that “[b]y stopping the vote count in Florida, the U.S. Supreme Court used its power to act as political partisans, not judges of a court of law.”<sup>38</sup> As Vincent Bugliosi persuasively argues, while the Supreme Court had historically delivered some clearly ideologically-motivated decisions (liberal or conservative), *Bush v. Gore* is unique in its crassly political (Republican vs. Democrat) agenda.<sup>39</sup>

Notwithstanding the majority's undisguised disrespect for the Florida Supreme Court, the decision that court issued on December 8<sup>40</sup> is quite thoughtful and modulated. It actually splits the difference between the positions of the parties by ordering both continuation of the manual recount in Miami-Dade County, sought by Gore, and statewide recounting of undervotes in all counties, sought by Bush.<sup>41</sup> In short, the Florida opinion reflects a balance that completely eluded the five Bush boosters in Washington.

Dissenters Stevens, Ginsburg, Breyer, and Souter noted the breathtaking upending of the majority's usual deference to state court interpretations of state law, even when federal rights are at stake,<sup>42</sup> as well as the cruel irony of using the Equal Protection Clause to disenfranchise the very victims of the perceived violation.<sup>43</sup> And in their view, since the Florida Constitution explicitly subjected all legislative power to judicial review, the Florida Supreme Court had not exceeded its lawful powers in resolving the electoral dispute.<sup>44</sup>

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<sup>37</sup> See TOOBIN, *supra* note 8, at 166 (supporting that at least one justice in the majority, Justice O'Connor, held this view).

<sup>38</sup> Law Professors for the Rule of Law, *554 Law Professors Say: By Stopping the Vote Count in Florida, The U.S. Supreme Court Used Its Power To Act as Political Partisans, not Judges of a Court of Law*, *N.Y. Times*, Jan 13, 2001, at A7 (advertisement).

<sup>39</sup> BUGLIOSI, *supra* note 8, at 75–76.

<sup>40</sup> *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

<sup>41</sup> *Id.* at 1262.

<sup>42</sup> See *Bush*, 531 U.S. at 135–43 (Ginsburg, J., dissenting). *But see* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003) (arguing that Supreme Court reexamination of state law in such cases is both familiar and proper).

<sup>43</sup> Souter and Breyer conceded there might be equal protection issues in the disparate standards for vote-counting, but would have left it to the Florida courts on remand to articulate uniform standards. Thus the spin by Bush supporters that the decision was 7–2 was just that, pure spin. Ginsburg, who as an advocate before the Court had pioneered the application of equal protection doctrine to women, was reportedly “galled” by the majority's cynical use of the clause to confer the presidency on a privileged white male legacy. TOOBIN, *supra* note 8, at 173.

<sup>44</sup> *Bush*, 531 U.S. at 145–46.

And so the ballot-counting was stopped permanently, with George Bush conveniently in the lead by just a few hundred votes. When the majority invoked the December 12 “safe harbor” deadline (envisioned by 3 U.S.C. § 5) as the reason a remand was not possible, it disingenuously failed to note that it was the Court’s own stay days before that made compliance impossible; or that the “safe harbor” deadline merely protects the state’s electors from being challenged in Congress, and that the only real deadline that mattered was the day the electors would meet together and vote, which was December 18 and still six days off. Nothing, in short, prevented the Court, as Justice Stevens chided, from remanding to the state courts for a remedy that would not deprive Florida voters of their franchise.<sup>45</sup> But, as noted above, he had accurately predicted this foreordained rush-to-judgment only days before. As Professor Tribe bemoaned, “having itself run out the clock, [the Court] sadly had no choice but to end all the counting that very night (Catch-22!).”<sup>46</sup>

Later in the evening of December 12, Al Gore conceded, again, but this time for real.

John Paul Stevens concluded his dissent with his now-famous admonition: “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.”<sup>47</sup>

His concern was sadly underscored by what we soon discovered about the direct self-interest that at least three in the majority had in the outcome. Antonin Scalia’s son, Eugene, was a partner in the Washington office of Gibson, Dunn & Crutcher in December 2000, the very firm in which Theodore B. Olson, who argued George W. Bush’s case before the Court, was also a partner.<sup>48</sup> Only months later, the Bush administration selected Eugene Scalia for the top legal position in the Department of Labor.<sup>49</sup> At the time the Court was hearing and deciding *Bush v. Gore*, Clarence Thomas’s wife Virginia was working for the conservative Heritage Foundation, gathering resumes for appointments in an anticipated Bush administration.<sup>50</sup> The calls for Thomas to

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<sup>45</sup> *Id.* at 127 (Stevens, J., dissenting).

<sup>46</sup> Tribe, *supra* note 8. Even *Bush v. Gore* defender Charles Fried, Harvard Law School professor and former Solicitor General for Ronald Reagan, admitted this use of the deadline as an excuse not to remand was “the least convincing portion of the Court’s opinion.” Charles Fried, Letter to the Editors, ‘A Badly Flawed Election’: An Exchange, N.Y. REV. BOOKS, Feb. 22, 2001, available at <http://www.nybooks.com/articles/archives/2001/feb/22/a-badly-flawed-election-an-exchange/?pagination=false&printpage=true>.

<sup>47</sup> *Bush*, 531 U.S. at 128–29. Professor Jesse H. Choper expanded on this concern in his *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335 (2001).

<sup>48</sup> Christopher Marquis, *Contesting the Vote: Challenging a Justice; Job of Thomas’s Wife Raises Conflict-of-Interest Questions*, N.Y. TIMES, Dec. 12, 2000, at A26, available at <http://www.nytimes.com/2000/12/12/us/contesting-vote-challenging-justice-job-thomas-s-wife-raises-conflict-interest.html>.

<sup>49</sup> Linda Greenhouse, *National Briefing — Washington: Scalia’s Son Named to Bush Administration Post*, N.Y. TIMES, May 8, 2001, at A22, available at <http://www.nytimes.com/2001/05/08/us/national-briefing-washington-scalia-s-son-named-to-bush-administration-post.html>.

<sup>50</sup> Marquis, *supra* note 48.



recuse himself, as 28 USC § 455 requires of judges if a spouse has “an interest that could be substantially affected by the outcome of the proceeding,” were to no avail. Lastly, Sandra Day O’Connor had been observed as visibly upset at an election-night party when Florida was first called for Gore, remarking “[t]his is terrible.”<sup>51</sup> Her husband explained to the surprised guests that the couple intended to retire to Arizona, and a Gore victory would mean she would have to stay on the Court another four years to avoid a Democratic pick for her replacement.<sup>52</sup>

The actual results of the 2000 presidential election remain in dispute. A Media Consortium review of Florida’s uncounted ballots in 2001 concluded that Bush would have won by a slender margin even if the Supreme Court had not intervened, but that a full statewide recount of rejected ballots would probably have gone Gore’s way.<sup>53</sup> With black precincts experiencing more than three times as many rejected ballots as white precincts, early concerns about vote suppression were confirmed.<sup>54</sup> And there were, of course, the infamous “butterfly ballots,” which assuredly confused thousands of elderly voters who intended to vote for Gore, but mistakenly punched Pat Buchanan. The New York Times lamented: “The reality, therefore, is that Mr. Bush’s victory in the most fouled-up, disputed and wrenching presidential election in American history was so breathtakingly narrow that there is no way of knowing with absolute precision who got the most votes.”<sup>55</sup>

We will also never know whether the Republican partisans on the Court would have made the same decision if it had been George W. Bush, and not Al Gore, who needed the Florida recount to become President. But we can certainly make an educated guess.

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<sup>51</sup> Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46 (internal quotation marks omitted); TOOBIN, *supra* note 8, at 143.

<sup>52</sup> Isikoff & Thomas, *supra* note 51, at 46; TOOBIN, *supra* note 8, at 143–44.

<sup>53</sup> Ford Fessenden & John M. Broder, *Examining the Vote: The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1, available at <http://www.nytimes.com/2001/11/12/us/examining-vote-overview-study-disputed-florida-ballots-finds-justices-did-not.html?pagewanted=print>.

<sup>54</sup> Ford Fessenden, *Examining the Vote: The Patterns; Ballots Cast By Blacks and Older Voters Were Tossed in Far Greater Numbers*, N.Y. TIMES, Nov. 12, 2001, at A17, available at <http://www.nytimes.com/2001/11/12/us/examining-vote-patterns-ballots-cast-blacks-older-voters-were-tossed-far-greater.html?pagewanted=print>.

<sup>55</sup> Richard L. Berke, *Examining the Vote: News Analysis; Who Won Florida? The Answer Emerges, But Surely Not the Final Word*, N.Y. TIMES, Nov. 12, 2001, at A16, available at <http://www.nytimes.com/2001/11/12/us/examining-vote-analysis-who-won-florida-answer-emerges-but-surely-not-final-word.html?pagewanted=print>.