

FOREWORD:
**THE LEGACY OF *BUSH V. GORE* IN PUBLIC
OPINION AND AMERICAN LAW**

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Very few Supreme Court decisions achieve a level of salience with the mass public comparable to that achieved by *Bush v. Gore*¹ on the day it was delivered. Because the 2000 presidential election seemed to turn on the Court's decision, even the large majority of people who never pay attention to the work of the Supreme Court decided to tune in. Given the perceived stakes and the decision's unusually high salience, the fact that *Bush v. Gore* polarized Americans along racial and partisan lines should have come as no surprise. Where you stood on the decision depended on whether your candidate won or lost as a result.

Would the polarization in the mass public found in *Bush v. Gore*'s immediate aftermath prove long lasting in public attitudes toward the decision or the Court itself? Early scholarship, led chiefly by James Gibson and his coauthors, noticed that the initial polarization toward the Court evaporated within a year of the decision.² They concluded that the Court could draw upon its deep reservoir of goodwill among the American people even in times of polarizing crisis such as the 2000 election. In short, the Court seemed to pay a small price, if any, for its decision. Polls taken four years after the decision confirmed that attitudes toward the Court did not evince the same partisan structure as the day after the decision. If anything, partisans had switched sides, with Democrats being more supportive of the Court than Republicans.³ According to a Gallup poll in June 2009, moreover, seventy percent of Democrats, but only forty nine percent of Republicans, approved of the way the Supreme Court was handling its job – a partisan structure of support almost the complete reverse of that found in the January 2001 Gallup Poll.⁴

1. 531 U.S. 98 (2000).

2. See generally James L. Gibson et al., *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POLIT. SCI. 354 (2003); James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POLIT. SCI. 535 (2003); James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507 (2007).

3. Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 333 (Nathaniel Persily et. al., ed., (2008)).

4. Jeffrey M. Jones, *Rating of Supreme Court Improves as Partisans Switch Sides: In a shift*

What about attitudes toward *Bush v. Gore* itself? Has it joined *Roe v. Wade* and *Brown v. Board of Education* as one of the few decisions about which Americans know and have opinions? In the summer of 2010, Stephen Ansolabehere and I conducted a poll⁵ that asked one thousand Americans the following question:

You may remember that ten years ago the U.S. Supreme Court issued a decision in the case concerning the counting of ballots cast in Florida in the 2000 presidential election contest between George Bush and Al Gore. Do you think the Supreme Court decided the case fairly or unfairly?

Yes, it decided the case fairly – 33.7%

No, it did not decide the case fairly – 35.2%

I don't remember – 28.4%

Refused to Answer – 2.6%

The even split among the public, which largely tracks partisan identification and attitudes toward the Bush presidency, indicates how charged the decision remains for many people. However, the sizable share of respondents who do not remember the decision suggest that it is fading in Americans' collective memory. The short time horizon for polarization on the decision is all the more supported by the fact that forty two percent of those age 18 to 29 say they do not remember—almost twice the rate of non-opinion for those age 45 or over. As the decision recedes into the past, we should expect fewer Americans to know or have opinions about *Bush v. Gore*.

Of course, those who are still licking their wounds or savoring their victory in *Bush v. Gore* will likely never forget or change their opinions about the decision. The symposium that led to this volume provided a unique opportunity to showcase a range of reflections from those who were involved in some way in the case. Over two days at St. Thomas Law School, participants in the 2000 election controversy reminisced, shared war stories, and critiqued and praised the associated court decisions. The symposium consisted of four panels presenting, respectively, the views of litigants, administrators, judges, and academics.

from last fall, most Democrats now approve; most Republicans disapprove, GALLUP, June 22, 2009, <http://www.gallup.com/poll/121196/Rating-Supreme-Court-Improves-Partisans-Switch-Sides.aspx> (noting Republican approval at 80% and Democratic approval at 42% in January 2001).

5. See STEPHEN ANSOLABEHERE & NATHANIEL PERSILY, KNOWLEDGE NETWORKS, FIELD REPORT: CONSTITUTIONAL ATTITUDES SURVEY (2010), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=54767.

The first panel of lawyers discussed views of the litigation ten years later. James Bopp, Jr., brought the first federal court case in the 2000 election controversy, which made the Equal Protection argument that eventually won the day in *Bush v. Gore*. He described the origins of that argument, praised several of the tactical decisions of the Gore legal team, and raised concerns about partisanship in the Florida Supreme court in how it handled the 2000 election controversy. Echoing some of Mr. Bopp's arguments was Joseph Klock, who represented Secretary of State Katherine Harris throughout the recount litigation. He described the process of decision-making that occurred concerning the recount and resulting litigation, as well as the media's misrepresentation of his client. Kendall Coffey and Benedict Kuehne, both lawyers who represented Vice President Al Gore, discussed the intense involvement of their client and the debates that occurred within the legal team as to which arguments would most likely lead to a successful recount. They described the euphoria in their camp when the Florida Supreme Court ordered the recount and the devastation when the United States Supreme Court stayed that decision.

The first panel was followed by a keynote address by Bob Butterworth, who had served as Florida's Attorney General and state chair for the Gore campaign. He described in detail the drama of that election night as different candidates presumed victory, Gore conceded and then withdrew his concession, and then different television stations showed up on his doorstep. His remarks revealed the perils shared by so many state officials who wore two hats at the time: one associated with a campaign or party and another associated with their position as enforcers, administrators, or interpreters of the election law.

The second panel featured several of the lawyers who oversaw, in one form or another, the recount. Murray Greenberg, formerly the County Attorney for Miami-Dade County, and Jeffrey Ehrlich, who was a lawyer for the county, described the very calm and smooth Election Day in Miami-Dade. Election Day turned out to be the calm before the storm, however, that would be the recount in Miami-Dade. The speakers described the confusion and delay that plagued the canvassing board's recount, as well as the much publicized and apparently overhyped "Brooks Brothers Riot" that was happening outside. Paul Hancock and Kim Tucker both worked for Bob Butterworth in the Florida Attorney General's office. They talked about the multiplicity of election problems throughout the state, many of which never received the notoriety of the "Butterfly ballot" or "dangling chads." Paul Hancock mentioned, for example, the problems in overvotes in Duval County and the controversy over military ballots. The eye-opening lesson he learned from the controversy, he said, was that an

individual does not have constitutional right to vote for President.

The third panel featured Judge Nikki Clark of the First District Court of Appeal and Justice R. Fred Lewis of the Florida Supreme Court. Judge Clark discussed the “Sleeper Case” of the 2000 election controversy, which involved the alleged improper handling of 15,000 absentee ballots. Alleging bias, parties to the litigation moved to disqualify her from the case and hate mail followed. However, once she issued the decision rejecting the motion to disqualify the ballots, she received apologies and love letters. Justice Lewis also emphasized the intense personal toll the litigation took on him and the other Justices on the Florida Supreme Court, as well as the at-times savage behavior of members of the media. Both he and Judge Clark, however, viewed the controversy and its eventual resolution as an incredible testament to the importance and success of the rule of law in the American system, as well as a tribute to the legal profession as a whole.

The final panel featured academics who have written about *Bush v. Gore*. It included Edward Foley of The Moritz School of Law at Ohio State University, James Gibson from Washington University, St. Louis, and Nelson Lund from George Mason University Law School. Professor Lund has established himself as the primary defender of the Equal Protection holding in *Bush v. Gore* and he reiterated his arguments that he has published elsewhere.⁶ Professor Foley is the nation’s leading expert on the law of recounts, both past and present. He described how the 2000 Election controversy had eerie parallels that stretched nearly all the way back to the Founding Era. Finally, James Gibson presented his findings, as already described, concerning the resilience of the Court in American public opinion. If the Court can survive a threat to its legitimacy akin to *Bush v. Gore*, he explained, it is hard to think of any other legal storm that it would not be able to weather.

As this written volume attests, the symposium would not have been possible without the extraordinary efforts of so many people at St. Thomas Law School. The support of Deans Cecile Dykas and Douglas Ray was indispensable in getting the symposium off the ground. The Executive Board of the *St. Thomas Law Review*, including Editor-in-Chief Michael Vera and Articles Solicitation Editor Michael Skiscim, as well as Symposium Editor Nicholas Reed and faculty advisor Professor Gary

6. See generally Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002) (responding to Laurence H. Tribe, *eroG .v hsuB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 178–79 (2001)); Nelson Lund, “EQUAL PROTECTION, MY ASS!”, *Bush v. Gore and Laurence Tribe’s Hall of Mirrors*, 19 CONST. COMM. 543, 543 (2003).

Kravitz, worked tirelessly to put the event and this volume together. Most of all, this symposium is inspired by Professor Murray Greenberg. He represents the best in a practitioner-professor that the legal academy offers. He personally lived through the 2000 Election controversy as Dade County Attorney. His willingness to share his reflections and help shepherd this symposium in his new role as legal academic provided the students, the audience, and we hope, the readers of this volume with a unique chronicle of one of the most important court cases in American history.