



2001

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Recommended Citation

Evan Tsen Lee, *The Politics of Bush v. Gore*, 3 J. APP. PRAC. & PROCESS 461 (2001).

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THE POLITICS OF *BUSH v. GORE*

Evan Tsen Lee*

In the mid-1970s, a movement known as Critical Legal Studies (“the Crits”) burst onto the law school scene. The Crits were leftist law professors disillusioned by the demise of the Warren Court. Impatient for further progressive judicial action, they upbraided mainstream legal liberals for insisting on “principle” and adherence to the “rule of law.”¹ The Crits famously claimed that “all law is politics”²—a slogan that first-year law students, in their intellectual bewilderment, found comforting because it made their world simple. Right-wing judges act on the basis of their political beliefs; why shouldn’t left-wing judges? Indeed, a judge is incapable of doing anything but acting on political beliefs, the Crits screamed. But by the 1990s, cooler heads had prevailed. Legal academics resumed talking as if the rule of law meant something. Critical Legal Studies had lost its momentum.

Then came *Bush v. Gore*³ As a piece of legal reasoning, the decision is so thin that legal liberals, who for twenty-five years stood against the Crits and their mantra of “all law is politics,” have now thrown up their hands and conceded the point. Ronald Dworkin, who has made a brilliant career out of insisting that the Supreme Court makes America a nation of principle, wrote that he can find no reason to think that the majority in *Bush v. Gore* was doing anything other than trying to recruit

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1. See e.g. Gary Peller, *Neutral Principles in the 1950's*, 21 U. Mich. J.L. Reform 561 (1988).

2. See e.g. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515 (1991).

3. 531 U.S. 98 (2000).

conservative reinforcements onto the Court.⁴ Bruce Ackerman, who has long struggled against the view that law is nothing more than politics, has concluded that the conservative justices in the *Bush v. Gore* majority quite simply arranged for their own succession.⁵ Ackerman openly fears a resurgence of the Crits: “I fear that *Bush v. Gore* will provoke another great renaissance of legal nihilism in our nation’s law schools, a cynicism that will slowly erode general confidence in the system.”⁶ Both Dworkin and Ackerman virtually plead for an alternative explanation—one that could be reconciled with their intellectual commitments of the last quarter century—but neither can glimpse what that explanation might be.⁷ In this essay, I will offer one such alternative explanation.

The explanation I will *not* offer is that the justices in the majority sincerely believed what they wrote. After reflection, I agree with Dworkin, Ackerman, and many others that the decision simply does not pass the “red-face” test. In Section I, I will explain why the majority cannot be defended on the basis of the written opinion. In Section II, I will offer my alternative explanation for why the Court decided as it did. In Section III, I will assess whether the Court’s action is tenable as a matter of political morality and legal process.

4. Ronald Dworkin, *A Badly Flawed Election*, N.Y. Rev. Books 53-54 (Jan. 11, 2001).

5. Bruce Ackerman, *The Court Packs Itself*, 12 Am. Prospect 48 (Feb. 12, 2001)

6. *Id.* at 48.

7. Dworkin wrote:

We should try to resist this unattractive explanation of why the five conservative justices stopped the recount process and declared Bush the winner. It is, after all, inherently implausible that any—let alone all—of them would stain the Court’s reputation for such a sordid reason, and respect for the Court requires that we search for a different and more creditable explanation of their action. Unfortunately, however, the legal case they offered for crucial aspects of their decisions was exceptionally weak.

Dworkin, *supra* n. 4, at 53.

Ackerman, noting that Justice John Paul Stevens accused the majority of a blatantly political act, wrote:

This harsh charge will be taken up in the nation’s law reviews; perhaps someone will even produce an intellectually serious defense of the Court’s decision. But at the moment, the silence of leading conservative academics is deafening. After a careful study of the Court’s opinion, I have reluctantly concluded that Stevens is right.

Ackerman, *supra* n. 5, at 48.

I. INDEFENSIBILITY OF THE WRITTEN OPINION IN *BUSH V. GORE*

There are many weak points in the Court's decision, and they are sure to be exploited in great detail elsewhere in the law reviews. For present purposes, I wish to focus on three of them: (1) the majority's assertion that Bush would have suffered irreparable injury had the stay been denied; (2) the majority's insistence that any further recount would violate Florida law; and (3) the concurrence's failure to follow the Court's usual practice of deferring to a state supreme court's interpretation of state law.

A. *Irreparable Injury*

In his concurrence regarding the issuance of the stay, Justice Antonin Scalia stated, "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."⁸ In other words, Justice Scalia believed some of the votes being counted were not legal votes, and if Al Gore were to have appeared to pull ahead on the basis of such non-votes, it would have sparked a political firestorm.

There are several problems with Justice Scalia's analysis. Let us leave to one side the fact that the Court has seldom, if ever, embraced a concept so ethereal as "legitimacy" when inquiring into legally cognizable interests. Recall that Justice Scalia has insisted on "concreteness" in harms when gauging standing to sue.⁹ But even assuming for the sake of argument that "legitimacy" counts as irreparable harm, how could the Court have possibly thought that the harm done to Bush in denying a stay could outweigh the harm done to Gore in granting the stay? Whatever cloud illegal recounts might have

8. 531 U.S. 1048, 1048 (2000) (Scalia, J., concurring).

9. See, for example, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1990) (citations omitted), where the Court stated:

First, the plaintiff must have suffered an "injury-in-fact"—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'"

cast on Bush's legitimacy would more than likely have been blown away by revelations of the precise illegalities in the recounts. The antidote to falsehoods is not prior restraint, but truth. On the other hand, had the Court ruled on the merits that the Florida recounts were legal, the stay would have prevented Gore from any chance at winning the election. After all, the Court ruled that Florida law authorized no recounts after December 12, which is exactly when the Court issued its decision on the merits.

B. Illegality of Further Recounts

The Court held that the Florida legislature had intended to take advantage of the December 12 deadline set forth in federal law,¹⁰ and, therefore, that any recounts after that date would be unauthorized. The Court here purported to rely on the Florida Supreme Court's interpretation of state election law.

Again, let us lay aside the most obvious criticism, which is that the Court did not give a fig for the Florida Supreme Court's interpretation of anything in this case. The critical fact here is that the Florida Supreme Court had never passed on the precise question of whether recounts after December 12 would violate the spirit or letter of the Florida electoral scheme as set forth by the legislature. If the United States Supreme Court had sincerely been interested in the Florida Supreme Court's view of the matter, surely it would have remanded the question to that court, leaving plenty of time for a new recount under uniform objective standards, should the Florida Supreme Court have found that state law authorized such a recount after December 12. The only reasonable conclusion is that the majority was uninterested in the Florida Supreme Court's view of the law and simply wanted to stop the recounts once and for all.

C. Comity and Federalism

As the Chief Justice's concurrence acknowledged, the Court normally defers to state supreme court interpretations of

10. 3 U.S.C. § 5 (1994).

state law.¹¹ He explained that this was an exception because Article II specifically grants state legislatures the power to determine the manner in which electors are to be selected—one of the very few places in the Constitution that gives power directly to state legislatures.¹² His concurrence gave no other, nor any further, explanation.

This makes little sense. As Justice Kennedy pointed out during oral argument, the Framers could not possibly have meant that state legislatures were completely unmoored from state courts in determining the manner of selecting electors. State legislatures have always used state courts as interpretive adjuncts because, as every first-year law student knows, general legislative pronouncements cannot apply themselves to concrete fact situations. So the Framers had to have assumed that state courts would routinely provide interpretations of legislative edicts on the selection of electors, and that those interpretations in turn would be treated as part of the whole legislative scheme. The notion that Article II tries to keep state courts out of the electors picture is historically improbable. The political dynamic in 1787 would not have pitted state legislatures against state courts; it would have pitted state legislatures against Congress. Article II contains no mention of state courts.¹³ It grants certain powers to state legislatures, to the exclusion of Congress. It grants certain powers to Congress, to the exclusion of the state legislatures. It does not attempt to exclude the state courts from anything, simply because state courts were not considered a political threat.

There is still another historical perspective that exposes the weakness of Justice Scalia's Article II analysis. Because general

11. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)) ("In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States of sovereigns.").

12. U.S. Const. art. II, § 1, cl. 2 provides:

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.

Id.

13. *Id.*

legislative enactments concerning the selection of electors will always be in need of judicial interpretation, there are only two candidates for the job—state courts or federal courts. There can be no doubt that the Framers would have chosen state courts as the final arbiter of such statutes. The Framers did not even know if the United States Supreme Court would have the power to review the judgments of state supreme courts.¹⁴ *Martin v. Hunter's Lessee*¹⁵ was still decades away, and the holding was anything but a sure proposition in 1787.¹⁶ Yet, without any analysis, Justices Scalia and Thomas, joined by Chief Justice Rehnquist, simply asserted that the final judge of the state statutes in *Bush v. Gore* should be the United States Supreme Court.¹⁷

Therefore, I must concede to Dworkin and Ackerman that the majority in *Bush v. Gore* deliberately fudged the rules. However, I deny that this necessarily means the justices deliberately tried to arrange for their own successors, or that they engaged in a partisan political act. I will argue that the justices in the majority thought they were saving the Republic from a crisis of legitimacy and widespread domestic unrest. My argumentative tool will have to be armchair psychology rather than doctrinal analysis, but if Dworkin, Ackerman, and other

14. See *Sheldon v. Sill*, 49 U.S. 441 (1850).

15. 14 U.S. 304 (1816).

16. Between 1789 and 1860, the courts of seven states denied the power of the United States Supreme Court to decide cases on writs of error to state courts. The legislatures of eight states formally adopted resolutions or statutes against this power of the Supreme Court. See Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1, 3-4 (1913).

17. At least one conservative defense of *Bush v. Gore* on the merits was pitifully weak. In *The Right Call*, 34 Am. Spectator 50 (Feb. 2001), Cornell University Government Professor Jeremy Rabkin argued that the decision could be explained in either of two (non-partisan) ways. First, the conservative justices have always been hostile to affirmative action, and *Bush v. Gore* was analogous to an affirmative action case because Gore lawyers argued that failing to count the undervotes disproportionately hurt black voters. *Id.* at 50. How one race-based argument could convert *Bush v. Gore* as a whole into an affirmative action case is utterly beyond me, and the notion that the five members of the majority might have seen the case that way is truly frightening. Second, Rabkin argued that the majority's unwillingness to remand to the Florida Supreme Court for further recounts based on a uniform objective standard merely reflects conservatives' preference for finality in legal process. *Id.* at 50-51. But finality at what point? When Bush himself not once but twice petitioned the United States Supreme Court for review of Florida Supreme Court decisions, was he demonstrating a preference for finality in legal process?

legal liberals are sincere in wanting to hear alternative explanations, some indulgence is in order.

II. ALTERNATIVE EXPLANATION FOR THE MAJORITY'S CONCLUSION IN *BUSH V. GORE*

The first question is why anyone in his or her right mind would believe that further recounts in Florida would have risked a true national disaster. Not just a brief interregnum, but an extended period during which a massive vacuum of power and legitimacy would produce widespread civil disintegration. Such a vacuum of power would make the nation vulnerable not only to the domestic violence of clashing protesters, but perhaps even to terrorist attacks by rogue foreign states.¹⁸ It could well cause a crash in the stock market, which in turn would bring about a deep recession or even depression. Everyone would agree that any such scenario would be highly undesirable; the question is why any reasonable person would have thought that a contrary decision in *Bush v. Gore* could conceivably have led to it.

Here is where politics comes in—not in the motivation, but in the cognition. Three of the five justices in the majority are ideological conservatives—Justices Antonin Scalia and Clarence Thomas, and Chief Justice William Rehnquist. A fourth, Justice Sandra Day O'Connor, is not so much a right-wing ideologue as a committed Republican.¹⁹ The ideological conservatives, especially Scalia and Thomas, are constantly surrounded by other ideological conservatives, from their relatives (Virginia Thomas's Heritage Foundation ties were well-documented), to their social companions, to their law clerks. It is well known that O'Connor was a Republican state legislator, and that O'Connor socializes at the Chevy Chase Country Club, whose membership

18. Of course, the justices were acting well before the events of September 11, 2001, but the point still stands.

19. The fifth, Anthony Kennedy, is neither. Kennedy sees himself as a statesman and the expositor of grand populist principles. It is absolutely conceivable that he truly believed the majority's Equal Protection analysis was correct. Less clear is why he voted with the majority on the remedy. Not being a hard-core ideologue on judicial federalism, he may simply have thought that the Florida Supreme Court did not need to be consulted on the question of whether the Florida Legislature would have wanted to take advantage of the safe-harbor provision, even if it meant foregoing recounts under a uniform objective standard.

(like most old-line traditional golf clubs) is thick with conservative Republicans. The point is simple: These justices are constantly exposed to people who view the world in a certain way. The point is not that they are philosophically conservative, but that they tend to perceive the acts and thoughts of Democrats, media figures, foreign leaders, institutional investors, and members of the general public through a particular lens.

And what is that lens like? Unfortunately, it appears to be quite warped. Put bluntly, conservative Republicans have become a paranoid lot in the last few years. Many of them honestly believe that Democrats, the liberal media, the NAACP, agents from foreign powers, and assorted other harlots are out to steal political victories that are rightfully theirs. The paranoia may be fed by events as far back as the Democratic skullduggery in West Virginia and Cook County in 1960 and the infamous Democratic recount of the Eighth Congressional District in Indiana in 1978. But surely the paranoia has been most powerfully driven by one William Jefferson Clinton. After the broken promises to Republican congressional leadership, the government shutdown debacle, Waco, Whitewater, Vince Foster, Travelgate, and Filegate, conservatives finally thought that Clinton's philandering and subsequent cover-up had given them more than enough ammunition for impeachment and conviction. Having suffered for six years, they could taste the sweetness of a Senate conviction and Clinton's removal from office. When Slick Willie slipped the hangman's noose, conservatives could only conclude that the fix was in.

Of course, the radical left has long had its own paranoid delusions, typified by Hillary Clinton's statement blaming her husband's problems on a "vast right-wing conspiracy." That accusation stung conservatives precisely because they saw hypocrisy in it. How dare Mrs. Clinton accuse conservatives of conspiracy when liberals are so deep into it themselves? Listen to the conservative talk show hosts. Listen to the Republican House leaders. Read the conservative columnists. A few days after Gore conceded, Rush Limbaugh couldn't leave well enough alone. He devoted an entire segment of his program to substantiate his allegation that election officials in Florida had deliberately dimpled chads for Al Gore by stacking ballots three

thick and then pressing with the stylus. No one called to point out that dimpled chads were found in many counties, that some of the dimpled chads were for Bush, or that Republican observers saw everything that was done during the recounts. For that matter, no one called to suggest that really crooked Democratic election officials might have had the presence of mind to punch the chads all the way through and put them through the machine on the first recount. Paranoia loves company.

This is why, in an election between two unattractive options, conservatives felt so much more passionate than liberals. Slightly more people voted for Al Gore nationwide, but if intensity of preference could have been measured, Bush would have won in a landslide. The intensity of preference for Bush was attributable not to Bush himself, of course, but to the need to defeat the liberal conspiracy. Bush had started the post-convention period with a huge lead, which all but evaporated by election day. Conservatives saw it happening again. Another rightful victory was about to be snatched away. The hopes of conservatives rose again when Bush appeared to have won Florida by an eyelash, but then began the recounts. Conservatives imagined counters manhandling ballots so that chads would break loose. They imagined counters dimpling chads on purpose. They imagined counters eating chads. Liberal Democrats would stop at nothing to retain the White House. *They are all crooked. Just look at Clinton.*

In fact, there is no good reason to think that the Democrats had the fix in during the recounts. There is no reason to think they were about to perpetrate a massive fraud on the system. It may be true that counting the “undervotes” would have on balance helped Gore, but so what? Without a doubt, Republicans would have gone after the “undervotes” if the roles had been reversed.²⁰ Pressing to have the undervotes counted was certainly within the ambit of normal political maneuver.

20. Conservatives point to the graceful concessions of Richard Nixon in 1960 and Senator John Ashcroft in 2000 as evidence that Republicans do not behave the same way after elections as Democrats. This is nonsense. In fact, Republican National Committee officials, with the assistance of trusted Nixon aides, filed lawsuits in Illinois, New Jersey, and Texas, challenging the results of the 1960 election. See Hendrik Hertzberg, *He's Back. Again.*, *New Yorker* 70, 70-72 (Nov. 27, 2000). Unlike Gore, Ashcroft had no argument that the electorate was on his side. Moreover, Ashcroft needed to maintain a graceful

The fact is that many conservative Republicans believed that Democrats were outright cheating during the recounts and that it was only a matter of time before that cheating put Gore over the top. Compounding matters, the Florida Supreme Court—well known as an activist liberal court dominated by Democrats—seemingly stood ready to guarantee Gore limitless bites at the apple. At oral argument, Justice O'Connor's vocal inflections scarcely concealed her outrage and incredulity toward the Florida Supreme Court's last ruling. It is perfectly plausible that she and her four colleagues in the majority thought that Democratic cheating was about to deny a rightfully elected Republican president his office.

Those who think the justices played simple partisan politics should conduct a thought experiment. They should put themselves in the justices' position, given their perceptions of the facts.²¹ According to these perceptions, one party is about to defraud its partisan rival out of the presidency. What would one think if Republican operatives had stolen ballot boxes from predominantly Democratic precincts in broad daylight and thrown them in the river, thus swinging the election to their candidate? To conservatives, the Democrats were about to perpetrate an equivalent act. *And what would happen if the Supreme Court stood idly by while all this went on?* Would the public lose faith in the integrity of the electoral process? In the Court? Would there be an enormous vacuum of power resulting from widespread refusal to accept the electoral outcome? Would there be blood in the streets? Would America's national security be threatened?

That, I believe, is how politics influenced *Bush v. Gore*. The justices did not say to themselves, "I am for Bush; therefore I shall vote for Bush." This is what the Crits would have us believe when they urge that "all law is politics." Yet few judges could live with that on their consciences. Instead, it was the justices' conservative outlook on the world that made them see fraud where in fact there was nothing more than clunky political

public image so as to enhance his chances of obtaining a major post in any Bush Administration.

21. H.L.A. Hart referred to this perspective as the "internal point of view," and he insisted that it was indispensable to the complete observation of a legal system. H.L.A. Hart, *The Concept of Law* 88-91 (2d ed., Oxford U. Press 1994).

maneuver. It was their conservative worldview that made them see conspiracy where, in fact, there was incompetence.²² And it was their conservative socialization that allowed them to sense that the Right was not going to take this lying down. They could imagine a constitutional crisis preventing an orderly transfer of power. They could imagine clashes between righteously indignant conservatives on the one side and liberals whipped into a frenzy by the Jesse Jacksons and Al Sharptons of the world on the other.

And so the justices voted to terminate the recounts, against law and logic, on the basis of a higher principle: the preservation of the Republic and its institutions. Does that make them heroes? Hardly. At the bar of public judgment, I have made the equivalent of a case for mitigation on the ground of diminished capacity. The justices allowed their cognitive capacities to be warped by conservative paranoia. For that they deserve criticism. Judges should do their best to avoid social contact with political activists, and they should try to hire law clerks irrespective of political persuasion.²³ Given the justices' warped perceptions of the facts surrounding the case, however, they did not act culpably. They lashed out in the same way as someone who honestly, but unreasonably, perceives an imminent attack on an innocent person. Society ought to criticize the actor for being unreasonable, but not for wanting to fend off the perceived attacker.

Politics, then, did play a crucial role in this case. It molded the justices' perceptions of the underlying facts. In that banal sense, all law is politics. Judges, like everyone else, see the world through lenses colored by political inclinations. But that is not what people think when they hear the slogan, "All law is politics." They think it means that judges make decisions the same way that politicians make them—by consciously

22. For example, conservatives saw the Florida Supreme Court as openly disobeying the United States Supreme Court when it ordered 168 votes counted. Those votes had been vacated by the Supreme Court's first opinion. Only a mind bent on conspiracy could see that as anything other than an oversight born of haste. Why would the Florida Supreme Court choose to declare war on the United States Supreme Court over 168 votes? If the Florida court had made a conscious decision to disobey, wouldn't it have simply reaffirmed its earlier opinion?

23. I have no doubt that some liberal justices have violated this injunction over the years as well, but two wrongs do not make a right.

manipulating the facts and the policy considerations to reach a result that toes the party line. Yet, if I am right, the majority in *Bush v. Gore* did not simply manipulate the facts or doctrine to serve the Republican Party's best interests. The justices invoked a higher principle to trump the rules in this unusual case where they honestly perceived a genuine threat to the nation.

That is my response, not only to the Critics, but to Dworkin and Ackerman. If they sincerely want some explanation other than partisan politics, here it is. We may never know which explanation is closer to the truth, but I submit that my explanation is at least plausible. I agree with Dworkin when he says our respect for the Court and for principled decision requires that we search diligently for an explanation other than partisanship. I would go beyond that to say we should prefer the most creditable explanation that is plausible.

III. THE TENABILITY OF THE MAJORITY'S CONCLUSION FROM THE STANDPOINT OF POLITICAL MORALITY AND LEGAL PROCESS

I could stop at this point, having fully proffered my alternative scenario. But it would be unsatisfying not to confront the major questions raised by my explanation: Is it proper and desirable to invoke the principle of "saving the Republic" to justify departure from established doctrine? Should a court ever "fudge" on the law, even to achieve some universally valued objective? Isn't such a decision "result-oriented" and therefore no different from partisan politics?

These are huge jurisprudential questions deserving fuller treatment elsewhere, but I will outline an answer here. Courts must, on rare occasion, depart from the rules.²⁴ In a case where it is widely agreed that massive injustice would result from following the rules, a refusal to depart would border on rule-fetishism. Imagine a judge being presented with an *ex parte* petition from the government for permission to torture someone. This person is the only one with information about a terrorist who is about to poison the water system of some large

24. Cf. Guido Calabresi, *A Common Law for the Age of Statutes* 179 (Harvard 1982) ("The Supreme Court must occasionally lie; the courts by and large should not.").

metropolitan area—the authorities do not know which one. The judge is convinced that if he or she does not permit the torture, millions of people will die in a matter of hours. Torture is, of course, always strictly prohibited by law. With heavy heart, this judge should and will grant the petition.

It might be argued that an exception for this type of case should be written into the rules. “Do not torture unless absolutely necessary to save many innocent lives,” the rule might state. In the case of *Bush v. Gore*, the rule might say, “Always defer to state supreme court interpretations of state law unless the future of the Republic is greatly imperiled.” The problem is that, in the common law system of adjudication, rules develop their own gravitational fields. The courts quite likely will end up with a larger set of exceptions than we want. If we leave them out of the rules, individual judges will invoke the exceptions silently when they feel they must, but the absence of any public justificatory statement and the absence of any formal imprimatur will minimize any future gravitational field.²⁵ Of course, commentators like myself will be on record as approving the exceptions, but academic scholarship cannot develop a gravitational field when unaccompanied by any open acknowledgment or imprimatur from courts.

IV. CONCLUSION

The day after Al Gore conceded, the noted liberal constitutional scholar Bert Neuborne appeared on a morning talk show. He was asked what he thought of *Bush v. Gore*. He said he disagreed with it, but before he could explain why, he had to draw an important distinction. It was fair to criticize the decision, Neuborne said, but not fair to criticize the justices personally. They had done their best under the circumstances, he said. I stand with Professor Neuborne. The justices would do well to socialize with people other than right-wing cranks, but we would be wrong to impugn their integrity as judges. And, although *Bush v. Gore* pointedly reminds us that politics

25. Cf. Charles L. Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, 222 *Harper's Mag.* 63 (Feb. 1961).

influences adjudication, law and politics are not one and the same.