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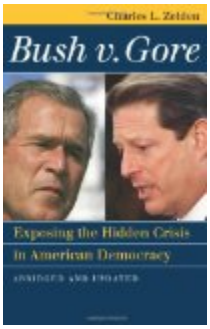
Charles L. Zelden. *Bush v. Gore: Exposing the Hidden Crisis in American Democracy: Abridged and Updated.* Landmark Law Cases and American Society Series. Lawrence: University Press of Kansas, 2010. 312 pp. $19.95 (paper), ISBN 978-0-7006-1749-4.



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Bush v. Gore: A Second look a Decade Later

The new edition of Charles L. Zelden's *Bush v. Gore* is a welcome addition to the literature on a case that continues to haunt American law and politics. An abridged and updated version of an earlier work, the new edition tells its story in a somewhat more streamlined form, though it still presents a careful and detailed reconstruction of the complex and momentous legal maneuverings that followed the election of 2000. Thus, it is not only a valuable reference work but also an excellent introduction to a complicated and easily confusing subject. The inclusion of a thirteen-page chronology of events from election day on November 7 to the conclusion of legal proceedings on December 22 adds to its utility, as does an updated bibliography and a new postscript that summarizes the progress–or lack thereof–in voting reform over the past decade.

While sorting out the actions of countless numbers of state officials and political partisans as well as the fate of dozens of separate lawsuits in different counties and courts, Zelden identifies and illuminates the key factors that drove the course of events that led to the Supreme Court's final decision in *Bush v. Gore*.[1] Paramount, of course, was the determination of the nation's two political parties to prevail by exploiting whatever advantages they had. The author insightfully examines their legal and political positions, the varied and changing considerations that influenced their critical decisions, and the basic strategies and often shifting tactics they employed during the seven-week campaign. The relevant law was vague, unsettled, and often inconsistent, and it provided few clear answers and wide latitude for partisan contentions. The weapons of combat, moreover, ranged far beyond the "legal" and included money, organization, public relations, political connections, and whatever practical handicaps one side could impose on the other. The Bush forces, for example, succeeded in enlisting "as many of the big [Florida law] firms to work for Bush as possible before Gore could get to them" (p. 28), and they used the power of the governor's office (in the hands of George Bush's brother, Jeb) to pressure the firms they could not enlist, ensuring that they would at least stay on the sidelines rather than aid the opposition. That tactic "deprived Gore not only of the technical legal support that the large Florida firms would have given him but, more important, of the practical support–office space, secretaries, phones, copiers–that they could have brought to the table" (p. 29). As the book makes clear, the availability of such practical resources was as critical to the course of events as any legal authority.

More broadly, Zelden's study highlights two major characteristics of the American governmental system. The first is the pluralistic, dynamic, and instrumental nature of the federal structure. Of the levels and branches of government that were potentially relevant to a final resolution, Republicans controlled the Florida state legislature, the governor's office and key state electoral positions, the United States House of Representatives, and the United States Supreme Court. Democrats controlled cer-

tain key local election boards, the Florida Attorney General's office, the Florida Supreme Court, and the United States Senate. The partisan alignment and potential utility of those varied levels and branches shaped the basic strategy and tactics of the parties, as each sought to magnify the role of the levels and branches that favored them and to ensure that final judgment rested with one or more of their preferred institutions. Ultimately, the Republicans succeeded because of the second major characteristic of the federal system. Over the century and a half since the Civil War the United States Supreme Court rose to a position of constitutional preeminence and compelling legal authority in the operations of American government. Consequently, while Congress controlled the decision-making process in previous disputed presidential elections in 1800, 1824, and 1876, the Court controlled that process in 2000. And there the Republicans had a majority.

But, as Zelden argues in a particularly thoughtful and sophisticated analysis, the Court's decision in *Bush v. Gore* was not simply a partisan decision, for the considerations and choices that confronted the justices were numerous, complicated, and in many ways uncertain. The author explores the backgrounds and values of the nine justices, probes their jurisprudential records, and thoughtfully assesses the likely reasoning processes of each. Acknowledging the heavy influence of personal values and preferences, he nonetheless concludes that the justices were inspired in significant part by their "sense of duty," their perception of a constitutional "crisis," their "confidence in their own abilities," and their "distrust of the skill and ability of the other branches of government to solve this problem" (p. 227). It was those factors, as well as personal preferences, that led five justices "to act and to act decisively to end the 2000 election controversy" (p. 228).

Although Zelden stresses the "highly complex and multifaceted" motives that animated the five justices and recognizes the weight of the reasons that supported their actions, he faults the Court on three grounds (p. 227). First, its "remedy"–ordering a stop to the recount and ending the electoral process–was extreme, most likely unwarranted, and in any event inconsistent with the equal protection rationale its *per curiam* opinion used to justify its decision. Second, its proffered equal protection rationale was doubly dubious. It constituted an abrupt break with the Rehnquist Court's normal approach to equal protection, and the Court further tainted it by declaring it applicable only to the 2000 presidential controversy and not to any future elections. Third, and for Zelden most fundamental, the Court bungled "a unique opportunity to catalyze the fixing of what was broken" (p. 228), a national voting system that was shot through with serious flaws and the potential for outrageous abuse and discrimination. "Had the justices issued a clear call to the nation to reexamine its voting system and take steps to repair them to avoid a repeat of the 2000 Florida debacle, they would have invested the Court's reputation in a worthy cause and would have done the nation lasting good" (p. 228). That, however, the justices did not do. Indeed, Zelden emphasizes, that failure was the real tragedy of *Bush v. Gore*. It meant that "the true lesson of 2000–that we had a broken electoral *system* and not just broken voting *machines*–was ignored and then forgotten" (p. 233).

While Zelden probes the complex considerations that shaped the Court's *per curiam* opinion and argues persuasively that it involved far more than mere political preferences, he seems too oblique when considering the motivations that inspired the Article II argument that Chief Justice Rehnquist, joined by Justices Scalia and Thomas, advanced in their concurring opinion. There, the power of personal values seemed starkly evident, especially since the concurrence was unnecessary for the Court's result; strained and essentially unprecedented in its reasoning;[2] and–in a momentous case that cried out for as much unanimity as the justices could possibly muster–intensely divisive. It failed to attract Justices O'Connor and Kennedy, broadened the grounds of dissent for Justices Souter and Breyer, and provoked fierce opposition from Justices Stevens and Ginsburg.

The Rehnquist concurrence held that the Florida Supreme Court had invaded the Florida legislature's federal constitutional prerogative in interpreting Florida's election statutes and, consequently, that its decision transgressed the mandate of Article II. The chief justice read the Constitution as if it provided that "each state shall appoint, in such Manner as the *legislature* may direct." In contrast, Justice Stevens maintained that the Florida court had merely performed the ordinary judicial task of construing and, where necessary, reconciling inconsistent and incomplete statutes. Indeed, he added, the Florida Constitution specifically adopted the practice of judicial review and made the Florida courts integral parts of the state's governmental structure.[3] Thus, Stevens read Article II as if it provided that "each *state* shall appoint, in such manner as the legislature *thereof* may direct."[4] Simply put, then, the chief justice's divisive effort relied ultimately, as Stevens suggested, on a mere jurisprudence of italics. In such a jurisprudence it was

the intensely felt personal views of the justices, not the text of Article II, that determined where they placed the emphasis and how decisive that emphasis would be. The considerations that led seven justices to advance an equal protection argument and five to order an end to the recounts may fall on one side of the line, but the considerations that produced the Rehnquist concurrence seem to fall on the other.[5]

The subtlety and breadth of Zelden's analysis precludes easy summary. Suffice it to say that, even in abridged form, the book tells the story of *Bush v. Gore* ably and comprehensively, treats highly controverted issues with fairness and intelligence, and offers a range of insights and conclusions sufficient to enlighten and stimulate any reader.

Notes

[1]. *Bush v. Gore*, 531 U.S. 98 (2000).

[2]. The sole authority the chief justice cited, *McPherson v. Blacker*, 146 U.S. 1 (1892), was easily distinguishable.

[3]. *Bush v. Gore*, 531 U.S. at 123-24 (Stevens, J., dissenting).

[4]. *Bush v. Gore*, 531 U.S. at 123 (Stevens, J., dissenting).

[5]. The fact that the plurality justices also abruptly abandoned their oft-proclaimed commitment to state authority and to the right of states to control their own governmental structures supports the same conclusion. As Justice Ginsburg stressed in her dissent, their opinion "contradicts the basic principle that a State may organize itself as it sees fit." Citing, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

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