

## THE SUPREME COURT IN REAL TIME: HASTE, WASTE, AND *BUSH V. GORE*

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### I

The legal proceedings following the 2000 election had their moments of humor. The oral argument in *Bush v. Gore*<sup>1</sup> may have produced the most guffaws, as Joseph Klock struggled to name the Justices of the Supreme Court, or even to limit himself to those currently living. But if one finds humor in the absurd, the comic highpoint came 34 hours later (34 hours!) when the Court released its decision. Network “runners”—presumably the employees who had distinguished themselves at company picnics, the network softball league, or summer corporate challenge races—grabbed copies, dashed outside, and handed them to on-air reporters who were waiting in the darkness on the Supreme Court plaza, breathless with anxiety and anticipation. The reporters then ludicrously attempted to understand, synthesize, and explain 65 pages of judicial exposition instantaneously. The reporters stumbled badly, and everyone remained in the dark, in every sense.

The televised farce received some slightly smug attention in the next morning’s *New York Times*. One article observed that the coverage was “almost at the level of comedy,”<sup>2</sup> and another, entitled “Once Again, the TV Mystery Prevails as Late-Night Fare,”<sup>3</sup> included this blow-by-blow:

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

2. William Glaberson, *Contesting the Vote: The Legal Analysis - With Critical Decision Comes Tide of Criticism*, N.Y. TIMES, Dec. 13, 2000, at A24.

3. Peter Marks, *Contesting the Vote: The Media - Once Again, the TV Mystery Prevails as Late-Night Fare*, N.Y. TIMES, Dec. 13, 2000, at A1.

“Tell me if you see any movement yet,” Brian Williams, the MSNBC anchor, said to Mr. Kur on the air, as the correspondent peered right and left for the first sighting of the network employee who was to deliver the opinion to him.

“Here comes our runner!” Mr. Kur announced, and as Mr. Williams offered bits of encouragement, the reporter began flipping anxiously through the document. “Hang on, Brian!” Mr. Kur said, struggling to find a page that offered some encapsulation of the decision, “Looking for the summary.”

When at last he found something, Mr. Kur began reading aloud, but the legalese was almost impossible to make sense of. The mandate placed on television for instant clarity and coherence proved elusive.<sup>4</sup>

Although the television reporters’ struggles in some ways amused the newspaper reporters, there seems at least as much sympathy as smugness in the newspaper accounts—recognition that “there but for the grace of God.” For the print journalists knew they enjoy one enormous advantage over their television colleagues. That is the luxury of time—time to read, to discuss, to think. Television gave us something instant but incoherent. Not laboring under the instantaneousness mandate, the newspaper reporters were able to provide greater clarity and coherence. By the next morning, with a little time between the event and the coverage, the newspapers (and, by then, TV and radio) could tell us with reasonable clarity what the Court had actually held and its stated rationales for doing so.

Exactly that sort of advantage is *usually* enjoyed by the Supreme Court. In *Bush v. Gore*, unfortunately, the Court put itself in the role of the television reporters who were fumbling in the dark rather than those who could read first and report later, in the clear light of day. The Court attempted the judicial equivalent of instantaneousness, operating in real time. The fiasco that resulted will not cause the Court irreparable harm (to use language with which the nation became familiar over that weekend), but it is a reminder of the importance of the Court keeping some distance from the disputes it decides. In particular, the episode highlights the increased risks of both actual and perceived politicization when the Court is in the middle of the fray, participating in an event in the present rather than evaluating it after the fact.

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4. *Id.* at A25.

## II

The conventional wisdom is that distance enhances the Court's decisionmaking. Many factors ensure a separation between a particular controversy and its participants, on the one hand, and the Court, on the other. The Justices' political insulation (life tenure, salary protections, no need to please a boss or an electorate), their lack of a personal stake in the controversy, and training and a turn of mind that, generally and relatively speaking, incline toward considerations of law and principle rather than politics and expediency are all part of the picture. No less important, however, is the time lag between a particular event or legislative or judicial decision and the Court's subsequent review of it.<sup>5</sup>

Normally, a Supreme Court case involves events that occurred years ago, and legal issues that have percolated through the lower courts. *Bush v. Gore* was just the opposite—a mad dash. Although preceded and surrounded by other lawsuits,<sup>6</sup> the specific case that became *Bush v. Gore* began on November 27, 2000, after the Florida Secretary of State certified George Bush as the winner of that state's electoral votes. This was an election contest action brought by Vice President Gore against Governor Bush and others under Florida Statutes' § 102.168 seeking the inclusion of certain Gore votes and a recount in specified counties. Following a two-day trial, on December 4, 2000, the trial court entered judgment for the defendants.<sup>7</sup> The next day, the Florida Supreme Court

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5. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 834 (1997) (Souter, J., concurring) (noting that one advantage to rejecting an expedited appeal by Members of Congress challenging the Line Item Veto Act was that "the presence of a party beyond the Government places the Judiciary at some remove from the political forces, [and] the need to await injury to such a plaintiff allows the courts some greater separation in the time between the political resolution and the judicial review").

6. Previously, the Supreme Court had heard the similar, though technically separate, case of *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). In that case, which also proceeded with extraordinary speed, the Florida Supreme Court ruled that the Secretary of State had to accept the results of certain manual recounts that she had deemed impermissible. The petition for certiorari raised essentially the same issues that were ultimately argued in *Bush v. Gore*. However, the Supreme Court denied certiorari with regard to the equal protection and due process issues raised by "standardless" recounts, limiting the grant to the federal statutory questions and the question whether the Florida Supreme Court had so misapplied Florida law as to take from the state legislature authority to determine how Florida would pick its electors. There the Florida Supreme Court decision came down November 21, 2000; the U.S. Supreme Court granted certiorari on November 24; opening briefs were submitted November 28 and reply briefs November 30; oral argument took place on Friday, December 1; and the decision came down Monday, December 4. In *Bush v. Palm Beach County Canvassing Board*, a unanimous Supreme Court failed to reach any conclusive result, vacating and remanding for a more complete explanation of the grounds for the state supreme court decision.

7. *Gore v. Harris*, No. CV 00-2808 (2d Jud. Cir. Dec. 4, 2000) (Sauls, J.), available at [http://jurist.law.pitt.edu/election/00-2431\\_transcript.pdf](http://jurist.law.pitt.edu/election/00-2431_transcript.pdf), *rev'd in part and aff'd in part*, 772 So.2d 1243 (Fla. S. Ct. 2000) (per curium).

agreed to hear a direct appeal; briefs were due by noon December 6; oral argument was set for the morning of December 7. The court decided the case the next day, December 8, reversing in part and affirming in part.<sup>8</sup> Critically, it ordered a statewide manual recount, under the supervision of a state circuit court judge, pursuant to which observers would seek to determine the “intent of the voter” in all cases where machine-counting had not indicated any vote for President.

That day, President Bush sought a stay of the state Supreme Court’s ruling from the United States Supreme Court. The lawyers argued that the recounts mandated by the state supreme court would run past the December 12 “deadline,” were inconsistent with the state election statutes, and were arbitrary and standardless. Accordingly, they violated (1) the federal statutory provision governing congressional counting of electoral votes,<sup>9</sup> (2) the constitutional allocation of authority to the state *legislature* to determine the manner in which the state selects its electors,<sup>10</sup> and (3) the equal protection and due process clauses.<sup>11</sup> The Court granted the stay the next day, Saturday, December 9, and, treating the petition for a stay as a petition for certiorari, granted certiorari as well.<sup>12</sup> Briefs were due by 4:00 p.m. on December 10, and oral argument set for 10:00 a.m. Monday, December 11.<sup>13</sup> The Court handed down its decision at a little before 10:00 p.m. the following evening.<sup>14</sup>

Only four similar instances come to mind in which the modern Court considered cases involving matters of great national importance on a highly expedited schedule. The steel seizure case,<sup>15</sup> the Nixon tapes case,<sup>16</sup> the Iranian assets case,<sup>17</sup> and the Pentagon Papers case<sup>18</sup> were all

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8. *Gore v. Harris*, 772 So.2d 1243 (Fla. S. Ct. 2000) (per curiam).

9. 3 U.S.C. § 5 (2000).

10. U.S. CONST. art. II, § 2.

11. U.S. CONST. amend. XIV, § 1.

12. *Bush v. Gore*, 531 U.S. 1046 (2000) (per curiam) (on application for stay).

13. *Id.*

14. It is unlikely that the opinions were in fact written entirely in the day and a half after the oral argument. Under the circumstances—the Court’s sense that it should get an opinion out on the 12<sup>th</sup>, the fact that the Justices had had to think about the merits in considering the motion for a stay—it is impossible to believe that work had not begun on the opinions before oral argument began Monday morning. Cf. DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* 307 (1996) (reporting that Justice Brennan had a law clerk begin researching legal issues in the Pentagon Papers case, and had already decided how he would vote, before the petitions for certiorari had been filed); *infra* note 24 and accompanying text (concerning speculation as to whether Chief Justice Marshall prepared his opinion in *McCulloch v. Maryland* in advance).

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

16. *United States v. Nixon*, 418 U.S. 683 (1974).

17. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

litigated in a matter of weeks or months and produced almost instant opinions from the Supreme Court (19, 16, 8, and 4 days after oral argument, respectively). But these are rarities. And even by these standards *Bush v. Gore* set new records for speed—for the overall litigation, for the briefing schedule, and for the period within which the Court reached its decision.

The speed of *Bush v. Gore* is less striking when compared to the standards of an earlier time. The Supreme Court once decided cases much more quickly than is the current norm. During the period from 1815 to 1835, for example, the Court decided 66 constitutional cases with full opinion; 17 of those opinions were handed down within five days of the argument, including several of the Court's most significant rulings.<sup>19</sup> "By contemporary standards, the Marshall Court was breathtakingly swift to render decisions."<sup>20</sup> By the following century, the pace had slowed. Robert Post has calculated that during the 1912-1920 Terms the Court averaged 63.7 days from the argument of a case to the announcement of a full opinion.<sup>21</sup> In contrast, during the 1993-1998 Terms the Court took an average of 91.1 days after argument to hand down its decision.<sup>22</sup>

Even by Marshall Court standards, however, *Bush v. Gore* was something astonishing. Compare, for example, *McCulloch v. Maryland*.<sup>23</sup> Oral argument in *McCulloch* ended on March 3, 1819; Marshall handed down his opinion for the Court a mere three days later, on March 6. The turnaround time was so quick, and the opinion so lengthy and complex, that some have speculated that Marshall had written it before the argument. Such was the supposition of Albert Beveridge, who deemed it "not unlikely" and "reasonably probable" that Marshall worked out the framework, if not the actual text, well in advance.<sup>24</sup> Speedy though this is, the scenario is still quite different

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18. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

19. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 181 (1988).

20. *Id.*

21. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1282-83 & n.53 (2001) (Figure 4).

22. *Id.*

23. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

24. 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 290 (1919). *McCulloch* provoked a never-to-be-repeated exchange in the public press between the Chief Justice and the decision's critics. Marshall's lengthy pseudonymous defenses were published in the *Philadelphia Union* and the *Alexandria Gazette* in late March and early April. Gerald Gunther argues that the scope and speed of these impressive efforts suggest that Marshall's opinion in *McCulloch* was not

from *Bush v. Gore*. The fact that Marshall took three days rather than a day and a half is the least of it. More important, *McCulloch* was decided after *nine days* of oral argument,<sup>25</sup> it concerned a completely familiar legal issue that had been argued by leading figures for decades<sup>26</sup> and whose resolution was not seriously in doubt,<sup>27</sup> and the decision was unanimous.<sup>28</sup> Most important, the *only* rush in *McCulloch* was between argument and opinion; the overall litigation had proceeded at a quick but not at all extraordinary pace.<sup>29</sup>

The risks of the mad dash are several, and all were painfully on display in *Bush v. Gore*. First, rather than giving their considered judgment, the Justices were shooting from the hip on extremely difficult legal issues. They were completely without time for reflection, study, or debate, all the things one wants when faced with a difficult problem. In addition, the Court was without the usual assistance from the parties or

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written in advance. Gerald Gunther, *Introduction to JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND* 18 (1969) [hereinafter MARSHALL'S DEFENSE].

25. BEVERIDGE, *supra* note 24, at 288 & n. 5. The case was argued from February 22-27 and March 1-3, 1819. *Id.*

26. See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 7-17 (4<sup>th</sup> ed. 2000) (describing background of and constitutional debate concerning the first and second national banks). Beveridge points out that in preparing his biography of George Washington Marshall had read Hamilton's and Jefferson's Cabinet opinions on the constitutionality of a national bank. BEVERIDGE, *supra* note 24, at 290 n.1. Many have noted the overlap of the *McCulloch* opinion and Hamilton's arguments for the constitutionality of the bank. See, e.g., *id.*; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 66 (4<sup>th</sup> ed. 2001) ("Hamilton . . . offered a defense of the constitutionality of the bank that was quite close to Chief Justice Marshall's.").

27. BREST, *supra* note 26, at 30 ("When *McCulloch* was decided in 1819, few persons of stature in the national political community genuinely disputed the . . . constitutionality of the national bank."); WHITE, *supra* note 19, at 544; David Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 930 (1982) (deeming it "surprising that Marshall treated all this as an open question").

28. G. Edward White has pointed out that the apparent unanimity of the Marshall court in so many cases actually masked more significant divisions among the Justices. "An opinion of the Court merely reflected one Justice's effort to advance a formal justification for a majority decision made orally and informally." WHITE, *supra* note 19, at 189. An opinion did not necessarily reflect either agreement or the reasoning of any other Justice who joined in the result. The Court's "internal practices . . . fostered an *appearance* of harmony on substantive issues," but not the consensus that a similar lack of separate opinions indicates today. *Id.* at 194. Regardless of whether the silence reflects submission or enthusiastic agreement, it remains the case that less time is necessary to produce a single opinion for the Court, about which other Justices are not too picky, than it does to produce an opinion that really pleases the other Justices or that responds to points made in separate opinions.

29. The Maryland tax statute was passed in February 1818 and the case proceeded quickly in the state County Court and the state's court of last resort, the Court of Appeals. *McCulloch*, 17 U.S. (4 Wheat) at 316. The latter rendered its decision in June 1818; the Supreme Court docketed the case in September of that year; the oral argument began on February 22, 1819. WHITE, *supra* note 19, at 543; BEVERIDGE, *supra* note 24, at 288 n. 5. Compare the course of the litigations described at *supra* notes 15-18 and *infra* note 56.

other judges. The parties themselves had had very little time to develop, refine, and brief the issues. The equal protection issue, on which the case turned, had received no consideration from any other court or individual judge before it was laid before the Supreme Court.<sup>30</sup> As the Court in other circumstances has emphasized, it benefits from the “percolation” of legal issues in the lower courts before it decides them.<sup>31</sup> Thus, many basic structures designed to give the Court the best chance of getting it right were absent.

The point is not just that slow work is sure work, though that is part of it.<sup>32</sup> The point is also that when the Court’s consideration is so rapid the chances increase that the decision will rest on purely political considerations. Deciding a case based on one’s initial, impressionistic reaction; being all too aware of how different outcomes will affect a current emergency; not having the chance to let the problem sit and then come back to it—all these make it more likely that one’s decision will reflect intuition, prejudice, and preference. Now, judicial decisionmaking *always* reflects intuition, prejudice, and preference;

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30. The Florida trial and Supreme Court decisions turned solely on statutory issues under state law. Neither court addressed the issue of whether the interpretation sought by the Vice President, and adopted by the Supreme Court, was unconstitutional. It is true that Chief Justice Wells, in dissent, stated (correctly, as it turned out) that “this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.” *Gore v. Harris*, 772 So.2d 1243, 1267 (2000) (Wells, C.J., dissenting). However, the Chief Justice did nothing more than state this unsupported conclusion.

31. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (rejecting a rule of nonmutual collateral estoppel in cases to which the United States is a party in part because such a rule would “deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari”). Indeed, the Court’s general practice of waiting for a circuit conflict to develop before granting certiorari, *see* SUP. CT. R. 10(a), is justified in part because the conflicting lower court opinions will best inform the Court’s own decisionmaking. *See Mendoza*, 464 U.S. at 160; *see also United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 & n.6 (1984); *id.* at 177 (White, J., concurring) (“Conflicts in the circuits are generally accepted and in some ways even welcomed.”).

32. One arguable example of rushed consideration affecting the quality of the Court’s final product is the seminal administrative law case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). On December 7, 1970, a motion for stay was treated as a petition for certiorari and granted (as in *Bush v. Gore*). The petitioner’s brief was due two weeks later, on December 21; the response was due on January 4, 1971; oral argument took place on January 11; the opinion came down March 2. Though *Overton Park* is an extraordinarily important decision, the opinion contains several universally acknowledged blunders. For the suggestion that the speed with which the parties had to prepare their briefs, and with which the Court decided the case, contributed to the errors, *see* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1265-66 & n.45 (1992) (noting that the timetable “would permit neither the attorneys in the Office of the Solicitor General responsible for briefing the government’s case nor the writers of Supreme Court opinions time to get far beyond the surface of things”).

nonetheless, it can do so in varying degrees, and those tendencies are often mitigated simply by giving a problem some time.

This risk is particularly acute when the case involves unfamiliar legal issues. *Bush v. Gore* was not one more search and seizure case, or one more free speech case, arising in an area with which the Justices are familiar and already have a doctrinal framework and a jurisprudential worldview within which to fit the specific dispute. Compare, for example, *McCulloch*, which involved an utterly familiar and longstanding constitutional question.<sup>33</sup> A more contemporary example is *United States v. Eichman*,<sup>34</sup> in which the Court struck down the federal Flag Protection Act of 1989,<sup>35</sup> handing down its decision a mere 27 days after argument, on direct appeal from the District Court, after expedited briefing and a special late-Term oral argument, all under pressure of a statute requiring expedited review.<sup>36</sup> From the date the Court took the case to the date it decided it was only 73 days.<sup>37</sup> While still a far cry from *Bush v. Gore*, that was pretty fast. But the case itself was largely a

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33. See *supra* notes 26-27. The pseudonymous Amphictyon essays attacking *McCulloch*, which ran in the *Richmond Enquirer* from March 30 to April 2, 1819, noted:

That this opinion is very able, every one must admit. This was to have been expected, proceeding as it does from a man of the most profound legal attainments, and upon a subject which has employed his thoughts, his tongue, and his pen, as a politician, and an historian, for more than thirty years. The subject too, is one which has, perhaps more than any other, heretofore drawn a broad line of distinction between the two great parties in this country, in which line no one has taken a more distinguished and decided rank than the judge who has thus expounded the supreme law of the land.

MARSHALL'S DEFENSE, *supra* note 24, at 54. From a distance, it is hard to know how much Marc Antony there is in these words; certainly one reading is that the author is painting Marshall as biased, politicized, and close-minded. Whatever Amphictyon's point may have been, mine is only that the subject was utterly familiar, to Marshall and others, by the time *McCulloch* was decided.

34. *United States v. Eichman*, 496 U.S. 310 (1990).

35. Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (1989)).

36. See *Eichman*, 496 U.S. at 312-13. The Flag Protection Act was one of several recent instances in which Congress has required expedited judicial review, including consideration by a three-judge district court and direct appeal to the Supreme Court. Other examples include the Gramm-Rudman-Hollings Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985) (codified as amended in scattered sections of 2 U.S.C.) (struck down on expedited review in *Bowsher v. Synar*, 478 U.S. 714 (1986)); the Line-Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified at 2 U.S.C. § 691(Supp. III 1997)) (set aside, on expedited review, in *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997), *vacated*, 521 U.S. 811 (1997) (lack of standing), and in *Clinton v. City of New York*, 524 U.S. 417 (1998)); and the Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-43 (1996) (struck down on expedited review in *Reno v. ACLU*, 521 U.S. 844 (1997)).

37. The District Court's decision was released on March 5, *United States v. Eichman*, 731 F. Supp. 1123 (D.D.C. 1990); that in a companion case was released on February 21, *United States v. Haggerty*, 731 F. Supp. 415 (W.D. Wash. 1990). The Court noted probable jurisdiction on March 30, 494 U.S. 1063 (1990), heard oral argument on May 14, and released its decision on June 11, 496 U.S. 310 (1990).



reprise of the previous Term's decision in *Texas v. Johnson*,<sup>38</sup> to which the Flag Protection Act was a response. The Justices were on well-trod turf, having only to consider whether the slight differences between the federal law and the state law they had just struck down in *Johnson* justified a different result. The specific problem and the overall setting were familiar. In utter contrast, *Bush v. Gore* presented novel issues. It is no slight to the Justices' erudition to suggest that none was familiar with the intricacies of the Electoral College provisions in Title 3 of the U.S. Code or with the Florida contest and protest statutes.

Finally, by rushing into the maelstrom rather than reviewing it in the calm light of day, the Court did much to further the *perception* that it had become a purely political actor. The decision has been overwhelmingly attacked as partisan.<sup>39</sup> This reaction stems primarily from the 5-4 conservative/liberal split, combined with an apparent abandonment by all nine Justices of their usual positions on "neutral principles" such as federalism, respect for state courts, and narrow or broad readings of constitutional rights. The validity of the ubiquitous political-operatives-in-robos attack is beyond the scope of this essay. My narrower point is that the extraordinary speed with which the Court acted significantly added to the overwhelming impression of the Court as a partisan institution. At a minimum, it eliminated an important barrier to hyper-legal-realist cynicism; it may have contributed to that

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38. *Texas v. Johnson*, 491 U.S. 397 (1989).

39. The examples are legion. Here is Anthony Amsterdam:

The important point to notice in the presidential election case is not simply the Supreme Court's abandonment of any pretense at behaving like a court of law. It is not even the sickening hypocrisy and insincere constitutional posturing with which the court's foray into president-making is dressed up. It is that the court finally has revealed unmistakably what it does all the time and usually gets away with: masking result-driven, political, unprincipled decisions in the guise of obedience to rules of law which the justices feel completely free to twist and retwist to suit their purposes.

Anthony G. Amsterdam, *The Law is Left Twisting Slowly in the Wind*, L.A. TIMES, Dec. 17, 2000, at M5. See also Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48 (describing decision as an act of raw partisanship that may, unfortunately, "provoke another great renaissance of legal nihilism in our nation's law schools, a cynicism that will slowly erode general confidence in the system"); 637 *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, 2000, at A7 (advertisement) (also at <http://www.the-rule-of-law.com>) ("The five justices were acting as political proponents for candidate Bush, not as judges."); Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BOOKS, Jan. 11, 2001, at 53, 54 ("[T]hose of us who have been arguing for many years that the Supreme Court makes America a nation of principle have a special reason for sorrow."). But see Charles Fried, Letter to the Editors, N.Y. REV. BOOKS, Feb. 22, 2001, at 8 (taking issue with Dworkin's attack on the Court and suggesting, among other things, that the equal protection ruling was "hardly a cause for fulmination, dire warnings of the sort issued by Justice Stevens, or imputation of dishonestly partisan motives"); John O. McGinnis, *A Just and Wise Action*, N.Y. POST, Dec. 14, 2000, at 41.

cynicism. If the Court accelerates its ordinary processes in order to solve a *political* crisis, it will inescapably be perceived as deciding on political grounds, for that is how political problems are decided. Not only was the Court in *Bush v. Gore* ruling *on* a political battle, it had become a participant *in* that battle. The usual insulation and distance had evaporated.

The per curiam opinion tried hard to limit the decision to its facts.<sup>40</sup> Many have observed that the opinion seems a prime example of just the sort of decisionmaking to which Justice Roberts was objecting when he complained that the Court's overruling a recent decision "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."<sup>41</sup> This effort surely reflects the Court's own lack of confidence as to whether it was getting it right. Such lack of confidence is hardly a surprise given the circumstances of the decision. If not an outright admission that they were going too fast, this statement is close to it.<sup>42</sup> The per curiam seems essentially to say: "here's our gut reaction, but don't hold us to it." Yet it is a fundamental characteristic of judicial decisionmaking that judges, unlike other governmental officials, *are* held to it. That is the rule of law. For that to happen, the court must take the time to decide the case properly, to give more than a gut reaction, and to be perceived as doing so.

It may not be necessary to point to counterexamples to this frantic rush. One famous equal protection decision that comes to mind, however, is *Brown v. Board of Education*.<sup>43</sup> In *Brown*, the Court's own decisionmaking, as well as the public acceptance of the result (such as it was), surely benefited from the "deliberate speed" with which the Court itself proceeded. After lengthy lower court litigation,<sup>44</sup> the cases were

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40. See, e.g., *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

41. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). See, e.g., Samuel Issacharoff, *Political Judgments*, in *THE VOTE: BUSH, GORE AND THE SUPREME COURT 70* (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter *THE VOTE*].

42. David Strauss states that "the majority opinion insisted that its rationale was to be applied, essentially only in this case—basically conceding that the result, not the legal principle, dictated the outcome." David A. Strauss, *Bush v. Gore, What Were They Thinking?*, in *THE VOTE*, *supra* note 41, at 184, 185. Issacharoff similarly complains that "the limiting instruction is either meaningless or reveals the new equal protection as a cynical vessel used to engage in result-oriented judging by decree." Issacharoff, *supra* note 41, at 70. I am suggesting a third possibility: the limiting instruction is an acknowledgment that under the circumstances the judges in the majority were just very unsure as to whether they had it right.

43. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

44. The lower court proceedings are described by the Court in its opening footnote. See *id.* at 487 n.1.

argued to the Supreme Court in December 1952. Badly divided - accounts vary as to the exact split<sup>45</sup>—the Court ordered reargument, which occurred in December 1953. The unanimous decision came down on May 17, 1954. Even then, the Court deferred any decision on the appropriate relief, setting the question for reargument and issuing an opinion a year later.<sup>46</sup> It is generally agreed that (1) the case was correctly decided, (2) it might not have come out the same way, and would certainly not have been unanimous, had it been decided during the 1952-53 Term, and (3) both the correctness and unanimity were critical to popular acceptance and to counterbalance the strong feeling in many quarters that the Court had acted lawlessly. The slow pace of the decision was not the be all and end all, but it was an essential element of the real and perceived correctness and legitimacy of the decision.

### III

The strongest attack on the Court's proceeding at a breakneck pace came from the dissenting Justice who objected that the Court was "almost irresponsibly feverish," pursuing a "precipitate timetable" after a "frenzied train of events," with the result that "the extraordinarily important and difficult questions" were never fully developed or examined:

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on this Court—should have been decided under the pressures engendered by the torrent of publicity that has attended

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45. The traditional understanding is that the Justices were very badly divided indeed, and the outcome in doubt. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN VERSUS BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 613-14 (1976). Michael Klarman emerged from careful examination of the available judicial papers with the conclusion that the Justices' "own subsequent tabulations indicated a vote somewhere between five to four for sustaining school segregation and six to three for striking it down." Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 242 & n.130 (1991). Mark Tushnet has argued that in fact the Justices were not especially divided but were only "talking through their concerns about what they knew they were going to do." MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 194 (1994). Tushnet's revisionist account is contested in Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Does It Matter?*, 83 GEO. L.J. 433, 436-46 (1994).

46. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

these litigations from their inception.

The dissenting Justice in question was not one of the participants in *Bush v. Gore*; the excerpts are from Justice Harlan's dissent in *New York Times v. United States*.<sup>47</sup> Justice Harlan's opinion remains the strongest judicial admonition that haste makes waste.<sup>48</sup> And much of what he said seems directly applicable to *Bush v. Gore*.

Tempting though it is to invoke Justice Harlan and leave it at that, it must be conceded that in retrospect his bitterness and dismay seem misplaced. Notwithstanding Justice Harlan's doubts, the *Pentagon Papers Case* is not a cautionary tale about the perils of judicial speed. Indeed, *none* of the four modern cases in which the Court has previously rushed to resolve a pressing dispute of national moment significantly harmed the Court's reputation, made what is generally seen as bad law, or required later apologies and backtracking.

To be sure, none of the actual opinions are paradigms of the judicial craft.<sup>49</sup> With more time, it would have been possible to have fewer than

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47. *New York Times Co. v. United States*, 403 U.S. 713, 753-55 (1971) (Harlan, J., dissenting). *See also id.* at 748-49 (Burger, C.J., dissenting) (objecting to the Court's "unseemly," "unjudicial," and "frenetic haste" and the unwarranted precipitate action rather than "reasonable and deliberate judicial treatment"). Justice Harlan and Justice Blackmun each also invoked Justice Holmes's famous and still relevant observation that:

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. *Id.* at 752-53 (Harlan, J., dissenting), 759 (Blackmun, J., dissenting) (both quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)).

48. A less ferocious, and less well-known, expression of similar concerns occurred when the Supreme Court granted certiorari in the steel seizure case, bypassing the Court of Appeals to review the District Court decision directly. Justices Burton and Frankfurter objected to the grant:

The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952) (memorandum of Burton, J.).

49. The same can be said of the opinions in *Bush v. Gore*. For example, it is quite striking to have an equal protection opinion that does not even nod to such basics of equal protection analysis as the level of scrutiny, the fit between means and ends, or the nature of the governmental interest. The Justices ignore basic equal protection doctrine about the intent requirement in disparate impact cases. Several of the opinions purport to be talking about equal protection but slip into due process here and there. No Justice considered the very real question as to whether the petitioners had standing; only Justice Breyer seemed vaguely aware of the powerful argument that the case raised a political question.

nine separate opinions in *New York Times*.<sup>50</sup> With more time, Justice Black might have produced a less wooden and more nuanced opinion for the Court in the steel seizure case,<sup>51</sup> there, too, the multiplicity of opinions (there were seven<sup>52</sup>) might have been avoided, and it might have been easier to tell who actually joined what (i.e., what the holding was).<sup>53</sup> Indeed, the problems in these opinions may run deeper than simply a lack of polish. Peter Strauss, for one, has suggested that the quality of the Court's reasoning was seriously diminished by the press of time. Citing *Youngstown* and *United States v. Nixon*, Strauss comments that "the Court's difficulties in deciding separation-of-powers questions have . . . often been compounded by the necessity of reaching a speedy decision."<sup>54</sup>

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50. As Blaise Pascal observed (and as law professors and Law Reviews have perhaps forgotten), more time should produce shorter rather than longer documents. See BLAISE PASCAL, LETTRES PROVINCIALES (1657), no. 16 ("I have made this [letter] longer than usual, only because I have not had time to make it shorter.")

51. The point is not simply that Justice Black's opinion is highly formalistic. This characteristic might be lamented or celebrated, and long and hard consideration can produce opinions no less so. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). Rather, it is that Justice Black combined his highly formal approach with a tendency to paint with a very broad brush. As Paul Gewirtz has written, Black's opinion is a well-known example of the use of broad language; "[y]et today it is almost universally believed that the more narrowly framed concurring opinions in that case capture what it really 'stands for.'" Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 352 (1989).

52. Each of the six Justices in the majority wrote separately; there was a single dissent, authored by Chief Justice Vinson.

53. On the difficulty of figuring out whether a majority of Justices actually endorsed Justice Black's reasoning in *Youngstown*, see Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 327 n.4 (1992) (noting that support for Black's opinion is debatable and, after reviewing the concurring opinions, concluding that "the actual lineup on whether the President has a prerogative may have been: no—three votes; not here, elsewhere maybe—two votes; yes—four votes").

The multiple opinions in steel seizure and Pentagon Papers—and, for that matter, in *Bush v. Gore*—make the single, unanimous opinion in the Nixon tapes case all the more striking. One would expect that consensus on the particulars of the opinion, as opposed to the overall result, would be the first thing to go when the Court is in a rush.

54. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Consistency?*, 72 CORNELL L. REV. 488, 497 n.30 (1987). Strauss includes *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down the Gramm-Rudman deficit reduction legislation), among the poorly reasoned decisions whose flaws are attributable in part to the press of time.

Indeed, the very importance of getting this case [i.e., *Bowsher*] decided during 1986 may have contributed to the Court's difficulties. The case came to the Court late in the Term, virtually undeveloped by lower court proceedings, and required an accelerated briefing schedule. In ordinary course it might have been a strong candidate for an order for reargument. Certainly, in the past, the Court has used this method to buy time for thoughtful decision. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926).

*Id.* In *Bowsher*, the Court was following Congress's directions. The Act provided that challenges

Yet none of these cases is on anybody's list of the Court's major missteps. None has since been overruled, or limited to its facts. Each gets prominent and unapologetic treatment in casebooks on Constitutional Law, without a Marisian asterisk. Courts and lawyers cite and rely on them without any special explanation or a reminder that one must bear in mind the circumstances under which the opinions were produced. Each retains significant, and in some instances fundamental, doctrinal importance.<sup>55</sup>

Thus, history suggests that proceeding at warp speed is not hopelessly risky for the Court. And if there is one such case every ten or twenty years, perhaps not that much harm can really be done. Great cases, hard cases, and rushed cases may not always make bad law after all.

#### IV

All of which is not to say that we should be wholly sanguine about *Bush v. Gore*. For one thing, to say these four cases were not embarrassments is a pretty low standard. And dodging bullets does not mean that the bullets are not dangerous. More important, there are real differences between these prior cases and *Bush v. Gore*. *Bush v. Gore* was the fastest of all; to release full opinions a day-and-a-half after argument and a week after the lower court decision beats all records. Moreover, the lower court litigation had been significantly more extensive in each of the earlier cases.<sup>56</sup> As a result, there was a more

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to its constitutionality would be heard first by a three-Judge District Court, then by the Supreme Court on an expedited schedule. The Act was signed into law on December 12, 1995; the District Court released its decision on February 7, 1986. *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986). The Supreme Court heard argument on April 23, 1986, and released its decision on July 7, 1986, the last day of the Term.

55. See, e.g., RUDENSTINE, *supra* note 14, at 355 ("The legal significance of the Court's decision in the Pentagon Papers case would be difficult to exaggerate . . ."); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10 (1993) ("*Steel Seizure* represents the bedrock principle of the constitutional order . . ."); Note, *The Supreme Court 1996 Term: Leading Cases, Separation of Powers – Presidential Immunity*, 111 HARV. L. REV. 227, 227 (1997) (describing *United States v. Nixon* as a "landmark decision").

56. With regard to the Nixon tapes case: the grand jury's indictment, naming Richard Nixon as an unindicted coconspirator, was issued on March 1, 1974. On April 18, a subpoena duces tecum was issued to the President asking for certain tapes and writings. The district court denied a motion to quash on May 20, rejecting the same arguments considered by the Supreme Court about the scope of executive privilege and who was its arbiter. On May 24, the Special Prosecutor filed a petition for a writ of certiorari before judgment. On May 31, the petition was granted with an expedited briefing schedule. *United States v. Nixon*, 417 U.S. 960 (1974). Argument was held on July 8, 1974 and the decision handed down on July 24. See *United States v. Nixon*, 418 U.S. 683, 689-91 (1974). Reportedly, Justices White and Blackmun voted against granting certiorari precisely

developed record, the attorneys had had more time to think through the issues; the Justices had the benefit of more considered judicial views. Furthermore, in the earlier cases the Court at least knew what the case was about when it agreed to hear it. Here, the Court (and the lawyers) initially thought that *Bush v. Gore* was, in essence, a statutory case about the meaning of the Florida election laws and the fairness of the state Supreme Court's interpretation thereof, and about 3 U.S.C. § 5. Indeed, the Court *denied cert* on the equal protection and due process questions in *Bush I*. Only at the very last minute did it discover that this was an equal protection case after all.

These are all differences of degree, and, when compared to the ordinary run of Supreme Court cases, these four are more like *Bush v.*

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because the case had proceeded too quickly. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 285-93 (1979).

With regard to the Pentagon Papers: the *Times* began publishing the papers on June 13, 1971. The District Court in New York heard argument on the government's request for an injunction on June 18; it denied the injunction on June 19. The District Court for the District of Columbia issued a similar ruling in the case involving the Washington Post on June 21. The Second Circuit (reversing) and the D.C. Circuit (affirming) handed down decisions on June 23. The Supreme Court granted certiorari on June 25, 403 U.S. 942 (1971), heard oral argument the next day, and handed down its decision on June 30, fifteen days after the government had filed its lawsuit against the *Times*. RUDENSTINE, *supra* note 14, at 3-4.

With regard to *Dames & Moore*: on May 28, 1981, the District Court for the Central District of California (1) stayed execution of its judgment in the underlying action between Dames & Moore and the Iranian government, and (2) dismissed Dames & Moore's action against the United States seeking to invalidate the Executive Orders and regulations that had terminated pending claims against Iran in the United States and transferred them to the Iranian-American Claims Tribunal. (The latter action had been filed April 28.) Dames & Moore appealed to the Ninth Circuit, but also sought a writ of certiorari before judgment from the Supreme Court. The Court granted certiorari on June 11. *Dames & Moore v. Regan*, 452 U.S. 932 (1981) (granting certiorari). It heard oral argument on June 24 and handed down its decision on July 2. *Dames & Moore v. Regan*, 453 U.S. 654, 666-67 (1981). Although this case went straight from the District Court to the Supreme Court, two other circuits had ruled on the validity of the challenged regulations and executive orders. *See id.* at 667 (citing *American Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800 (1st Cir. 1981)).

Finally, in the steel seizure case, President Truman issued the Executive Order requiring Secretary Sawyer to seize the mills on April 8, 1952, prompting an immediate lawsuit and request for a temporary restraining order. The District Court held a hearing on April 9 and denied a TRO the same day. After briefing and argument, the District Court enjoined the seizure on April 29. The D.C. Circuit issued a stay the next day and, after oral argument, issued an opinion on May 2 reaffirming the stay. The petition for certiorari was filed on May 2 and granted on May 3 (bypassing the Court of Appeals). The Supreme Court heard argument May 12 and 13, and handed down its decision on June 2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583-84 (1952); *see generally* ALAN F. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958).

Like *White and Blackmun* in the Nixon tapes case, Justices Frankfurter and Burton would have denied certiorari in light of the accelerated pace of the litigation. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (memorandum of Burton, J.).

*Gore* than unlike it. Nonetheless, the pace of *Bush v. Gore* was uniquely frantic, the record especially thin, and the level of confusion especially high.

A more important difference, perhaps, is that in the four earlier cases, the world waited for the Supreme Court. In *Bush v. Gore*, the Court rushed to keep pace with the world. In each of the earlier cases, the Court sped up its normal processes in order to minimize the disruption and delay that its consideration caused; however, it did not operate under an external deadline. In *Bush v. Gore*, the Court was determined to release its opinion by the December 12th “deadline.” It did so, technically. But the 10:00 p.m. release only confirmed that the Court was caught in the maw of events. Indeed, the timing almost conclusively establishes that the opinions were released before they were ready. That is the inescapable conclusion from two factors. The first, of course, is simply the extreme speed with which they appeared. The second is the fact that they were released two hours before the deadline expired, at an unheard hour of the night. Had the opinions come down at noon, one might think that that was when they were done. Appearing when they did, we must assume that the Court ran out of time.

It is this combination of factors—the extreme speed plus the crunch of a deadline not of the Court’s making—that was, I think, so pernicious. The raw speed with which the Court acted raised a host of concerns about its ability to do its job well, but did not render that impossible. Indeed, it speaks well for the Court that it can, *when necessary*, rise to the challenge of a real emergency when, in the words of the Supreme Court’s rules, a “case is of such imperative public importance as to . . . require immediate determination.”<sup>57</sup> And it speaks well for the Court that it has rightly perceived such emergencies to be few and far between. However, in *Bush v. Gore* the Court not only acted with unprecedented haste, it did so on a timetable set by external events, which were not waiting. It thus became a participant in those events.

I will return to that theme in the next section. First, however, one final possible difference between the four prior rushed decisions and *Bush v. Gore* deserves mention. In each of the four, the Court reached a decisive result—there was a clear winner and a clear loser—but doctrinally it struck a middle ground. Taking the opinions as a whole, the doctrinal propositions established in each case are between poles. The President *does* enjoy an important privilege, but he is not above the law and must make a convincing showing of the need for

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57. S. Ct. R. 11 (regarding writs of certiorari to the courts of appeals before judgment).



confidentiality,<sup>58</sup> the President is not limited to mere law-execution, but when venturing into the lawmaking arena he must have clear statutory authority to do so,<sup>59</sup> the First Amendment does not bar all prior restraints, but the government cannot enjoin publication of information merely because it has labeled that information “classified.”<sup>60</sup> It is not at all clear that the Court charted a middle course in *Bush v. Gore*. The implications of the decision with regard to voting rights and the mechanics of voting are extraordinarily far-reaching. The Court required a precise equality of treatment that it has rarely if ever required regarding voting or anything else.<sup>61</sup> While the per curiam opinion was at pains to caution against too strong a reading; it was the very sweep of the rationale that made such cautions necessary.

## V

With the Court injecting itself into the political fray as it did, it is hardly a surprise that the hapless reporters treated the release of the decision like any other political announcement. The reporters saw the ruling as simply the announcement of an *outcome*—the result of the presidential election,—which could be noted and reported like the outcome of any other election. They struggled because they tried to treat a Supreme Court opinion like an envelope at an awards ceremony (“And the Oscar goes to . . .”). The assumption was that they could glance at the opinions and know instantly all there was to know, and that all there

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58. On the “middle-groundness” of *United States v. Nixon*, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 384-89 (1994).

59. Monaghan, *supra* note 55, at 11.

60. RUDENSTINE, *supra* note 14, at 351-52. This characterization cannot be applied to *McCulloch*, where Marshall’s opinion came down very much at one pole of a familiar debate.

61. One might analogize the Court’s decisions regarding districting and the one-person-one-vote principle. Relying on Article I, § 2 of the Constitution, the Court has required that a State’s congressional districts be as identical in size to one another as is humanly possible. See Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (“[T]he State is required to ‘make a good-faith effort to achieve precise mathematical equality. . . .’ [Article I, § 2] permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.”). Thus, in *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court set aside a redistricting plan in which the largest district had a population of 527,472 and the smallest 523,798. In contrast, applying the equal protection clause to review state legislative districts, the Court has applied a much more relaxed standard. See, e.g., *Mahan v. Howell*, 410 U.S. 315, 320-25 (1973) (acknowledging that the “more stringent standards” applicable to congressional districting are not applicable to state legislative districting). The Court in *Mahan* upheld a 16.4% population deviation, noting, however, that it “may well approach tolerable limits.” *Id.* at 329. See generally SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 145 (1998) (state legislative districts with population deviations “in the vicinity of 10 percent” have been held presumptively valid). That sort of flexibility disappears in *Bush v. Gore*.

was to know was who won.

But that is a fundamentally incorrect and destructive understanding of the Court's opinions. The Oscar, or the presidential election, comes without an explanation. The outcome is the salient fact, and it is, by definition, the right outcome. We have no other meaningful way of assessing the correctness of the outcome than by counting the votes. The people may be foolish, shortsighted, misled, or plagued by poor judgment; that does not make their selection incorrect. (In contrast, a *fraudulent* election can be said to produce the wrong outcome precisely because the result does not reflect the popular choice.) The winner of the election is *rightly* the President because he won the election; popular approval is self-legitimizing. Put differently, elections provide a form of "pure procedural justice"—the result is by definition just if it was achieved by the prescribed procedures.<sup>62</sup>

In contrast, the winner of a Supreme Court case is not *rightly* the winner because she prevailed; the vote of the Supreme Court is not self-legitimizing. (In this sense, Justice Jackson's famous aphorism—"[W]e are not final because we are infallible, we are infallible only because we are final"<sup>63</sup>—is a gross overstatement, accurate only as a description of a practical reality.) If the Court is foolish, shortsighted, misled, or plagued by poor judgment, its result is wrong. And for these reasons, the Court's own explanations for its decision must be taken seriously. In *Bush v. Gore*, it matters that only three Justices were willing to reject the Florida Supreme Court's reading of state law; it matters that seven Justices, not five, agreed there had been an equal protection violation; and if their explanations for these positions are unconvincing that matters as well. To say, "Bush won, 5-4," is not just incomplete, it is inherently misleading.

The point is not that the reporters were foolish. Rather, it is that the circumstances predictably and perhaps unavoidably channeled them toward this approach to the Court. And the circumstances importantly included the furious pace of the Court's consideration and lack of any temporal distance between the relevant events and the Court's consideration of them.

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62. On procedural justice, see JOHN RAWLS, A THEORY OF JUSTICE 85-89 (1971). Rawls's example of pure procedural justice is gambling. The outcome cannot be justified other than by the fact that it was the result of certain procedures, but that alone makes it just. *Id.* at 86.

63. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

## VI

In *The Least Dangerous Branch*, Alexander Bickel wrote of the courts' advantage over the political branches in pursuing principle rather than policy:

[W]hen the pressure for immediate results is strong enough and emotions ride high enough, [legislators] will ordinarily prefer to act on expediency rather than take the long view. . . . [C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. . . .

Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. This is what Justice Stone called the opportunity for "the sober second thought."<sup>64</sup>

Bickel's account is easy to mock, and in the best of times it is not clear that the Justices are pursuing the "ways of the scholar." (For that matter, it is not always clear that law professors are pursuing the ways of the scholar either.) Nonetheless, his account is both appealing and valid. It is also laughably inapplicable to the Court that decided *Bush v. Gore*, which was *part of* the hue and cry. Who knows what the 2000 election or the decision it produced will look like on sober second thought. It seems at least safe to say that the Court's conservatives will be fleeing from and attempting to distinguish the per curiam opinion for years to come, just as the liberals will be struggling with language from the dissents (for example, about tolerating some "play in the joints"<sup>65</sup> and recognizing that "we live in an imperfect world"<sup>66</sup>). Beyond that, however, we just do not know, and that's the point.

Breathing room between event and judicial consideration is not the only important thing. After all, for all Bickel's emphasis on this passive virtue, his own first, and perhaps only, foray into the courtroom was, of

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64. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25-26 (1962). *See also id.* at 116 (noting that the time lag "cushions the clash between the Court and any given legislative majority and strengthens the Court's hand in gaining acceptance for its principles").

65. *Bush v. Gore*, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting) (quoting *Baine Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931)).

66. *Id.* at 143 (Ginsburg, J., dissenting) ("Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world . . .").

all things, as the attorney for the *New York Times* in the Pentagon Papers case, pressing forward with “unseemly haste” in the case that held the previous record for fastest Supreme Court decision.<sup>67</sup> And speed does not doom the Court. Notably, the four other “great cases” considered with such rapidity are not generally seen as having made “bad law,” although neither are they lauded as paradigms of judicial craft.

The per curiam opinion asserted that the Court had no choice but to proceed as it did; it had been “forced to fulfill” an “unsought responsibility.”<sup>68</sup> This was not technically true; the Court could have denied certiorari. Perhaps as a *practical* matter it had no real choice, though many would dispute that as well.<sup>69</sup> Even accepting the majority’s characterization, however, *Bush v. Gore* and the outcry that surrounds it stand as a reminder that Bickel was right. The Court is well served by proceeding in judicial rather than real time.

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67. RUDENSTINE, *supra* note 14, at 290 (noting that Bickel had never made a courtroom argument before appearing in this case, in which he argued in the District Court on June 18, the Court of Appeals on June 22, and the Supreme Court on June 30).

68. *Bush v. Gore*, 531 U.S. 98, 111 (2000).

69. *See, e.g.*, Elizabeth Garrett, *Leaving the Decision to Congress*, in *THE VOTE*, *supra* note 41, at 38-39 (arguing that the Court should have stayed its hand and allowed Congress to resolve any dispute as to Florida’s electoral votes).