

# The Academy of Political Science

475 Riverside Drive · Suite 1274 · New York, New York 10115-1274  
(212) 870-2500 · FAX: (212) 870-2202 · [aps@psqonline.org](mailto:aps@psqonline.org) · <http://www.psqonline.org>

## *POLITICAL SCIENCE QUARTERLY*

---

Volume 117 · Number 4 · Winter 2002-2003

---

No part of this article may be copied, downloaded, stored, further transmitted, transferred, distributed, altered, or otherwise used, in any form or by any means, except:

- one stored electronic and one paper copy of any article solely for your personal, non-commercial use, or
- with prior written permission of The Academy of Political Science.

*Political Science Quarterly* is published by The Academy of Political Science. Contact the Academy for further permission regarding the use of this work.

---

*Political Science Quarterly*

Copyright © 2002 by The Academy of Political Science. All rights reserved.

**Supreme Injustice: How the High Court Hijacked Election 2000** by Alan M. Dershowitz. New York, Oxford University Press, 2001. 275 pp. \$25.00.

**The Votes that Counted: How the Court Decided the 2000 Presidential Election** by Howard Gillman. Chicago, University of Chicago Press, 2001. 301 pp. \$27.50.

Books published on *Bush v. Gore* were an early casualty of September 11. Publishers and authors who expected a public eager to read about hanging chads soon found popular taste had turned to distinctions between various Islamic sects. The law that people wanted to know about was the law of military tribunals, not the law of disputed ballots. Predictions that the events in Florida would haunt the national campaigns of 2002 and 2004 now seem far away memories.

The limited attention presently given in the popular media to *Bush v. Gore* is perhaps inevitable. The public attention span is short. People were tiring of the seemingly never-ending presidential election saga by early December 2000. Serious scholars were half-seriously suggesting the matter be resolved by coin flip. This public weariness helps explain popular support for the judicial ruling that put an end to the electoral contest. Politics had to move on. Howard Gillman properly notes that whether the Supreme Court's decision plays a role in future elections will depend more on how President George W. Bush performs in office than on how the justices performed in *Bush*.

This public forgetfulness is unfortunate. The numerous academic books and articles recently published on *Bush v. Gore* raise fundamental questions about the rule of law in times of political uncertainty. Howard Gillman and Alan Dershowitz have each written particularly distinguished volumes analyzing judicial performance during the aftermath of the 2000 national election. *The Votes that Counted* and *Supreme Injustice* explore how American constitutionalism functioned when the political stakes were raised. Whether justices in the future should be trusted to maintain constitutional norms during the war on terrorism may depend on whether they demonstrated their capacity to be guided by constitutional norms during the battle for Florida.

Gillman and Dershowitz both conclude that the conservative Republican majority "cheated" in *Bush v. Gore* (*Supreme Injustice*, p. 183). Gillman declares that the judicial decision ending the national election struggle was "an unacceptable partisan short-circuiting of a messy but established constitutional process for resolving disputes over presidential elections" (*The Votes that Counted*, p. 15). Dershowitz declares the Rehnquist Court majority "shamed themselves and the Court on which they serve, and defiled their places in history" (*Supreme Injustice*, p. 4). Neither author naively maintains that constitutional interpretation is a mechanistic process that allows no place for judicial beliefs about public policy or justice. Both acknowledge that judicial values do matter and should matter when questions of constitutional interpretation arise. What should matter, however, are judicial beliefs about what principles place

the Constitution in its best light, not judicial beliefs about who would make the better president. *Bush v. Gore* is unique, Gillman notes, because the case is a rare example of justices being motivated by the low politics of winning elections, rather than the high politics of political principle. Dershowitz asserts that *Bush v. Gore* will go down in history as the only major judicial outrage caused by justices refusing to apply the principles that the justices had consistently applied in cases of less immediate concern to the political survival of their political sponsors.

*The Votes that Counted* is deservedly earning the reputation as the best work on *Bush v. Gore*. The book is a model of how a study of contemporary politics may be rapidly written, expeditiously published, scholarly, and readable. Gillman provides a detailed account of the litigation that resulted from the 2000 presidential election in clear prose that keeps the reader's attention for the full book. *The Votes that Counted* discusses all the cases generated by the election dispute, not just the case that became *Bush v. Gore*. The contents of the oral arguments and legal briefs are presented in dispassionate detail. Lawyers for both sides are allowed to present their claims in their words. Academic and scholarly commentary on those cases are reported as they appeared in the press. Rather than Monday-morning quarterbacking the courts from the perspective of three months or two years, readers are given the arguments the courts got and the evaluation of those arguments by constitutional experts when those arguments were first made. Gillman is particularly effective when he notes that Republican lawyers were initially very skeptical of the arguments that later proved central to the Rehnquist Court opinions in *Bush*. The equal protection argument at the heart of the per curiam opinion was almost abandoned by lawyers for George W. Bush who thought the claim too weak. Justice Antonin Scalia at oral argument had to repeatedly prod Theodore Olson to make the Article II argument that Scalia, Clarence Thomas, and William Rehnquist would later adopt in their separate *Bush* concurrence. Academic reviewers will no doubt have their quibbles, but this is a masterful volume.

Gillman's critique of the Rehnquist Court gains force from his meticulous comparison of the performance of that tribunal with the other benches that resolved issues spawned by the presidential contest. *The Votes that Counted* carefully documents how no other tribunal behaved in as partisan a manner as the Supreme Court of the United States. Justices identified with Democrats rejected crucial Gore requests. Lower federal courts staffed by Republican appointees thought silly several arguments made by the Bush legal team. The Supreme Court of Florida merits particular praise for maintaining constitutional principle. Legalists, Gillman cheerfully admits, may disagree with that state court's decisions on the recounts. Nevertheless, those decisions were clearly based on values the justices proved willing to apply when candidate Bush was the beneficiary. The principle "count all votes" justified the Florida decision to order the recounts and the Florida decision to include various absentee ballots that were illegally filled out by Republican party members. Had the Florida

courts insisted that only legal ballots be counted, candidate Gore would have the presidential election. Had all Floridian votes been counted, candidate Gore might have won the presidential election. The only legal result that guaranteed a Bush victory was letting stand the Florida court rulings efforts to count all the ballots that favored candidate Bush and having the Supreme Court of the United States overturn all Florida court efforts to count all the ballots that favored candidate Gore.

*Supreme Injustice* is better characterized as an effective polemic than as an academic study of the Supreme Court. Dershowitz has written what might be described as a work of celebrity constitutional law, a genre in which type is bigger and the bibliography shorter than in traditional scholarly works. Whereas Gillman keeps himself hidden throughout *The Votes that Counted*, *Supreme Injustice* consistently reminds readers that the author is a distinguished professor at Harvard Law School, a prominent litigator with friends in high places, and one of the leading public intellectuals in the United States. Gillman meticulously footnotes. Dershowitz presents information given to him by unnamed reliable sources. He has been informed, readers learn, that Justice Anthony Kennedy is campaigning for the chief justiceship and may have tailored his opinion in *Bush* to advance his candidacy. Such comments are routinely removed from refereed journals, but quite commonly grace the writings of popular commentaries.

Academic snobbery aside, *Supreme Injustice* is first rate celebrity constitutional law. Dershowitz is an outstanding litigator who has the uncommon ability to present complex points in plain prose. His analysis of “legal votes” under Florida law is clear and devastating to the justices in the majority. Dershowitz is equally effective when raising questions about whether the Bush campaign had standing to bring *Bush*. George Bush had not voted in Florida, so presumably he could not claim that his vote was diluted, and candidates do not normally have standing to challenge voting practices. The occasional gossip, while out of place in certain academic formats, more often than not advances the argument without being tawdry. If Justice Kennedy was campaigning for chief justice and was making sure Bush administration officials were aware of his role in *Bush*, the matter ought to be investigated more critically should Justice Kennedy be nominated to the chief justiceship. *Supreme Injustice* slows down only when Dershowitz demonstrates at too great length that *Bush* was inconsistent with the dominant trends of Rehnquist Court jurisprudence. These points are well known among scholars, and analysis suffers from overkill.

Both books and other studies critical of *Bush* might have benefited from providing a broader context for the judicial cheating that took place. What happens in courts is structured by what happens outside of courts. Gillman notes that the conservative Republicans on the Supreme Court abused law in ways the Democrats on the Florida Court did not. Prominent Republicans similarly instigated a riot to prevent ballots from being counted, while President Bill Clinton remained on the sidelines. Surely, a president willing to cheat could

have done as much for candidate Gore as a court willing to cheat did for candidate Bush. The central lesson of *Bush* from this perspective is that contemporary Republicans as a whole are far more willing to do whatever is necessary to gain and maintain office than contemporary Democrats.

MARK A. GRABER  
*University of Maryland*

**In Defense of Public Opinion Polling** by Kenneth F. Warren. Boulder, CO, Westview Press, 2001. 384 pp. \$26.00.

Kenneth Warren acknowledges up front that he is a pollster and that he is out to write a book to change people's minds. His effort is commendable, but it is directed to a lay audience and falls short in a number of areas of satisfying a more sophisticated reader. In his epilogue, he describes his effort as a "sympathetic defense," as one would expect from a practicing pollster. The difficulty of such a task is highlighted in Chapter 10, which takes a look at the accuracy of preelection polls in the 2000 election. Warren's review is a more gentle review of the pollsters' performance than, for example, the critiques that appear after each election in *Public Opinion Quarterly*. While the comparison between national and state polls and those for offices other than president are laudable, the emphasis on the magnitude of errors without discussion of their direction or the use of final estimates from tracking polls that do not include the widely discussed variability in the Gallup tracking poll for CNN/*USA Today* from Labor Day to Election Day are significant omissions.

The discussion of more general issues such as the media's love/hate relationships with polls are very well done. Warren describes in detail both the individual and institutional imperatives that draw journalists to polls but that also make good reporting difficult. His experience in the business makes him a good judge of good and bad polls, and he devotes considerable attention to the discussion of good and bad practices, especially shopping mall polls, media call-in polls, biased interest group-polls, and push polling, a campaign strategy where negative persuasion phone calls are made under the guise of a poll. The conclusion that well conducted polls produce good data but poorly conducted polls do not seem self-evident, although the number and type of examples that Warren cites are very illustrative. The cartoons interspersed in the text are more of a distraction than a contribution to the story he wants to tell.

This book provides a good introduction to the contemporary debate that rages about the appropriate role of polls in a democratic society, including how they can contribute to the process of democratization in political systems undergoing change. It is best suited to a reader who has not had much previous exposure to these issues rather than to a more knowledgeable reader.

MICHAEL W. TRAUGOTT  
*University of Michigan*