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TIMING CONTROVERSIAL DECISIONS

*Cass R. Sunstein**

I. INTRODUCTION: THE PROBLEM

Suppose that members of a state court are prepared to announce a highly controversial ruling. The court might be prepared to rule that a state must allow same-sex marriage, that a state may not continue affirmative action programs, or that a popular environmental statute is unconstitutional. Suppose too that the opinion is complete and ready to be made public. Suppose finally that an election will be held in a short time, and that the court is aware that the ruling will have at least some degree of relevance to voters. In the most extreme cases, members of the court believe that the ruling will become a highly salient issue in the campaign and that many voters might be affected by the decision. Should the court refuse to issue the opinion until after the election?

As far as I am aware, there is no serious scholarship on the question whether and when it is appropriate to wait to issue a controversial ruling until after an election. In this brief essay, I set out and evaluate an argument in favor of waiting. The central question is whether a court should not issue a controversial ruling under two conditions: (1) an election is about to occur; and (2) it is far from unreasonable to suppose that the decision will affect its outcome. Under those conditions, I shall

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suggest that there is a plausible argument that the court should wait before issuing the opinion.

The ultimate conclusion cannot, however, be resolved in the abstract. As I will suggest, everything depends on whether voters will react rationally to the court's decision, or whether the proximity of the decision to the vote, and its exploitation by political entrepreneurs, will distort voters' judgments. There is also a question about judicial competence to assess the underlying empirical questions. If judges lack such competence, it might be best for them to ignore the possibility that their decisions might have electoral effects. My conclusion is that *if* courts are able to assess the underlying questions, and *if* the likelihood of distortion is high, there is a good argument that courts should wait before announcing their rulings, not least because little is likely to be lost by a delay.

II. THE CENTRAL CONCERN

In any election, voters have a large menu of items on which to focus. They might be concerned about national security, unemployment, climate change, abortion, energy independence, the stock market, the price of gasoline, or some combination of these. If there is a highly salient event immediately before the election, it might have a large role, simply because of its immediacy. Such an "external shock" might well affect numerous votes.¹ Suppose, for example, that the nation faces a terrorist attack a month before a presidential election; that a natural disaster, two months before the election, devastates a city; that gasoline prices fall dramatically in the previous three months; or that the unemployment rate, in that time, suddenly spikes up. The idea of the "October Surprise" signals the possibility that events of this kind might be expected to influence electoral outcomes. We know enough about human cognition to know that a salient incident can have a significant effect on people's judgments. A great deal remains to be learned about this subject. Let us simply stipulate that in imaginable circumstances, such an effect is likely.

But perhaps there is nothing wrong with that effect. Perhaps voters are simply updating on the basis of new information. If a terrorist strike occurs, voters learn that the nation is more vulnerable than they had

1. There is extensive literature on the relationship between this point and monetary policy, which might be manipulated to help or to hurt an incumbent. *See, e.g.*, Allan Drazen, "Laying Low" During Elections: Political Pressure and Monetary Accommodation (2002) (unpublished manuscript, on file with author).

thought. If unemployment jumps, the economy is apparently weaker than had appeared. If voters are rationally incorporating new information, then any external shock provides a legitimate and perhaps an invaluable input into voter decisions.

We might make some distinctions here. If the relevant event is not self-consciously timed by anyone, then there is no effort to manipulate the system—and if voters will rationally incorporate the relevant information, nothing is amiss. But suppose that some person or institution has deliberately triggered a salient event, and done so at the appropriate time for maximum effect. The problem here is that voters might be deceived, in a way that will affect their judgments. If voters are unaware of the manipulation, they might believe that, for example, gas prices or unemployment rates are falling, even though these effects are temporary ones, made visible by self-interested politicians who are unable or unwilling to maintain them for the long run. If a terrorist has been caught two weeks before the election, and if the timing of this event has been orchestrated to convince voters that an incumbent administration is winning the war on terror, then voters might be manipulated to believe that a victory is occurring when in reality it is not. Consider in this regard the controversial 2006 decision, by the Internal Revenue Service, to delay in the collection of back taxes until after the election, in part to avoid negative publicity.²

Perhaps the political market can expose any real efforts at manipulation. Perhaps the market functions well enough to ensure that such efforts will be revealed as such. But suppose that political markets cannot be expected to work this well. Even if so, the conclusion does not speak to my question here: No one is arguing that courts should deliberately time their announcements in order to influence the outcome of elections. Everyone agrees that any such effort would be illicit. The question is whether courts should deliberately time their announcements so as *not* to influence the outcome of elections.

The discussion of the effect of manipulation of events shows why an affirmative answer is not implausible. The risk is that a recent judicial decision may distort voter behavior, simply because its timing gives undue salience to a particular issue. No one doubts that recent events can have large effects on public judgments. Consider the fact that public concern about risks usually tracks changes in the actual fluctuations in those risks. But public concern outruns actual fluctuations in the

2. See David Cay Johnston, *IRS Going Slow Before Election*, N.Y. TIMES, Oct. 27, 2006, at A4.

important case of “panics,” bred by vivid illustrations that do not reflect changes in levels of danger.³ A “particularly vivid case or new finding that receives considerable media attention” played a major role in those leaps in public concern.⁴

Legislation itself is often fueled by identifiable events, putting issues on the agenda that would otherwise be ignored. “Availability cascades” occur when an available event spreads through the public, spurring attention to an issue that had formerly been neglected.⁵ To take just one example, legislation calling for disclosure of toxic releases was spurred by a chemical accident at Bhopal, India, which focused media attention on the safety issues and led members of Congress to introduce right-to-know legislation.⁶ The relevant legislation could not possibly have been enacted without the highly publicized Bhopal disaster. These points should be enough to suggest the possibility that in a genuinely close election, a salient judicial decision will have a large impact, perhaps even altering its outcome.

Even if it is agreed that a highly visible event can have a large effect on political processes, we might insist that the effect can be salutary and sensible, as voters and representatives respond to a problem that had received too little concern. Undoubtedly sensible responses often occur. Unfortunately, the optimistic view seems unwarranted, for at least some of the time, the recent event produces a distorted judgment and undesirable law.⁷ Let me therefore sketch a highly tentative principle: *To the extent that salient judicial decisions can significantly affect voters’ judgments, such decisions should not be issued in the period immediately before an election.* Of course this position would be vulnerable if a great deal were to be lost by the delay. But in ordinary circumstances, any delay will produce no harm at all; it is not important for a judicial decision to be announced in October rather than December. If the delay is costless, and if it avoids a potential distortion, why should courts refuse to delay?

3. See George Loewenstein & Jane Mather, *Dynamic Processes in Risk Perception*, 3 J. RISK & UNCERTAINTY 155, 171 (1990).

4. *Id.* at 172.

5. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999).

6. JAMES T. HAMILTON, REGULATION THROUGH REVELATION: THE ORIGIN, POLITICS, AND IMPACTS OF THE TOXICS RELEASE INVENTORY PROGRAM 184 (2005).

7. See Kuran & Sunstein, *supra* note 5, at 685, 691-703.

III. OBJECTIONS

This position is not a usual one, to be sure; I am aware of no rule, explicit or implicit, that supports the italicized principle. Because of what seems to me to be a happy accident, the issue is largely irrelevant at the Supreme Court level. The Court begins its term in October, and elections are held in early November; it is therefore most unlikely that the Court would have to consider whether to delay a decision in order to avoid electoral effects.

We might imagine three possible objections to the principle I have described:

1. Precisely because it is a court of law, the court must rule as it sees fit and ignore its electoral effects.⁸ The political consequences are irrelevant. It certainly does not matter whether an election is imminent.
2. A decision not to issue an opinion is itself a choice—one that will, by hypothesis, favor one or another side. If, for example, a court decides to delay issuing an opinion calling for same-sex marriage, it might well be favoring Democratic candidates. Why should it do that? It is no more neutral to hold the opinion than to issue it immediately.
3. If the court's decision is controversial, the voters deserve to know about it before they vote, not after. Suppose that the court is prepared to rule that a state must permit same-sex marriages. If the court is interpreting the state constitution, it is possible that the voters will want to amend that constitution so as to ban same-sex marriages. That question is a legitimate part of the electoral debate. Ought not the court let citizens know of its position, rather than wait until a time when it is, for some purposes, too late? "Holding" an opinion is too strategic; it smacks of opportunistic behavior on the court's part, an effort to avoid electoral reprisal.

Let me explore these objections in sequence.

The judicial role. The problem with the first objection is that it is a conclusion, not an argument. It offers a claim about the court's appropriate role, but it does not defend that claim. Why, exactly, should the court ignore the consequences of its decisions?

8. A former commissioner of the Internal Revenue Service took an analogous position with respect to delaying enforcement action in anticipation of an election, asserting, "Oh my God, that is unthinkable," but this view is not unanimously held. See Johnston, *supra* note 2, at A4.

In other domains, courts pay attention to those consequences. On occasion, the Court refuses to rule on an issue in part because of the intense political controversy that a ruling would spark.⁹ Perhaps some such refusals are unjustified, but it is not easy to defend the proposition that in considering issues of timing, the Court should *always* be indifferent to the public reaction.¹⁰ If timing matters when the Supreme Court decides whether to rule, or how ambitiously to rule, then it might matter as well for state courts attempting to decide whether to hold their decisions until after the election.

The non-neutrality of delay. The second objection is more forceful. Suppose that a liberal court, consisting mostly of Democratic appointees, decides not to issue a liberal opinion, because it does not want to move voters in the direction of Republican candidates. We should be able to agree that this decision would be entirely illegitimate; it would be too narrowly partisan. Judges should not time their decisions so as to help identifiable candidates and parties. But suppose instead that partisanship is not involved—that liberal and conservative judges are willing to support a general practice against issuing controversial opinions, say, one month before an election. Is this a violation of neutrality? The second objection insists that it is, because holding the opinion is itself a decision, and not properly characterized as neutral.

Whether the objection is correct, I suggest, depends on whether voters are prone to overreaction or are rational updaters. If voters are prone to overreaction, and if their judgments might be distorted, then holding the opinion is a decision, to be sure, but it is the right one, because it prevents what is (by hypothesis) an overreaction. There is nothing abstractly neutral about a decision to delay; but if that decision is a sensible way of avoiding a distortion in political judgment, it is defensible for that reason. Suppose, however, that voters are rational updaters. If so, there is no reason to hold the decision, and indeed there is good reason not to do so—an issue to which I now turn.

Informing electoral judgment. The premise of the third objection is certainly correct. Often a judicial decision is a legitimate part of political debate, and it deserves to play a role in a campaign. Suppose, for

9. The most famous example involves miscegenation laws. In both 1955 and 1956, the Court refused to rule on the constitutionality of antimiscegenation laws. See *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), *vacated and remanded on procedural grounds*, 350 U.S. 891 (1955), *reinstated and aff'd*, 90 S.E.2d 849 (Va. 1956), *appeal dismissed for lack of federal question*, 350 U.S. 985 (1956). See also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004) (declining to rule on the constitutionality of the words “under God” in the Pledge of Allegiance).

10. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 240 (1962).

example, that a state court has invalidated a series of environmental regulations, or struck down the practice of capital punishment, or called for same-sex marriage. If so, voters are entitled to take account of those decisions in casting their votes, especially when the electoral process is able to overturn judicial decisions (for example, through amendments to the state constitution). And if voters are rational updaters, this consideration would seem to be decisive. Why deprive voters of relevant information before they vote?

But suppose that significant numbers of voters are prone to overreaction—that their votes will be affected by the immediacy of the judicial decision, and that if some months had passed, the decision would have been put into proper perspective. If this is so, the assessment of the timing issue is not simple. By delaying a decision, the court deprives citizens of relevant information. By issuing the decision, the court might distort the electoral process by giving undue salience to a single event.¹¹

There is no easy way out of this dilemma. The conclusion would seem to depend on an empirical judgment about whether the distortion is expected to be serious. If not, a delay has no motivation; if so, the court would seem to have good reason to wait. It is important here that if citizens do not like the court's decision, and if their objections survive a period of deliberation, then little is lost in a delay. Representatives are highly likely to respond to an immensely unpopular decision, even if it is issued a month after the election. Hence the decision to hold the decision does not deprive voters of ultimate control. I conclude, with some tentativeness, that if a judicial decision is likely to produce a short-term overreaction by the public, the better practice might well be to avoid issuing it.

Questions of judicial competence. There is a final problem. Suppose that courts do not have good tools for answering the key empirical questions. Suppose that they do not know whether a decision would have significant electoral effects, or that their judgments about the rationality of voters' reactions are highly unreliable. If so, courts might do well to adopt a firm rule against considering those questions, or at least a strong presumption, to be overcome only in the most compelling circumstances. But if courts have adequate tools, they might do well to time their decisions so as not to produce electoral distortions.

11. For relevant discussion, see generally Daron R. Shaw, *A Study of Presidential Campaign Event Effects from 1952 to 1992*, 61 J. POLITICS 387 (1999); Tom W. Smith, *Freedom to Conduct Public Opinion Polls Around the World*, 16 INT'L J. PUB. OPINION RES. 215 (2004).

IV. NOT A CONCLUSION

My main goal here has been to raise a problem, not to resolve it. If particular events can have large effects on voters by virtue of their timing, and if those events can distort rather than inform deliberation, there is a good reason for courts to hold especially controversial decisions rather than to issue them immediately before an election. Most of the time, little or nothing is lost by delay. It is true that the argument for waiting is effectively answered if voters are rational updaters, giving recent information no more weight than it deserves; but I have offered some reasons for doubts on that score. My suggestion has been that judges might plausibly delay their decisions if the risk of a significant electoral effect is serious and if the public's judgment would be inflamed and distorted rather than rational—at least if courts have adequate tools for answering the empirical questions.

There are more general issues in the background. To what extent do or should political actors defer controversial decisions? To what extent do the most recent events actually affect voter behavior?¹² To what extent are those effects a product of rational updating, rather than distortion as a result of immediacy and salience? If the effects are significant, what responses, if any, are appropriate on the part of those involved in institutional design outside of the judicial context? I have not attempted to answer these questions, but any answers would bear both on the timing issue on which I have focused here and on broader questions about the relationship between individual rationality and collective self-government.

12. See *supra* note 11.