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The Game of Politics and the 2000 American Presidential Election

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The Game of Politics and the 2000 American Presidential Election

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Abstract

Every political system is governed by a set of formal and informal rules and fundamental principles. One must understand how these rules work in order to understand how the system functions. Five important such fundamental principles in the United States are: federalism, separation of powers, judicial review, elective principle and decentralization. This article outlines the development of these principles and then examines how they impacted the electoral process. Through the interaction of these five principles a president was inaugurated without having won a majority of the popular vote and without all the votes in the deciding state having been counted. In the conclusion, some recommendations are made as to how the rules must be changed in order to prevent a repeat of this unusual election.

1 Introduction

If it ain't broke, don't fix it. This attitude has long been held by Americans concerning both their electoral system and their political system. The United States is justifiably proud of its long history of responsible and democratic institutions. These venerated institutions have served the nation well and there has been a hesitancy to tamper with them. The Constitution of the United States has been amended only 26 times in more than 200 years, and ten of these were necessary to insure the ratification of some of the original states. Four amendments provided guarantees of suffrage to various groups of individuals. Two related to the prohibition of the sale of liquor, so that relatively few actually deal with the way the political system is organized. The system has not been in need of repair too often.

In 1800 the electoral system broke down because no distinction had been provided for the election of the president and vice-president. This breakdown was repaired in Amendment XII that provides for separate ballots for each office. Now, exactly 200 years later, the system has broken down again. The person inaugurated did not have the most votes of the people and some potentially crucial votes were never counted. This article will examine how this

could happen and what caused this breakdown. It will also suggest some areas in which the system is badly in need of repair.

2 The game of politics

Sometimes it is referred to as the 'game' of politics. One of the justifications of such an analogy must certainly be that games are played according to rules. Children may play together, but if they are to play a game, they must learn the rules. It is the rules that to a considerable extent define the game. The more organized a game becomes, the more the rules become codified. There are official rules and maybe even international rules. The rules also determine who wins the game, i.e., how the rules are written affects the outcome of the game. In organized competition it is generally necessary to specify neutral judges or referees to interpret and enforce the rules. Finally, in addition to the official, codified rules, there may be unofficial or traditional rules, actions that are just 'not done'.

Politics shares many of these elements with games. Rules may be codified either in law or in a constitution. These rules determine how the game of politics is to be played in any particular political system. In addition, perhaps more so than with games, there are uncodified rules that are also part of the 'political culture'. When an individual or group dares to break such traditional rules, the political system can either adapt or codify the unwritten rule.

To understand the game of politics in any political system, one must understand the rules by which it is played. There are no international rules for politics and each country determines its own rules. The importance of the rules by which the game of politics is played is sometimes overlooked and/or observers are not sufficiently aware of the impact and importance of certain rules and how they affect the outcome. The American presidential election of 2000 is a case in point. To understand how George W. Bush could be inaugurated as president without 'winning' the election, one must understand the rules that were involved, and, in particular, how certain rules interacted with or even contradicted each other. In particular, the electoral system in the United States broke down in 2000 because of inconsistencies and inadequacies of five fundamental principles of American politics. These five principles are:

- Federalism
- Separation of Powers
- Judicial Review
- Elective Principle
- Decentralization.

In this article, I will first examine the background and development of each of these rules, and then show how they were related to the election of 2000.

2.1 Federalism

During the 17th and 18th centuries, a number of British colonies were established in the Americas and the Caribbean. During the 18th century Britain increased its possessions and following the Peace of Paris in 1763, had acquired Nova Scotia, Quebec, Florida, as well as Jamaica, the Bahamas, British Honduras, and several small islands in the Caribbean. In 1776 thirteen of the North American colonies revolted; Nova Scotia refused to join and an attack on Quebec was repulsed. This revolt was actually thirteen revolts in which all thirteen cooperated. During the period between 1776 and the end of the Revolutionary War in 1781 the colonies turned their charters into constitutions. There were thus at the end of the war, in effect, thirteen independent countries.

Many European, but also American, observers tend to overlook this fact when they look at the United States today. They forget that the name does in fact refer to a union of independent states. They tend to compare their own country with the United States rather than to the European Union, or what the European Union may become in 200 years. There are some fascinating parallels between the developments in the United States and Europe in the attempts to create cooperation and union.

The American states set out quickly to establish a national union, but Americans themselves tend to forget that the first attempt was a failure. The Articles of Confederation provided for a 'league of friendship' between the states, but they did not provide for a national executive or national judiciary and the Congress had the power to regulate commerce or levy taxes. Many powers could not be executed without the consent of the states. And, in what was considered its weakest element, the Articles could only be amended with unanimous consent of the states.

The so-venerated Constitution of the United States was in fact drawn up in 1787 in illegal fashion. Many delegates to the Convention only had orders to revise the Articles, and since no delegates from Rhode Island were ever selected, there was no possibility for unanimity. Rather than revise, the delegates wrote a new Constitution.

This specified the powers of the new national authority. But, before some of the states would ratify the new constitution, they demanded a Bill of Rights be added. Most of these rights are rights of the individual, but Amendment X attempts to clarify the relationship between the national and state governments: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This is the essence of the principle of federalism in the United States. However, despite this attempt at clarification, what the national (often called the 'federal') government may or may not do and what

the state governments may or may not do has remained uncertain. In many cases, it has been necessary to render an interpretation of the provisions of the Constitution. The election of 2000 was such a case.

2.2 Separation of powers

One of the aims of the new constitution was to provide for a national executive. Since they had recently revolted against what they saw as a tyrannical king, they wanted a political system that would guard against such tyranny. They were inspired by the works of the French philosopher Baron de Montesquieu who argued that divided powers provided the best such guarantee. They thus set up three distinct branches of government – legislative, executive and judicial. Each had its own responsibilities and was to be kept in line through ‘checks and balances’ by the others.

One of the primary controversies at the Constitutional Convention was between the small states and the large states over the question of representation. Considerable effort went into the negotiation of a compromise that provided for a bicameral legislature. A House of Representatives based upon population and election by the people, and a Senate in which each state received two Senators regardless of size to be elected by the legislatures of the states.

There were many precedents for representative assemblies, but the office of President was a new creation. What we now know as the presidential system was their creation and the parliamentary system had not yet fully emerged, so their primary precedents were either from European monarchies or from the Roman and Dutch republics. Although discussed, monarchy was rejected. Selection of the President by the Congress was also considered, but would have violated the principle of separation of powers. On the other hand, too many of the delegates were opposed to direct popular election to make this a viable option.

Against this backdrop the creation of the Electoral College seems quite sensible. In line with the separation of powers, it provided that the president was not dependent on the legislature for his selection. It incorporated the principle of federalism by specifying that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress (...)” By allotting each state these numbers of electors, the small states were given a slightly disproportional influence upon the selection of the President. This may have been useful in helping to secure the support of the smaller states for ratification, but as stated above, some rules favor certain players and this one favors the small states. Since approval of three

fourths of the states is necessary for ratification of a constitutional amendment, it makes it very difficult to alter or eliminate the Electoral College as the means of selecting the President. The smaller states of today would have to be willing to give up their disproportional influence.

The above matters monopolized most of the discussions of the delegates at the constitutional convention, but they also wished to set up a national judiciary. Time pressures prevented them from providing more than outlines of such a system by specifying ‘one supreme Court’. The details were left to the Congress. It specified in broad terms that “the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States (...)”

It is clear that the judiciary must fulfill the role of objective referee in a game. The judges must interpret and enforce the rules of the game. As we have seen before, the principle of federalism would lead to numerous questions that require such interpretation. Similarly, the principle of separation of powers contains innumerable possibilities for conflict. It has come to the judiciary to resolve conflicts between the legislative and executive branches. As we shall examine below, the courts played a crucial role in the 2000 election process.

2.3 Judicial review

Since the powers of the judicial branch are not outlined in detail in the Constitution, the courts, especially the Supreme Court, have been important in defining their own jurisdiction. One crucial aspect of the expansion of its jurisdiction occurred in 1803 when the Supreme Court established itself as the defender of the Constitution. In its role as referee and interpreter of the rules it established its power to declare acts of Congress unconstitutional. Separation of powers hereby led to a new check within the system. Concomitant with this newly assumed power and related to the principle of federalism is the ability to overrule decisions of state courts and to declare acts of the state legislature unconstitutional.

The principles of separation of powers and federalism, together with this power of judicial review, give the Supreme Court of the United States a more central role in the politics of the United States than courts have in systems in which parliament is deemed as supreme. The need for a referee is more essential in such a system. But, it also introduces a complication into the system, for it becomes difficult for the referee to remain completely neutral. At best it may merely be accused of favoritism in its decisions, at worst of becoming a full player. As we shall see below, the Supreme Court allowed itself to be drawn into the conflict surrounding the 2000 presidential election and to have its impartiality questioned.

2.4 Elective principle

The delegates at the Constitutional Convention of 1787 aimed to create an effective, non-tyrannical national government. They did not refer to their creation as a democracy, but as a republic, but they were not in agreement as to whether it should be a democratic or aristocratic republic (Dahl 1967: 34-42). The one element of popular government that they were in agreement on was the election by popular vote of a legislative assembly, i.e., the House of Representatives.

As we have seen above, there was insufficient support for direct election of the president. Yet the seeds had been planted and during the following century the political system would become more democratic. Suffrage was expanded so that by 1830 virtually all white males had the right to vote. Although the state legislatures had full authority to choose presidential electors as they saw fit, during the first half of the 19th century most decided to allow them to be chosen by popular vote; the last case of a legislature choosing electors was the new state of Colorado in 1876 (Longley & Peirce 1999: 211). Towards the end of the century, populism swept the country and led to many democratic innovations, including the principles of initiative, referendum and recall. Populists pushed for and obtained an amendment to the Constitution (Amendment XVII) in 1913 that provided for the election of Senators by the people rather than by the state legislatures.

There is no patented definition of democracy and no international rule concerning what role the people should have in it. Certainly there is a commonly accepted element that the voters must somehow choose their rulers. In some countries, such as the Netherlands, this role is limited to a minimum. Political officials are chosen by popular vote only if not to do so would nullify this fundamental principle of democracy. The Netherlands is a representative democracy and only representatives to the legislative bodies at the municipal, provincial and national levels are elected; other officials are either selected by these bodies or appointed. The populism of the United States has led to a different – ‘elective’ – principle. All officials of government are elected by popular vote unless there is a good reason not to do so. This means that not only the members of legislative bodies are elected, but so too are members of the executive and even judicial branches of government. The extent of popular choices may vary between and within states, but the elective principle tends to hold.

2.5 Decentralization

Not only is the United States a federal system, it is also highly decentralized. The most recent *Census of Governments* tallied 87,504 governmental units in the United States (U.S. Census 2000). According to the definition, “governmental units include all agencies or bodies having an organized existence, governmental character, and substantial autonomy” (p. 307). They include 3,043 counties, 19,372 municipalities, 16,629 townships and towns, and 13,727 school districts. Most of these units can impose taxes.¹ An important aspect here is the autonomy of these units. For example, in some states, municipalities of a certain size are allowed to choose their own form of municipal government. They can choose how to organize and operate services within their boundaries. Counties and school districts also have a considerable degree of autonomy to regulate their own affairs.

Many people in the United States do not live within ‘incorporated’ areas and thus do not fall under any municipal government. However, each state is subdivided into counties (in Louisiana into parishes) that include the entire territory of the state. Thus, each inhabitant of the United States falls subject to the county, which is the lowest level of government. As we shall see, county government played an important role in the 2000 presidential election.

3 Breakdown in 2000

Rules are important to determine that the correct team wins. In this regard it is important that in close contests the rules are consistent and help insure the correct outcome. In the 2000 American presidential election, this was not the case. The rules proved to be confusing, inconsistent and outdated.

3.1 The winner did not win

The most glaring inadequacy of the system is that in 2000 the candidate gaining the most votes did not become president. It has just been described how the Founding Fathers attempted to create a political system in which the three branches of government held each other in check. The president was not to be selected by the Congress (and thus be dependent upon it), but was to have his own power base. They did not create this base in a popular vote. Despite the rise of democracy and the elective principle, the mechanism they created, the Electoral College, has never been replaced. Nevertheless, for more than one and a half centuries the state legislatures have designated that the

electors be chosen by popular vote. Generations of American voters have grown up with hardly any knowledge of the Electoral College and generally assumed that it was they who were electing the president.

Given this premise and the principle of one man-one vote that came from Amendment xiv guaranteeing the citizens of each state the "equal protection of the laws", it might be assumed that the candidate receiving the most votes should become president. If the Electoral College was not imbedded in the Constitution, it would surely be unconstitutional. It gives voters in small states disproportional influence on the outcome and it makes it possible for a candidate to receive the most popular votes and still not become president.

That this can happen has long been known. It actually happened three times in the nineteenth century – in 1824, 1876 and 1888 – and there were some close calls in the twentieth century.² Longley and Peirce (1999: 162) concluded that: "The electoral college is a highly imperfect method of electing the president of the United States. At best it distorts campaign strategy and poorly represents the popular will. At worst it can create political and constitutional crisis in determining who should be president." Of course, the Electoral College has had its defenders. There has often been discussion concerning change, but nothing has ever come of it.

This lack of change was not because of strong public support in favor of the Electoral College. The Gallup Poll first asked American voters whether they would favor electing the president directly in 1944 (Gallup 2000a). Almost two-thirds favored such a procedure over the Electoral College. Since then the question has been asked several times and a majority has always been in favor of change. Since 1966 the following question has been asked on seven occasions: "Would you approve or disapprove of an amendment to the Constitution that would do away with the Electoral College and base the election of a president on the total vote cast throughout the nation?" (Gallup 2000b). The greatest support for such a change was following the election of Richard Nixon in 1968 (81%). Somewhat surprisingly, support in 2000 (61%) was not higher than in previous surveys.

The most one can say is that since 1888 the candidate who had received the most popular votes was also elected by the Electoral College. In the election of 2000 this did not occur. The Democratic party candidate, Al Gore, received some 550,000 more votes than the Republican candidate, George W. Bush, but it is the latter who has been inaugurated as president. One would have hoped that this fact would have led to a public discussion of how the American president is elected. Clearly the result is inconsistent with ideas concerning how every other official in the United States is elected. Perhaps this discussion will take place, or possibly the Congress will at least examine alternatives. However, since the Electoral College is rooted in the Constitution and since it would be as difficult in 2001 as in 1787 to come up with a proposal that might

receive universal approval (including the support of the smaller states) it is quite likely that nothing will change.

3.2 Florida

One reason that no outcry has taken place and the public discussion has been limited is because for several weeks following the election, all attention was focused on the state of Florida. It is what happened in that state that revealed so clearly how the various rules of the game could produce a convoluted result.

Article II specifies that: "Each State shall appoint, in such manner as the legislature thereof may direct. . ." In line with the principle of federalism, it is the states that determine how the electors will be chosen. This means that, in fact, 50 separate elections are held and 50 different legislatures determine the rules. There was considerable discussion during the post-election period concerning the fact that Bush was trying to prevent the state of Florida from counting ballots that would have been counted in Texas under a law that he himself had signed. In Texas there would also have been more time to carry out the recount, but again, each state is allowed to specify its own procedures. The only restrictions are that the electors must meet on the first Monday following the second Wednesday in December of an election year, and that the votes are to be counted by the Congress on January 6 of the following year.

In line with the principle of separation of powers, the legislature makes a determination how the electors are chosen. This would seem to be quite clear. However, this simple provision leads to at least two complications when other rules come into play. First, were the rules laid down by the legislature binding, or were they subject to interpretation by the judiciary (a question of separation of powers)? Second, had the selection of the electors been delegated to the voters of the state of Florida (as most would have assumed by application of tradition and the elective principle) or could the legislature still make its own determination concerning selection?

In accordance with decentralization, the Florida legislature has delegated much of the administration of elections to the counties. As Judge Donald M. Middlebrooks of the Federal District Court in Miami wrote in his denial of a preliminary injunction to block the manual recounts in four counties:

In Florida, the administration of elections includes statewide and local features. While the secretary of state is the chief election officer of the state, the actual conduct of elections occurs in Florida counties. Except for the appointed supervisor in Miami-Dade County, the county supervisor of elections is an elective office, chosen every four years. (New York Times 14/11/00)

The counties and the county supervisors have the responsibility of designing the ballot and counting the votes. Decentralization therefore can lead, as it did in Florida, to a variety of systems. In Florida, five different systems were used. One county still used paper ballots that must be counted by hand and one used an old-fashioned lever machine. Some used optical scanner equipment; others used one of two systems of punch card ballots. The most problems arose with the use of the Votomatic system. But, even among those counties using the Votomatic system, there was variation. In Duval county the names of the presidential candidates were spread across two pages, and when the Democratic Party instructed voters (primarily newly recruited black voters) to "vote each page" a disproportionate number invalidated their ballots. More controversy centered on the 'butterfly' ballot employed in Palm Beach county. This ballot was constructed in contradiction to state legal guidelines by listing the names of the candidates on two opposing pages instead of underneath each other; and instead of the blank to be crossed being on the right, in some cases it was left of the candidate's name. Although designed to help elderly voters, it confused them and probably cost Al Gore the election when a disproportionate number of votes was counted for Pat Buchanan.

Judge Middlebrooks wrote that decentralization had the advantage that "the more county boards and individuals involved in the electoral regulation process, the less likely it becomes that corruption, bias or error can influence the ultimate result of an election." (New York Times 14/11/00). This was written in the week following the election in response to the first law suit in the case that had been brought by the Bush campaign. In the following weeks, it would become clear that although decentralization might protect against corruption, it had not prevented bias and error from creeping into the results.

When the results in Florida were first counted in Florida by the county boards, it was found that there was a margin of 1784 votes (0.0299%). According to Florida statute, when the difference is less than 0.5%, an automatic machine recount must be held. This mandatory recount reduced the difference between the two candidates substantially and the real battle began.

Florida law provides that in addition to the mandatory machine recount, the candidates as well as the political parties can submit written requests for hand recounts. This request must be made within 72 hours of the count. Guidelines are laid down by which the canvassing board 'shall' undertake a manual recount, but it is a decision to be taken by the local canvassing board. The Gore team was thus forced to decide whether to ask for manual recounts and where. If there had been a statewide administration of the election, it would have been possible to make a single request. However, decentralization dictated that 67 requests would have had to be made to achieve a statewide recount. Lacking the time and resources that might have been necessary to

fight legal challenges in all 67 counties, the Gore team decided to concentrate on the four counties in which the problems were greatest (and in which he stood to gain the most). With hindsight this may have been a critical mistake, since it later made it possible for the Bush legal team to mount a challenge under the 14th Amendment equal protection clause (Barstow & Nagourney 2000). Two rules of the game clearly clashed here. Gore tried to rectify the situation a few days later by suggesting that both candidates call for a statewide recount, but Bush refused.

Instead Bush went to Federal court to seek an injunction to block the manual recounts. The above-mentioned Judge Middlebrooks denied this injunction, but it quickly became clear that it would not be possible for the counties to complete their recounts before the deadline for certifying the results. For although the legislature had given the local canvassing commissions the authority to carry out manual recounts, it had not given the larger counties sufficient time to do so. The deadline for sending the county returns to the Department of State was 5 p.m. of the seventh day following an election.³ Secretary of State Katherine Harris declared that she would not accept returns after this deadline, thus forcing the Gore team to go to court.

The legal questions now centered on matters of separation of powers. What discretion did the Secretary have? Was the deadline set down by the legislature binding, even if the recounts could not be carried out? Could the courts rule on the matter. The cases quickly moved to the Supreme Court of Florida.⁴ In a carefully reasoned opinion, the Court ruled that the Secretary would have to accept any amended certifications received by 5 p.m. on Sunday, November 26, 2000. The Bush team appealed to the federal courts about this ruling. To the surprise of most observers, the Supreme Court of the United States agreed to hear the case. Almost as surprisingly, it vacated the decision of the Florida Supreme Court and asked this court to clarify on what it had based its decision. The important question was whether in extending the deadline, the Court was interpreting existing legislation or making new legislation. If it were the latter, it would be overstepping its role in the separation of powers.

By the time the Supreme Court of Florida was able to clarify its opinion, the contest had moved to a challenge of the manual recounts themselves. After a tumultuous session with demonstrators trying to force their way into the room, Miami-Dade county officials decided to stop the recount, since they could not satisfy the November 26 deadline. Broward county completed its recount, but Palm Beach county was a few hours too late and the Secretary refused the results. The Gore team went to court again to try to insure that all the votes were finally counted. In a 4-3 decision, the Florida Supreme Court ordered that all the so-called undervotes (votes for which the machines could record no vote) be counted manually in **all** Florida counties. It also ordered that the recount in Palm Beach county be accepted, as well as a net gain of 168

votes for Gore from the partial recount in Miami-Dade county. The margin of difference was now 193 votes.

Again, Bush appealed to the federal system and the question arose whether the Supreme Court of the United States would be the institution that could bring closure to the controversy. Whether the Court would or should get involved was a question related to both the principles of separation of powers and of federalism. If the judiciary is to act as a referee in the political process, it needs to give an impression of impartiality. Never before had the Supreme Court become involved in deciding who was to become president. This was left to the other branches of government. In 1876 five justices had become involved as individuals, and as Justice Breyer would point out later in his dissent, this action

did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.⁵

The court did, however, agree to hear the case and stopped the manual recounts in Florida.

The case involved almost all of the principles that have been discussed here.⁶ Separation of powers was involved not only in whether the U.S. Supreme Court would become involved, but whether the Florida Supreme Court had overstepped its authority in ordering the manual recount throughout the state. The question whether the U.S. Supreme Court should defer to the Florida Supreme Court or whether there was a national issue that needed to be addressed is related to federalism.

The substance of the case brought two more of the principles into play. Because of the decentralization of voting procedures in Florida, no statewide procedures were available for determining how to count the votes that the machines had rejected. State law provided that the local boards must count a vote if the 'intent' of the voter could be determined, but how this was to be determined was left up to the county boards. The terms 'dimpled ballot' and 'hanging chads' entered the language, but neither the law nor the Florida Supreme Court had provided guidelines that would guarantee a uniform interpretation of voter intent. Bush's attorneys argued that this would violate the equal protection clause of the U.S. Constitution. Since the U.S. Constitution and its interpretation were involved, judicial review came into play.

The court found the Florida procedures to be a "violation of the Equal Protection Clause". It pointed out that:

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide

election as the means to implement its power to appoint members of the Electoral College (...).

[However], when the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.⁷

Chief Justice Rehnquist, with Justices Scalia and Thomas concurring, went a step further and addressed the question of separation of powers. His argument concerned the delegation of responsibility for the selection of electors to the state legislatures in Article II of the U.S. Constitution. He examined various state laws⁸ and precedents and concluded that:

What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.⁹

Various justices were also quite aware of the principle of federalism. Rehnquist himself wrote, "In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law."¹⁰ But that was not so in this case, to the irritation of some of the minority justices, including Justice Ginsburg. She granted that it might be possible to disagree with the interpretation of the law, "[b]ut disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated" [i.e. violated the separation of powers].¹¹

Once the determination had been made that the Florida recount procedures were in violation of the equal protection clause, the question arose what the next step was to be. The decision was announced on December 12, just a few hours before the deadline set up by federal legislation establishing a 'safe harbor' for the selection of electors. This safe harbor date protects the electors from challenge at a later phase in the process. The Florida Supreme Court, in its decision, had mandated that the manual recount had to be completed before December 12, in order to take advantage of this protection. The U.S. Supreme Court ruled that the statute

requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.¹²

One can disagree with the interpretation of the law and the Constitution by the majority of the court on the substantive matters, but still concede that the

court has acted within its role as mediator in political conflicts. However, by taking this step and not sending the case back to Florida so that the Supreme Court could at least attempt to devise a uniform standard and have the recount completed by the date that the electors would have to cast their votes (December 18), the U.S. Supreme Court overstepped the bounds of impartiality. This was pointed out by Justice Breyer: "The Court was wrong to take this case. It was wrong to grant a stay." But having done so and having ruled that a violation of equal protection had occurred, "I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards."¹³

By taking this decision the majority signaled that the Supreme Court's primary aim was to insure the election of George W. Bush. By not allowing Florida to attempt to devise a procedure that would satisfy equal protection provisions, it took a political rather than a judicial decision. In fact, it could easily be argued that the Supreme Court hereby had usurped the powers of the Congress of the United States to a far greater degree than the Florida Supreme Court had usurped any powers of the Florida legislature. After all, the safe harbor provision protected against a challenge of the electors in the Congress. It is the Congress, and not the Supreme Court, that has the right to rule upon such a challenge. The U.S. Supreme Court took a questionable step in intervening in this process.

However questionable the decision, the case did bring closure to the controversy. Vice-President Gore was left with no more legal options and gracefully conceded to Governor Bush. In the context here, however, not all of the difficulties with the five fundamental principles have been discussed. Several problems related to the elective principle must still be mentioned.

As has been outlined above, in Florida the persons administering elections are elected officials. It hardly needs explanation to say that in a close election, such officials can be viewed as having acted in a partisan, rather than neutral, manner. This charge was frequently leveled at Secretary of State Katherine Harris, who at all stages sought to interpret legislation, even conflicting legislation, quite strictly. The fact that she had been an active campaigner for Bush brought her neutrality into question.

Problems also occurred at the county level. The recounts in the four counties involved charges of partisanship, but the most serious charges concerned the actions of county elections supervisors in Seminole and Martin counties. In these counties, Republican supervisors had allowed officials of their own party to complete information on the applications for absentee ballots, without notifying Democrats or allowing them to do the same. These actions were challenged in two lawsuits brought by Democrats (Gore did not join the suits). The courts finally ruled that the actions of the officials were inappropriate, but that the remedy desired, throwing out all of the absentee ballots in the county,

was too far-reaching for the injury suffered.

The elective principle is also applicable to the Florida judges. The seven justices of the Florida Supreme Court are appointed by the governor, but after six years in office they must face voters in a 'merit-retention' election. Three of the justices were retained in office at the same election that became so controversial at the presidential level. Others are up for retention election in 2002 and conservative groups in Florida were quick to announce that they would try to unseat Justice Harry Lee Anstead, who had voted with the majority in ordering the statewide manual recount. In fact, these groups indicated that they would push for a constitutional amendment in Florida to provide that appeal judges be elected in the state, i.e., extend the elective principle to appellate judges.¹⁴

Finally, the elective principle must be examined with respect to the election of the President. Most people in the United States believed that although the Electoral College was still in effect, basically it was the voters who chose the President. Even if the person inaugurated had not won the popular vote, the voters would have at least chosen the electors. In 2000 they discovered that this was not guaranteed. The provisions of the Article delegating the means of selection of the electors to the state legislatures is very much in effect. Not only is this true and could a legislature decide to select electors in another fashion, it could even do so after the election. If the electors had not been chosen by the December 12 safe harbor deadline, the legislature of the state could make its own determination. The legislature of the state of Florida was, in fact, preparing to do just that when the ruling by the U.S. Supreme Court made it a moot point. Nevertheless, it was clear that if Gore had won the Supreme Court case, whether or not he won the recount, the Florida legislature would have chosen a set of Bush electors. That might have led to two sets of electoral votes being submitted to the Congress, but since legislation exists specifying that the list signed by the governor of the state is to be recognized (and in this case the list submitted by the legislature would have been signed by Governor Jeb Bush, the brother of the Republican candidate), it would have been possible for the legislature to overturn the vote of the people of the state of Florida.

4 Repairing the system

In the 2000 American presidential election, the electoral system broke down completely. The candidate who received the largest number of votes in the country was not inaugurated as president. The person who was inaugurated utilized the rules of the system in such a fashion to prevent all of the votes in Florida from being counted. After all, even the Supreme Court of the United

States did not contend that there were no valid votes among the undervotes in Florida, only that there was no time to devise a system to count them properly. Thus the American people did not even know if Bush had actually won under the existing rules. The system is clearly broken and needs fixing.

Unless the Supreme Court restricts its ruling to the case at hand, thereby revealing that its only motivation in the decision was to insure the inauguration of George W. Bush, the decision can have monumental consequences. If the procedure for the hand recounts in Florida was unconstitutional because it lacked the 'equal protection of the laws', then the entire electoral process surely must be unconstitutional. (It should be noted here that although the focus has been on Florida in 2000, similar problems could undoubtedly have been found in many other states.) In Florida, the different methods of voting produce widely different percentages of undervotes or invalid votes. Surely this too must be unconstitutional? So too must many aspects of the highly decentralized Florida system. The demand for equality in every detail is inconsistent with the decentralization that is employed in Florida. Surely Florida and many other states must consider whether a more centralized system is not required?

Of course, the most glaring inequality in the system is the Electoral College itself. Small states are allotted a disproportional number of electors. Voters in these states thereby have a disproportional influence on the outcome. If the Electoral College was not imbedded in the Constitution, it surely would be unconstitutional. Yet, even with its constitutional protection, it is difficult to justify it as a part of a modern democracy. The states may have been independent and sovereign when they united to form a new country, but surely their position has now changed? They may remain important for the election of the legislative branch, but as is pointed out so often, the President is the only official with a national constituency. It is inconsistent with the elective principle of democracy and with the principle of equality that he or she is not elected by the people under the one-man one-vote principle.

On the other hand, the states need to examine the employment of the elective principle in at least two areas. Election of the officials who are to administer elections carries a high risk. Analogous to organized games, those administering the game should be impartial and not favor one side or the other. The experience in Florida, both at the state level—especially with respect to the Secretary of State—and at the county level with the Supervisors of Elections, has shown that at the crucial moment, when an election is close, it is difficult to guarantee that impartiality. Even if an official attempts to remain impartial, having been elected under a party label will make any decisions suspect to the voters of other parties. Surely it does not violate the principles of democracy to replace these elected officials by non-partisan appointees?

Similarly, surely there is no advantage to the political or electoral system if

the judicial branch becomes completely politicized? Here too election under party labels does not seem the best way to provide impartiality. And attempts to remove justices because voters do not like their decisions, does not contribute to that impartiality. Although appointment by the executive and legislative branches does not provide an ironclad guarantee of impartiality (as in the case of the U.S. Supreme Court), direct election does not seem to be the answer.

Finally, the electoral procedures of the states must be examined. In too many counties and too many states, these procedures are outdated. Voting machines must be available to all voters that allow them to cast a vote without becoming confused or having their vote invalidated because of faulty technology. Although this will cost money, it is scandalous that governments have cut corners on something that is so very fundamental to the system.

Counting procedures must also be examined. In Florida it was impossible to carry out the recount for which the legislature had provided in the time allotted by the same legislature. The counting procedures must be examined in other states too. In many states, an increasing number of individuals cast their vote by absentee ballot. Many of these ballots are not counted until several weeks after the election. It was not known until late in December that Gore's margin of victory in the popular vote was more than half a million votes. In a speech at Leiden University on January 8, 2001, Bill Schneider of CNN stated that the public reaction might have been very different if he could have announced on election night that Gore had won the popular vote by more than 500,000 votes, but that Bush would become President.

The United States may be proud of its institutions of government. But when the system broke down in 1800, it was repaired. Two centuries later it has again broken down and it must again be fixed.

Notes

1. The remaining 34,683 are special districts, many of which are financed by other means.
2. Longley and Peirce (1999: 39-95) list 1948, 1960, 1968, 1976, 1980, 1992, and 1996 as recent crisis elections.
3. Section 102.111 of Florida election Law, found on New York Times website, November 14, 2000.
4. Palm Beach County Canvassing Board vs. Katherine Harris, etc. et al. and two companion cases, Nos. SC00-2346, SC00-2348 & SC00-2349.
5. Bush v. Gore, 531 U.S. ____ (2000), Breyer dissenting, p. 14.

6. Only the 'elective principle' is not involved here directly, but since the case dealt with the election of the President, one could argue that it was at least involved indirectly.

7. Bush v. Gore, 531 U.S. ____ (2000), per curiam opinion, pp. 5-6.

8. However, Justice Breyer referred to this as "the CHIEF JUSTICE's unusual review of state law." Bush v. Gore, Breyer dissent, p. 4.

9. Ibid, p. 4-5.

10. Ibid., p. 2.

11. Ibid., Ginsburg dissent, p. 1.

12. Ibid., per curiam opinion, p. 12.

13. Ibid, Breyer dissent, pp. 1 and 15.

14. 'Election could make 2002 vote tougher for Supreme Court justice', Cnn.com.law center news, December 14, 2000, www.cnn.com; Dexter Filkins, 'Republican Group Seeks to Unseat Three Justices', *The New York Times on the Web*, December 20, 2000, www.nytimes.com.

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'Strategy,' 'Dignitude' and Election 2000: Citizens, Media and the Crisis of Legitimacy

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Abstract

This article argues that the 2000 US presidential election has raised questions about the legitimacy of the electoral process that has cast a long shadow over the nation's most cherished principles and institutions. This article is informed by interviews with voters and first-hand observation of news and information in the aftermath of the election campaign from mid-December 2000 to mid-January 2001, and summarizes the information from various research projects on the election that published their results in real time during the campaign and its aftermath, to identify the main characteristics of the news and public responses to events. The candidates themselves were the subject of much political comedy throughout the campaign and there was only a small window for campaign news in the networks' evening programs. Voters were more attentive to and involved in the campaign after Election Day than before, driven primarily by their own partisan viewpoints.

1 Introduction

If, as they say, visuals are what we remember most from election campaigns, then for many Election 2000 will be remembered by the expressions on the faces of the two actors impersonating Texas Governor George W. Bush and Vice President Al Gore on NBC's Saturday Night Live (SNL) during the campaign and its incredible aftermath.¹ If you had not stayed up late enough to catch the program when it was broadcast live in October 2000, no problem. Between Christmas and New Year's Day, MSNBC ran a series of short clips in between programs featuring some of the funniest SNL moments on the election, as well as longer sketches in special programs on what had happened in campaign 2000. Watching these comedians at work, and then later tuning into actual news on the latest developments in the post-election drama, it became almost impossible for me to see the Vice President or the President-elect without smiling and thinking immediately of how much they appeared to be like their comic doubles. Laughter made it possible, if only for a moment, to forget about the sorry state in which American democracy had found itself.