

EDITORS' INTRODUCTION

This issue of *Florida Philosophical Review* is broadly focused on political and legal philosophy with specific attention to applications of philosophy to the 2000 U.S. presidential election. While the events surrounding the election of the U.S. president in 2000 had salience for the entire nation, they were particularly disconcerting for Floridians as we found ourselves at the center of media scrutiny. Our electoral processes, balloting procedures, and procedures for ballot recounts were closely scrutinized; our Secretary of State, our Governor, our state Supreme Court, and our voters themselves were widely questioned, caricatured, and satirized in the national news media. Yet, the events surrounding the 2000 election clearly required more thoughtful philosophical analyses than the round-the-clock media coverage provided. These events beckoned us to (re)consider the notions of enfranchisement, fairness, equality, and impartiality that are central to our conception of democracy. Collectively, the essays contained in this issue of the *Florida Philosophical Review* address these philosophical concerns.

Although not written as a response to the 2000 elections, the first essay included here examines, in a broader context, the issues of political justice. In "There are Peoples and There are Peoples," Brian Butler examines John Rawls's *The Law of Peoples*, arguing that this project of extending the principles of justice developed in Rawls's earlier works to the international (interpeoples) realm is flawed by virtue of its failure to treat liberal and non-liberal peoples equally and impartially. More specifically, Butler suggests that the eight principles that make up Rawls's Law of Peoples would be acceptable to what Rawls terms "decent, non-liberal peoples" only because Rawls implicitly defines "decent hierarchical societies" as societies who would be likely to accept these principles. Moreover, Rawls's principle of equality is undermined by the "internal" stance of *The Law of Peoples*. As the title of Butler's essay suggests, formulating a foreign policy from within a liberal framework privileges the outlook of liberal peoples and only "grudgingly" admits the viewpoints of "carefully defined decent peoples" who are depicted as less than "fully reasonable." Further, Butler notes, some liberal persons themselves might find Rawls's suggested framework for foreign policy insufficiently fair in terms of its proposed principles governing redistribution of wealth and standards of human rights. Finally, Butler contends, by adopting the terminology of 'peoples' (rather than the more familiar "nations" or "states"), Rawls may undermine our ability to reason intuitively from an "original position: "[t]he very idea that the tools of the original position and the veil of ignorance can be used in both intrapeoples and interpeoples justice inquiries seems highly implausible," argues Butler. Butler concludes that, when applied to questions of interpeoples justice, Rawls's methods and tools for developing principles of justice are insufficiently able to "deal with differing beliefs about what constitute relevant reasons," and thus to accommodate "genuinely differing voices."

The remainder of the essays included in this issue address, in different ways, how differing beliefs and attitudes should be accommodated within our own polity, paying special attention to the implications of the 2000 U.S. presidential election for American democratic values and practices.

In his essay, “The 2000 Presidential Elections: A Matter of Opinions,” Miguel Martinez-Saenz explores the judicial reasoning in *Bush v Gore*, arguing that both the U.S. Supreme Court’s Majority decision and the Court’s Minority decision were justified. To see this, Martinez-Saenz suggests, we need to make explicit the implicit values that guided each opinion. On the one hand, the Majority’s leading concern was the finality of the election; avoiding a national crisis was the imperative that guided their decision. On the other hand, the Minority’s principal concern was suffrage, i.e., ensuring that no voter was disenfranchised. These differences in guiding principles, argues Martinez-Saenz, led to quite different interpretations of the notion of a “legal vote” and of “irreparable harm.” Given a belief that “finality” is the overriding principle, “one will, like the Majority, tend to interpret ‘legal vote’ as a vote that is properly executed. . . . If, however, one asserts . . . that the overriding principle is the ‘right to have one’s vote counted,’ then one will, like the Minority, tend to interpret a legal vote as a ballot that shows clear indication of voter intent.”

With regard to the Court’s divergent understandings of ‘irreparable harm,’ Martinez-Saenz suggests that the Majority believed that the petitioner, George W. Bush, “could suffer ‘irreparable harm’ if the votes considered ‘legal votes’ were counted,” thus casting doubt on the legitimacy of the election. “The Minority, however, argued that preventing the recount constituted a violation of the people’s right to vote and therefore, those disenfranchised voters could be the victims of ‘irreparable harm.’”

So who was right? Martinez-Saenz suggests that there is no easy answer to this question. While both the Majority and dissenting Justices provided a legitimate justification for their respective positions, “it was almost impossible to determine, based on consistency and prior decisions, what the Justices were going to [or should] decide.” The determining factor, Martinez-Saenz asserts, was partisanship: “Both camps seemed to decide in advance the ‘desirable outcome’ and provided opinions that justified their respective positions.” Thus, this case enables us to recognize that “adjudicative neutrality is not as neutral as it is espoused to be.” Martinez-Saenz concludes that that recognition of the ways in which ideology permeates judicial decision-making should force us to “reconsider the process of judicial appointments.”

Ramón Vela’s essay addresses the notion of political equality as interpreted by the U.S. Supreme Court during the election. In “Political Equality and *Bush v Gore*,” Vela asks whether “inequality may be unfair simply because it is arbitrary.” In contrast to Martinez-Saenz, Vela depicts the Majority Court as concerned with issues of suffrage. According to Vela, the Court argued in *Bush v Gore* that the Florida recounts violated the Fourteenth Amendment because the Florida statutes provided insufficient guidance for determining the “intent of the voter.” Without specific

rules for determining whether, for example, “dimpled” or “hanging” chads were to be counted as votes for a candidate, the Supreme Court reasoned, voters could be treated differently, thus deviating from the requirements of political fairness guaranteed by the Fourteenth Amendment.

But is such differential treatment of voters, by virtue of its arbitrariness, unfair? Vela notes that the dominant view among democratic theorists, and shared by the Florida Supreme Court, is that “inequality is objectionable only when it is intended or expected to create patterns of discrimination or disadvantage.” However, Vela argues in support of the view of the U.S. Supreme Court that disparate treatment of voters, without a compelling state justification for such differential treatment, *is* unfair—even where no predictable patterns of disadvantage are likely to occur. Electoral laws, Vela argues, must “recognize each citizen’s ‘equal dignity.’” Hence, we do not conduct elections by “polling a sample of the electorate,” nor by “raffling” votes. Although neither random sampling, nor gambling “can be expected to advantage anyone (beforehand),” such methods of political decision-making would offend our democratic sensibilities by regarding “political participation as a kind of luxury.” Our intuition concerning such hypothetical cases, Vela argues, is “that there is something in the idea of political equality that goes beyond the need to prevent predictable patterns of advantage or disadvantage.”

The implications of interpreting the Fourteenth Amendment as a guarantee of each citizen’s “equal dignity”—and thus as disallowing arbitrary differences in the treatment of citizens—are far-reaching, suggests Vela. In particular, the majority opinions in *Bush v Gore* should lead us to question the political fairness of our current requirements for ballot access, our unregulated system of political finance, and our “winner-take-all” system of political representation. Thus, the *per curiam* decision reached in *Bush v Gore*, while widely depicted as ideologically conservative, may in fact set a precedent for far-reaching democratic reforms.

In “A ‘W’ is not a ‘W,’” James Roper turns his attention to the media coverage of the 2000 election. Specifically, Roper critiques the public dialogue, embodied in the media, which suggested that “the Florida election shared with modern sports their supposed fairness and the usual finality of any sporting contest.” Bush supporters suggested that Gore’s “team” strategy of insisting on ballot recounts was tantamount to attempting to “change the rules of the game after it [had] been played.” This rhetorical strategy, contends Roper, misrepresents the confusing Palm Beach County ballot as a “bad call” in a normal sporting event. Roper suggests that if there is a parallel between the 2000 presidential election and a game, the appropriate sports analogue here would be the third game of the World Series at Candlestick Park, CA in 1989. Because of the earthquake, the game was rescheduled. “What had happened was *not* a ‘bad call,’ rather *the playing field itself malfunctioned*. Similarly, Roper argues, to have a fair and final outcome in the election, there needed to be recognition that “the playing field” malfunctioned in Palm Beach County, thus throwing the “rules of the game” into question. Moreover, Roper notes, even when playing fields do not malfunction,

“there is nothing *inherently* fair about professional and big time college sports.” Hence, it begs the question to “compar[e] the election with sports and games in order to imbue it with fairness and finality.”

The real difficulty with the analogical argument to the conclusion that the election was fair and final, however, is that “the presidential election is not at all *like a game*; rather it is one of our most important *democratic institutions*.” Roper thus argues that the goal of an election is misrepresented on the analogy with sports and games because “the *goal* of the election is the *election of the president*--not to ‘win.’” Implicitly disagreeing with the Supreme Court Majority’s reasoning as depicted in Martinez-Saenz’s paper, Roper argues that “fairness in a democratic election is not about being *even handed to the candidates*, rather it mandates *justice for the electorate and the American people*. The goal of the election, in other words, “should have been to ascertain the will of those who went to the polls, not to discover who was ‘playing the game’ correctly under extremely puzzling circumstances and in the designated time period.” Roper concludes that if the goal of an election is to recognize the voices of the electorate, then a “win” is not simply a “win.” In cases such as the 2000 presidential election (in which the electoral processes malfunctioned and the electorate was clearly divided), Roper suggests that power should be invested in a president whose obligation it is to bring the nation together in the center.

Finally, in his research note, “Elections and Temperament: Rancor and Hyperbole after 32 Years of De-Alignment,” Dwight Kiel attempts to understand the “hostility ‘penned by [conservative] editorialists in major publications after the 2000 presidential election.” The post-election demonizing of Gore and the hyperbolic claims that the U.S. was “on the verge of a constitutional crisis,” Kiel claims, are best understood as the result of frustration resulting from “a change in presidential politics.” Following presidential elections of 1860, 1896, and 1932, political realignment behind parties with new ideas led to long periods of united government where one party dominated both the presidency and the Congress, thus establishing long-term political agendas. In 1968, however, a period of divided government ensued in which conservatives, even under a popular president such as Ronald Reagan, could not secure the House and could not, thus, “pursue their own agenda effectively.” Kiel concludes that divided government has led to rancor and hyperbole among conservative commentators who feel that their party is “entitled” to govern. The acrimonious tactics used post-election 2000 were, Kiel suggests, simply a manifestation of this “entitlement mindset.”

This issue concludes with three reviews of books on legal and political philosophy. Miguel Martinez-Saenz reviews Alan Dershowitz’s *Supreme Injustice: How the High Court Hijacked Election 2000*; Suzanne Jaeger reviews Iris Marion Young’s *Inclusion and Democracy*, and Cristina Bradatan reviews Michael Forman’s *Nationalism and the International Labor Movement: The Idea of the Nation in Socialist and Anarchist Theory*. Book reviews will become a regular feature of *Florida Philosophical Review* and we

invite readers to recommend recent publications that they would like reviewed.

Since we last published the *Florida Philosophical Review*, much has happened. The terrorist attacks on the World Trade Center and the Pentagon, the ensuing “war on terror,” and most recently the establishment of a new coalition government in Afghanistan, have given rise to a variety of emotional responses. Here again, however, the philosophical issues raised by these events, and the philosophical disagreements underlying our different reactions to these events, have been largely submerged by sensationalist news coverage coupled with our own fear and outrage.

Volume II, Issue 2 of *Florida Philosophical Review* will be devoted to philosophical examinations of issues arising from these international events. Potential contributors to this special topic issue should consult the call for papers in the back of this issue or contact the editors for more information.

Once again, we thank our editorial board and the readers of, contributors to, and anonymous reviewers for the *Florida Philosophical Review* for their support of this journal. With your assistance, we have enjoyed a successful first year and look forward to continuing philosophical conversations in 2002.

Shelley Park and Nancy Stanlick, Editors

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**There are Peoples and There are Peoples:
A Critique of Rawls's *The Law of Peoples*
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Introduction

The political philosophy of John Rawls has dominated discussions of liberal justice for the last thirty years. The ideals elaborated in his theory have without doubt greatly influenced everyday ideas of justice and political reasoning. His *A Theory of Justice*¹ is one of a very short list of works that are undisputedly representative of the most important and influential philosophical thought of the 20th century. *The Law of Peoples*,² as an extension of the central ideas of *A Theory of Justice* and *Political Liberalism*³ to the issue of international relations and law, is therefore a philosophically important event.

To construct a workable foreign policy for liberal theory, Rawls sets out to create a group of principles necessary and sufficient for justice between decent “peoples” from his liberal framework developed in *A Theory of Justice* and *Political Liberalism*. In *The Law of Peoples* he chooses to utilize the concept of “peoples” instead of “state” to avoid issues attached to traditional ideas of state sovereignty. To develop a law of international (interpeoples) cooperation, he utilizes two of his most famous tools: (1) the original position; and (2) the veil of ignorance. His argument, in essence, is that from an original position adjusted to eliminate improper information (or “wrong reasons”) through use of the veil of ignorance, it is possible to arrive at proper and workable principles of justice to be used to regulate interaction between peoples. The veil of ignorance is used to ensure that only relevant issues will determine the principles that the individual chosen representatives of peoples arrive at through their rational yet constrained deliberation.⁴ Rawls's claim is that his Law of Peoples would be acceptable to both the members of liberal states and those members of non-liberal states that correspond to the description of what he calls “decent but non-liberal peoples.” Therefore, the same tools that allowed liberal individuals to arrive at basic principles of justice for their own government can be used to arrive at principles useful for evaluating international law.

In this paper, I will show that the arguments offered and conclusions at which Rawls aims in his *Law of Peoples* are telling as to the intellectual legitimacy of his larger theoretical project. To show this I first investigate how (1) non-liberal peoples fit within the limitations Rawls describes in *The Law of Peoples* and (2) how liberal peoples would react to such rules. I argue from the answers to these questions to the further conclusion that by spreading the principles and tools of *A Theory of Justice* and *Political Liberalism* to the international realm some assumptions implicit in the earlier works come out more clearly. The final section of the paper analyzes some of the implications of the newly exposed assumptions for Rawls's project of liberal justice.

How Do Non-liberal Peoples Fit into the Law of Peoples?

How exactly do non-liberal peoples fit into Rawls's Law of Peoples? Rawls is less concerned with whether non-liberal societies would accept the Law of Peoples than he is with whether liberal peoples should tolerate any non-liberal peoples. In his words: "A main task in extending the Law of Peoples to non-liberal peoples is to specify how far liberal peoples are to tolerate non-liberal peoples."⁵ This is consistent with his attempt to create the principles of the Law of Peoples from inside the framework of political liberalism. This indicates that non-liberal peoples will not be granted the same consideration as liberal peoples in the creation of such a law of peoples. Rawls's describes his project as follows: "the Law of Peoples is an extension of a liberal conception of justice for a *domestic* regime to a *Society of Peoples*. Developing the Law of Peoples within a liberal conception of justice, we work out the ideals and principles of the foreign policy of a reasonably just liberal people."⁶

Rawls's description of his project as "foreign policy" – rather than, say, international (or interpeoples) relations – highlights the internal aspect of his project.⁷ Not only does placing non-liberal peoples in a position of "toleration" show that they are outsiders, but "foreign policy" implies a choice from within a settled and independent territory (or people) that is then imposed upon relations with other peoples. In contrast, the inter-entity relational approach of international relations implies the inclusion of at least two voices in the policy choice conversation. What Rawls actually concludes is very simple. Decent non-liberal peoples are to be tolerated and accepted in the Law of Peoples alongside liberal peoples; other societies or peoples are to be either a) helped to become one of the two acceptable types, if burdened or b) to be thought of as an outlaw state.⁸ So the classification of peoples as "liberal" or "decent" becomes crucial to understanding the limits of toleration within the Law of Peoples.

As will be seen below, this internal aspect of Rawls's theory actually ensures that any peoples classified as "decent," under the use of this term that Rawls adopts, will, by definition, accept many, if not all, of the principles of his Law of Peoples. Because of this, much of this part of Rawls's argument has the quality of a foregone conclusion. This is an endemic problem of missing justification that the content of *The Law of Peoples* has in relation to both non-liberal and liberal societies. In the Law of Peoples, definitions are repeatedly doing work where argumentation is required.

To see that Rawls's definition of "decent but non-liberal peoples" smuggles in his conclusions, one must outline his portrait of decent non-liberal peoples and place it beside his Law of Peoples. "Decent non-liberal peoples" is never completely defined by Rawls. In *The Law of Peoples* it is mainly exemplified by another concept--that of "decent hierarchical societies." According to Rawls there are two criteria for decent hierarchical societies. First, the society does not

have aggressive aims.⁹ Second, a decent society secures: (a) a set of minimal human rights (the right to life, liberty, and formal equality);¹⁰ (b) bona fide moral duties and obligations that are imposed upon all members within the peoples' territory; and (c) "a sincere and not unreasonable belief on the part of judges and other officials who administer the legal system that the law is indeed guided by a common good idea of justice."¹¹

A "common good idea of justice" entails that the society has a common aim that the society tries to achieve and a "decent consultation hierarchy" which allows for the people of various groups within the society to be heard by the main peoples.¹² In his imaginary picture of the decent but non-liberal peoples of Kazanistan, the consultation hierarchy satisfies six "guidelines": 1) all groups are consulted; 2) each member of a people belongs to a group; 3) each group must be represented by a body that "contains at least some of the group's own members who know and share the fundamental interests of the group"; 4) the body that makes the final decisions must weight the claims of those consulted and explain/justify the decisions if asked; 5) the decision should be made according to the society's common aim; and 6) the scheme should coordinate all the groups under explicit and fair terms.¹³

It is important to acknowledge that Rawls allows that there might be decent non-liberal peoples other than those in a decent consultation hierarchy. In his words "other possible kinds of decent peoples I do not try to describe, but simply leave in reserve."¹⁴ But this open quality of the concept is belied by his description of their makeup as having attributes "equivalent" to those of the consultation hierarchy and right of dissent.¹⁵ In any case, because the only example Rawls offers for an understanding of the concept "decent non-liberal peoples" is that of the "decent hierarchical society," I will treat them as virtually identical in content.

Place these definitional features of decent but non-liberal peoples next to the principles of The Law of Peoples. Eight basic principles make up the Law of Peoples:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions on the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.¹⁶

(Rawls immediately qualifies the fourth principle by stating that intervention will be justified in the case of “outlaw states and grave violations of human rights.”)¹⁷

Of the qualities a decent society must satisfy, the first is that the society does not have aggressive aims. This, extended by the most minimal inference, ensures that the non-liberal but decent society would satisfy 1, 4, and 5. That is, because the country is non-aggressive it will not disrespect the independence of other peoples, intervene in other peoples’ affairs or instigate a war. Here agreement is ensured by Rawls’s definition of what is to be accepted as decent, and thereby worthy of toleration, by liberals; hence no argument is necessary. This leaves us with 2, 3, 6, 7, and 8. Six might be thought the most problematic, but because Rawls defines human rights as “necessary conditions of any system of social cooperation”¹⁸ this would be trivially true of any society, but is undeniably true here because a decent hierarchical society must by definition secure “minimal human rights” (see above). Two follows from any theory based upon contract. So while this is not explicitly pointed to in the definition of decent non-liberal peoples, it is clearly an essential presupposition for any theory that Rawls will accept as reasonable (more on this issue later). Therefore the question is whether non-liberal peoples would satisfy 3, 7, and 8?

Principle Seven requires restrictions upon the conduct of war. The reason given why liberal peoples come to this agreement is that an aim behind a law of peoples is ultimately to come to a “just and lasting peace among peoples.”¹⁹ Rawls seems to believe that waging war in a just fashion will both give the other side a model to which to aspire and create a better chance of living in mutual respect later.²⁰ No evidence is offered for this belief, but it hardly seems deductive; therefore it is hard to see how the principles of just war could be arrived at in the original position. On the other hand, if the claim is true, then these reasons would pertain to the decent non-liberal society as well as the liberal society.

Principle Eight creates a duty to assist peoples that are disadvantaged. This requirement might be justified in two ways. First, it might be thought prudent to assist disadvantaged peoples because their instability could be a threat to well-ordered peoples.²¹ Second, there might be a duty to assist based upon the “minimal” human rights that Rawls believes individuals must have as individuals within their various peoples. The first reason applies equally to both non-liberal and liberal peoples. If the second justification is adopted, then the duty to assist disadvantaged peoples follows from the definition of a decent society; here again, stipulation by definition appears to replace needed argumentation.

The most interesting law is the third, which requires that “peoples are equal and are parties to the agreements that bind them.” This seems a fair requirement for a Law of Peoples. Peoples implicated in such an international set of laws certainly can be expected to demand equal treatment. On the other hand, it seems somewhat out of place given Rawls’s project. Rawls develops the Law of Peoples from within liberalism and then asks what type of non-liberal peoples liberal peoples

would be able and willing to tolerate. Even the carefully defined decent peoples are only grudgingly let in, and are tellingly described as less than “fully reasonable.”²² They clearly are a second-rate peoples among “equals.” The Law of Peoples is an ideal contract theory full of “boiler plate” provisions that other parties are to accept in order to be tolerated. What Rawls does is to define a tolerable and minimally non-liberal peoples to fit his Law of Peoples.²³ “Decent peoples” are defined such that they accept, by definition, the terms of his ideal contract between peoples. This “reverse engineering” seems inappropriate in the world of real people and real problems of international scope.

Would Liberal Peoples Accept the Law of Peoples?

So, it is by definition that decent non-liberal peoples would be fit peoples for toleration by liberal peoples. It is more interesting to ask the question whether liberal peoples would agree to the content of The Law of Peoples. This question is clearly germane since it is Rawls's express description of the project to develop The Law of Peoples from within liberal beliefs. The eight laws drastically curb the standard modern or Hobbesian ideas of national sovereignty concerning the right of war. Non-aggression between peoples is the baseline rule. This result, I agree, would be embraced by liberal peoples in an ideal environment. But the negative conclusions about redistribution of wealth between peoples seem much more troublesome. Why does Rawls, even in the domain of relations between liberal peoples, think that the peoples would refuse to allow for more than a minimal and short-term redistribution of wealth between peoples? This is a question that has troubled some followers of Rawls who have attempted to apply his theory's strategy and tools to the international context. For example, Charles R. Beitz argues that in international relations peoples using a Rawlsian original position analysis would come to the conclusion that each person has “an equal *prima facie* claim to a share of the total available resources.” This, it is argued, would follow from a “resource redistribution principle” that would function analogously to the way Rawls's difference principle did in domestic distributions.²⁴

Because this conclusion seems just as reasonable a conclusion as Rawls's own, and is plausibly derived from use of the original position, the reasons Rawls gives for the narrower set of laws are informative. Once again, according to Rawls, the Law of Peoples allows for relatively large inequalities in wealth between peoples. Rawls seems to think that a peoples' being decent will ensure enough equity in distribution of social goods within the peoples' territory. Further, it is apparently a deductive truth for Rawls that individuals within a well-ordered people will have adequate means to “make intelligent and effective use of their freedoms and to lead reasonable and worthwhile lives” (114) no matter what constitutes the natural assets of the people's territory.

The quasi-deductive truth that well-ordered peoples will be just and fair even in the face of vast differences in the wealth of various peoples is based upon a claim that actual distress and poverty within a country are caused by the political culture of the country, and not its lack of material resources, historical treatment, etc.²⁵ As Rawls puts it, “there is no society anywhere in the world--except for marginal cases--with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered.”²⁶ Here the clear claim is that if a people is well-ordered it will not be impoverished.²⁷ Once again, a claim that seems indisputably empirical is offered with no substantiating evidence.²⁸ More importantly, while this claim is debatable, its truth would still not force the conclusion that Rawls aims for.

Just because a country or a people would not be impoverished if well-ordered does not explain why a wealthier people might not have a duty to distribute some of its wealth to the poorer people. This is especially true if the wealthier peoples have accrued that wealth with the use of resources that other peoples might have utilized for their differing purposes. An example of an element missing in Rawls's analysis, but ever present in today's global situation, is the trans-national issue of pollution. Should there not at least be some type of luxury tax upon the more industrialized nations to force them to internalize the costs they are currently imposing without constraint upon other peoples? Why should there be no reallocation of expenses due to activities that have effects that cross the boundaries of various peoples? Does Rawls really mean to ignore such externalities in the interpeoples context? In any case, just because a people are not impoverished does not mean that the world might not be much fairer and just if greater redistribution between peoples was accomplished. That Rawls seems to ignore this possibility is problematic. This is especially true because Rawls finds pressure towards adopting such a principle when the same tools are used internally by a liberal people. It seems that the Law of Peoples might be, in Rawls's hands, a tool with which to help liberal peoples avoid the greater issues of justice in favor of a minimal stability.

So, there might be much more impetus to redistribution of resources between peoples than Rawls allows. On the other hand, why would a liberal people relax the idea of rights so as to allow in the decent non-liberal peoples? It is important to remember that this is what Rawls describes as ideal theory. Why would a liberal peoples who base their political organization upon the inviolability of the individual allow other peoples the ability to ignore the inviolability of some individuals? Why water down the idea of human rights to the point where it becomes equivalent to the “necessary conditions of any system of social cooperation?”²⁹ In the original position, the representatives of the liberal peoples might value human rights for individual members of other peoples more than the rights of various non-liberal but decent peoples as group or corporate entities. If not, we deserve more of an argument as to why not.

Such an argument seems necessary because it is highly questionable whether liberal peoples would accept the Law of Peoples as Rawls sets it out. First, the liberal peoples might feel the need

for greater redistribution of wealth between peoples. A sense of justice as fairness that goes beyond necessities and the alleviation of poverty and distress might come into play. In other words, fairness might require redistribution between peoples even where no peoples are impoverished. Second, the representatives of liberal peoples might not be willing to relax their assumptions enough as to the necessity of a broad set of human rights so as even to allow in decent non-liberal societies (regardless of the euphemistic label such societies get from Rawls).

Further Implications of the Rawlsian Project

As stated above, Rawls uses the term “peoples” as a strategy to avoid traditional problems of national sovereignty. Specifically, he thinks that this terminology will avoid the ability unconsciously to adopt traditional international attitudes of national right and aggression. An important question here is whether the chosen terminology actually achieves Rawls’s goals. As discussed above, the conclusions argued for might not be acceptable even to his target audience--liberals--so why adopt such an awkward vocabulary and perpetuate an awkward style of analysis?

The use of the term “peoples”--as opposed to “nation” or “state”--does highlight some of the strange assumptions attached to the existence of a state. Ideals of national sovereignty, the inviolability of the border, and group agency issues are brought to the fore just by changing the term “nation” to “peoples”. Furthermore, by not using the “nation” or “state” terminology, Rawls avoids suggesting that a peoples are a single, unified entity, but implicitly points to the individual people that make up such an entity. “Peoples,” that is, both points to the group status and to the individuals that make up the group. This is admittedly a virtue related to the label. But what does the avoidance of the “nation” and/or “state” terminology really do for the Law of Peoples as a whole? Especially within the Rawlsian style of argument, an appeal to our intuitions³⁰ must take human issues much as they are--this must be true even if the theory is described as utopian. It is easy imaginatively to put an individual person behind the veil of ignorance to further the project of deciding his or her own rules because this fits many of our intuitions concerning how issues should relate an individual to a national covenant. It is much harder to put a person in the original position as a representative of “peoples” without explaining the shift from nation to peoples.³¹ This just doesn’t fit our intuitions very cleanly. In fact, we have almost no idea of what a “peoples” is unless we project the attributes of nations or states upon the concept.³² While a “nation/state” has a familiarity from which we could start, “peoples” is a vague term and it is not clear what nature and entitlements it connotes. Liberalism carries within itself a firm common-sense ontology that undergirds the intuitive acceptance of the primacy of the individual. The ontological commitments underlying talk of “peoples” is unclear. Rawls's theory appeals to common liberal intuitions. But when Rawls moves from the idea of state to that of peoples *to avoid common intuitions as to the sovereignty*

of states, he tries to avoid these very same intuitions without having explicitly to justify the shift. This seems to be begging the question in a way that substitutes a lack of intuition for intuitions Rawls wants to avoid.

This vagueness or lack of intuitions about the reasonable entitlements of peoples becomes even clearer when Rawls tries to limit redistributive principles to within each individual people. How can he explain why such peoples only care about being internally just? None of the reasons he offers seem adequate. As argued above, allowing Rawls's reasons full force doesn't explain why the further distribution of social goods might not be required on grounds of fairness, not necessity. So, the combination of the internal appeal to our intuitions and a novel vocabulary creates less a new picture of international relations than a new set of problems to be solved in addition to the old ones. And with these new issues arrive the potential for new conflicts and entitlements to be identified.

This realization raises a number of questions. Can Rawls reasonably utilize the same tools of analysis in such divergent situations as individuals contracting within a liberal society and that of "interpeoples" relations? The very idea that the tools of the original position and the veil of ignorance can be used in both intrapeoples and interpeoples justice inquiries seems highly implausible, indeed, counterintuitive. Rawls situates his liberal theory within a liberal culture and explicitly appeals to our intuitions to justify his conclusions about liberal justice. Some have found this purported humility of expectations and goals to be one of the theory's great virtues. It seemed that by limiting the reach of the theory to only those within a liberal society it helped liberalism live up to its own ideals and yet allowed other societies to exist on their own terms. This in turn appeared to combine the hope for rigorous justification of liberal ideals of justice with another important liberal virtue--toleration of other world-views. Such toleration of various possibilities shows (at least on its face) a lack of imperialist ambition. One might argue that this ignores too much of the international discourse or inter-peoples intercourse that exists. However, this oversight seemed benign because the humble goals would not impede other discourses, just help liberals to justify the liberal principles used at home within their own society.

But the benign and intuitive quality of the story radically changes with the ambitions and conclusions contained in *The Law of Peoples*. Here the social contract strategy Rawls uses shows itself to be less fitting to the problem at hand. Here we are confronted with the existence of many clearly non-liberal peoples, a strong tradition of national sovereignty with attendant assumptions, further assumptions as to what kind of knowledge should and should not be allowed into the newly modified original position, and results determined by the thought experiment that are applied to peoples that would neither agree to the assumptions used to arrive at the interpeoples principles nor to those principles agreed upon among liberal intrapeoples. Because this agreement is supposed to cover relations with all peoples, the coercive nature of such a stance can no longer be ignored and must be seen as other than humble and benign.

From Implicit Dialogue to Deduction

As stated above, Rawls's liberalism gains much of its plausibility from the assumption that it is situated within a group of individuals who agree on many ideals and objectives. His arguments generally appeal to shared intuitions concerning what reasons should count in a dialogue on justice and then conclude that certain results follow naturally from a properly defined set of reasons and relevant knowledge. This form of argument, in Rawls's case, runs through the original position constrained by a properly adjusted veil of ignorance. As a reading of *A Theory of Justice* shows, Rawls originally thought that an argument or arguments must be provided at every stage of this process to justify the conclusions at which he arrived. That is, the factors excluded by the veil of ignorance must be justified and the conclusions arrived at the same after running the thought experiment. This is, at minimum, a kind of input/output equilibrium that helps fill out the famous Rawlsian concept of "reflective equilibrium" if it is to mean more than "good enough, now I rest." So, for a liberal society, Rawls's strategy is to start with an argument for why certain reasons should or should not count in a liberal theory of justice, and then process these reasons through his imaginary position to conclusions that seem reasonable. After this process, the conclusions are compared to the reasons again to see if more adjustments need to be made in the procedural apparatus to arrive at a coherent view of what liberal justice requires. Neither the starting point nor the conclusion is taken as given (in terms of not needing further justification or being closed to further revision). Both aspects require justification even though the starting point is from within a liberal society. This method seemed happily to combine the situatedness of our beliefs with an analytical rigor that justified our beliefs about our underlying political arrangements, as well as helped to diagnose those beliefs for inconsistencies.

That something has changed in *The Law of Peoples* is clear. Here what Rawls provides is a set of conclusions from a process originally designed for use at constructing principles of justice internal to a liberal society. But whereas earlier works were characterized by a more dialectical process of trial, revision, and criticism, in *The Law of Peoples* arguments for the reasonableness of the input of some information and the exclusion of other information is almost entirely lacking. It has been claimed that the system is therefore exposed as an "ad hoc"³³ procedure that serves merely as "camouflage."³⁴ That is, insufficient argumentation is offered as to why certain aspects of peoples are included or excluded by the veil of ignorance to arrive at conclusions concerning a just law of peoples. In the "Second Original Position" (that designed to produce the Law of Peoples) "rational representatives of liberal peoples" are represented as being "situated symmetrically," rational, and subject to a veil of ignorance that excludes knowledge of territorial size, population, strength of people, natural resources or level of economic development.³⁵ Deduction from first principles or a truly original position is used in place of a dialectical or reflective process. Furthermore, the

explanation of why certain peoples are excluded seems to be summed up in the response “because they wouldn’t agree.” But this is just to admit that we are not engaging in discourse or trying to justify our conclusions to those who don’t accept the conclusions or premises already.

It appears that Rawls thinks this argumentation is unnecessary because the second original position is just an extension of the first use of the original position, and therefore the arguments previously used to justify the first original position are equally useful in the context of interpeoples inquiry. But this move seems intuitively wrong. The similarity between the two positions is tenuous at best. Social contract theory applies much more cleanly to a circumstance where all are parties to the agreement. Contract theory in general works best when people have agreed to the starting principles within which a valid contract can be created. But where some agree to principles that cover parties not in on the contracting process the analytical situation changes radically. The internal standpoint loses its *prima facie* appearance as a combination of humility and tolerance and becomes an imposition upon, or at least a dismissal of, parties not privy to the contract. While the question Rawls asks is how far a liberal society can tolerate other peoples, the type of tolerance required is drastically different from that between liberal individuals. Here the question is toleration of people, and peoples, outside of the original position who do not have an ability to opt out of the regulated environment. The imposition from the other side is too great; the inequality between purported equals too palpable. Some peoples are not recognized as "decent" by other peoples, and because they are not decent they are by definition not reasonable. Given this analytical framework why would a liberal people feel the need to recognize peoples that are outside of these parameters?

The Law of Peoples exposes a problematic side of Rawls's liberal theory--its inability to accommodate opposing viewpoints and its insular and formalistic picture of reasoning. As Jean Hampton puts it: “It is one thing to call your opponents wrong; it is another to say they hold their incorrect views only because they have been unable to form their beliefs in a fully rational and reasonable way.”³⁶ Rawls's formal and proceduralist picture of reasoning begins to look less benevolent once we get to see how his liberal peoples view the other peoples in the world. What kind of response is “you brought incorrect information into the original position” to a people’s representative who disagrees with Rawls's rules? The question to ask is: “Why did anyone think that any such a proceduralist account of justice ever could lay claim to more reasonableness than any other?”³⁷ Some procedures may be helpful, but arguments are needed to justify the adoption of such procedures. As opposed to a stance that aims to create a forum to reason--such as Habermas’s, Rawls's system aims at determining what reason must be like, and how it must be utilized.³⁸ A procedure that appears neutral only to those who approve of the results it guarantees and only allows in reasons that reinforce the desired results doesn’t offer much for those who prefer different outputs and acknowledge different reasons. Allowing “a space between the fully unreasonable and the fully reasonable”³⁹ doesn’t ensure the less than fully reasonable that their “reasons” will be

recognized at all. And if the inputs are determined by the desirability of the resulting outputs, then more argument should be allowed concerning what should be included as reasons and/or reasonable.

Conclusion

In this paper, I first asked how a non-liberal but decent peoples would fit into the Law of Peoples scheme as it is proposed by Rawls. Here the problems identified were that: 1) the Law of Peoples is described as being developed from within the stance of political liberalism as a question of foreign policy and therefore the question of non-liberal consent is, at best, secondary; 2) the criteria for a decent non-liberal state are seemingly “reverse engineered” to fit within Rawls’s Law of Peoples so that any real, and substantial, toleration of non-liberal societies is questionable; and 3) the rules Rawls proposes, especially number 3 (relating to equality among peoples), are incompatible with his method of deduction of the rules from within one type of peoples. The explicit task for Rawls is to answer whether a liberal peoples should tolerate non-liberal peoples. And the explicit description of the task is one of creating foreign policy.

Second, I asked a question that more directly relates to Rawls's express aim in *The Law of Peoples*, namely, would liberal peoples accept the law of peoples? Here the difficulty is how to explain the strange allocation of rights and limitations put upon peoples by the Law of Peoples. First, Rawls must offer a better explanation concerning why the representatives of liberal peoples would agree to such minimal redistributive principles. His argument that such distribution is not necessary to relieve poverty does not answer the question asked. It might not be necessary for such purposes and yet still be required because of justice issues. The issue raised is justice between peoples, not whether some peoples would be impoverished. Why would there not need to be redistribution based upon issues of justice between two wealthy societies? There seems to be no *a priori* way to rule this possibility out, though that appears to be Rawls’s aim. Fairness and justice issues extend beyond the alleviation of poverty within a liberal society; why shouldn’t they extend further between liberal peoples as well? Furthermore, more analysis is needed to explain why the representatives of liberal peoples would relax their own beliefs in human rights so as to allow decent hierarchical peoples into the Law of Peoples. As described, such peoples will have license to ignore certain rights that liberal peoples hold to be central to their ideals of justice. Why should these ideals be relaxed at the edge of the people’s territorial border? As far as I can tell, Rawls gives no real answer. As others dealing with the same issues, and using the same tools, have arrived at conflicting answers, more reasons for one side of the debate are needed before we can consider the question settled. The conclusion from this section has to be that no one knows if a liberal peoples would accept the Law of Peoples that Rawls describes.

From the investigation of the questions above, I drew some further implications of the Rawlsian project. First, I highlighted some implications of the strategic move of labeling what we would consider a nation or state a “people.” While this does serve to escape some of the assumptions thought normally attached to statehood, this escape mechanism proved to be double-edged. Because Rawlsian argument always appeals to intuitions from within, his new terminology seems to cut us loose from any concrete ability to reason consistently.⁴⁰ This, in turn, seems to create room for Rawls to ignore ideas of state sovereignty when he wants to and, at the same time, smuggle them back in when they are convenient. But this destroys Rawls’s ability to appeal to the usual basis of his argument—we really have no intuitions to which to appeal unless we fall back on the nation/state analogy. If we make this move and admit a return to the nation/state analogy, then the content of *The Law of Peoples* may fill in much differently.

The problem of trying to understand just what a “people” is gave way to the last section which asks why it should be the case that the tools that seemed so effective in arguing for liberal justice among self-contained liberal societies should be thought equally useful for inter-peoples theories of justice. The argument highlighted how ideals of argumentation that appeared humble, tolerant and benign in one context became one-sided, coercive and disrespectful of genuine difference when translated into a different context. Because of the disanalogy between the internal stance of his earlier work and the inter-peoples import of *The Law of Peoples*, the solipsism of Rawls’s method of argumentation becomes clear. Once this becomes clear, its inability to deal with differing beliefs about what constitute relevant reasons, and therefore genuinely differing voices, becomes all too obvious. What can be seen is that according to Rawls’s Law of Peoples there are peoples, and there are peoples, and the two will never be truly equal because the one will have a monopoly upon properly reasoned argument. Such a result as this should raise questions concerning the larger Rawlsian enterprise. It certainly casts doubt upon its relevance to the domain of international relations and global justice.

Notes

¹ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard UP, 1971).

² John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard UP, 1999).

³ John Rawls, *Political Liberalism* (New York: Columbia UP, 1993).

⁴ In *The Law of Peoples*, instead of individuals representing their own interests, there are chosen representatives of peoples who decide on principles for their group.

⁵ Rawls, *Law of Peoples* 59.

⁶ Rawls, *Law of Peoples* 55.

⁷ For one version of this distinction, see Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge UP, 1999) 11.

⁸ Rawls, *Law of Peoples* 63.

⁹ Rawls, *Law of Peoples* 64.

¹⁰ Rawls, *Law of Peoples* 65. Here the extent of such rights is incompletely specified. Depending upon how broad or narrow the reading of such a list the Law of Peoples would be either very intolerant of what western liberals would consider human rights violations or very intolerant of alternative political arrangements. For example, Rawls's concept of a right to liberty entails "freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought." Obviously this could be read broadly so as to rule out almost any non-liberal society. Even more worrisome is his definition of formal equality as "treating similar cases similarly." As feminist and critical race scholars have shown, the meaning of this phrase is anything but clear. In fact, from the position of a non-liberal society, the vagueness of such rights could be seen as allowing a liberal society the ability to explain its intolerance at any time by changing the limits of such terms. Furthermore, Rawls's description of such rights is prefaced by the words "[a]mong the human rights." What others are going to be required? If no others are required, then why the open-ended nature of the requirement?

¹¹ Rawls, *Law of Peoples* 66.

¹² Rawls, *Law of Peoples* 71-72.

¹³ Rawls, *Law of Peoples* 77.

¹⁴ Rawls, *Law of Peoples* 4.

¹⁵ Rawls, *Law of Peoples* 61.

¹⁶ Rawls, *Law of Peoples* 37.

¹⁷ Rawls, *Law of Peoples* 37.

¹⁸ Rawls, *Law of Peoples* 68.

¹⁹ Rawls, *Law of Peoples* 94.

²⁰ Rawls describes six principles as central to the concept of “just war doctrine”: (1) “the aim of a just war waged by a just well-ordered people is a just and lasting peace among peoples;” (2) “Well-ordered peoples do not wage war against each other . . . but only against non-well-ordered states whose expansionist aims threaten the security and free institutions of well-ordered regimes and bring about the war;” (3) “In the conduct of war, well-ordered peoples must carefully distinguish three groups: the outlaw state’s leaders and officials, its soldiers, and its civilian population;” (4) “Well-ordered peoples must respect, as far as possible, the human rights of the members of the other side, both civilians and soldiers;” (5) “well-ordered peoples are by their actions and proclamations, when feasible, to foreshadow during a war both the kind of peace they aim for and the kind of relations they seek;” and (6) “practical means-end reasoning must always have a restricted role in judging the appropriateness of an action or policy” (*Law of Peoples* 94-96). It seems to me that this list, and its internal perspective, is another example of the internalist quality of Rawls’s style of reasoning, with the vocabulary doing most of the work. It may be that acting on this list would help ensure peace after the war, but the important point is that this is an empirical and not a conceptual issue.

²¹ It seems that such prudence is required to create a stable environment so issues of immigration become dismissible (such as Rawls believes they would be in a proper world of liberal and decent peoples).

²² Rawls, *Law of Peoples* 74. Of course, the real problem may be in the characterization of human or international relationships as relationships of “toleration.” This choice of terminology might inevitably privilege the “tolerators” point of view in relation to the “toleratee.”

²³ This can be seen also in that the real defining characteristic of his “outlaw states” is aggression. They are outlaws by definition, though what counts as aggression might not be so easy to operationalize.

²⁴ Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton UP, 1979) 141-142. See also Beitz, “Rawls's Law of Peoples,” *Ethics* 110 (2000): 692-693.

²⁵ Rawls, *Law of Peoples* 117.

²⁶ Rawls, *Law of Peoples* 108.

²⁷ It seems to me that Rawls is generalizing in a rather reckless way from Amartya Sen’s work on famines. Sen’s work showed that political organization seemed to have an intimate relationship with famines in India. What Sen’s work could not have done is proven Rawls's much more all encompassing claim that this is the actual necessary and sufficient cause of famines. See Sen, *Poverty and Famine* (Oxford: Oxford UP, 1981).

²⁸ As Allen Buchanan argues, it seems as if there should be more consideration of “alternative conceptions of justice for the global basic structure.” Buchanan, “Rawls's Law of Peoples: Rules for a Vanished Westphalian World,” *Ethics* 110 (2000): 707.

²⁹ Rawls, *Law of Peoples* 68.

³⁰ As Rawls puts it, “the Law of Peoples starts with the need for common sympathies, no matter what their source may be” (*Law of Peoples* 24).

³¹ As Darrel Moellendorf argues, even the analogy between states and individuals is tough to use to justify the conclusions to which Rawls wants to get. See his “Constructing the Law of Peoples,” *Pacific Philosophical Quarterly* 77 (1996): 152. Even more difficult is to argue from the vague term “peoples,” if we are to use our current intuitions as a starting point.

³² This is a point made by Kok-Chor Tan in “Liberal Toleration in Rawls's Law of Peoples,” *Ethics* 108 (1998): 287. Furthermore, as Fernando R. Teson points out, the claims made on behalf of peoples in Rawls's theory fall short of moral claims that are already accepted internationally. See his “The Rawlsian Theory of International Law,” *Ethics and International Affairs* 9 (1995): 84

³³ For this claim and a defense against it, see Roger Paden, “Reconstructing Rawls's Law of Peoples,” *Ethics and International Affairs* 11 (1997): 222.

³⁴ Robert Justin Lipkin makes this claim in “In Defense of Outlaws: Liberalism and the Role of Reasonableness, Public Reason, and Tolerance in Multicultural Constitutionalism,” *DePaul Law Review* 45 (1996): 284.

³⁵ Rawls, *Law of Peoples* 32–33. Of course, the exclusion of these factors might be proper, but Rawls offers no argument as to why they should be excluded. The important point is that the starting point, as well as the resulting conclusions, have the quality of *a priori* truths in Rawls's system. What is completely lacking is a reasoned justification for the starting point. It almost appears as *The Law of Peoples* is less an exercise in the use of his philosophical system to arrive at justifiable principles of foreign policy and more a use of modern intuitions of foreign policy to further justify the adoption of his political-philosophical reasoning apparatus.

³⁶ Jean Hampton, “The Moral Commitments of Liberalism,” in *The Idea of Democracy* (Cambridge: Cambridge UP, 1993) 308-309.

³⁷ For a critique of such assumptions, see Gary Peller, “Neutral Principles in the 1950s,” *Journal of Law Reform* 21 (1988): 284. Unfortunately, the critique that Peller makes is marred by a completely incorrect description of Dewey's relationship to the idea of neutral procedure. But the questioning of the assumptions upon which hopes for such procedure rest remains insightful.

³⁸ This may be why when Habermas tries to show that a Rawlsian original position element could fit into his communicative type of liberalism he must broaden the presuppositions to the point where all that is maintained are the “symmetries of mutual recognition of communicatively acting subjects in general.” Jurgen Habermas, *Between Facts and Norms* (Cambridge, MA: The MIT Press, 1998) 63.

³⁹ Rawls, *Law of Peoples* 74.

⁴⁰ Another way that Rawls puts this is that his way of arguing appeals to “you and I, here and now” (*Law of Peoples* 30, 32).

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The 2000 Presidential Election: A Matter of Opinions

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Introduction

The 2000 Presidential election with its undeniable complications has forced most legal and constitutional scholars, legal journalists and Supreme Court journalists to examine critically the status of the Supreme Court's power. For example, articles related to the Court's accountability or lack thereof, Supreme Court appointments, and possible reform and constitutional interpretation, have filled newspapers, weekly magazines and professional journals alike. Perhaps most problematic is the fact that the Court's opinion has been, for the most part, considered a partisan opinion. As Harry J. Mansfield pointed out, "I hardly heard anyone agreeing with the thesis of the person he didn't vote for in the matter of the Supreme Court."¹

Relying on both court transcripts and commentary, I evaluate critically the U.S. Supreme Court's decision of December 12. I maintain that the Court's decision is both reasonable and valid based on a particular interpretation of the purpose, not only of the law, but of the judiciary. There exists a tension in Florida Law between finality, namely, meeting the deadline, and disenfranchising the voters, namely, attempting to count all votes. I argue that the Majority decision upheld the importance of "finality" in rendering their decision. Like the Majority decision, I argue that the Minority dissent and opinion was valid. Unlike the Majority's concern with the issue of finality, the dissent attempts to uphold the importance of suffrage. They argue that the right to have all votes counted clearly outweighs the concern with "finality." As a consequence, I argue that the Majority and the Minority of the Supreme Court argue past one another. In other words, both positions can be considered valid if the underlying guiding principle is made explicit, i.e., finality with the Majority opinion and suffrage with the Minority opinion. The arguments can be understood as follows:

1. The Majority argued that it was attempting to avoid a national crisis. In other words, the premise underlying their arguments was "finality is of highest priority." If finality and avoiding a national crisis is deemed an imperative, then the Court, doing what Courts do, namely, interpret the law, did what it should have done.
2. The Minority was attempting to make sure that there existed no disenfranchised voters. The premise underlying their opinion was "the right to have one's vote counted should never be compromised." If "the right to have one's vote counted should not, under any circumstances be compromised," is considered the guiding imperative, then the Minority opinion was not only reasonable but valid.

U.S. Supreme Court's December 12, 2001 Decision

On December 12, 2001 the U.S. Supreme Court reversed the Florida Supreme Court decision of December 8, 2001 effectively barring the continuance of manual recounts enabling the Florida Legislature to appoint Bush electors. As a consequence, Al Gore conceded the 2000 Presidential Election on December 13, 2000.

On the application for stay of December 9, 2000 the U.S. Supreme Court Majority decided that “the petitioner, i.e., George W. Bush, had demonstrated sufficiently that he had ‘substantial probability’ of succeeding in his petition.” In other words, the Majority ruled that the recount, if allowed to continue, could cast a cloud over the legitimacy of the election. The Majority’s two central concerns were the following: 1) are votes being counted legal votes, and 2) are the standards for counting votes uniform, ensuring that counting of votes is not unlawful. They maintained that the recount should be halted to avoid “irreparable harm to the petitioner.” The issue of Federal jurisdiction was not properly evaluated, however. Justice Stevens, arguing for the dissenting minority, maintained first, that the Federal Judiciary and the U.S. Supreme Court most specifically has tended to abstain from interfering in State Supreme Courts’ interpretation of state law. They have, keep in mind, stepped in when State Court interpretations are, in the words of Chief Justice Rehnquist, irreconcilable with prior precedent.² The question one should consider, then, is whether the Florida Supreme Court’s ruling on December 8 was not only inconsistent with statute but also with precedent. As Ginsburg points out, however, not only was the Florida Court decision consistent with statute and with Florida precedent, it was also consistent with rulings by other State courts.³ Secondly, the court did not, as is customary, construe its jurisdiction in a narrow manner, especially because Congress has jurisdiction in these matters. Clearly 3 U.S.C. Sec. 15 determines that Congress, not the Judiciary, shall be responsible for determining which electors are lawful electors:

. . . then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

The *per curiam* decision of December 12, 2000 outlined, as did the application for stay, the general issues in question.⁴ First the Majority explained that the petition under consideration maintained that the Florida Supreme Court’s definition of a “legal vote” was not consistent with the

Florida Statute. Second, the petition maintained that the standard by which “undervotes” were to be counted was arbitrary and subjective. The questions at issue were:

1. Did the Florida Supreme Court establish new standards for resolving election disputes that were not only inconsistent with Florida Statute and precedent, but that violated Article II of the U.S. Constitution and failed to comply with 3 U.S.C. Section 5?
2. Did the lack of a uniform standard for counting the undervotes violate the Equal Protection Clause and Due Process Clause of the 14th Amendment?

Chief Justice Rehnquist’s opinion, with whom Justices Scalia and Thomas joined, argued that the Florida Supreme Court had been unjustified in usurping the right of the Florida Legislature to appoint electors and of rejecting unconstitutionally the “reasonable interpretation” of Florida Election Code, especially 97.012 and 106.23, by Secretary of State Katherine Harris. As Rehnquist argued, the “uniquely important national interest” of the presidential election forced the Majority to believe that Federal intervention was necessary. Article II, Rehnquist argued, maintains that “each State shall appoint, in such a manner as the *Legislature* thereof may direct,” electors for President and Vice President (emphasis added).⁵ The Florida Supreme Court, by intervening, had attempted to undermine Article II. Furthermore, Rehnquist argued the Florida Supreme Court ignored the “legislative wish to take advantage of the safe harbor provision provided by 3 U.S.C. Sec. 5.”⁶ While the Florida Legislature had empowered the courts of the State to provide relief under a contested election--Fla. Stat. 102.168--it “must have meant relief that would have become final by the cut-off-date of 3 U.S.C. Sec. 5.”⁷

That Rehnquist construed Article II too narrowly should be clear. One should recognize, however, that Rehnquist was trying to avoid what some have labeled a “national crisis.” The courts of the State, in this case, the Florida Supreme Court, have the right and responsibility to ensure that legislative power and actions are consistent with the State’s Constitution. In this case, the Florida Supreme Court ruled that Katherine Harris’s definition of a “legal vote” was not in line with the Constitution. Section 101.5614(5) of the Florida Statutes indicates that “no vote shall be declared invalid or void if there is a clear indication on the ballot that the voter has made a definite choice as determined by the canvassing board.” Consequently, the Florida Supreme Court Majority interpreted “legal vote” to be a vote where a clear indication of voter intent could be determined. Harris, however, maintained that a “legal vote” was a properly marked vote that could be counted by the vote tabulation system. The disagreement concerned what constituted an “error in the vote tabulation,” not necessarily whether the Florida Supreme Court violated Article II or 3 U.S.C. Section 5. Keep in mind Judge Terry P. Lewis of Leon County ruled on November 14, 2001 that the Secretary of State had to withhold her decision to ignore late returns until all relevant information had been examined by the Canvassing Boards.⁸ Was Judge Lewis’s decision in violation

of Article II? It is clear or should be clear that the “7th day after the election deadline” had just been compromised by Lewis’ ruling. Was Judge Lewis acting within the purview of the court? If so, why isn’t the Florida Court’s interpretation of Florida Law a decision that falls with the Florida Supreme Court’s legislatively granted power?

The Florida Supreme Court ruled, maintaining that while the Secretary of State could use her discretion to determine whether to accept “late” ballots, she could not do so if it meant that she would “summarily disenfranchise innocent voters.”⁹ While we can consider both the position of the Court and the position of Katherine Harris reasonable, one should wonder whether they were appealing to the same principle. The Florida Supreme Court maintained that Florida Statutes clearly give the power to vote to the people, and it follows, the Court argued, that all ballots clearly indicating the intent of the voter should not be ignored. Furthermore, the Court argued, Florida Statute delineates the recount process.¹⁰ This implies, the Florida Majority maintained, that recounts are an important part of the Florida Election Code. If a recount is consistent with the Florida Election Code would it be reasonable to assume that a recount, a manual recount if determined necessary by the Canvassing board, could or should be accomplished within the “7th day after the election” deadline? Keep in mind that Katherine Harris relied on Florida Statute 102.112 instead of 102.111. Statute 102.112 states that the Secretary of State *shall* ignore late returns; statute 102.111 states that the Secretary *may* ignore late returns. The Secretary determined that 102.112 was the governing statute and, as a consequence, decided that she *should* ignore late returns. Like Rehnquist and the Supreme Court Majority, Katherine Harris affirmed the importance of ending the “crisis.”

One of the issues was whether the Florida Court or Katherine Harris was correctly identifying the governing statute. Rehnquist sided unquestionably with Harris, but as we should recognize, this is a matter of judicial interpretation. Moreover, as we can see, the Florida statutes are not specific or complementary. Therefore, that the Florida Supreme Court rewrote or created legislation is questionable. They did, no one denies, determine which was the governing statute. Isn’t this what courts customarily do?

The dissent argued, for example, that Rehnquist’s opinion ignored the following: 1) that no state is required to abide by the safe harbor provision, 2) safe harbor issues are issues, as stated in Article II, of the jurisdiction of Congress and not the Judiciary, 3) Article II does not maintain that the legislature’s role to choose electors is devoid of any constitutional limitations.¹¹ As Stevens argued in dissent, Article II takes into account the role of the state judiciary in interpreting election laws and the Florida Supreme Court ruling did not lead to a substantive change in the State Election Code. As a consequence, to maintain that the Florida Supreme Court usurped the right of the legislature by not allowing them to appoint electors and rewrite the statute is not, as Rehnquist argues, a departure from legislation. The Florida Supreme Court did what courts generally do, namely, they determined which statute was the governing statute. Moreover, their decision was

consistent with precedent. More importantly, however, the Florida Supreme Court's decision should be understood in connection with their professed belief that all "legal votes" should be counted. Their position relies on the idea that the legislative intent was that all votes that could be counted should be counted.

That this question (i.e., "Did the Florida Supreme Court establish new standards for resolving election disputes that were not only inconsistent with Florida Statute and precedent, but that violated Article II of the U.S. Constitution and failed to comply with 3 U.S.C. Section 5?") does not provide an easy answer should be clear. Florida Election Code as it is written contains a number of inconsistencies. First, Florida Code does not clearly identify whether all counties must in fact meet the "mandatory" 7th day after the election deadline. In fact, Florida Statute indicates that the Secretary of State has the power to fine those counties that do not meet the November 14th deadline. Does this mean that the Secretary of State should ignore the votes that do not meet the deadline or that she has the power to put pressure on the counties that do not tally their votes in a timely fashion? If the "date" mandated cannot be compromised under any circumstances, other than natural disaster, why does Florida Election Code give the Secretary of State this power? Moreover, Florida Statute clearly identifies and delineates rules and governance regarding recounts. What is the legislative intent? Rehnquist suggests that while the Florida Supreme Court has the right to judicial review it does so only if it respects the State imposed deadline. The suggestion, then, is that the governing statute is the statute that sets the deadline. The Florida Supreme Court Majority, however, disagreed. They argued that the "legislative intent," determined by Rehnquist to be that the deadline be met, was in fact that all votes that could be counted, by a tabulation system or manually, should be counted to ensure that the government remained a government of the people and by the people. We can or should see, at this point, that one of the conflicts was deciding the guiding principle, i.e., finality or doing everything possible to make sure everyone's vote could be counted.

This issue forces us to evaluate our second question i.e., did the lack of a uniform standard for counting the undervotes violate the Equal Protection Clause and Due Process Clause of the 14th Amendment? While Justices on the Majority and Justices on the Minority, i.e., Souter and Breyer, recognized that the lack of uniform standard potentially presented some constitutional concerns regarding the 14th Amendment, we should, as we consider this problem, wonder whether a solution to this potential problem could have been adopted.

As the *per curiam* decision affirmed:

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.¹²

Appealing to this principle, the U.S. Supreme Court Majority argued that the fundamental rights of the voters would be undermined if a recount was allowed to continue. As they pointed out, the issue is not whether we count all votes, but the manner in which the votes are to be counted. The Equal Protection Clause applied to the manner in which the votes were being tabulated. The Majority determined that the recount procedure was not consistent with the obligation to avoid arbitrary and disparate treatment to voters or votes. The Majority claimed that the lack of uniform standard could lead, as was being demonstrated in Florida, to arbitrary standards that could undermine the fairness of the election.¹³ That the Florida Supreme Court should not have forced the Secretary of State to certify the ballots, counted using different standards, of Palm Beach, Broward and Dade counties is clear. The Florida Supreme Court could easily be accused of partisanship. As Stuart Taylor, Jr. pointed out: “With no real explanation, the Florida court conclusively awarded all 911 of these ‘votes.’”¹⁴

The U.S. Supreme Court Majority opinion did, however, admit that “the search for intent can be confined by specific rules designed to ensure fair treatment.”¹⁵ But the Court argued “it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial work.”¹⁶ Consequently, the Majority decided to stop the recount to ensure that the Florida Legislature would have the opportunity to elect its electors. As Justice Ginsburg noted, “The Court’s conclusion that a constitutionally adequate recount is impractical is a prophecy the Court’s own judgment will not allow to be tested.”¹⁷ Again, we can see that what is at issue is whether finalizing the election overrides the belief that all votes that could be counted should be counted.

Justice Stevens, joined by Ginsburg and Breyer, argued that Florida Law identifies “a clear indication on the ballot that the voter has made a definite choice” as the uniform standard. Like the “beyond reasonable doubt” standard used in criminal cases, this issue is not a constitutional issue. Secondly, Stevens argued Florida Law sets down the following guiding principles: 1) the legislature will select electors through a popular vote, 2) the right to have votes counted is a constitutional issue, 3) all ballots that reveal clearly voter intent are deemed to be valid votes. From this it follows, Stevens argued, that the Court, not Katherine Harris, was correct in trying to find a way to avoid disenfranchising a number of voters. If the votes could be counted, then the Florida Supreme Court ruled they should be counted. The tension in Florida Law is between finality, namely, meeting the deadline, and disenfranchising the voters, namely, attempting to count all valid votes. The Florida Supreme Court decided to attempt to count all valid votes, while Katherine Harris and the U.S. Supreme Court Majority decided to rule in the interest of finality.

In this essay, I have tried only to show that both opinions are valid. Unlike constitutional and legal scholars who remain divided along partisan lines, I maintain that we should acknowledge how difficult and complicated the adjudicative process can be. As I read the opinions of the Justices

I find that the underlying premises that guide their respective decisions differ and, as a consequence, they reach very different conclusions. This “problem” can be seen in at least two ways. First, the confusion over “legal vote” plays a significant role in both decisions. The Florida Statutes are inconsistent when it comes to determining when a vote is legal. One interpretation comprehends a legal vote to be a ballot that shows clear indication of voter intent; on the other hand, one could understand legal vote to mean a properly executed vote. Moreover, understanding an “error in vote tabulation” also cast a cloud over the Court’s decision. Was “error in tabulation” supposed to mean a machine error or a failure to count a vote? If one affirms with the U.S. Supreme Court majority that “finality” is the overriding principle, then one will, like the Majority, tend to interpret “legal vote” as a vote that is properly executed. If, however, one asserts, with the Minority, that the overriding principle is the “right to have one’s voted counted,” then one will, like the Minority, tend to interpret a legal vote as a ballot that shows clear indication of voter intent.

Secondly, one can see that the opinion of the Majority and the opinion of the Minority diverged regarding their understanding of “irreparable harm.” The Majority believed or maintained that George W. Bush, the petitioner in this case, could suffer “irreparable harm” if the votes considered “legal votes” were counted, possibly casting a cloud of illegitimacy over the election.¹⁸ The Minority, however, argued that preventing the recount constituted a violation of the people’s right to vote and therefore, those disenfranchised voters could be the victims of “irreparable harm.”¹⁹ Who was correct? We can see that interpretations play a significant role in the Justices’ decisions and that a background set of values govern their position.²⁰ In other words, is the right to vote (for the President) a right of the people? Scalia maintained that our Founding Fathers never intended that the people vote directly for the President. We might question, however, whether or not the mentality that governed the Founding Fathers, i.e., an elitist mentality, should remain in place today. As Eric Foner argues, “the Electoral College was created by a generation fearful of democracy. Its aim was to place the choice of the President in the hands of each of the state’s most prominent men, not the voters.”²¹

Florida legislation has not provided enough clarity in determining whether they want election officials to rule on the side of finality or on the side of the fundamental right to have your vote counted. As a consequence, if the issue of “legal vote” was made clearer perhaps a *per curiam* opinion could have been justified by either the Florida Supreme Court or the U.S. Supreme Court. If the Florida Statutes lacked the ambiguity detailing conditions under which the deadline could be comprised, the Court’s job could have been made easier. As the U.S. Supreme Court Majority opinion noted, Florida Statute 102.166 states that both overvotes and undervotes should be identified and counted during a recount. The Florida Supreme Court, however, only required that undervotes be counted. Furthermore, the Majority correctly pointed out the Florida Supreme Court’s wantonness to have certain votes count that were counted under differing standards was

arbitrary. This suggests that there were clearly some issues glossed over that should have been taken into account. No one should deny that the respective opinions provided a justification for their position, something all or most skilled judges can provide. The question is which of the underlying premises as I have identified them, namely, “finality and avoiding a national crisis” and “right to have vote counted,” is true.

Concluding Remarks

The implications of this decision will reverberate for many years to come. And although the U.S. Supreme Court Majority maintained in its opinion that their “consideration was limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities,” one must wonder why they had to qualify their decision in this manner.²² We must keep in mind that law and judges’ interpretations of the law should be predictable. Is the Majority suggesting that under similar circumstances, but with Gore ahead, they could have just as easily been justified in opining differently? Is the Minority suggesting that under similar circumstances, but with Gore ahead, they would have rendered the same opinion?

For example, what brand of federalism was being practiced by the Majority and the Minority? Generally, the Justices on the Majority are champions of State rights and State sovereignty, and some suggest of constitutional constraint. Generally, the Justices on the Minority practice cooperative federalism. Does only one position entail judicial activism? We should see, furthermore, that it was difficult in this case to predict with certainty how the Judges were going to rule. As Alan Dershowitz points out, “Predictability is the essence of judicial legitimacy and accountability.”²³ During the 2000 Presidential Election it was almost impossible to determine, based on consistency and prior decisions, what the particular Justices were going to decide. One thing that was certain and which turned out to be a determining factor was partisanship. Both camps seemed to decide in advance the “desirable outcome” and provided opinions that justified their respective positions.²⁴ Thus, this decision should enable us to recognize the lack of impartiality in Court decisions with so much at stake, forcing us to reconsider the process of judicial appointments.

And while the 2000 election controversy seems to be an exception, we can certainly point to other cases that are equally relevant. *Dred Scott v. Sanford*, *Marbury v. Madison*, *Brown v. Board of Education*, *Roe v. Wade*, and *Planned Parenthood v. Casey* are a few examples of landmark cases that not only had undeniable political implications, but were instances where the Court was clearly divided. I am not suggesting that we should try to undermine the courts (in this case, the Supreme Court). I am suggesting only that we should recognize that adjudicative neutrality is not as neutral as it is espoused to be. I am suggesting that we should make clear that ideological conflicts are encountered

in jurisprudence. Courts and justices, like politicians, do have substantive positions regarding the purpose of the law. So why, we should ask, “is [it] a journalistic convention to state that the Republican Party now controls the White House, the Senate [and/or] the House of Representatives, but to exclude talk of a right-wing Republican Supreme Court[?]”²⁵

Notes

¹ Harry Mansfield, "What We'll Remember in 2050," *Chronicle of Higher Education* 5 January, 2001. Reprinted in *Bush V Gore: The Court Cases and the Commentary*, eds. E.J. Dionne Jr. and William Kristol (Washington D.C.: Brookings Institute Press, 2001) 340.

² Dionne Jr. and Kristol 111. All page references to the court cases, decisions and opinions will be to this text.

³ See Dionne Jr. and Kristol 138.

⁴ *Per curiam* decisions, decisions given by the Court rather than by specific justices, are generally decisions that are uncontroversial. That this case is controversial seems clear. Why then, did the Majority decide to offer a *per curiam* decision? Some have suggested that the Majority decision was based on a 7-2 vote. That Breyer and Souter argued that there were constitutional concerns regarding the way the manual recount was taking place is clear. That the Majority decision was 7-2 is far from clear. Neither Souter nor Breyer sided with the Majority. Both Justices argued that the case should have been remanded giving the Florida Court an opportunity to avoid violating the Equal Protection Clause.

⁵ Dionne Jr. and Kristol 109.

⁶ Dionne Jr. and Kristol 115.

⁷ Dionne Jr. and Kristol 116.

⁸ Dionne Jr. and Kristol 23.

⁹ Dionne Jr. and Kristol 46.

¹⁰ See Fla. Stat. 102.166.

¹¹ See Fla. Stat. 102.168.

¹² See Dionne Jr. and Kristol 103.

¹³ Dionne Jr. and Kristol 105-107.

¹⁴ Stuart Taylor, Jr. "Why the Florida Recount was Eggregiously One-Sided." In Dionne Jr. and Kristol 333.

¹⁵ Dionne Jr. and Kristol 104.

¹⁶ Dionne Jr. and Kristol 106.

¹⁷ Dionne Jr. and Kristol 132.

¹⁸ See Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton, NJ: Princeton UP, 2001) Chapter 2.

¹⁹ See Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York, NY: OxfordUP, 2001) 57-70. Cf. Posner 95-97.

²⁰ Lawyers and judges require a background prescriptive theory to determine the applicability of rules. If the lawyer and judge require a background prescriptive theory to determine the branch of law in question, then it follows that the sense of impartiality they seek is impossible. As Dworkin argues against Scalia, the idea that a judge interprets or extracts the “plain meaning” from the text and proceeds to apply the law in a formal manner, overlooks the fact that “intent” is not related only to expectation. Scalia, Dworkin maintains, seeks the “semantic intention” enabling him to determine what Legislators intended when they wrote the law. For example, in *Smith v. United States* Scalia argued that the expression “use of a firearm” meant “use of a gun for what guns are normally used for, that is, as a weapon.” Dworkin suggests that “using a firearm” can be used to describe a situation when a gun is used as a threat and/or when a gun is used “for any purpose including barter.” This means, Dworkin asserts, that the interpretive process requires more of the judge than Scalia grants. In other words, the judge does not simply identify plain meaning, but has, on most difficult occasions, to determine the intent of the legislators. Antonin Scalia, *A Matter of Interpretation*. (Princeton, NJ: Princeton UP, 1997) 117.

²¹ Eric Foner, “Partisanship Rules,” *The Nation* 1 Jan. 2001. Reprinted in Dionne Jr. and Kristol 293.

²² Dionne Jr. and Kristol 107.

²³ Dershowitz 118.

²⁴ For example, Scalia’s analysis of the *Church of the Holy Trinity v. United States* enables him to illustrate his point. The Church had contracted an Englishman to be their pastor and proceeded to encourage the Englishman to come to the States. While the Southern District Court of New York ruled that the action by the Church of the Holy Trinity violated a federal statute that maintained that it is unlawful “in any way to assist or to encourage the importation or migration of such alien . . . to perform labor or services,” the Supreme Court overturned their decision (Scalia 19). The Supreme Court argued that the law was meant only to discourage manual laborers and as a consequence that while the action was within the letter of the statute, it was not within the spirit of the law or intention of the legislators. Scalia’s point is that this should not take place. If the action violates clearly the language of the law, then the judge has the obligation to maintain that the action in question violated the law. The problem, Scalia argues, is that judges are not legislators and as a consequence, they should not be creating laws.

²⁵ Randall Kennedy, “Contempt of the Court,” *The American Prospect*, 12.1 (2001) 1-15. Reprinted in Dionne Jr. and Kristol 337.

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Political Equality and *Bush v. Gore*

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Introduction

In *Bush v. Gore*, the U.S. Supreme Court struck down a portion of Florida's electoral law in the name of political equality. The law required local election officials, when counting votes manually, to examine the ballot and determine the "intent of the voter." Because this standard is vague, it is possible for two identical ballots to be interpreted differently in different jurisdictions. The Court ruled that this is incompatible with the commitment to political equality implicit in the 14th Amendment's Equal Protection Clause.

This decision raises an important question about the nature of political fairness.¹ The Court seems to have endorsed a demanding view, according to which inequality may be unfair simply because it is "arbitrary." In contrast, critics of the Court's decision hold that political inequalities are acceptable unless they can be expected to disadvantage specific persons. Inequality is objectionable only when it is intended or expected to create patterns of discrimination or disadvantage. The critics are not breaking new ground by taking this position. It is arguably the dominant view among democratic theorists. And it shapes their position on some of the key controversies about democratic institutions--the choice between proportional and winner-take-all representation, the system of political finance, and the design of ballot access requirements. Yet I shall argue that this common view is mistaken. The Court is right to suppose that arbitrary political inequalities may be objectionable, even when they do not create predictable patterns of discrimination or disadvantage. And this conclusion may lead us to rethink the controversies about representation, political finance, and ballot access.

Background to *Bush v. Gore*

After the general election on November 7, 2000, the Florida Division of Elections reported that George Bush had received 1,784 votes more than Al Gore. This margin was less than 0.05% of the votes cast, so Florida law required a machine recount of all the votes. On November 9, Florida's Division of Elections reported that Bush had won, but now by only 327 votes.

In light of these results, and also on November 9, Al Gore's campaign filed protests and sought hand recounts in Volusia, Palm Beach, Broward, and Miami-Dade counties. These recounts proceeded amid a couple of legal disputes.² On November 21, Florida's Supreme Court (in a 7-0 decision) extended the deadline for counties to file their results to November 26, and ordered the

Secretary of State to accept these results. On November 26, the Florida Elections Canvassing Commission certified the election and declared Bush the winner.

Al Gore's campaign filed a contest of this certification on November 27, citing a Florida statute--102.168(3)(c)--allowing candidates to contest an election if there has been "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." This challenge reached the Florida Supreme Court, which made its decision on December 8. The decision contained two key elements. The Court held that votes resulting from several manual recounts be added to the official totals--recounts conducted in accordance with the "intent of the voter" standard. In addition, it ordered that every county conduct a manual recount of its "undervotes" (ballots for which the machines had failed to register a vote for President). These recounts would take place under the state's "intent" standard.

On December 12, the U.S. Supreme Court ordered an end to the proposed recounts and set aside the order to include the results from previous recounts in the official totals. These recounts would violate, or had violated, the 14th Amendment's Equal Protection Clause (and there was no time to conduct recounts under procedures that would not violate the 14th Amendment's Equal Protection and Due Process Clauses). The Court offered several arguments for this conclusion, but the only plausible one involves Florida's "intent of the voter" standard.³ Officials counting the votes would be required to determine "the intent of the voter", with no further guidance. They would be bound to do this in different ways, adopting different rules about how to determine the voter's intent. This would mean that voters in different counties, or in the same county over time, would be treated differently. The same ballot might be counted differently depending on where and when it was counted. This difference in treatment, said the Court, constituted a substantial deviation from the requirements of political fairness contained in the 14th Amendment's Equal Protection Clause.

It is worth noting that the Court reached this conclusion with a 7-2 majority. Of course, the decision to reverse the Florida Supreme Court--in particular, to halt the recounts and to prevent inclusion of the previous recounts--was 5-4. Justices Rehnquist, Scalia, Thomas, O'Connor, and Kennedy joined the *per curiam* opinion. Justices Stevens, Ginsburg, Breyer, and Souter argued that the Court should do something other than reverse the Florida Court (in particular, something other than halt the recounts). On the question of equal protection, however, the decision was 7-2. Only Justices Stevens and Ginsburg argued that the Florida Court's decision did not raise problems of political equality.⁴

The Critics on *Bush v. Gore*

Most of the opinions in *Bush v. Gore* give the impression that Florida's "intent" standard is

clearly at odds with the value of political equality. It would allow differential treatment of identical ballots, for no reason other than the rules that county officials happen to adopt here and there, now and then. Beyond this observation of fact, there is little explicit argumentation in *Bush v. Gore*--either in the way of legal precedent or political principle--to support the conclusion that Florida's standard is unfair. Yet arguments are needed. For although the "intent" standard is bound to create political inequalities, it is not clear whether these inequalities are unfair. In the following section, I explain this criticism of *Bush v. Gore*. Subsequently, I suggest that the criticism has substantial roots in contemporary democratic theory.

"Intent" Standards and Political Fairness

The majority's central concern regarding Florida's standard for conducting manual recounts involved the lack of guidelines for determining "the intent of the voter." Florida's Supreme Court held that state law required that manual recounts be conducted to determine the voter's intent (if one existed). The *per curiam* opinion accepted this rule, but held that there must be more specific guidelines. Otherwise, different counties are bound to use different rules for determining the voter's intent. And the same county may change the rules over time:

The problem inheres in the absence of specific standards to ensure [the "intent of the voter" requirement's] equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary (104).⁵

Without clear, uniform standards, two identical ballots would be counted differently in different counties or at different times. The majority holds that this is an arbitrary form of treatment that undermines the right to vote.

The fact that there are different standards for determining voter intent--at least in a punchcard system--is obvious to anyone who observed the 2000 election. For example, it is not clear whether one should count a ballot in which the "chad" next to a candidate's name is completely attached to the ballot, but has been "dimpled". Did the voter intend to vote for that candidate? Or did the voter decide to vote for no one and, therefore, fail to apply enough force to detach the "chad"? Different counties had adopted different rules with respect to questions such as these, and at least one county (Palm Beach) had changed the rule several times in the course of its recount. According to the Court:

The state Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The Court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November

14 certification by the Secretary of State, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties. (105-106)

The Florida Supreme Court ordered recounts without specifying a standard clearer than the “intent of the voter.” Hence, these recounts were likely to feature the same sorts of inequality. The majority held that these inequalities are in violation of equal protection.

The gist of the Court’s concern, then, is that voters in different counties (or in the same county over time), who cast identical ballots, would have their ballots counted differently. Should that trouble us? This question arises when we notice that the standard was not intended, and could not be used reliably, to discriminate against anyone in particular. Ronald Dworkin makes this point in an essay in the *New York Review of Books*:

The Florida Court’s “clear intention” standard . . . puts no one at a disadvantage even if it is interpreted differently in different counties. Voters who indent a chad without punching it clear through run a risk that a vote they did not mean to make will be counted if they live in a county that uses a generous interpretation of the “clear intent” statute; or they run a risk that a vote they meant to make will be discarded if they live in a county that uses a less generous interpretation. But since neither of these risks is worse than the other--both threaten a citizen’s power to make his or her vote count--the abstract standard discriminates against no one, and no question of equal protection is raised.⁶

Dworkin’s point gains credence if one compares the equal protection issues in *Bush v. Gore* and in *Reynolds v. Sims*.⁷ In *Reynolds*, the Court required that Congressional districts be drawn so as to give every vote an equal weight. The problem with districts of different sizes is that some group of persons is certain to be at a disadvantage. People in a populous district are certain to have votes with less weight than people in a sparsely populated district. So there is an inequality in political influence that is predictable and targets a specific group.

These conditions do not hold in the case of an “intent of the voter” standard for conducting manual recounts. There is only a chance that a person’s ballot will be treated unequally. She has to cast a ballot that the machine cannot read, and her ballot has to fall in the gray area where the rules for determining intent make a difference. Moreover, the unequal treatment is not aimed at anyone in particular. It does not favor people in the northern part of the state over the southern part, it does not favor people who live in small towns over those who live in large cities, and so on. It is hard to say before an election who will be hurt if the state allows manual recounts conducted so as

to determine the voter's intent. In short, Florida's standard is not guaranteed to discriminate against anyone.

It is not clear why we should object to political procedures that do not discriminate against anyone (even if they are unequal in some sense). To see why this might be, consider a thought experiment. Suppose that the citizens of Florida were coming together to write a political "social contract," which has to meet with everyone's approval. They would want to find political procedures to which no one would object. Now, it is not hard to see why people in populous districts would object to anything other than a "one person, one vote" standard. Otherwise they would have less influence than people in other districts. Of course, the people in those other districts might have some counter-arguments, so the issue would have to be examined in more detail. But the point is that we can expect a complaint from people in populous districts. In contrast, it is not clear why anyone would reject Florida's "intent of the voter" standard. That rule does not appear to disadvantage anyone in advance (although there is a risk that one might turn out to be at a disadvantage). Therefore, at first glance, it is not clear why anyone should object to it. And if Florida's standard is the kind of rule that everyone can be expected to accept, why should we suppose that it is objectionable?

Behind these observations lies an important insight: political inequality is not necessarily unfair. When we propose to pass moral judgment on our political institutions, we need to ask two questions: Do the arrangements create inequalities? Are those inequalities unfair (or objectionable in some other way)? A "yes" to the first question does not imply a "yes" to the second. By way of illustration, consider a common criticism of the decision in *Bush v. Gore*. The critics point out that different jurisdictions use a wide variety of voting equipment. Some of this equipment is slightly more accurate than the rest. So there is political inequality here (some citizens have a higher chance of not having their votes counted). But it is natural to ask whether this inequality is unfair. As long as the difference in accuracy is small, and as long as its effects are distributed randomly,⁸ why should this inequality concern us? Until the 2000 election, in fact, it concerned almost no one. So a political procedure is not unfair simply because it is unequal. The unfairness emerges when the inequality has other features--for example, when it is intended or expected to affect a specific group of persons.

Political Equality or Political Fairness: The Case of Proportional Representation

This distinction between acceptable and unacceptable forms of political inequality is among the key lessons of contemporary democratic theory. To see the idea at work, and to appreciate its importance, consider a long-standing controversy about how we should elect our representatives. Many have thought that the spoils of an electoral contest--e.g., the seats in a legislature--should be

distributed proportionately. For example, if a party wins 40% of the votes in a race to elect a ten-member city council, it should receive four seats on the council. In *Considerations on Representative Government*, John Stuart Mill argued that arrangements such as this are preferable to winner-take-all systems, in which the party with 40% of the votes would not receive a single seat. According to Mill:

In a really equal democracy every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives, but a minority of the electors would always have a minority of the representatives. Man for man they would be as fully represented as the majority.⁹

Mill is arguing that, if proportional representation (PR) is a reasonably workable system, then we ought to adopt it, for it is more compatible with the value of political equality.¹⁰ This argument continues to hold some appeal. Yet many prominent democratic theorists maintain that the argument is mistaken. Although proportional representation offers a kind of equality that is absent from winner-take-all systems, this sort of equality is not an important feature of a fair political process.

Consider Charles Beitz's argument for the claim that political fairness does not always call for proportional representation.¹¹ Beitz recognizes that PR systems provide a kind of equality that is missing from winner-take-all systems (WTAR). Both PR and WTAR provide voters with *equal power* over electoral outcomes: each voter must overcome the same amount of resistance to prevail, because every vote has an equal weight. But PR comes closer to a second sort of equality, namely, *equal prospects of success*. It allows more people to vote for a winning candidate--to cast a ballot that elects someone. As Lani Guinier has argued, PR provides "an equal opportunity to vote for a winning candidate."¹² It achieves "one vote, one value," and it "wastes" fewer votes. So PR achieves a kind of equality that WTAR does not.

Yet Beitz argues that political procedures do not become unfair simply because they fail to provide "equal prospects of success." How come? According to Beitz, political inequalities are unfair when they threaten a person's fundamental interests. Among these interests is an "interest in recognition": people have an interest in political procedures that do not mark them as being inferior to others. A political arrangement that gives some votes more weight than others--for example, that gives rural voters, or white voters, more clout than urban or black voters--seems to be incompatible with this fundamental interest. And so it is unfair. But it is not clear why there is a similar failure of recognition if we adopt a winner-take-all system of representation. Such a system deprives many people of the opportunity to cast a ballot that helps to elect someone. But why does this indicate that those people are less worthy than others? Certainly it indicates that some people have preferences that differ from those of the majority. It may even indicate that the majority think those

preferences are deeply objectionable in some sense (e.g., suppose that a pro-choice party always loses at the polls). But it does not appear to indicate anything about the relative worth of different individuals. And so a winner-take-all system is, to this extent, perfectly compatible with the value of political equality, even if it does not provide “equal prospects of success.”

This line of argument resembles the criticism of *Bush v. Gore* I described earlier. It is agreed that Florida’s “intent” standard will create some sort of inequality. The question is whether the inequality at hand should concern us. Critics argue that it should not. The reason is that inequality *per se* is not objectionable. After all, the political process has all sorts of inequalities, such as the fact that different jurisdictions use voting equipment with different levels of accuracy. Political inequalities are objectionable only when they have a special kind of impact on someone: for example, when they are intended or can be expected to discriminate against specific persons. Given that Florida’s “intent” standard is lacking this feature, the critics argue, it is not incompatible with the value of political equality.

The Court’s Position

In *Bush v. Gore*, seven Justices held that Florida’s intent standard would infringe on the right to an equal vote. Different ballots would be treated differently, according to the vote counter’s method of determining voter intent. Even though this process cannot be predicted to favor or harm anyone in particular, it is still a form of political unfairness.

Why should that be so? The Court’s reasoning is not crystal clear, but it appears to go as follows: The value of political equality requires that a state’s elections law give an “equal weight” to each vote and acknowledge each citizen’s “equal dignity”(103). This means that the law may not “value one person’s vote over that of another” by allowing “arbitrary and disparate treatment” of a person’s vote (103-104). Florida’s “intent of the voter” standard would diminish the value of some people’s votes. And it would do so by allowing those votes to be treated in a disparate and arbitrary manner. Hence the standard is in conflict with the value of political equality.

Let me describe this argument in two steps. First, I will explain the basic premises about political equality underlying the *per curiam* opinion. Then I will explain why Florida’s standard would assign a lower value to some people’s votes by treating their ballots in a disparate and arbitrary manner.

The Majority on Political Equality

Insofar as the Court’s decision is based on theoretical considerations about political equality, their most abstract statements are contained in part IIB of the *per curiam* opinion. The Justices write:

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. (103)

Shortly thereafter they add:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another. (103-104)

The way to assess the Florida Supreme Court's decision, concludes the U.S. Supreme Court Majority, is to determine whether the Court went astray of its obligation to avoid "arbitrary and disparate treatment" of the state's electorate (104).

These remarks are suggestive, but they are not very clear. What is the connection between the comments about "equal weight" and "equal dignity" in the first passage? What is their connection to the concern about votes having different values as a result of "arbitrary and disparate treatment?" And what does "arbitrary" treatment amount to? There is very little in the *per curiam* opinion to help one answer these questions.¹³ However, the discussion of Charles Beitz's theory above suggests a natural interpretation of the Court's *per curiam* opinion. On this view, our first concern is to have electoral laws that recognize each citizen's "equal dignity." Procedures that assign different weights to different votes, for example, are objectionable in part because they do not provide such recognition. Suppose that people in sparsely populated rural districts enjoy more influence than people in populous urban districts (as happened in the Court's reapportionment cases). Here electoral laws confer an advantage on some people over others. And so they fail to recognize each person equally. They indicate to some people that their views or interests do not deserve as much consideration as those of other people.

Florida's "Intent" Standard as Arbitrary

In *Bush v. Gore* the Court identifies another kind of "equal dignity" problem. It suggests that "disparate treatment" is unfair when there is no good reason for it, even if it does not target anyone in particular. Random inequalities offend against our equal dignity when there is no good reason for them.

Now it is apparent how an "intent of the voter" standard might value votes differently by treating them in a disparate manner. The difference in value stems from the fact that some votes will be counted and others will not. The "disparate treatment" derives from the fact that different

counties--and the same county over time--will interpret "intent of the voter" in different ways. Two identical ballots may be treated differently. So it seems clear that Florida's standard allows "disparate treatment" that will give votes a different value. The real question is whether this treatment is "arbitrary." According to the *per curiam* opinion, Florida's standard is arbitrary in two respects. First, it creates inequalities that have no rational explanation. Second, it is a standard that is unnecessarily vague. Let me describe each point in turn.

The Court appears to think that an "intent of the voter" standard will create inequalities that cannot be explained to those on the wrong end of the inequality. The Justices believe that sometimes there is no obvious way to determine a voter's intent. One's conclusion will depend on the rule one adopts (e.g., "dimpled chads" don't count). And reasonable people are likely to adopt different rules. So there is no single "right" or "best" way of determining voter intent. This means that when two identical ballots are counted differently in two different counties, there is no good reason for the difference. Since each county's method is acceptable, the difference in treatment lacks a good reason.¹⁴

The Court's other claim is that this baseless difference in treatment is avoidable. According to the Court:

The law does not refrain from searching for the intent of the act in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment. (104)

The Court agrees that disparate treatment, deriving from vagueness in the law, may be acceptable when no good alternative to vagueness presents itself. For example, telling a jury to determine whether a person is guilty, beyond a "reasonable doubt," creates the potential for unequal treatment without a good reason. Different juries may interpret the phrase "reasonable doubt" differently. And there is no good reason why a given person gets a given jury. Yet we have no good alternative to using vague guidelines such as these. Criminal cases can be extremely complex, so the instructions to a jury must contain a great deal of vagueness. However, that is not the case in regard to counting ballots. Here precise rules are possible (e.g., do not count "dimpled chads"). Yet Florida did not choose specific rules, for no apparent reason.

The problem with Florida's standard, then, is that it assigns a different value to different votes by treating them unequally and arbitrarily. This interpretation of the equal protection problem is apparent also in Justice Souter's dissenting opinion. He writes:

Petitioners have raised an equal protection claim . . . in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics. . . . I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental right. The differences appear wholly arbitrary (125).

It is not clear why Justice Souter thinks that manual recounts create "a different order of disparity" relative to machine recounts, or what importance he attaches to this fact. But setting that question aside, his view appears to be that allowing a variety of voting machines might serve some legitimate state interests. Such interests are absent in the case of Florida's standard. Hence the "differences" it creates are "wholly arbitrary."

Implications

We are now in a position to appreciate the disagreement between the Court and its critics. The latter contend that political inequality is objectionable only when it is intended or can be predicted to burden specific persons. For only then can we say that the law fails to recognize each citizen as an equal. In contrast, the Court suggests that political inequalities lacking a proper justification may be objectionable, whether or not they threaten specific individuals. Their arbitrariness constitutes a failure to recognize citizens equally.

What bearing does this controversy have beyond *Bush v. Gore*? As a matter of constitutional law, we may have to wait a good while for the ideas in the Court's *per curiam* opinion to bear fruit.¹⁵ But it is worth asking not simply what the U.S. Constitution says, but what it ought to say. And the disagreement about political equality I have described has a substantial bearing on this question. Let us examine four examples.

Electoral "Fusion"

To appreciate how the ideas in *Bush v. Gore* might bear on the character of a fair political process, it is useful to compare that case with another recent decision on the political process,

Timmons v. Twin Cities Area New Party (1997).¹⁶ Here the Court upheld Minnesota's ban on electoral "fusion." In a fusion ballot, a candidate's name appears under more than one party's column. (For example, Ronald Reagan might appear as a Republican and as a Libertarian). Fusion helps small parties to succeed inasmuch as it makes it easier for them to gain ballot access. Hence a ban on fusion favors the major parties. To this extent it creates an inequality in political influence. People with the interests and ideas that the major parties espouse have a greater degree of influence, simply because the system is arranged in a certain way (*not* because their views are more popular).¹⁷ Now suppose that there is no compelling reason to allow this sort of inequality. Is it unfair?

In *Timmons* the Court said "no". The inequality that fusion bans impose is not objectionable. According to Justice Rhenquist's opinion for the Court:

. . . the supposed benefits to minor parties of fusion does [sic] not require that Minnesota permit it. Many features of our political system--e.g., single-member districts, "first past the post" elections, and the high costs of campaigning--make it difficult for third parties to succeed in American politics. But the Constitution does not require states to permit fusion any more than it requires them to move to proportional-representation elections or public financing of campaigns.¹⁸

Hence inequality in political influence is compatible with the 14th Amendment, and, perhaps, with the requirements of political fairness. Of course, this is just what the critics say about *Bush v. Gore*. Indeed, part of Justice Rhenquist's argument in *Timmons* resembles the criticisms of that decision:

. . . Minnesota has not directly precluded minor political parties from developing and organizing. Nor has Minnesota excluded a particular group of citizens, or a political party, from participation in the election process. The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen.¹⁹

In other words, there are two kinds of inequality in political influence: discriminatory and non-discriminatory. The first are directed at specific individuals or parties. The second are general rules that do not make reference to specific persons or associations. (These may happen to favor some existing individuals or parties, but they are not designed to do so.) Although the first kind of inequality is objectionable, the second is not. This argument parallels what the critics have said about *Bush v. Gore*--in a nutshell, that the inequalities at issue were non-discriminatory.

Yet the majority opinions in *Bush v. Gore* may lead us to reconsider this argument. Fusion bans create an inequality in political influence. Hence the state should be required to produce a convincing justification for them. Assuming that such reasons are not available--which seems likely, since several states allow fusion without major difficulties--we might conclude that a fair political process should allow fusion candidacies.

Political Finance

There is a common intuition that the role of money in politics gives some people a larger say than others, and that this is unfair. Indeed, the system of political finance established in 1972 and 1974--which the Supreme Court weakened in *Buckley v. Valeo*²⁰--had political equality among its aims. (The Court recognized in *Buckley* that the Federal Elections Campaign Act was “aimed in part at equalizing the relative ability of all voters to affect electoral outcomes.”)²¹

Yet some democratic theorists suggest that this intuition is mistaken. The fact that some people can spend more on the political process does not offend against our equal dignity. To see the intuition behind this claim, consider an example. Suppose we have a local referendum with two options. The people who back one side are more eloquent than those who back the other side. In addition, they are more willing to go door-to-door in support of their views, to do phone-banking, etc. In that case there is bound to be an inequality in political influence. But how does it constitute a failure to recognize citizens as equals? Allowing people to argue their case and to work hard on behalf of their views does not imply that others are inferior.

We are now in a position to see what lies behind the intuition that unregulated political spending creates unfair inequalities in political influence. A laissez-faire system gives wealthy people more of a say in the political process (other things being equal) and this inequality appears to lack a good justification. When a person has more influence because she is persuasive, the fact that others are persuaded is reason enough for the fact that she has more influence. When people with roughly equal resources spend different amounts on the political process, we might welcome this as a measure of how strongly people feel. But in a society with substantial economic inequalities, an unregulated system of political finance creates inequalities that lack such justifications. Wealth does not make an appreciable contribution to political deliberation. And those who spend it do not necessarily care more about an issue than others. It is simply that they have more to spend, and that such spending makes their voices louder. Hence an unregulated system of political finance appears to create arbitrary inequalities in political influence--that is, inequalities lacking a proper justification.

Consider an example. Suppose that our society is deciding whether to allow human cloning. And suppose that there are two individuals, one pro-cloning and one anti-cloning. Both care about the issue. Each wants to live in a society that makes the right choice. But one is Ross Perot and the other Joe Schmo. Ross gets to take out large editorial ads in the country's major newspapers. He buys thirty minutes of prime time on the big networks. And he pays to have anti-cloning billboards set up all over the country. Meanwhile, Joe Schmo gets to write his Congressman (who responds with a form letter). His local paper will publish a short letter-to-the-editor (if he's lucky). And he will install a pro-cloning sign on his lawn. This situation features a kind of political inequality that seems unfair. And we are now able to see the source of that intuition. The political system is set

up--perhaps not intentionally--so as to favor one person's point of view over another's. And this inequality is not likely to produce a better decision on the question of human cloning, nor even to give an accurate measure of how strongly each person feels. Indeed, it is hard to see what political purpose the inequality serves.

Proportional Representation

The case of proportional representation mirrors the situation in political finance: once we acknowledge that political inequalities can be objectionable because they are arbitrary, we can explain why proportional representation seems more democratic than winner-take-all representation. Most democrats regard representation as a necessary evil. The ideal arrangement is one in which people vote on the issues themselves. Yet such systems face a range of potential difficulties: they are time-consuming, they inhibit deliberation, etc. So we must make use of representation. Now proportional systems come closest to the ideal of direct democracy.²² This is why the ability to vote for a candidate who actually wins--what Beitz calls "equal prospects of success"--is important. And winner-take-all systems lack this feature. They are a step away from the ideal of direct democracy--as if the Republican majority in a small town passed a law prohibiting democrats from attending town meetings.

Of course, that is not to say that a process is undemocratic simply because it uses winner-take-all representation. Some scholars believe that PR creates obstacles to political stability and effective governance. When and where these concerns are reasonable, they certainly count against the idea that a democratic society should elect its representatives proportionately. But we may come to the conclusion that the worries about PR are over-stated. We may learn to avoid them. Or we may encounter cases where PR is likely to work properly. In such circumstances, the inequality that characterizes winner-take-all representation lacks a convincing justification. And so we might conclude that the value of political equality requires a proportional system.

"Intent of the Voter" Standards

Although the position implicit in *Bush v. Gore* will heighten our sensitivity to political inequality, it does not entail that every disparity in the political process is unfair. Ironically, the decision in *Bush v. Gore* provides a good illustration of this point: the *per curiam* opinion is unpersuasive even if one adopts its conception of political equality. It is worth explaining this point, not to criticize the Court (whose decision is a *fait de compli*), but to show that the conception of political equality implicit in *Bush v. Gore* does not threaten every facet of our political system.

The Court's argument emphasizes the idea that Florida's "intent" standard allowed disparate

treatment arbitrarily, that is, without reason. It is this lack of justification that makes the inequality incompatible with each citizen's "equal dignity." As Justice Souter puts it, the problem is that Florida's standard serves no legitimate state interest. If this is the Court's position, though, it faces an obvious challenge: a vague, "intent of the voter" standard does not seem arbitrary. Indeed, it appears to serve an interest internal to the value of political equality itself--namely, counting votes in an accurate manner.

As critics of the Court's decision have argued, allowing local officials to exercise discretion may increase the likelihood that a voter's intent will be determined correctly. For example, suppose that someone makes strong indentations for every question on the ballot, except one. It seems reasonable to conclude that she did not intend to cast a vote on that question (she changed her mind).²³ Or suppose that we have a ballot with a great deal of slight indentations, "hanging chads," and so on. Again it seems reasonable to suppose that this voter did not use a lot of force, but intended to vote on the relevant issues. Allowing local officials to exercise discretion may enable them to identify the voter's intent in cases such as these. And if their discretion serves (or is likely to serve) that purpose, the inequalities it creates do not seem arbitrary. Now we have a reason for those inequalities. The reason is that, in the state's judgment, a vague "intent of the voter" standard will produce a more accurate count than a specific set of rules.

It is hard to see how one could argue that this state interest--in counting a larger number of votes accurately--is not legitimate. Indeed, the interest in question seems more "legitimate" than the ones Justice Souter cites in favor of allowing local jurisdictions to use different voting machines. He cites the interest in lowering costs. But such considerations seem weak, given the Court's language about the *fundamental* right to vote. Unless the costs in question are prohibitive, why should they allow a state to violate the Equal Protection Clause? In contrast, the state interest that I have identified with regard to Florida's standard is an interest related intimately to the Court's fundamental right. It is an interest internal to the value of political equality.

Of course, there may be other arguments against Florida's "intent of the voter" standard. At one point, the Court says that Florida's contest procedure, as mandated by its Supreme Court, is not "well calculated to sustain the confidence that all citizens must have in the outcome of elections" (107). Yet, the Court's main argument is not persuasive--even though the claim about political equality that underlies it is.

Which View is Correct?

Thus far we have encountered a disagreement about political equality, and we have seen that its resolution may have important implications for the shape of our political institutions. The question that remains is who is correct: the Court or its critics? I believe that the seven justices who

saw an equal protection problem with Florida's "intent of the voter" standard have the better position (in regard to political equality). It is not possible to defend this conclusion at length here, but let me enter a few remarks on its behalf.

The conception of political equality that critics of *Bush v. Gore* defend--and that features in much work in contemporary democratic theory--is unpersuasive because we can imagine random inequalities in the political process that seem objectionable. For example, it is unacceptable to conduct elections by polling a sample of the electorate. Everyone must have an opportunity to vote, and we must go to considerable lengths to ensure that each vote is counted accurately. Yet it would be hard to explain this intuition with a theory that condemns only non-random inequalities. Proper sampling is, by definition, random. Hence our intuitions about what democracy requires suggest that there is something in the idea of political equality that goes beyond the need to prevent predictable patterns of advantage or disadvantage.

The Court's view, on the other hand, fits better with the idea that political institutions must answer to our equal dignity. When equals undertake to govern their common affairs, it is natural for them to establish a process that is egalitarian in every aspect. They begin from the presumption that every political inequality is unacceptable. Of course, this ideal is unattainable, especially in a large, complex society. Hence there are political inequalities that everyone is willing to accept, because they are necessary for an effective political process. This hypothetical, unanimous consent explains why the inequalities are compatible with our equal dignity. But such an explanation is lacking when the state cannot produce a convincing reason for political inequality. Here the law is at odds with our underlying commitment to govern our common affairs as equals.

Unfortunately, this failure of recognition can be obscured by an implicit, consumerist vision of the political process. Suppose we liken political decision-making to the proverbial pie. There are two ways of dividing it: we can raffle the entire pie (or the largest slice) to one person, or we can ensure that everyone's piece is the same size. Now both methods are 'equal' in this sense: neither can be expected to advantage anyone (beforehand). But the first method regards political participation as a kind of luxury, a good that one would like to have, but not one that everyone must have. The second method reflects the thought that those who do not have an equal slice are being deprived of something important. Now each of these methods has its place. But governing our common affairs is not a luxury. It is something that every citizen expects to enjoy, and to enjoy equally.

Conclusion

I have argued that the controversy surrounding *Bush v. Gore* raises an important question about the nature of political equality. The Court held that Florida's "intent of the voter" standard

was incompatible with the 14th Amendment's Equal Protection Clause. When the state diminishes the value of a citizen's vote, it must have a good reason for doing so, because differences in political influence resulting from "arbitrary and disparate treatment" are unfair (103). On the belief that Florida's standard lacked such reasons, seven of the nine justices found it to be unacceptable. According to Justice Souter, for example, the intent standard produced inequalities that served "no legitimate state interest" (125). Critics of the Court's decision respond that Florida's standard treats people equally, properly speaking, because it does not discriminate against anyone in particular. For instance, Ronald Dworkin argues that the intent standard raises "no equal protection problems" because it "puts no one at a disadvantage" and "discriminates against no one."²⁴ In short, the Court rejects "intent of the voter" standards because they create "arbitrary" inequalities in political influence, whereas many critics maintain that arbitrary inequalities are not objectionable unless they can be expected to disadvantage or discriminate against specific persons.

Most democratic theorists would be tempted to agree with Dworkin that political inequalities are acceptable unless they discriminate or disadvantage specific individuals. According to Charles Beitz, for example, inequalities are unfair when they convey the impression that some people are less valuable than others. Political inequalities that impose special burdens on specific persons, in a predictable way, convey the impression that those people are less worthy than others. For example, a districting plan that disadvantages areas with large Latino populations may convey the impression that Latinos are less worthy than others. But it is not clear how differences in treatment can signal differences in worth when they are not intended and cannot be expected to burden anyone in particular.

Yet there is an answer to this question implicit in the Supreme Court's decision in *Bush v. Gore*. It is that arbitrary inequalities may be unfair *because* they are arbitrary. When the state creates political inequalities, it must have a good reason for doing so. Otherwise the inequalities are incompatible with the recognition of each citizen's "equal dignity" (103). I have argued that, in articulating this position, the Court has taken a significant and fortuitous step beyond the prevailing conceptions of political equality. And it is a step that may have implications for several key questions about the design of democratic institutions.

Notes

¹ In this essay I use the terms “political equality” and “political fairness” interchangeably.

² These were the “November 14 deadline” and “error in voter tabulation” disputes. The first question was whether Florida law required the counties to submit their final results seven days after the election, on November 14; whether the requirement could be waived or imposed at the Secretary of State’s discretion; or whether the Secretary was required to accept election returns delivered after November 14. The second issue emerged because several counties counted a sample of votes manually, which revealed a divergence from the machine count. The question was whether this discrepancy amounted to an “error in vote tabulation” according to Florida’s statute.

³ The *per curiam* opinion raises three equal protection problems beyond the “intent” issue. They do not seem very troubling, though.

⁴ Note that *Bush v. Gore* raised another legal question, namely, whether the Florida Supreme Court’s decision violated federal law and/or Article II, section 1, clause 2 of the Constitution. Only Justices Rhenquist, Scalia, and Thomas reached this conclusion.

⁵ References to the opinions in *Bush v. Gore* are given in parentheses and are drawn from E. J. Dionne, Jr. and William Kristol, eds., *Bush v. Gore: The Court Cases and the Commentary* (Washington, D.C.: Brookings Institution Press, 2001).

⁶ Dworkin, “A Badly Flawed Election: An Exchange,” *New York Review of Books* 22 February 2001: 9-10.

⁷ 377 U.S. 533 (1964).

⁸ As a matter of fact, the inequality produced by the use of different voting machines may not be random. Inasmuch as wealthier jurisdictions tend to have the better machines, there is an economic bias in the likelihood of having one’s vote counted.

⁹ Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton, NJ: Princeton UP, 1989) 124 (citing chap. VII of Mill’s *Considerations on Representative Government*).

¹⁰ This is not to say that PR is absolutely necessary. One must determine whether PR is a workable

system, given the society and circumstances at hand.

¹¹ Beitz, *Political Equality*, chap.Six.

¹² Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (New York: Free Press, 1994) 122.

¹³ I have already quoted the most pertinent passages, and precedent does not help very much. The opinion mentions two cases, *Gray v. Sanders* and *Moore v. Ogilvie*. The trouble is that these are reapportionment cases like *Reynolds v. Sims*. They have to do with predictable differences in the value of one's right to vote, differences that affect specific groups of people. For example, in *Moore* the Court struck down an Illinois statute because it "discriminates against the residents of the populous counties . . . in favor of rural sections." See *Gray v. Sanders*, 372 U.S. 368 (1963) and *Moore v. Ogilvie*, 394 U.S. 814 (1969).

¹⁴ I assume that this is among the Court's concerns in those passages of the *per curiam* opinion that describe the different rules adopted in different counties.

¹⁵ For one thing, the case is concerned with the right to vote, whereas the most salient issues in contemporary democratic theory concern other aspects of the political process--ballot access regulations, political finance, etc. Moreover, the *per curiam* opinion contains indications that it is not to be construed as precedent.

¹⁶ No. 95-1608 (1997).

¹⁷ A lower court had said that Minnesota's ban keeps the New Party "from developing consensual political alliances and thus broadening the base of public participation in and support for its activities" (quoted in *Timmons* 8).

¹⁸ *Timmons* 9-10 (citations omitted).

¹⁹ *Timmons* 9 (citations omitted).

²⁰ 424 U.S. 1 (1976)

²¹ Buckley 17.

²² For example, if every citizen is part of a legislative assembly, then, by definition, every point of view in the population is represented proportionately.

²³ This example is drawn from Dworkin's essay in the *New York Review of Books*.

²⁴ Dworkin, "A Badly Flawed Election: An Exchange," *New York Review of Books* 22 February 2001: 9-10.

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When a "W" is not a "W"

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Without a healthy public dialogue, democracy cannot reflect the will of the people. They may have the right to vote, but they will not be in a position to make informed choices. In our mass media culture, that healthy dialogue must be reflected in the electorate's daily news and commentary. I suggest the crisis of confidence created by the Florida presidential vote was resolved in the minds of many voters by the Bush group's use of an analogy between the presidential election and a sport or game. That analogy was offered repeatedly to the news media by Bush's associates--especially James Baker, Bush's primary spokesperson; and the media dutifully related it to the American people, who, it appears, either found it persuasive or could not envision an alternative way to conceptualize the matter.¹

I want to make very clear, however, that the main thrust of this paper is not to *prove definitively* that the analogy between the election and a sport or game determined the outcome of the Florida election.² Although I believe that the analogy did play a major role in resolving the crisis, *my arguments in this paper do not depend on this supposition*. I propose to show that the public dialogue about the election, embodied in the media, described the Florida election crisis as analogous to a sport or game--specifically, the public dialogue suggested that the Florida election shared with modern sports their supposed fairness and the usual finality of any modern sporting contest. More important, I argue that this way of characterizing the matter misrepresents the fundamental character of the democratic institution of electing our president; and that this distortion leads the supposed "winner" of such a contest to assume power and authority that are not warranted by the process.

Shortly before the Supreme Court effectively declared George W. Bush president of the United States, and on many other occasions, Bush confidant James Baker said that you cannot change the rules of the game after it has been played.³ As innocent as this remark sounds, it signaled a rhetorical strategy for framing the debate about the apparent irregularities in Florida's presidential vote. That strategy drew an analogy between the presidential election and a sport or game. Baker and other Bush supporters told the media and the public that the election was like a game. They thereby implied that, just as games and sports are thought to embody the virtue of fairness, the analogical parallel between such activities and the election justified the claim that the election, too, was fair.⁴ In addition, the analogy suggested that, just as sports and games generally have a clear beginning and end, which are typically discernable by examining when the event is scheduled to be played, so the Florida presidential election was completed when the polls closed and the ballots were initially tabulated.⁵ Since Bush seemed to be ahead at that point, further wrangling was seen as sour grapes--the same sort of improper behavior as contesting the outcome of a sporting event after it

has been played. After all, Baker and other Bush supporters intimated, a win is a win--or, as this familiar mantra is sometimes rephrased, a "W" is a "W."⁶

Baker's remark is not the only evidence that Bush supporters succeeded in framing the public debate about the election in terms of what I call the rhetoric of sports/games. Commentators spoke of Bush or Gore "winning," rather than being elected, referred to the Gore or Bush "teams," and suggested that people should not be "sore losers."⁷ Of special significance is the idea that Gore should not have tried to "win" the election by winning Florida, where Bush had the "home field advantage." Analysts referred to Republicans and Democrats as if they were the "fans" of two football teams--overriding the established principle that a citizen's most important obligation is to the truth and the integrity of the political process.⁸

Critics of my position will point out that even Gore supporters made use of the analogy between the election and a sport or game. They might contend that the rhetoric of sports/games was not a Bush strategy, as I maintain; but rather that it is a pervasive feature of our culture. After all, even Gore's lawyers framed their arguments in these terms. During the court proceedings over whether there should be a manual recount, for example, Gore's lawyers accused Bush's attorneys of trying to "run out the clock"⁹; and in his argument before the U.S. Supreme Court, Gore attorney Lawrence Tribe told the Justices that what the Gore campaign was seeking was not a reversal of the [game's] outcome but, rather, a sort of "instant replay" of the finish.¹⁰ But these arguments came at the end of the process, just before Bush was declared president. I find no evidence that Gore and his allies introduced this way of describing the election; rather, I suggest Bush strategists' success in framing the election as analogous to a game or sport created a media environment that scarcely recognized any other way of describing the Florida crisis. In a last ditch attempt to turn the tide of the debate, Gore's people consciously used the sports/games rhetoric.

But suppose the critics are right, and the sports/games rhetoric was not introduced by Bush's advisors. Suppose thinking in terms of sports and games *is* so pervasive in our culture that something like a presidential election is typically characterized in such terms. *Even if this were true, Gore supporters could still have successfully argued their candidate's position in terms of the analogy with sports and games.* In short, even if we characterize the election as a sort of game or sport, Gore could still have shown that the Florida election was not "fair," and that it was not "over." Undoubtedly this is what Gore's lawyers were trying to do when they spoke of "instant replays" and "running out the clock," but there are much more persuasive ways to counter the Bush groups' arguments, as represented in the mass media.

To show how Gore might have exposed the logic of the Bush camp's implied analogical argument and might even have used this argumentative structure to derive conclusions that contradicted those suggested by Bush's advisors, I examine the basic composition of the analogical

argument that the Florida election was fair and complete in virtue of its close parallel with some kind of game or sport:¹¹

1. The Florida presidential election has $p_{1,2,\dots}$ and $n_{1,2,\dots}$.
2. Sports and games have $p_{1,2,\dots}$ and $n_{6,7,\dots}$.
3. Sports and games have p and q (fairness and finality).

It follows that the Florida presidential election has p and q (fairness and finality).

The first premise claims that the Florida presidential election has certain properties $p_{1,2,\dots}$ and $n_{1,2,\dots}$. The second premise states that the analogical parallels, sports and games, also have the properties $p_{1,2,\dots}$; but have properties $n_{6,7,\dots}$, rather than $n_{1,2,\dots}$. Consistent with standard analyses of analogical arguments, we call " $p_{1,2,\dots}$ " *the positive analogy*. It follows that " $p_{1,2,\dots}$ " represent the characteristics that the Florida election shares with sports and games. Since no two things are completely alike, however, we also note *the negative analogy*, represented by " $n_{1,2,\dots}$ " and " $n_{6,7,\dots}$ ". These are properties that the election does not share with sports and games. *Both* the *ratio* between the positive and negative analogies and the *relative importance* of the characteristics they include are crucial to evaluating any analogical argument. Should the positive analogy encompass a number of particularly relevant properties and the negative analogy consist largely of characteristics that are marginally applicable, for example, we probably would consider the argument strong. Since there is clearly no contradiction in supposing the conclusion of such an argument to be the opposite of what is originally presented, marking the argument as "strong" signals *inductive*, rather than deductive, force. In short, certifying such an argument would mean that, if its premises should be true, its conclusion would probably be true as well.

I contend that the implicit analogy between the Florida presidential election and a sport or game breaks down, in spite of being widely appealed to in the national media. But the broad appeal of this analogy in the national dialogue suggests there must be a number of positive analogies that are at least superficially persuasive. What are some of these apparently shared characteristics? According to Thomas R. Dye *et. al.*'s popular introductory political science text, "[m]odern democracies are built around the machinery of free popular elections," including our presidential election.¹² In the context of the Florida presidential election--the primary subject matter of the above (schematic) analogical argument--some of the relevant characteristics usually attributed to our presidential elections might be: (1) A *goal*--electing a president (and vice president); (2) *Rules, specifically laws*, that govern the election of the president; (3) Typically *just two candidates* who have a serious chance of being elected, given our "two-party system"; (4) *Officials* who oversee the election to make sure that it proceeds in accordance with the rules (laws); (5) *Containment in time and*, to a certain extent, *space*, in the sense that the election takes place on a specific day and at specific

"polling places" around the country; and (6) *Free access*, as stated in the above quotation, in the sense that people do not have to pay a fee to vote.

Most of these characteristics are apparently reflected in, for example, modern professional sports--the type of "sport or game" most often cited by the media when drawing the analogy. Sports have a *goal*--winning some sort of game. There are *rules* that are enforced by *referees and other officials*. The major professional sports, football, basketball, and baseball, all have *two teams or players* who *compete to determine a victor*. Moreover, these games *take place at specific places, dates, and times*. The last characteristic I mentioned above is more problematic. Major sports are certainly not free in the sense that there is no price for admission to the game; nor is it clear that they do not discriminate, at least on the basis of talent, in playing the game. So (1) through (5) might, *prima facie*, be thought part of the positive analogy between presidential elections and, for example, major sports; while (6) seems to be part of the negative analogy. There are deeper comparisons we can make between the presidential election and major sports, but these properties reflect the sorts of similarities many with an elementary knowledge of civics might find appealing; and they are, therefore, most relevant to our examination. To proceed with the analysis, I ask you to imagine these properties applied to the 2000 Florida presidential election. *Prima facie*, in the case of the Florida election, the positive analogy outweighs the negative analogy and the analogical argument to the conclusion that the Florida presidential election is fair and final (over) appears to be supported.

In light of our structural analysis, however, the central Bush analogical argument is severely weakened or refuted if the parallel between the Florida election and sports and games has been misinterpreted or misunderstood in some central and crucial way. I contend that this is exactly what happened when Bush officials implied we should treat the confusing Palm Beach County ballot, and the resulting claim that thousands were denied their right to vote, as if it were a "bad call" in a sporting event. The critical importance of the Palm Beach County dispute entails that Bush's advisors had to maintain that the positive analogy between the election and a sport or game included a parallel between what happened in Palm Beach County and a questionable call in, say, a major league baseball game.¹³ If this parallel broke down, it would throw serious doubt on the conclusion that the Florida vote was fair and that the electoral process was properly completed. If this parallel failed to hold, the idea that the election proceeded according to established rules, uniformly enforced, would also be cast into question; and a major aspect of the positive analogy--the dependence on uniform rules and laws governing the election--would be open to question, at least with regard to the Palm Beach County vote. This disanalogy would significantly weaken the analogical argument to the conclusion that the election was fair and complete. Disputed calls may decide a game, Bush advisors intimated; but, if the rules have been followed, serious people will "move on" and regard the matter finished. To continue to argue the point, perhaps in the courts, is akin to arguing with the referees after a game is over. Such behavior shows the same sort of sour

grapes we attribute to others we label "sore losers."¹⁴ Unfortunately for an advocate of this approach, this analysis amounts to comparing apples and oranges; hence, the positive analogy between the Florida presidential vote and a sport or game does break down in a crucial way, as I argue below.

When the third game of the World Series was played at Candlestick Park, CA, in 1989, and the game could not proceed because of an earthquake, the game was rescheduled. What had happened was *not* a bad call; rather the *playing field itself malfunctioned*.¹⁵ That is an apt description of what happened in the Palm Beach County vote--assuming, for the sake of argument, that the sport/game analogy is appropriate. A confusing, arguably illegal, ballot apparently deprived many of their vote. It doesn't matter that a Democrat had examined the ballot. That individual was, in effect, part of the broken playing field. Bush officials admitted as much when they urged that we "follow the rules."¹⁶ "The rules" were in doubt here, as they were at Candlestick Park, in 1989. That's what happens when the playing field malfunctions. "The result" Bush officials said the analogy confirms to be fair is simply the Florida vote without reference to the approximately 19,000 Palm Beach County ballots (mostly "overvotes"¹⁷) that were thrown out and the roughly 3,400 that were awarded to Buchanan, who denied they were his. Bush officials countered that a large number of ballots were also thrown out in '96. But the fact that the playing field also malfunctioned in '96 doesn't make it acceptable to overlook its malfunctioning *this time, when it mattered*. It follows that, even if we grant that there is a *prima facie* analogy between the Florida election and a sport or game, even if we grant the validity of this basic approach, the argument that the Florida election procedure was fair and complete breaks down because the relative strength of the positive analogy has been strongly overstated in light of the "broken playing field" analysis. The significance of the Palm Beach County result entailed Bush proponents could not allow this result to become an issue. This result, by itself, was sufficient to turn the outcome of the Florida vote in Gore's direction. Only by maintaining the fiction of a sort of "bad call" in the Palm Beach result could Bush associates argue to the media, by analogy, that the election was fair and complete.

I think it is clear that Palm Beach County is much more like a broken playing field than a disputed decision by a referee. In short, someone who rejects this interpretation has the burden of proof. It follows that, even if we accept the general approach of regarding the election as analogous to a game or sport, the conclusion that it was fair and final does not follow because a critical part of the positive analogy has been misinterpreted. Only if the Palm Beach County vote were to be handled in a way consistent with what happened at Candlestick Park, in 1989, when the World Series game was rescheduled, would it make sense to conclude the election was fair and the electoral process complete.¹⁸ Otherwise, the positive analogy breaks down, and there is no appropriate parallel in this centrally important respect. In this case, Bush's only recourse is to assume what he is trying to prove--that the Palm Beach County result was akin to a bad call. Philosophers, of course,

have a name for such behavior. We call it *begging the question*, or *reasoning in a circle*. Such behavior is like trying to fly by lifting your heels off the ground with your hands. It doesn't work.

There is a second serious problem with comparing the election with sports and games in order to imbue it with fairness and finality. This is especially true if what we really have in mind are "big time" sporting events--professional football, major league baseball, etc. The problem here is that the fairness of these very games has been repeatedly questioned, and not only by "sore losers." Here are some of the issues that bring into question the fairness of major sporting events: Forcing players to play even when they are injured, coaching violent techniques designed to injure or intimidate the opposition, taking steroids and other performance enhancing drugs, using equipment that fails to satisfy the rules of the sport in question, and the fact that players and coaches are known to gamble on games in which they participate or at least have a stake. Certainly not all professional sports figures are guilty of such behavior, but such things occur more frequently than most sports fans like to admit. Where large amounts of money are at stake, fairness is always going to require careful policing and regulation. There is nothing *inherently* fair about professional and big time college sports. To use an analogy with such activities to prove *some other activity* is fair, again, begs the question. Whether truly amateur sports (if there are any left) have such inherent fairness is open to question; but there is no question about professional athletics.

I have maintained that the analogical argument suggested by Bush advisors like James Baker fails even if we grant, for the sake of argument, the basic idea that the election may be analogous to games or (especially major) sports in certain respects. I contend, however, that the presidential election is not at all *like a game*; rather, it is one of our most important *democratic institutions*. As such, it has its own unique logic. We are so accustomed to thinking in terms of games and sports that it is hard for us not to think in these terms; but we must try. Traditionally, characteristics like fairness and finality are attributed to games by virtue of their clearly defined goals, which must typically be achieved within the constraints of very specific rules. Moreover, these games take place in front of audiences and officials who are able to enforce the rules in a more uniform way than is usual with social norms and laws, leading to very clear cut determinations of winners and losers. Those who seek to apply the game analogy to presidential elections argue that if a presidential election is like a sport or game--if it meets the minimal criteria of a sport or game--it possesses the same fairness and finality as games. Fairness and finality are the sport/game characteristics I have focused on in most of this paper, but there are others--especially characteristics associated with the outcome of a game: winning and losing. The problem is that applying these characteristics of sports and games to a presidential election distorts the democratic process, as the remainder of the paper illustrates.

The *goal* of the election is to *elect the president*--not to "win." This implies the election is an occasion for citizens--all who care to participate--to cast their votes; and the purpose of the vote count is to determine, as accurately as we can, how many votes each candidate received. Fairness is

not something we can import into the procedure by an ill-considered comparison with sports and games. Fairness in a democratic election is not about being *even handed to the candidates*; rather, it mandates *justice for the electorate and the American people*, who are, to use Baker's words to a different purpose, "neither Republicans nor Democrats" but citizens of what was once considered the world's greatest democracy.¹⁹ This view is supported by the Dye *et. al.* claim that elections are *free* because we want to encourage *maximum participation* of the electorate. Dye *et. al.* elaborate: "The rights and interests of a person are secure only to the extent that he [or she] is able to protect them actively, and the interest of the community is best promoted by the maximum participation of its citizens."²⁰ Some advocates of amateur sports have spoken of large scale participation, but the major media companies who broadcast professional sporting events are certainly not advocating broad based participation. They are encouraging us to sit on our couches and watch the professionals.

How does it alter our perception of the presidential election if we view it as a democratic institution, and not as a game or sport? It alters our perception in several very important ways. If we abandon the game model, there are no "instant replays" in this democratic institution; but there are *remedies* which seek to maximize the participation of Americans whose intentions usually can be ascertained. The idea that the rules of the game cannot be changed after it is played misses this major point: the many strange occurrences in the Florida election amount to a breakdown of our procedure for electing the president--a practice many consider one of our most important democratic institutions--not a glitch in some game or sporting event.

It follows that, in contesting the outcome as he did, Gore was not a "sore loser." Whatever his actual motivations, from a political perspective, Gore and his allies were attempting to have more votes counted. If they were focusing on the votes they thought might be most likely to help Gore that was unfortunate; but the *time frame* issue pressed in court by Bush and his advisors, and reinforced by some Florida officials and by the U.S. Supreme Court, placed severe constraints on what could be done. Again, we were not dealing with a sporting event in which everyone understands the role of, and the vaunted integrity of, "the clock."

The bottom line is this. In many other States, including Michigan, where I live, there are very clear criteria for what a vote is--and these criteria are uniform throughout the State in question. In the event a hand count is required, in Michigan, for example, there are clear criteria for how to count votes on which the "chad" is still attached but is "hanging," etc. Florida does not have such a uniform code. Instead, Florida refers to "the intent of the voter," which can be interpreted differently in different counties, and regularly is.²¹ Bush and his "team" were not being denied their rightful "win" by Gore's attempts at such voter vindication; rather it was the Bush group who fought to stop any examination of an electoral process that had clearly misfired--and done so on the watch of the brother of their candidate--who clearly stood in potential conflict of interest.²² The idea that Gore was doomed because he was on George W. Bush's "home field" makes as little sense in this

connection as saying that Republicans and Democrats are locked into their roles of supporting one candidate or the other. There were mistakes on both sides, but the failure to allow votes to be hand counted--after all the other oddities of the Florida presidential vote--is not consistent with our democratic institution of electing the president according to a just and fair procedure--*a procedure stressing maximum participation.*

Recasting the election as a democratic institution, rather than a sport or a game, also implies analysts should have looked carefully at the Florida exit polls, even though they were called into serious question. Some people have even suggested the exit polls might have been right in declaring Gore the winner. My point is that these polls provided one additional source of insight into the intent of Florida's voters. In the arguments over whether the votes should be carefully hand counted, the Bush group and their allies repeatedly stressed that there was no indication that such a recount would yield a different result than that already produced by the counting machines, which James Baker said were "neither Republicans nor Democrats."²³ The polls might have provided one such indication that a different result was at least possible--particularly any exit polling data from Palm Beach County. I have been able to find no information that isolates such results. In this area, where there were thousands of discarded overvotes and appalling confusion over the butterfly ballot, exit polling data, no matter how limited, might have thrown light on a difficult situation. The American people should have had access to these polls. I suggest these exit polls were ignored not only because they were called into question by some analysts, but also because *we were regarding the election as a game that had been played, not as a democratic institution.* The point was to do everything possible to make sure one's candidate won and that the matter was quickly resolved, not to determine who was elected president.

This point is supported by the recently released results of the so-called "consortium" of major media outlets. The consortium's examination of Florida ballots suggests the election was too close to call; but the consortium ignored the thousands of overvotes Gore almost certainly received in Palm Beach and Duval Counties, where confusing ballots led many to invalidate them by marking their ballots in two places. The consortium believed these votes could not reasonably be counted because the voters had violated the election rules.²⁴ This is an excellent example of why it is a bad idea to think of the presidential election as a game. *Suppose the goal had been to determine which candidate had more of the Florida electorate attempt to vote for him?* Gore would have been elected. In a game, what actually happened would make perfect sense. You have to follow the rules or you are not playing the game; and when the game is "over," it is inappropriate to keep challenging the outcome. In an election, construed as a democratic institution, the goal should have been to ascertain the will of those who went to the polls, not to discover who was "playing the game" correctly under extremely puzzling circumstances and in the designated time period.

Because of the distortion of regarding the election as a sport or game, instead of as a democratic institution, we are led to another misrepresentation that is arguably more serious than who won the presidency. I have titled this paper, "When a 'W' is not a 'W'." Whoever was declared president in the aftermath of this very contested election, the mandate of the American people was clear. With Gore winning the popular vote decisively and Bush supposedly eking out a victory in Florida to inch ahead in the Electoral College and become president, the American people were obviously very closely divided. Whoever was declared president needed to respect that close division and move toward the political center. Instead, George W. Bush has only paid lip service to the sort of compromise and bi-partisanship indicated by the outcome of this presidential election.²⁵ The justification for such behavior seems to be that "A 'W' is a 'W'"--that even an *ugly win*, even an incredibly close win--is still a win. It is not a tie, and the winner receives all the privileges of victory.²⁶ If we renounce the sport/game model of the presidential election, however, the claim that "a win is a win" no longer has the same force. In fact, if the goal is to recognize the voices of the electorate, a win surely is not a "W" in this case.

The clear obligation of whoever assumed the mantle of president was to bring the nation together. To the extent that Bush has attempted to do this, he has attempted to bring us together "on the right"--as have many members of his own party. In effect, George W. Bush echoes the lyrics of an old Jim Croce song, "If you're going my way, I'll go with you."²⁷ If this becomes the norm in U.S. politics, it will no longer be possible to be in the minority and have any impact on our society. Political "losers" will become the "Rodney Dangerfields" of our political landscape.²⁸ They will get no respect. This is, of course, the essence of dictatorship. Power is not shared; and electoral procedures eventually become meaningless gestures.

I do not suggest that George W. Bush is not president. In raising questions about the way the election was decided, I am not suggesting that we should change presidents in the way that, for example, a professional football team might change quarterbacks if the designated hurler fails to win games or if the way he was selected is called into question. I support *the institution of the Presidency*, in a way that would be inappropriate if we were discussing a professional football team's quarterback. There is no such thing as *the institution of the quarterback*.²⁹ This is a further manifestation of the impropriety of comparing our political institutions to sports or games. We should not sweep the problematic nature of last year's presidential election aside in an attempt to assure continuity and stability. In reexamining how we decided the election, we are not revising that decision. Nor can we mandate that George W. Bush bring us together in the center, as I suggest would be a more plausible interpretation of the election than the one Bush and his advisors seem to have chosen. The goal is to assure the integrity of the procedures we use in supporting one of our most important democratic institutions by examining conditions that may contribute to such an ambiguous result--in

particular, by exposing the inappropriate use of the rhetoric of sports/games in arguing the matter in the media and presenting it to the American people.

Bush supporters might try to counter the arguments of this paper by arguing that there were many irregularities in last year's presidential election--irregularities in States other than Florida. At the time of the election, many argued that Bush's aids should have contested other electoral results if they believed they were incorrect. I focus on the Florida result because that became the key to the election. I have argued that an analogy between the election and a sport or game was used by Bush associates--especially his spokesperson James Baker--and the media to frame the public debate about the Florida presidential election. I have not gone further and contended that this use of the rhetoric of sports/games *determined the outcome* of the election. I *have* argued that describing a presidential election in terms of this analogy misrepresents the fundamental character of one of our most important democratic institutions. E. J. Dion, commenting on the Supreme Court's decision in favor of Bush, elaborates on this theme:

Bush, with help from the nation's highest court, was allowed to *run out the clock* in what is not supposed to be a *game*. This court majority has handed Bush the presidency in a way that can only make an excruciating job even more difficult. Robert A. Nisbet wrote long ago about the difference between "power" and "authority." Power, he said, is "based upon force." Authority is "based ultimately upon the consent of those under it." In a democracy, we recognize the authority even of leaders with whom we disagree because we accept the legitimacy of the process that got them there. Bush now has power. He will have to earn authority.³⁰

To conclude: Justice is the most important virtue of what is arguably our most important political institution--the election of our president. Justice requires that we not deny citizens their votes because their balloting procedure has malfunctioned or because we are unwilling to do elaborate hand recounts. If we allow our electoral process to be regarded as a kind of game, as I argued (and as E. J. Dion apparently concurs) we did, we not only jeopardize the president's moral legitimacy, we also risk losing our ability to govern ourselves. This is especially true if the norm in such cases is: A "W" is a "W." Some worry one of the candidates will have "sour grapes" over the outcome of the election; I worry we will reap "the grapes of wrath" because of what has been done to our most important democratic institution.

Notes

¹ Robert Scheer, "Wait Till Next Season Despite Gore's Fumbles, Democrats Will Be Back," editorial, *Pittsburgh Post-Gazette* 7 Dec. 2000, Sooner ed.: A31. Note: I cite only those sources required to support particular points; but I have examined a very large volume of print and electronic media discussing the election which refers to the analogy discussed in this paper. I have located only one such source, by E. J. Dion, quoted at the end of this paper, that is openly critical of the comparison between the election and a game.

² As a philosopher of social science, I am not even sure what such a "definitive proof" would involve. I have, however, now constructed the rudiments of an argument to the effect that the United States Supreme Court's decision in *Bush v. Gore* only makes sense if the election were regarded as a game. Paper-in-progress.

³ Loren Mell, letter, *The Seattle Times* 29 Nov. 2000, fourth ed.: A11.

⁴ Felicity Barringer, "Counting the Vote: The Reaction," *The New York Times* 24 Nov. 2000, late ed.: 42.

⁵ It was, of course, understood that absentee and military ballots would have to be counted; but it was assumed that these were already "cast" and "in the mail" when the election "ended."

⁶ Doug Smith, "Bucks Win Ugly over Sick Sixers," *The Toronto Star* 27 May 2001, Sunday first ed.: Sports.

⁷ Joseph H. Brown, "'Sore Loser' Could Have Fit Either Side," *The Tampa Tribune* 17 Dec. 2000, final ed.: 6.

⁸ Jill Lawrence, "Election Night's Story: Too Close to Call," *USA Today* 8 Nov. 2000, first Chase ed.: 3A.

⁹ David Lightman, "U.S. Bench: Holding the Key to the Presidency," *The Hartford Courant* 1 Dec. 2000, Sports final ed.: A1.

¹⁰ Andrew Sullivan, "The Mounting of a Legal Insurrection," *Sunday Times* [London] 10 Dec. 2000: Overseas news.

¹¹ I am not suggesting that Bush or his advisors ever laid this argument out in the precise way I do here. As I said earlier in the paper, I believe Bush's associates "implied" something like this argument in their discussions with the media, and thereby with the American people. Nor, to emphasize another earlier point, do I contend that this argument necessarily "resolved" the Florida electoral crisis, and so determined the election. I maintain that this argument reflects the way debate about the election was framed in the mass media, with encouragement from the Bush camp.

¹² Thomas R. Dye, Lee Seifert Greene, and George S. Parthemos, *Governing the American Democracy* (New York: St. Martins Press, 1980) 49-51.

¹³ Howard Troxler, "Bad Calls, Fumbles No Excuse for Final Score," *St. Petersburg Times* 10 Nov. 2000, South Pinellas ed.: 1B.

¹⁴ Brown 6.

¹⁵ Mike Kupper, "Aftermath: Baseball Ponders Whether the World Series Should Continue," *Los Angeles Times* 18 Oct. 1989, home ed.: C7.

¹⁶ Mell A11.

¹⁷ Troxler 1B.

¹⁸ I said "consistent with." I am merely suggesting that some sort of remedy "consistent with" the sort of thing done in the Candlestick Park case is suggested by the situation in Palm Beach County. I am not advocating a specific remedy; though I believe simply urging that "the rules" be "followed" ignores the special character of the situation.

¹⁹ Barringer 42.

²⁰ Dye *et. al.* 50.

²¹ *Michigan Information and Research Service, Inc., Capitol Capsule*, (Issue 227, Vol. XVIII) 27 Nov. 2000: 1.

²² Howard Fineman, "Unsettled Scores," *Newsweek* 17 September 2001: 26-28.

²³ Rupert Cornwall, "U.S. Election Special: Bush Fails to Block New Florida Recount," *The Independent* (London) 12 Nov. 2000: 20.

²⁴ David Corn, "Bush and the Butterflies." *The Nation*. 3 Dec. 2001: 5-7.

²⁵ Jack Torry, "President's Bipartisan Words Hollow," *The Columbus Dispatch* 29 Mar. 2001: 15A.

²⁶ Smith Sports.

²⁷ Jim Croce, *Photographs and Memories: His Greatest Hits* (New York: Blendingwell Music, Inc., 1974) 33-34.

²⁸ "Canadians Give NBA Basketball No Respect," *The Toronto Star* 4 May 2001, first ed.: Sports.

²⁹ I thank my friend, Mr. David Zin, for suggesting this way of explaining this point and for some general help and encouragement with this paper.

³⁰ E.J. Dion, "And the Clock Ran Down," *The Denver Post* 14 December 2000, 2D ed.: B-11. My italics. E. J. Dion is a Washington Post columnist and a senior fellow at the Brookings Institution.

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**Elections and Temperament:
Rancor and Hyperbole After 32 Years of De-Alignment
(Research Note)**

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For representative governments to work, citizens must have an abundance of two qualities not easily acquired, reason and proper temperament. The reason for reason seems obvious enough; we would like citizens to be informed and to vote consistently with their interests and their beliefs. Citizens don't have to be geniuses or policy wonks, but they certainly shouldn't be so overcome by passions that reason is swept away. The reason for a proper temperament is also rather obvious, but less attention is paid to this quality--unless one studies democratization globally. For representative government to work citizens must be good winners and good losers. Citizens don't have to embrace those they have defeated or those who have defeated them, but they do have to accept the results and wait to do battle in the next election. Winners must avoid the temptation to reeducate, restrain or remove losers once the winners hold political power, and losers must resist the temptation to alter the results by violence. With two glaring exceptions, the Alien and Sedition Acts of 1798 (bad winners) and Lincoln's election in 1860 (bad losers), American presidential elections have been marked by a proper temperament. For a country so well armed, we have remarkably low levels of election-induced violence.

Given this rather nonvolatile past, the most interesting development to come out of the 2000 presidential election is the rancor and hostility penned by editorialists in major publications after the 2000 presidential elections. This was particularly the case with conservative publications that sought to demonize Gore and to raise the specter of a "constitutional crisis." The *Weekly Standard* and the *Wall Street Journal* accused Gore of a *coup d'etat* and of impeachable offenses because of the litigation he began in Florida.¹ James Baker, speaking for the Bush campaign, could simply not stop himself from declaring we were in or were on the verge of a "constitutional crisis." This claim of constitutional crisis was absurd; Bush and Gore made it clear that they would abide by court decisions and recounts.² If members of their campaigns had engaged in drive-by-shootings of their opponents then one might entertain this claim, but litigiousness can be a sign that a system is working, not failing. (Litigiousness is certainly preferable to violence.)

I want to point out one the reasons I think the conservative press resorted to such rancor and hyperbole in the 2000 election. One may be tempted to suggest that this was a carry over from the conservative mudslinging of the Clinton years. (Bill's low morals brought out the worst in his opponents.) However, I think the source was born of a deep frustration, a frustration that is the result of a change in presidential politics traceable to

1968. To understand why 1968 is a pivotal point we need to examine the idea of critical elections.

Political scientist Walter Dean Burnham developed the concept of critical elections and electoral realignments.³ Examining turnout levels for presidential elections, Burnham noted peak turnouts in 1860, 1896 and 1932. Inspecting those elections more closely, Burnham noted other interesting characteristics of these elections:

- (a) a third party emerges (except in 1932) and it brings new ideas and new policies to the national agenda;
- (b) a plurality of the voters identify with one party, often realigning to the other party;
- (c) during the 36 year periods the realignment causes one party to dominate the presidency;
- (d) the party that dominates the presidency also dominates the Congress thus allowing united rather than divided government.

These elections are critical elections because they establish political agendas for the next 36 years. Furthermore, they provide the opportunities for electoral realignments where one party maintains such a large plurality of voters that the party easily dominates national politics.

The election of 1860 is the “purest” example of a critical election/electoral realignment. The Republicans, led by Lincoln, were the new third party and they championed the end of the expansion of slavery and the interests of the rural north. They dominated national politics for the next 36 years. The 1896 election fits the model well with a strong third party, the Populists, and a new agenda featuring urban concerns and international trade issues. The Republicans, led by McKinley, remained the dominant party but shifted their agenda and their base of strong support. The 1932 election has all the right features except that no third party develops. FDR led the Democrats to victory in 1932 and his farm-labor-southern-urban-minority coalition would dominate American politics into the 1960s. This coalition’s policies generated the American version of the welfare state. FDR’s realignment proved so strong that only one Democratic president in 36 years faced divided government and that was for only two years of Truman’s second term. The only Republican elected during this period was Eisenhower and he ran more as a General than a Republican.

If the 36 year time period remained in place after 1932, then the next critical election should have taken place, of course, in 1968. Indeed, 1968 met some of the conditions for a critical election. There was a third party, Wallace’s American Independents, that raised a series of issues about affirmative action, state’s rights and the welfare state that were incorporated into the Republican agenda (and Clinton’s also) during and after 1968. Voter turnout was high compared to recent elections, and a Republican captured the Presidency. However, the Democrats did not give up the Congress *and* voters did not realign to the

Republican Party. Republicans could not wrest control of the House away from Democrats, even during the Reagan Presidency, until 1994. (The frustration of divided government during the Reagan years fueled the term limits movement, a movement abandoned by conservatives once Gingrich became Speaker of the House in 1994.) Thus, although the Republicans could win the Presidency they could not pursue their own agenda effectively because of divided government. When the Republicans finally gained control of the House they had to deal with a Democratic President who somehow “stole” the Presidency from a Republican administration that only 10 months before the election had registered approval ratings (91%) that most political scientists considered unachievable.

Although Republicans could count on support for their presidential candidates, a realignment failed to occur when increasing numbers of voters became Independents rather than Republicans. Even in closed primary states, like Florida, where it makes little sense to be an Independent, the number of Independents now is over a third of the electorate. Fewer and fewer citizens identify with the parties and those that do identify with a party tend to do so less strongly than partisans once did.

The failure of either party to lure enough voters to avoid divided government has led to the bruising strategies of ethics complaints, special prosecutors and public humiliation. There is now even an acronym for the acrimonious tactics during divided government: RIP for Revelation, Investigation and Prosecution.

The frustration of having an agenda of new ideas in the face of those Democrats doggedly conserving the remains of the welfare state is almost too much for conservative commentators. These conservatives feel, quite ironically of course, that they are entitled to govern. That is why the conservative editorials reproduced in *Bush v Gore: The Court Cases and the Commentary* represent an entitlement conservatism that is both smug and nasty.⁴ This entitlement conservatism is, fortunately, largely restricted to party activists and editorialists. We have been reminded constantly by conservatives that an entitlement mindset can produce sloth and a bad attitude. They may be right.

Notes

¹ These two editorials can be found in E.J. Dionne Jr. and William Kristol, *Bush v Gore: The Court Cases and the Commentary* (Washington, D.C.: Brookings Institution Press, 2001) 167-175.

² For an example, see Susan Jones, "James Baker: No One's Claiming Fraud," CNSNews.com. 9 Nov. 2000. <http://www.cnsnews.com/ViewPolitics.asp?Page=%5Carchive%5Cpol20001109c.html>

³ Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: Norton, 1970).

⁴ Dionne Jr. and Kristol.

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**Alan M. Dershowitz, *Supreme Injustice:
How the High Court Hijacked Election 2000***
(New York, Oxford UP, 2001). Pp. 275, ISBN 019-514827-4 \$25.00

Reviewed by
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Alan Dershowitz's *Supreme Injustice: How the High Court Hijacked Election 2000* provides a thorough, albeit at times partisan, account of the 2000 Presidential Election. Dershowitz's analysis enables specialists and non-specialists alike to appreciate the complexity of the issues involved in determining the "real" or "legal" winner in the 2000 Presidential Election. He attempts to clarify some of the more important misunderstandings of the High Court's decision exposing some of the implications related to judicial review. Dershowitz does little to point out, however, that ideological conflicts and partisanship are encountered in jurisprudence generally and that one could rightly question whether all of the Supreme Court Justices acted in a partisan fashion. He tries to maintain that he and the four dissenting Justices have recognized the "correct" legal interpretation in an impartial, objective, and neutral fashion. This, as one might expect, is asking too much of the process of adjudication.

Dershowitz begins by outlining the events that led to the "supreme injustice." He explains in moderate detail the steps that led to the Supreme Court decision identifying the nuances in the Florida Supreme Courts' decisions, Florida's Secretary of State Katherine Harris's interpretations of the law, and the interpretations by lower courts in Florida. He recognizes the centrality of the "equal protection clause" and provides a thorough analysis of the status and role of precedent and possible interpretations and misinterpretations of the "equal-protection clause." He argues that the United States Supreme Court played a game of cat and mouse with the Florida Court knowing all along that the equal protection clause would be applied. As Dershowitz claims, and as Souter and Breyer point out, the equal-protection problems could have been avoided had the U.S. Supreme Court been more forthright in its original *per curiam* remand. Furthermore, Dershowitz provides helpful insights regarding the imperfect ballots and prior court rulings, namely, the "No.2 pencil case," that suggests the Florida Supreme Court ruled consistently based on precedent. As a consequence, the U.S. Supreme Court's decision to reverse the Florida Court's decision led to an interpretation of the law that was not only inconsistent with the statute but also with precedent. The Florida Supreme Court ruled in 1998 that, although voter error led to undervotes because voters had failed to use a No. 2 pencil, the State had to count those votes. This suggests, as Dershowitz argues, that voter error does not, as the Supreme Court Majority maintained, constitute an illegal ballot.

The question of discerning intent, Dershowitz argues, is clearly delineated in the Florida Statute and, as a consequence, the Florida Supreme Court's interpretation of the law remained

clearly within the court's purview. He points out plainly that Charles Fried, now a lawyer for the Republicans, inconsistently justified the High Court's ruling. One must keep in mind, Dershowitz explains, that in 1996 Fried provided an argument maintaining that discerning a voter's intention is of utmost importance because the "voters are the owners of government." Perhaps Fried could have been lead counsel for both parties.

The Florida Supreme Court Majority was, according to Dershowitz, attempting to interpret the law recognizing both the time constraints and the potential accusation that awaited them. They did provide the correct interpretation of the law. The court should always attempt to make clear that its decisions are based on principles, not on compromises due to social and political pressures. According to Dershowitz, while Breyer, Souter, Ginsburg, and Stevens are able to make this claim, Scalia, Thomas, O'Connor, Rehnquist, and Kennedy cannot. Like Charles Fried, Dershowitz argues that the U.S. Supreme Court Majority would have argued differently, though never impartially, if Gore had been in Bush's position.

As Dershowitz contends, the High Court Majority would not have stopped the hand count had Gore been ahead. Recognizing the difficulty of demonstrating judicial impropriety, Dershowitz levels an *ad hominem* attack that provides the background impetus for his legal analysis. As he mentions, "no one denies that there are also legal principles that would justify the opposite result." What Dershowitz is not questioning is whether the Majority provided a justification for their position, something all or most skilled judges can provide, but whether they provided, in good conscience, the correct interpretation and one consistent with their previous opinions.

Dershowitz shows that the majority judges were inconsistent in their application of the equal protection clause and their interpretation of Article II. Furthermore, he points out that while most legal experts could have predicted that Scalia and Thomas, recognized by Bush as "ideal justices" just months earlier, would "support" Bush, they could not have predicted that O'Connor and Kennedy would have sided with the majority. As a consequence, Dershowitz builds a substantial case against O'Connor and Kennedy showing why O'Connor may have been affected by her desire to retire and why Kennedy may have been affected by his hopes to be appointed Chief Justice.

As the 2000 Presidential campaigns made clear, the issue of Supreme Court appointments was central to this election. As a consequence, one has to contemplate how O'Connor's retirement and Rehnquist's potential retirement, at a minimum, could have affected the High Court's decision. As Dershowitz considers, we should reevaluate how we choose our justices. No one, not even Dershowitz, is suggesting this is or would be an easy task. One of the issues to consider, however, is whether a substantial change can ensure that we do not encounter another sullied presidential election.

Dershowitz goes to great length to show how political motives undermined the courts' ability to be "objective." One must wonder whether any of the justices involved were behaving in an

impartial manner. Clearly, legal decisions can have significant political implications. While the 2000 election controversy seems to be an exception, we can certainly point to other cases that are equally relevant. For example, *Dred Scott v. Sanford*, *Marbury v. Madison*, *Brown v. Board of Education*, *Roe v. Wade* are a few landmark cases where the United States Supreme Court rendered legal decisions with serious political implications. We should not try to undermine the courts, in this case, the U.S. Supreme Court. I am suggesting that we should recognize that legal neutrality, impartiality, and objectivity are part of a legal mentality that misleads the American public. More importantly perhaps, it is idealistic and unachievable, especially in court cases where the parties involved--this includes justices--have so much at stake. Although some academics called for recusal, we should ask: "who's to say any of the justices would have been left standing?" Ideological conflicts and partisanship are encountered in jurisprudence. Courts and justices do have substantive positions regarding the purpose of the law. The issue is that judges do not always agree what the purpose of the law is or should be. As Richard Posner has argued, for example, the Majority justices had to make a pragmatic decision recognizing that time constraints forced them to decide the purpose of election laws and the intent of the Founding Fathers.

Dershowitz's analysis is valuable, instructive and forces us to reflect genuinely on the 2000 Presidential Election. While he seems to argue that the five justices in question took generous leeway interpreting the laws and applying and recognizing precedent, Dershowitz demonstrates quite clearly why the American public and "cynical academics" continue to argue that adjudicative neutrality and issues of impartiality are not only disingenuous but should be made transparent. Dershowitz builds a case against Scalia, Thomas, Rehnquist, O'Connor and Kennedy. While some will be prone to agree with Dershowitz, it seems that Dershowitz spins the events in ways that favor his position. Isn't this what good lawyers are supposed to do? If he is trying to argue that legal decisions are not, for the most part, ethical and political decisions, but in this case the legal interpretation is clearly motivated by political considerations, then one might be required to consider whether Dershowitz's analysis is an interpretive analysis also tainted by his political affiliations or whether he provides an objective analysis that clearly and demonstratively identifies the wrongdoing by the Supreme Court Justices in question.

Iris Marion Young. *Inclusion and Democracy*
(New York: Oxford UP, 2000). Pp. 304, ISBN 0-19-829754-8. \$29.95

Reviewed by
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Young has a vision for a democratic world order. Her scheme is inspired, at least in part, by feminist writings on emancipation that value utopian visions as important optimistic goals towards which people work together. She is not simply idealistic, however, for she argues subtly and persuasively, using many concrete examples, against current liberal political concepts that are similar to, but slightly different from, those she develops in her book. Concepts of deliberative and representative democracy are compatible with the value Young places on heterogeneity, multiculturalism, civil discourse and communicative justice. Traditional concepts belonging to the processes of representative government are revised because of an important change in epistemological perspective. Young aims to show the difference it makes to prevailing concepts of justice and democracy when a relational model of the self is assumed. This shift from the atomistic notion of the self that is typical in Western liberal political philosophy to a relational concept of the self mirrors recent ontological shifts in discussions of subjectivity from concepts of substance, presence and self-identity to notions of difference, relational structures and embodied spaces.

The book has seven chapters, and although each stands on its own as a separate essay, they are also connected as the development of Young's political vision. The first chapter, "Democracy and Justice," presents her concept of inclusive justice as a revised version of Habermas's theory of communicative action. Young points out that in large-scale mass societies the context for the processes of democratic deliberation is not face-to-face decision-making. "The challenge for a theory of discussion-based democracy is to explain how its norms and values can apply to mass polities where the relations among members are complexly mediated rather than direct and face to face" (45). She argues in favor of proportional representation. However, rather than base representation on the opinions and competing interests of differently identified groups, she recommends that representation be structured more by the many perspectives individuals have in their plural relationships to each other and to their representatives. Her proposal is intriguing; however, in the end its implementation sounds improbable. Young admits to suggesting a new way to think about representation without also providing a practical account of how to structure a representative government on relationships rather than group identity.

In her analysis of civil discussions, Young emphasizes the importance of acknowledging differences and disagreement rather than the goal of achieving participatory

consensus. She does not assume that an underlying agreement or shared understanding is the condition for the possibility of communication. "Serious and open public dialogue is more likely . . . to reveal differences than a common good" (44). One has only to recall heated classroom discussions or an academic department's hiring committee meeting to find examples of irreconcilable differences. Although most often in such cases authority is the eventual arbitrator, Young instead defends a non-hierarchical system of institutionalized power. She develops a de-centered model of deliberative democracy that follows a version of Habermas's. "In a decentered model of deliberative democracy, the democratic process cannot be identified with one institution or set of institutions--the state, or legislative bodies, or courts, etc. Rather, the processes of communication that give normative and rational meaning to democracy occur as flows and exchanges among various social sectors not brought together under a unifying principle" (46). In keeping with her commitment to non-domination in political decision-making, Young endorses the relevance of alternative modes of political discussion in addition to argumentation.

The second chapter, "Inclusive Political Communication," addresses the narrowing of political theory to legitimate only argumentation as proper democratic communication. Here, Young develops three alternative modes of communication including greetings, rhetoric and narrative. She draws on the work of Emmanuel Levinas for her discussion of subject-to-subject recognition. Her concern is political debates that refer to certain groups in the third person and never in the second person, for example, single mothers and low income families. Their voices are never heard in debates of the very issues that directly affect them. They are neither greeted nor addressed other than as the object of the debate.

In opposition to exclusionist political discussions, Young also argues that rhetoric and narrative are both important parts of rational deliberation. "In real situations of political communication, people sometimes reject claims and arguments not on their rational merits, but because they do not like their modes of expression. They dismiss those who do not express themselves in the 'proper' accent or grammatical structure, or who display wild and funny signs instead of write letters to the editor" (70). Young discusses the function of both rhetoric and narrative to provide politically significant social knowledge from non-unified, more particularized perspectives.

Chapter three, "Social Difference as Political Resource," begins by reviewing the various arguments against the politics of difference. She reiterates her arguments against the concept of identity as the distinguishing marker for interest groups and her support of the complex, interweaving network of relationships in which individuals are engaged. However, she adds to this discussion an important spatial notion of structure to contrast with substantive notions of identity.

Young takes seriously the social construction of subjectivity and therefore, like Foucault, Bourdieu, and other social constructionists, Young focuses attention on the social relations that constitute the conditions for one's personal life, including one's social class, economic resources and degrees of prestige. She reformulates Charles Taylor's emphasis on the political importance of recognition, contending that because the politics of recognition "usually is part of or a means to claims for political and social inclusion or an end to structural inequalities that disadvantage them," the politics of recognition is more about structural inequalities than cultural differences (105). The issue is not self-identity, but self-location within a community.

In a subsequent chapter, Young considers how a deliberative form of communicative justice can be pluralistic, include other styles of speech and communication besides argumentation and be achieved in the decentered mode necessary for large-scale mass societies. She examines explanations of justice that assume a false dichotomy between the competition of private interests and the necessary putting aside of private interests for the sake of the common good. If society is structured by different relations of privilege and disadvantage, then the idea that people can share a common goal or have common interests must be critically explored (109). "Fairness," says Young, "usually involves coordinating diverse goods and interests rather than achieving a common goal" (110).

Approximately half-way through her book, in chapter five, an essay entitled "Civil Society and its Limits," Young makes it clear that the concept of justice that underpins her account of inclusive democracy has to do with self-development. She defines self-development as "being able actively to engage in the world and grow" (184). Social institutions ought to provide "conditions for all persons to learn and use satisfying and expansive skills in socially recognized settings, and enable them to play and communicate with others or express their feelings and perspective on social life in contexts where others can listen" (184).

Young then makes what may be the most provocative point of the book in its American context. Because self-development is not reducible to the distribution of resources, and because market-and profit-oriented economic processes impinge on the ability of many to develop and exercise capacities, state institutions are necessary to subvert structural injustices that produce oppression. "Authoritative state regulation can limit the harmful effects of economic power. Economic and infrastructure planning, redistributive policies, and the direct provision of goods and services by the state can minimize material deprivation and foster the well-being of all members of society" (189).

Young goes on to examine the role of civil society in promoting social justice when delimited by state organization. Here again, in keeping with her overall project, Young does

not assume that “state organization, economy and its associative lifeworld are distinct spheres or clusters of institutions” (160). Rather, they are kinds of activities. When we recognize that they are not substantively, but relationally defined activities we see how many institutions include all three activities. It is, therefore, not distinct institutions that need to be examined, but “how activities of an associative lifeworld support democracy and promote social justice.” She then discusses three levels of associative activity including private, civic and political, all three of which are interwoven activities administered by our social institutions.

Both the harms of and reasons for the continuing existence of racial and class segregation are discussed in chapter six. Along with the moral harms that segregation fosters, such as disrespect, conflict, and lack of communication, another politically significant problem is that it does not let the advantaged see the lives of the disadvantaged. On the other hand, public spaces such as public streets, squares, plazas and parks serve to displace the effects of segregation. “They importantly contribute to democratic inclusion because they bring differently positioned strangers into one another’s presence; they make concrete the fact that people of differing tastes, interests, needs, and life circumstances dwell together in a city or region” (214).

The role Young gives to both public spaces and public protest epitomizes the ideal of social and political inclusion for which Young advocates in her concept of “differentiated solidarity.” Unlike many other theories of democracy, Young’s acknowledges the normative implications of spatialized social relations. She appeals to the interconnectedness of citizens who are spatially related and proposes a form of regional democracy that respects autonomy as the right of individuals to non-interference in the pursuit of their self-chosen goals. However, this right does not imply a social structure in which atomized agents simply mind their own business and leave each other alone (231). Experience shows that agents are able to either thwart or support one another. Indeed, “agents are related in many ways they have not chosen, by virtue of kinship, history, proximity, or the unintended consequences of action” (231).

Young’s concept of differentiated solidarity is therefore not based on fellow feeling or mutual identification but on a form of respect and caring that also presumes the distance of strangers inhabiting the same region. Reminiscent of virtue ethics, differentiated solidarity is based on a commitment to justice owed to people. Moreover, one of the advantages of a political organization based on differentiated solidarity is that because it is not focused on serving either groups or spatial boundaries meant to contain or exclude, it is open to serve people who do not fit into any particular group, whether by choice or accident. At the close of the chapter Young provides a helpful sketch of regional

government as she understands it. She argues against both forced integrations and segregation and describes the ways in which a regional government can promote more equality in neighborhood quality and access to services.

In the final chapter, "Self-Determination and Global Democracy," Young discusses the boundaries of state justice obligations. To whom are we obligated? For what reasons might we be obligated to those outside the state? She begins with a discussion of the "bantustan" policy in apartheid South Africa which created "homelands" for several Black African peoples on the worst land in the region. The South African state declared the homelands as independent states and thereby absolved itself of any obligation towards the relocated peoples (239). Most nations have judged this policy as unjust because so arbitrary. Young uses the example as a measure against which citizens of first world nations can be seen to have obligations to others outside their state boundaries. She argues in support of the redistribution of goods beyond state boundaries and for stronger institutions of global governance than those presently in existence. Her discussion of the non-democratic governance of global organizations such as NATO, the Security Council, the United Nations, the International Monetary Fund, and the World Trade Organization is instructive. However, Young remains mystifyingly optimistic about the future of democratic global governance.

In summary, Young's book is accessibly written and virtuously jargon-free. She offers probing criticism of current debates and positions without alienating the reader unfamiliar with the various theories. Her professorial penchant for explanations and clarifications makes the book seem somewhat formulaic, but therefore also a good resource for upper division and graduate level courses. It encompasses several political theories, provides clear definitions and excellent bibliographic references for both feminist and non-feminist political philosophy. Like other careful thinkers, Young often states what one already knows, but never tried to articulate for oneself.

Michael Forman. *Nationalism and the International Labor Movement: The Idea of the Nation in Socialist and Anarchist Theory*
(University Park: Pennsylvania State UP, 1998). Pp. 212. ISBN 0-271-01727-9.
\$19.95.

Reviewed by
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Nationalism and the International Labor Movement: The Idea of the Nation in Socialist and Anarchist Theory is a review of the ideas that some primary socialist thinkers developed about the ideas of “nation” and “nationalism.” Divided into an introduction and four chapters, the book offers interesting and coherent perspectives on the subjects “nation” and “nationalism.” Each of the first three chapters presents the views of the main figures of the First, Second and Third International, while the last chapter formulates Forman’s conclusions about the place and role which the two concepts (“nation” and “nationalism”) have had within socialist theory and how some present political developments in Eastern Europe can be interpreted in light of such a theory.

Ideas about the origin of the nation seem to divide socialist thinkers into two groups. From one point of view, the idea of “nation” has developed from historical communities and refers to many of the community’s characteristics. From the second point of view, the concept of “nation” is a political creation of the capitalist order and does not have many linkages to ancient small communities. Those who shared the former standpoint considered the state as responsible for the conflicts between nations; among them, Mikhail Aleksandrovich Bakunin’s was perhaps the most important voice. Karl Marx and Frederick Engels are the main figures advocating the second idea; they discussed the notion of “nation” as important for the dominant class and less relevant for the working people. As they said, the workers have no country, and have to put aside any ideas about nationalism, focusing instead on the class struggle.

Marx, Engels and Bakunin were the major figures of the First International; as for the Second International period, Forman analyzes Vladimir I. Lenin, Rosa Luxemburg, and Otto Bauer (68). Properly, Lenin never developed a concept of “nation;” his concepts of “nation” and “national” were rooted in Karl Kautsky’s ideas. Lenin’s ideas changed after the Bolshevik revolution succeeded, but he continuously advocated nations’ right to self-determination (79). He extended Kautsky’s arguments, claiming that the support for the national liberation movements has to take into account the developing stage of the country or nationality that needs to be helped to realize the right to self-determination (81).

In opposition to Lenin, Rosa Luxemburg did not consider the autonomy of various ethnicities coexisting within the same state as a solution to ethnic problems. Her position “was antinationalist but not anti-nationality” (84); she distinguished between support for

nationalism and opposition to persecution. She advocated administrative autonomy for Congress Poland in terms of “rational purposive action” not in terms of “nation” and “nationality.” She thought that “nation,” “nationality,” and “national interests” were political constructions and only served capitalist interests.

The nation, in Bauer’s formulation, was not a collection of “empirical characteristics such as language, territory and customs” or a “vague set of peculiarities.” There are two important notions in Bauer’s concept of “nation”: *community* and *national character*. Community is a derivative of Kantian philosophy, and represents a force that binds people internally, the result of a “shared experience of living the same fate” (98). Kant considered a nation as being a “relative community of character” and the formation of a “national character” as resulting from ongoing interaction within the cultural communities (99). National character is, for Bauer, the set of the intellectual and cultural tastes characterizing people belonging to a nation when they are compared with people belonging to another nation. The explanation he gives for the nationalism of Southern Slavic nations seems to be important especially in view of the present revival of nationalism in Eastern Europe, especially in the Yugoslavian area. He thought that those nations who lived for a long time under the domination of others had not developed a consciousness of their being national communities. For them, nationality is “an instrument of class struggle in the hands of the dominant-nation bourgeoisie.”

Forman suggests that for the Third International the emergence of Bolshevik Russia was a very important fact. Internationalism changed its meaning, and began to be closely related to Russia as a nation within a “hostile system of states” (120). Within this part of the book, Forman analyzes two bodies of ideas about “nation” and “nationalism,” namely, Josef Stalin’s and Antonio Gramsci’s. Gramsci’s original understanding of the civil society and of the role of culture and ideology is the chief reason for which Forman chooses him as representative of this period. In contrast, Stalin is included here for his political role rather than for the importance of his ideas.

Stalin was pragmatic in his outlook; his thought generally developed as a practical response to real political facts, events and situations, and his approach was openly an anti-theoretical one. He wrote about “nationality” and “nation” only in addressing Russia’s specific condition as a multinational state, underdeveloped economically and politically. Stalin considered international solidarity as reducible to loyalty to the USSR, and claimed that the substance of ethnic conflicts disappeared in the new Bolshevik state as a result of the Communist revolution.

Forman understands Gramsci’s notion of “nation” in close relation to the Italian context. Gramsci studied the relationship between state and civil society, trying to see how a nation could be built. This aspect was important for the Italy of those years: a rather poor

country, lacking linguistic unity, with an intellectual elite who had no understanding of ordinary people's cultural horizons.

Easy to read and agreeable, Forman's book offers a well-documented overview of the concepts of "nation" and "nationalism" deployed by the thinkers of the international labor movement. The roots and developments of the ideas presented are explained in each chapter, giving coherence to the discourse. Importantly, Forman believes that the concepts of the socialist theoreticians could be related to the present revival of nationalism in some of the former Communist countries.

Forman's suggestion that concepts of "nation" and "nationalism," as developed by the International labor movement, underlie present political developments in Eastern Europe is both interesting and potentially illuminating of those developments. This can be considered as an excellent argument for reading a book about socialist thinkers long after Communism collapsed. There are some insights developed in this book that could be employed successfully in understanding the evolution of events in the contemporary Balkans. Forman, for example, explains the revival of nationalism in Yugoslavia after 1990 as a result of "segmented structure of the state" (175) and of the adoption (by the participants in these events) of the "Leninist language of national rights and self-determination" (176). However, these evolutions (the war among the various ethnicities of the Yugoslavian Federation) can be explained from other perspectives too. Bauer's ideas are a good example of this. Bauer argued that, because in Eastern Europe the process of nation formation was related to the fight against a foreign bourgeoisie, nationality was "a weapon in commercial competition" (105). From this perspective, what happened in Yugoslavia after 1990 could be viewed *also* as a result of some major economic discrepancies among the republics of the Yugoslavian Federation, as well as of the general decrease in the standard of living. Both were transformed into national hate, and the "others," those who did not share the same ethnicity, became viewed as responsible for the economic problems. They were "oppressors" and had to be fought. (It is worth noticing that many forms of anti-Semitism have been explained as having similar economic roots.)

Consequently, Forman's book could be read not only as a review of some interesting historical perspectives on "nation" and "nationalism," but also as a valuable source of ideas helping us understand some contemporary political developments. Even if this line of thought is present only in the book's introduction and conclusions, and although Forman does not systematically follow up on this fascinating possibility, his book can be considered a good starting point for future approaches to understanding nationalism and current affairs in Eastern Europe.

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Florida Philosophical Review: The Journal of the Florida Philosophical Association announces two calls for papers for Volume II, Issue 2 and Volume III, Issue 2 to be published in December 2002 and December 2003, respectively. We invite submissions from all interested persons both inside and outside the State of Florida. *FPR* is an anonymously refereed, indexed publication adhering to standards of professional excellence. We welcome submissions representing a variety of philosophical approaches.

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- Peace and Reconciliation
- Understanding the 'Other'
- Conceptions of Rationality
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- Other issues of relevance from epistemological, ethico-political, socio-cultural, and general philosophical standpoints

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