

Anatomy of a Constitutional Coup

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After one of the most boring presidential campaigns in history, Americans were sleepwalking their way to the ballot box in November 2000 when a crisis hit—after it was supposed to be all over.

Call it a crisis of the written Constitution, caused by the enormous historical gap that has opened up between the Constitution of 1787 and the living Constitution of the twenty-first century. During the thirty-five days following the election, the written and living Constitutions interacted in unpredictable and awkward ways that challenged America's commitments to democracy and the rule of law.

The challenge proved too great for the country's political and legal elite. The Republicans managed to get their man into the White House, but at grave cost to the nation's ideals and institutions. It will take a decade or more to measure the long-term damage of this electoral crisis to the presidency and the Supreme Court, but, especially in the case of the Court, *Bush v. Gore* will cast a long shadow.

According to the living Constitution, the American president is the leading symbol of the nation, the bearer of a democratic mandate. This commanding office is largely a creation of the twentieth century, however, the work of leaders like Wilson, Roosevelt, and Reagan. It bears no resemblance to the presidency that the Founders wrote into the Constitution. Fearing that universal suffrage and direct election to the presidency would enable demagogues like Caesar or Cromwell, or another tyrant like George III, to destroy the nascent Republic, the Founders envisioned the American president as a dignified notable, with sharply limited powers, presiding over a federation of states.

The Electoral College expresses this federalist vision. Each state counts, not each voter. Populous Pennsylvania and tiny Delaware, equal states, each represented by two senators, got two electoral votes apiece. Pennsylvania wields more votes in the College only because it also obtains an elector for each of its seats in the House of Representatives, awarded on the basis of population. Thus a small state like Delaware has three electoral votes (two senators, one representative) and big states like Pennsylvania many more (two senators, many representatives). This formula expresses a substantial bias towards states' rights.

The Philadelphia Convention expressed the same federalist tendency when deciding who should vote for president, by delegating the franchise question to each state's legislature. Indeed, the legislatures were even free to name their

state's electors without referring the matter to the larger voting public, and many legislatures availed themselves of this privilege during the early decades. These eighteenth-century ideas have been swept away by history, but the text has remained basically intact. In 2000, as in 1787, the Constitution penalizes states with large populations; and each state selects individual electors to cast ballots as if they were making independent judgments. To emphasize the federalist nature of the choice yet further, the electors do not even travel to Washington, D.C. They vote in their states, and send their ballots to Congress for counting.

George W. Bush's victory is entirely a product of the federalist bias inherited from 1787. Al Gore won the popular vote by more than 500,000, carrying California, Illinois, New York, and Pennsylvania. But he won only twenty states (plus the District of Columbia, which votes like a state for this purpose). In contrast, Bush won thirty states, even though he managed to carry only Florida and Texas among the major prizes. Bush's sweep of the small states netted him eighteen extra votes in the Electoral College—rather a lot, considering that he beat Gore by only four.

This will inevitably make him a weak president, but not an illegitimate one—at least not if we assume that his win in Florida was legitimate. In turning to this question, it is important to keep one basic point in mind: the federal Constitution imposes few constraints on the way each state structures its own form of government. This means that the practical operation of the Electoral College depends on how Florida chooses to organize its own voting process.

Despite Gore's national lead of half a million votes, Florida's twenty-five Electoral College votes turned on a few hundred ballots. Under the circumstances, it made sense for both sides to go for broke. This point was made most explosively in Miami, where more than ten thousand ballots had been rejected by the city's pathetically inadequate voting technology. As the election board prepared for a manual recount, a Republican mob successfully intimidated them into calling it quits. Who funded and organized the mob? No less tantalizing: why was Gore so ineffective in stiffening the election board's resolve? Newspaper accounts suggest that the Elián González affair was to blame. When the Clinton administration seized Elián, it so alienated local Democratic politicians that they were unwilling to help Gore in his hour of need. The Republicans were more fortunate in their choice of party warriors. Secretary of State Katherine Harris, a co-chairman of Bush's election campaign in the state, suffered from an obvious conflict of interest. Without question, she should have disqualified herself, leaving legal rulings to career officials in the Department of State. Nevertheless, Harris single-mindedly proceeded to block, delay, or nullify any manual recount that threatened Bush's diminishing lead.

It is a mistake to linger on the role of the well-placed mob or the well-dressed flunky. Florida's election choice would be determined by much higher powers: the Florida Supreme Court. Throughout the crisis, it had one overriding aim: to ensure that all challenged votes were counted. This is not remarkable, as Florida's constitution emphasizes the sanctity of the vote, and its laws expressly allow for manual recounts.

At the same time Florida's election code is the work of many decades, and contains ambiguities and inconsistencies when read as a whole. This is typical in the law, and the Florida court was on firm ground in harmonizing different provisions by reference to the fundamental purpose of an election law in a democracy. All serious scholars recognize that the ramshackle American election system would collapse if state courts failed to demonstrate an ongoing commitment to basic democratic principles.

But the Florida court's political complexion provided an excuse to discredit its decisions. All seven members were Democrats appointed by previous Democratic governors (with the partial exception of one appointment in which Governor Jeb Bush participated). This allowed Republicans to denounce the judges as partisans who were trying to steal the election.

During the early stages of the controversy, Jeb Bush retired from public view, allowing his secretary of state, Katherine Harris, to take the political heat. As Florida's courts began to threaten his brother's victory, however, he re-emerged from the shadows to endorse a breathtaking proposal: if the judges insisted on counting the votes rejected by machines, why not take the presidential decision out of the hands of the voters?

Governor Bush's weapon was the written Constitution. The 1787 text does not guarantee the right to vote in presidential elections: it simply authorizes each state legislature to determine how its electors should be chosen. Bush called on his fellow Republicans to act "courageously," and return to the early days of the Republic when legislatures ignored the voters and appointed electors on their own initiative. Under Bush's plan, these legislatively appointed electors could then vote for his brother even if the courts found that the popular vote had gone to Gore. The Republican leaders of the Florida legislature called a special session to do their governor's bidding, and the Florida House of Representatives had already named a Bush slate when the crisis reached its climax. With the Bush family at its head, the Republican party was making a brazen effort to seize the presidency by assaulting the state courts and wresting power away from the voters—all in the name of the written Constitution.

The only thing that stopped this Constitutional coup was the United States Supreme Court. Just as the Florida senate was preparing to endorse the Bush slate, the Court intervened to stop the Florida recount, and establish George W. Bush as the next president. With its mission accomplished by higher powers, Florida's Senate quickly adjourned in the hope that the attempted Bush coup would be quickly forgotten.

This would be a mistake, however: not only because of what it tells us about the Bushes but also for what it tells us about the American Constitution. Suppose that the United States Supreme Court had stayed on the sidelines, and allowed Florida to determine its own electoral destiny. In this scenario, the state could well have sent sets of votes from two different groups of electors to Washington: one slate certifying the judicial conclusion that Al Gore had won the election of November 7, the other certifying the legislative decision in favor of Bush on December 13. How would Congress have resolved the conflict when it convened on January 5 to count the electoral votes?

With difficulty, but not without precedent. In 1876 the country was still experiencing the aftershocks of civil war, and elections in three Southern states, including Florida, were so chaotic that rival governments in each of these states submitted rival electoral slates to Congress. In response, Congress appointed a special bipartisan commission—consisting of five congressmen, five senators, and five justices of the Supreme Court. After considering the rival slates, this commission awarded the presidency to the Republican candidate, Rutherford B. Hayes. Then, in 1887, Congress passed a statute ensuring that things would be easier the next time. This statute would have guided Congress, as it chose between the Gore slate picked by Florida’s voters and the Bush slate picked by its legislature. But there would have been a problem, for the statute requires the two houses to agree on a single slate, and Republicans controlled the House, while Democrats controlled the Senate.

This split might not have entailed a deadlock. Both houses were controlled by very narrow margins, and the Bush coup in Florida would have provoked a great argument across the nation. The ensuing debate might have forced a few Republican moderates to vote for Gore. After all, it was not going to be easy to explain to outraged constituents why they had insisted on Bush after he had lost both the popular vote by 500,000 and the Florida vote by a hair—merely because his brother managed to ram a piece of paper through the Florida legislature. Suppose, however, that the Republican majority in the House had stood firm. The 1887 statute is drafted too imprecisely to tell us what should have happened at this point, and some form of creative compromise would have been required. My best guess is that Congress would have followed precedent and created an electoral commission with five senators, five congressmen, and five Supreme Court justices. The five justices might well have cast the deciding votes, but they would have been acting in a plainly political, rather than a judicial, capacity, and their decision would not have tainted the future operation of the Court. This is, of course, precisely what didn’t happen. Rather than stand on the sidelines, the Supreme Court flung itself into the political vortex. Curiously, the Court denies that it had any choice in the matter, asserting that it is “our unsought responsibility” to resolve the case. Every American lawyer knows otherwise. Like thousands of cases each year, *Bush v. Gore* appeared on the Court’s discretionary docket. Since the Court accepts only eighty of these requests for a hearing, it was aggressively displacing Congress in its zeal to decide the election.

Judicial activism is not necessarily a vice in America—so long as it is thoughtfully conceived and carefully executed. In the Court’s famous interventions in the past, the justices have made heroic efforts to achieve unanimity, or something close to it, before rushing to the center of the political stage. *Brown v. Board of Education* was unanimous, as well as *Marbury v. Madison*, and even *Roe v. Wade* was initially decided by a vote of seven to two. But the Court awarded the presidency to Bush by a five to four vote, with the dissenters filing bitter public protests. Nor was there much time for deliberation. The Court typically labors many months before handing down a significant judgment: *Bush*

v. Gore was issued thirty-four hours after oral argument. This is not a recipe for clear legal thinking.

There is only one serious defense for the Court's precipitous leap into presidential politics. In my hypothetical sketch the House and Senate come to a common-sense solution, either picking the Gore slate or following the precedent of a bipartisan electoral commission. But pessimists might foresee hordes of right- and left-wing extremists marching on Washington, Congressional elites deadlocked, and the situation spinning out of control. (Had the impasse continued beyond the end of Clinton's term, existing law would have authorized the Speaker of the House, Dennis Hastert, to serve as acting president until Bush or Gore was finally selected.) If one is haunted by the specter of acute crisis, one can view the justices' intervention more charitably. However much the Court may have hurt itself, did it not save the larger Constitutional structure from greater damage?

Perhaps. But even pessimists should question the way the Court chose to intervene. The more democratic solution would have been not to stop the Florida courts from counting the votes, but to stop the Bush brothers from creating constitutional chaos by submitting a second slate of legislatively selected electors. The Court could have taken care of all the serious difficulties by enjoining Jeb Bush not to send this slate to Congress. With the legislative slate eliminated by judicial decree, the legal situation would have been dramatically clarified. Like every other state, Florida would then have submitted a single slate of electors—pledged to Bush or Gore, depending on the outcome of the final vote count. Under the statute of 1887, this slate must be accepted by Congress unless both houses vote to reject it. But while Republicans in the House might have been tempted to reject a Gore victory, the Democrats in the Senate would never go along with it; and vice versa. In short, if judicial intervention was justified at all, the Supreme Court chose the wrong target. The root of the problem was the Bush Constitutional coup, not the judicial demand that every vote be counted. There would have been another advantage to this solution. The Court could have written an opinion that made legal sense. The Constitutional text gives state legislatures the power to determine "the manner" in which electors are selected, but a second provision gives Congress the power to establish a uniform day for choosing electors throughout the United States. Florida's legislature violated this when it sought to choose its own slate of electors in December, a month after election day. It is one thing for a legislature to determine the "manner" of election, but quite another for it to authorize popular election by the voters of Florida on November 7 and then try to change the result by legislative fiat after the fact. In short, Supreme Court action against the Bush coup was not only commended by democratic principle but by the Constitutional text.

The actual opinion of the Court in *Bush v. Goré* is a shabby affair. The majority's conclusion does not follow from its premises. Most important, the majority does not challenge the Florida court's demand for a manual recount. It simply questions the standard under which the recount was proceeding. The Florida court had instructed officials to inspect each ballot to determine each voter's intention. In the Supreme Court's view, this allowed for too much arbitrariness

in the evaluation of individual ballots. In order to pass muster under the Equal Protection Clause, the Court held that more concrete criteria for ballot evaluation must be judicially elaborated before the recount could proceed.

I do not challenge this doctrinal conclusion. But it does not remotely justify the next—and crucial—move in the Court’s argument. Having emphasized the need for concrete standards, the next obvious step was to send the case back to Florida to allow the state courts to satisfy federal requirements and move on with the recount. This is precisely what the Supreme Court refused to do. Instead, it took upon itself the task of interpreting Florida law and found that Florida no longer wished to proceed with the recount. According to the majority, Florida law required that all disputes be resolved by December 12 and not a moment later. Since the Court handed down its decision in Washington at 10 p.m. on December 12, there was—alas—no time left to do anything but declare George Bush the winner!

Nothing in Florida law remotely justified this remarkable act of interpretation. No state statute says anything whatsoever about December 12. Nor did the Florida Supreme Court make a fetish of this date. In a brief discussion, it did take passing notice of a federal law that gives states a special privilege if they manage to file an undisputed slate of electors by the 12th. Under this provision, Congress guarantees that it will treat such uncontested filings as absolutely binding when it counts electoral votes.

This statute does not, however, disqualify late returns. This year, for example, at least four states—California, Iowa, Maryland, and Pennsylvania—submitted their slates of electors after the Supreme Court’s magical deadline. Their casual attitude is readily explained. As we have seen, late filings cannot be rejected unless both Houses agree, and this is unimaginable when the House is controlled by Republicans and the Senate by Democrats. Moreover, Congress has been especially liberal when manual recounts have revealed that an earlier return was erroneous. In 1960, for example, Congress accepted a change made by Hawaii, based on a recount, as late as January 4.

The Florida courts, in short, had more than three weeks to complete their recount when the Supreme Court cut them off. And the Florida court’s entire conduct suggests that it was eager to continue. In asserting otherwise, the majority of the Supreme Court was engaging in an act of “interpretation” without any basis in law—as the four dissenters took pains to note.

Suppose I had been reporting on the recent election of Vicente Fox as President of Mexico. I would have described how a mob of Fox’s partisans stopped the vote count in Mexico City, how Fox’s campaign chairman used her authority as chief elections officer to prevent the count from continuing, how Fox’s brother exercised his position as governor to take the presidential election out of the hands of the voters, how the Supreme Court intervened to crush, without any legal ground, the last hope for a complete count. Would we be celebrating the election of President Fox as the dawn of a new democratic day in Mexico?