BOOK REVIEWS

Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts


INTRODUCTION BY PETER TILLERS

On November 7, 2000, citizens of the United States of America went to the polls to elect a new President. The contest between the two main contenders for the American Presidency—George W. Bush and Albert Gore—was hard-fought. Moreover, several public opinion polls conducted shortly before November 7 suggested that the race between Bush and Gore was very close. So the results of the voting on November 7 were anxiously awaited.

During the second half of the twentieth century US citizens had grown accustomed to learning the identity of their next President shortly after casting votes expressing their preferences among Presidential candidates. After the election of 1948 the outcomes of quadrennial Presidential races were often known the same day of such voting by the general public and, in any event, the identity of the winner of the Presidential race was usually reasonably certain the day following such voting. But the 2000 Presidential election did not follow the normal pattern: the outcome of the 2000 Presidential race remained unsettled for more than a month after ‘election day’.1

The phrase ‘Presidential election day’ is, strictly speaking, a misnomer when it is applied to a polling day such as November 7, 2000. Ordinary American citizens do vote in Presidential elections. But the votes of ordinary citizens do not directly elect American Presidents. The US Constitution provides that the President of the United States is to be elected—under normal circumstances—by a body commonly known as the ‘electoral college’.2

Under the American electoral college scheme each State of the United States of America is allocated a specific number of electors (according to a constitutionally prescribed formula). In the 2000 Presidential contest Florida was entitled to choose 25 such Presidential electors. The total number of electors slated to be chosen by all of the various States for the 2000 Presidential election was 538. The American Constitution (it is generally believed) allows the election of a President by the electoral college only if an absolute majority of all authorized electors—i.e. a majority of 538 electors—vote in favour of a single presidential candidate.3 Hence, in the 2000 Presidential election the votes of 270 members of the electoral college were required to put a Presidential candidate ‘over the top’.

1 The outcome of the election was effectively settled on December 13, 2000, when Gore conceded the Presidential race to Bush.
2 The body authorized to elect a President—the electoral college—does not even meet for that purpose until more than two months after a ‘Presidential election day’ such as November 7, 2000.
3 Default procedures for the selection of a President are prescribed by the Constitution if an absolute majority for a Presidential candidate cannot be achieved in the electoral college.
Although the US Constitution does not provide for direct election of the President by popular vote, in the modern era a combination of American constitutional and nonconstitutional law does confer great significance—if not necessarily decisive or uniform significance—to popular voting in Presidential election years. The laws of all States of the American Union provide that the Presidential electors allocated to the various States are to be chosen (at least initially or presumptively) in accordance with popular votes by qualified voters in each of the various States. However, while popular voting now plays a very important part in the American Presidential electoral process, the laws governing the selection of Presidential electors in the States generally provide for the winner-take-all principle. This means that the winner of the popular vote in a State is usually awarded the votes of all of the electors that are allocated to that particular State. Consequently, even in a ‘normal’ Presidential election, the winner-take-all scheme can produce a substantial disparity between the popular vote and the electoral college vote.

On November 7, 2000, approximately six million Floridians cast votes in a polling process that was designed to eventuate in the selection of electoral college members for Florida who would vote in accordance with Floridians’ polled preferences among Presidential candidates—including, not only the mainline candidates Gore and Bush, but also ‘fringe’ candidates such as third-party candidates Patrick Buchanan and Ralph Nader. According to a preliminary vote tally that appeared on November 8, Bush’s supporters had garnered—out of roughly 6,000,000 votes—1,784 more votes than Gore’s supporters had managed to amass. The closeness of this initial tally triggered a legally mandated ‘mechanical’ recount of some of the ballots cast by Floridians (indirectly) for Presidential candidates. The purpose of this recount was—so it is usually said—only to ensure that the voting machines that tallied votes automatically operated in a proper mechanical fashion while tallying votes. This mechanical recount—which had some ability to generate errors as well as correct them—further narrowed Bush’s margin over Gore—to 327 votes. Other preliminary tallies in the days following November 7 also suggested that the popular vote margin in favour of Bush was, at best, razor-thin.

The question of whether Bush or whether Gore garnered the greater number of the valid votes cast by Floridians on November 7 was important. In the days immediately following the voting on November 7 there was some uncertainty about the outcome of the popular vote in several other States for Presidential electors. Very shortly, however, such uncertainty dissipated. As a result, there was soon general agreement that if the popular vote in Florida were disregarded, Gore had secured the very probable support of 267 Presidential electors, while Bush had secured the very probable support of 246 such electors. The bottom line was that neither candidate had achieved an absolute majority in the electoral college; neither candidate had secured the 270 electoral college votes that were necessary for the election of a President by the electoral college.

Thus, the outcome of the 2000 Presidential election depended on Florida’s 25 electoral

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4 Florida law—like the law of some but not all other States—mandates that duly-chosen Presidential electors must vote for the Presidential candidate that they have pledged to support.

5 This has in fact happened. Indeed, it happened in the 2000 Presidential election: Gore, the winner of the nationwide popular vote, failed, in the end, to gain a majority of the electoral college vote.

6 A much-mooted question is whether Gore would have been the official winner of the popular vote for President in Florida if Ralph Nader had not been a candidate. (Like all counterfactuals, this counterfactual possibility is hard to assess.)
college votes; everything depended on whether Florida chose electors supportive of Bush or, instead, electors supportive of Gore.

Which set of Presidential electors Florida would or should choose appeared to depend on the identity of the winner of the Florida popular vote.

And which candidate—Bush or Gore—won the Florida popular vote was uncertain.

Gore decided to launch a legal and political campaign to secure further counts and recounts of the votes cast (indirectly) for President in Florida in the year 2000. Bush supporters launched a counter-campaign along the same fronts. These countervailing campaigns raised a large number of statistical, legal, and ethical issues. In his book "Breaking the Deadlock" Judge Richard Posner discusses some of these issues. The four book reviews that follow comment on various aspects of Posner’s discussions of such issues.