
A Tale of Two Democracies
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Edward J. McCaffery, Ann N. Crigler,
and Marion R. Just

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University of Southern California Law School
Los Angeles, CA 90089-0071

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Edward J. McCaffery

Ann N. Crigler

Marion R. Just

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Abstract

The generally heated scholarly and political debates over Bush versus Gore, the election, and *Bush v. Gore*, the case, can be seen to relate to two competing visions of democratic theory and the role of the vote therein. Minimalists such as Richard Posner have low expectations for the role of individual voter participation; such theorists view the 2000 presidential election as a statistical tie that had to be broken, one way or another, and the U.S Supreme Court's role in breaking it as a perfectly acceptable, pragmatic act. Participatory democrats such as Cass Sunstein and Lani Guinier, in contrast, see individual voting as the constitutive act of democracy, and consider *Bush v. Gore* to be a violation of that process. In this Introduction to an edited volume, the authors trace out these competing theories and their implications for the politics of and prospects for voting reform in the United States.

Strangely, the major effect of *Bush v. Gore* was to reinvigorate America's interest in democracy itself, partly by producing a more limited judicial role, but much more by ensuring that all votes would be counted, and be counted equally. By discrediting itself, the Supreme Court that decided *Bush v. Gore* helped to draw new attention to the importance of the franchise, and to the ideals of self-government and political equality (Sunstein 2001).

The armchair generals have been busy criticizing the participants in the deadlock drama, notably the judges (especially the Justices of the Supreme Court). . . . These criticisms seem to me largely misplaced. The participants most deserving of criticism, though as yet largely spared it, are the law professors who offered public comments on the unfolding drama (Posner 2001).

What is to be done about voting reform? That is the question for this book. The context is framed—as it must be, now—by the curious events of November 7, 2000, and the days and weeks following. The book proceeds from the understanding that an exploration of what to do next should begin with some sense of what, exactly, is wrong now: of what, exactly, went awry on November 7 and its aftermath. Reasoned thought should precede action: hence the title for this book, *Rethinking the Vote*. But therein lies a considerable rub. It turns out to be

surprisingly difficult to reach an understanding of just what, exactly, did go wrong.

The Curtain Rises

It certainly *seemed* as if something was terribly wrong on the day and night of November 7 and in the wee hours of the morning following. As the Yale law professor and constitutional scholar Bruce Ackerman put it, “after one of the most boring campaigns in history, Americans were sleepwalking their way to the ballot box—when crisis hit after it was supposed to be all over” (Ackerman 2001).

First, fairly early in the day, the major networks called the closely contested state of Florida for the Democratic presidential candidate, Al Gore. Political pundits quickly calculated that this meant that Gore, who came into election day trailing in most polls, would win the Electoral College and thus become America’s next president. The fly in the ointment came later in the day when the networks changed their call, citing erroneous projections from exit poll data, and declared Florida’s outcome uncertain. Still later—now into the early hours of November 8 on the east coast—the networks called Florida for the Republican candidate, George W. Bush, making him the Electoral College victor. Gore called Bush to concede the election in the face of Bush’s victory in the Electoral College, despite Gore’s winning the national popular vote. Gore left his hotel room and was on his way to making a public concession speech when things changed yet again. The networks reversed themselves, declaring Florida too close to call, after all (see

Frankovic, this volume, for more detail on the media calls and miscalls).¹

What was certain was that whoever had won in Florida would be the next president of the United States. What was uncertain was who had won in Florida.

The initial tabulation of Florida's votes (not including late-arriving overseas absentee ballots, which could legally come in and be counted up to November 18) had Bush's lead at 1,784 votes, out of a total vote of just about 6 million. This was far less than the 0.5 percent margin that triggered an automatic recount under Florida law. A quick mechanical recount soon dropped Bush's lead to 327 votes. The "crisis" that Ackerman cited was underway.

Over the next five weeks a sometimes anxious, sometimes bemused, sometimes partisan public watched and waited as lawyers, election officials, politicians, pundits, and judges battled it out. Gore supporters alleged that Bush and his minions were trying to "steal" the election, bullying their way through the recount process, intimidating the re-counters, relying on ballots and ballot-counting procedures that systematically disenfranchised members of the Democratic core constituency: racial minorities, the poor, the elderly. Bush supporters alleged in turn that Gore and his minions were trying to "steal" the election, too, in this case by changing the rules on an ad hoc basis, after the fact, and by forum shopping in

¹ For chapters from *Rethinking the Vote*, see attached table of contents.

the law courts. The story of the recounts and judicial decisions has been told, with varying spins, elsewhere (compare Posner 2001 with Gillman 2001; see also Hasen, this volume). The story came to a halt, more or less, with the United States Supreme Court decision of December 12, 2000, in *Bush v. Gore*, overruling the Florida Supreme Court's demand for a recount (Chemerinsky, this volume). The next day Gore conceded the election to Bush, and within a week the Electoral College had voted Bush the 43rd president of the United States.

What's the Problem?

Those are the simple facts of the matter. With them behind us, we return to our initial question: What, if anything, went wrong? Characteristically, most commentary answering this question has clustered on the extremes.

The View from the Trenches

The view of a good many critics of the ultimate outcome, including the most partisan advocates for Al Gore, was that practically everything had gone wrong. The Supreme Court had “discredited” itself in *Bush v. Gore*, as Cass Sunstein of Chicago Law School alleged in the opening epigraph; the whole thing amounted to a “coup,” as Ackerman further charged. In addition to the unprincipled and partisan Court decision, plenty of other things looked bad, too. Faulty ballot design had systematically disfranchised people in several counties. Inadequate registration lists and polling place problems had disfranchised poor and minority voters in particular. Local election officials had rigged things in various ways. Partisan politicians in Florida had circumvented democracy before, during, and

after the fateful day. Democracy's emperor was shown to have no clothes, at best, and scandalous rags, at worst.

But another view, held by a good many non-critics of the ultimate outcome, including the most partisan advocates for George W. Bush—and presented most forcefully and systematically by Richard Posner—was that nothing in particular had gone wrong at all. The vote in Florida was merely a statistical tie; such things are bound to happen once in a while. The tie had to be broken, one way or another, and the Supreme Court engaged in perfectly plausible, pragmatic, and acceptable decision making to do so, averting the only true crisis that might have obtained: a prolonged period of uncertainty over who was, indeed, the president. The sole problem was the hyperbole of the academics—including Ackerman and Sunstein—which had discredited these scholars alone. In sum and in short, it was the academy, not democracy or the Court, that was shown to be in tatters.

The Search for a Middle Ground

Where does the truth lie? As a preliminary matter, we suggest looking between the extremes, for some kind of reasonable—if not quite golden—mean. Indeed it is possible, after the remove of time, that both sides might in fact be right, albeit for necessarily different reasons.

Posner might be right in the narrow, immediate context of November and December, 2000. Late breaking developments suggested that Bush had, indeed, “won” in Florida, by the standards that Gore’s lawyers themselves wanted applied

(Fessenden and Broder 2001; “Vindicating the Court” 2001). While there is room to quibble with this journalistic finding—which came after the events of another date destined for infamy, September 11, 2001, had made Bush a widely popular president—it’s hard to argue with Posner’s facts of the matter. A difference of one thousand or fewer votes out of six million is indeed a statistical tie.² Voting in a real and imperfect world is an imperfect affair. Any way to break the tie would have involved legal judgments about counting and recounting dimpled and damaged ballots that were sure to make one side unhappy. The Supreme Court, operating under intense time pressure, did a reasonably good job of things, and life proceeded without long-lasting crisis.

But it may also be that the critics such as Cass Sunstein and Lani Guinier were right, though not for the reasons that they themselves often proffered, such as Ackerman’s dramatic talk of a “coup.” Bush in fact probably did “win” the election under the rules in place at the time. Even if the Supreme Court decision did indeed reflect a significant departure from what little precedent, if any, there was on point (see Chemerinsky, this volume; Hasen, this volume; Gillman 2001; contrast Posner 2001), only a naive formalist would deny that court decisions are

² “You had the perfect tie,” said Walter Dean Burnham, a professor of government at the University of Texas at Austin, making a statistical point that many scholars have fastened on to. “When you’ve got an election this close, the most sensible way to determine the outcome is to flip a coin” (Burnham 1982).

often, and maybe even always, “political” in some sense. *Bush v. Gore* may have been a bad decision under many lights, but it was hardly a coup d’etat.

Quite apart from these jurisprudential matters, however, there was something unsettling about the events of November 7, creating an unease that lurks deep and lingers still. “What began as judicial overreaching may be a clarion call for major democratic reform,” as Guinier, now a professor at the Harvard Law School, wrote in a *New York Times* piece in December, 2000 (Guinier 2000). Fair enough, but what kind of reform was being called for? And, more fundamentally, to what end?

Setting a Context

To understand the case for a broader rethinking of the vote—and to reconcile the views of Posner and his ilk with those of Sunstein and his ilk—we need a wider context than November 7, 2000 and its aftermath.

Looking Backwards

Let’s go back to 1787, the year of the Constitutional Convention, for starters. Voting in colonial America was of course far from a universal affair (Dahl 2001; Posner 2001; Keyssar 2000; Rakove 1996; Dinkin 1982). For the most part, only white, Protestant, property-owning males could vote. In the face of this limited franchise, the original Constitution was vague, to say the least, about the mechanisms for electing a president. It wasn’t just the cumbersome and indirect expedient of the Electoral College, with representatives chosen by state

legislatures voting for president and vice president in thirteen isolated meetings. The very subject of voter qualifications was left to the states; nothing remotely approaching a “right to vote” was included in the original Constitution or in the later Bill of Rights.

The entire pattern revealed an undeniable truth: the founding fathers were hardly populists, or even democrats in the contemporary sense of the term (Wood 2002; Dahl 2001). The initial drafters of the U.S. Constitution presumed that presidents would be drawn from a limited, aristocratic pool of politicians, a “natural aristocracy based on virtue and talents,” in Thomas Jefferson’s mind (as quoted in Mueller 1992), selected in turn by another aristocratic pool, the electors. George Washington himself was assured of unanimity in the Electoral College before agreeing to run for president. Failing to anticipate the rise of political parties, the founders seem to have assumed that the Electoral College would often, and perhaps even generally, fail to elect a president, leaving the ultimate choice up to the state delegations in the House of Representatives, as in fact occurred in 1824 (Rakove 1996). The whole scheme was pretty far, indeed, from the “one person one vote” mantra of modern democrats.

But since the founding things have changed in America. There has been a steady if not quite constant trend towards universal suffrage. Important constitutional, legislative, and judicial reforms have advanced a participatory project (Potter and Viray, this volume; Traugott, this volume; Norris, this volume).

Property qualifications soon disappeared from state constitutions. By the time Alexis de Tocqueville came to America in 1830 he saw universal free male suffrage (De Tocqueville 1850). In 1870, the Fifteenth Amendment to the Constitution guaranteed the vote to men who had been slaves; 50 years later, the Nineteenth Amendment gave women the vote. The Twenty-fourth Amendment, ratified in 1964, abolished poll taxes that had in practice disenfranchised the poor. The Twenty-sixth Amendment in 1971 lowered the voting age from 21 to 18.

Congress added important changes too, most dramatically in the Voting Rights Acts of 1964 and 1965, which expanded the vote to include American Indians living on reservations, members of the armed forces, and residents of the District of Columbia (42 U.S.C.A. §1973.2). The acts also made voting rights more meaningful by strengthening federal protections (see Potter and Viray, this volume, for more detail on these acts of legislation).

Finally, the Supreme Court, in an important series of decisions, articulated a standard of “one person, one vote,” meant to ensure that voting schemes did not disenfranchise *de facto* those given the vote *de jure* (Hasen, this volume; *Reynolds v. Sims*).

Notwithstanding this impressive march towards greater participation and a fuller, more meaningful equality—a movement played out over some two centuries—we are still a long way from “one person, one vote,” or even figuring out what, exactly, in concrete terms and across a range of cases, this slogan even means.

Americans under eighteen don't have the vote, nor do certain other classes of individuals, such as resident aliens and convicted felons in most states. More to the point, "one person, one vote" lacks a clear theoretical or practical definition. Most adult Americans now do indeed have the formal right to vote, but no guarantee that their vote will matter at all—and some pretty formidable odds suggesting that it will *not*. Critical reflection about voting in America has long been haunted by the paradox, first and most forcefully pressed by Anthony Downs in 1957, that an individual's vote almost never determines an election's outcome. It's pretty much an arational, if not an irrational, act to vote in the first place (see Gelman, Katz, and King, this volume, discussing "voting power" of individuals under alternative voting systems; Downs 1957). While many pundits were quick to point out that November 7, 2000 proved this perspective wrong because the votes were close in so many states, a plausible case can be made for just the *opposite* conclusion. Even in such a close election, no state, not even Florida, was decided by one vote. Further, and in fact, the closer we get to a literal statistical tie, the more discretion is given to the institutions of government, including Congress, state legislatures, the courts, and the local officials who do the counting and recounting, to determine the outcome. These institutions necessarily had more to do with Florida's outcome—and hence with the presidential election—than any one voter did. Downs' voter's paradox has not been solved; indeed, if anything, it's been compounded. For in the extremely rare case where there is a statistical tie, beauracrats, politicians, lawyers, and judges have the ultimate voting power.

More dramatically, a wider perspective on November, 2000 shows just how far we are, still, from a true, populist democracy where, in Sunstein's words, "all the votes would be counted, and counted equally." Although the Supreme Court's opinion in *Bush v. Gore* purported to rest on counting votes equally—and most virulent critics of that opinion at least implicitly presumed that there was, indeed, some meaningful way to do so—we should first ask why the election had come down to a battle between George Bush and Al Gore in the first place. This very choice was more or less preordained from the moment that Bill Clinton defeated Bob Dole in November 1996. Long before any primary votes were cast, Bush and Gore were amassing preemptive advantages in campaign war chests that pushed most opposition to the sidelines, in each case trading on the power and prestige of a prior presidency: in Gore's case, of his boss, in Bush's case, of his father (see Estrich, this volume, for more discussion of the role of money in politics). In the primary seasons, the brief popular honeymoons with John McCain, Bush's only real persistent rival, and Bill Bradley, Gore's only one, showed that the public was hungry for some choice, any choice. But in the end the public was left with the most likely candidates from the beginning and there is ample evidence that plenty of people were less than thrilled with the options: some 64 percent of voters did not support *any* candidate (Ackerman 2001; McDonald and Popkin 2000; Kranish 1999). Yet while these conditions might suggest a viable third party candidate—and Ralph Nader seemed, at times, to rise to fill the bill—that didn't happen, either. In the end, Nader ended up with less than five percent of the national vote, failing to qualify his Green Party for matching funds in subsequent elections (Martelle 2000).

This is so far more a story of the power of the purse and of party politics than of any true expression of popular will, where each individual voter has an equal say in who, in fact, becomes president (see Barnes, this volume, for a brief discussion of alternative choice rules that might better get at a full set of voter preferences).

With all that, the campaign was so close that each major candidate increasingly focused his attention on a relative handful of swing states, including Florida. Gore virtually wrote off California, certain of its large electoral prize; Bush likewise largely ignored New York, certain not to get its. Just about 100 million votes were cast, nationwide, on November 7, 2000; Gore defeated Bush in the aggregate popular vote tally, 49,244,746 to 49,026,305. Yet the strategic and policy decisions of the candidates about how to win the Electoral College vote were based on a comparative handful of voters in a comparative handful of states. Where's the "one person, one vote" in that scenario? Put another way, even if there would have been some way to count all the Floridian votes, would all votes, across the nation, truly have counted "equally?"

Searching for a Deeper Understanding

It turns out, not surprisingly, that the lingering and often highly partisan debates between supporters of Bush and the U.S. Supreme Court, on the one hand, and of Gore and the Florida Supreme Court, on the other—between proponents of the view that nothing especially untoward happened on November 7, 2000 and those of the view that practically everything went awry—have their roots in competing

abstract theories of what, exactly, the vote is supposed to be doing in the first place: that is, in theories of democracy itself. Both schools of thought have a respectable intellectual lineage, and both can point to elements of American history, practice, and popular thought still prevalent today.

Minimal Democracy

In one camp stand the minimalists,³ generally conservatives and moderates who can trace their heritage back at least as far as Plato and his well known distrust of democracy, which he derisively called “a pleasant constitution . . . distributing its peculiar kind of equality to equals and unequals alike” (Plato 1957, 316). By the time of John Locke (1698), however, theorists were coming to see that a limited democracy at least might be preferable to the alternatives. This hedged skepticism was given fuller expression three centuries later by another Englishman, Winston Churchill:

³ Barnes, this volume, uses “Madisonian” to get at the same concept as our “minimalist” model of democracy. At the price of some inconsistency among chapters, we retain our preferred label, in part to avoid disputes over the proper interpretation of Madison’s own historical ideas and opinions (Wills 2002).

Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the 'worst' form of Government except all those others that have been tried from time to time (quoted in Jenkins 2001).

In a similar spirit, Edmund Burke had lauded the limited British democracy in contrast to the more radical French variant found in their revolution (Burke 1790).

This model of a limited democracy or republic was no doubt in the minds of many if not all of the founding fathers, who were hardly radical populists, as we have seen (Dahl 2001; Wood 1992). Under this minimalist view, the popular vote is no more than a crude but efficacious check on more despotic alternatives. As the contemporary political theorist William Riker sees it, "popular rule" provides for an "intermittent, sometimes random, even perverse popular veto" that "has at least the potential of preventing tyranny and rendering officials responsive." Riker concludes that this "minimal sort of democracy . . . is the only kind of democracy actually attainable" (Riker 1982, 244). In an important and particularly striking expression of the minimalist view, the political theorist John Mueller, almost echoing Plato, states that "[d]emocracy's genius in practice is that it can work even if people rarely if ever rise above the selfishness and ignorance with which they have been so richly endowed by their Creator" (Mueller 1992, 991). Under Mueller's view, the "minimal human being," generally apathetic and selfish, works to check the potential excesses of government, allowing for a

limited form of democracy that importantly protects property rights and individual freedoms, and relatively insures stable, consistent governance over time. Minimal human beings coming together under conditions of minimal democracy lead to minimal governments and—so the story goes—maximal wealth and well-being.

Richard Posner shares this minimalist view. Indeed, it is the central organizing theoretical framework in his extended commentary on *Bush v. Gore*. Posner writes:

American democracy is structured, formal, practical, realistic, and both supportive of and supported by commercial values. It is not starry-eyed, carnivalesque, or insurrectionary. *It is not pure or participatory democracy*, and it does not consider political chaos a price worth paying to actualize the popular will. Its spirit is closer to that of Burke than to that of Rousseau. The populism of a Jefferson or a Jackson remains a part of our democratic ideology, but a smaller part than in the days of yore. These summary reflections, too, will turn out to be relevant to evaluating the Supreme Court's performance in *Bush v. Gore* (Posner 2001, emphasis added).

It is no surprise, then, that Posner saw nothing particularly disturbing with the outcome of the 2000 presidential election. Under the minimalist view, popular elections are mainly beneficial as protective devices against the possibility of

extreme and tyrannical governments that would disrespect “commercial values.” Voting is an act designed to foster stability—to avert “political chaos”—not to “actualize” some amorphous “political will.” Democracy in this sense was working well in offering up two relative moderates, Bush and Gore, to an electorate predictably—and quite rationally—largely apathetic to the choice between them. Then the electorate—again not irrationally—left us with a statistical tie that the Supreme Court pragmatically broke. Into this comfortable and perhaps comforting view, Posner is only troubled by the Court’s hasty interjection of “equal protection” into its rationale for breaking the deadlock (Posner 2001). Other than this disturbing (to Posner) note, America can take a few moderate steps to improve the technology of voting, of counting and recounting ballots, and then get back to business as usual.

Participatory Democracy

One of the many ironies of the commentary over and about *Bush v. Gore* is that what has troubled Posner and other conservatives in victory has given some cheer to liberals in defeat: the Court’s invocation of “equal protection,” a legal and Constitutional principle responsible for much of the expansion of civil rights and freedoms under the Warren Court (see Hasen, this volume; Karlan 2001). For progressives and liberals such as Pam Karlan, Lani Guinier, Cass Sunstein, and Bruce Ackerman stand in another camp from Posner’s, with a different view of democracy and of the democratic project. These theorists uphold a model directly at odds with the minimalist view, a model of participatory democracy, whose

ultimate end is the attainment of a rich and meaningful equality among individuals. This view can trace its intellectual roots back to Rousseau and Immanuel Kant. Andrew Jackson and, even more importantly, Abraham Lincoln developed it historically and politically in the U.S. context. Under this model, voting, far from being a mere check on excessive governmental power meant to protect commercial interests, is the very expression of government power. Hence America has, in Lincoln's marvelous phrase, a "government of the people, by the people, and for the people."

This participatory view of democracy and the vote animated the great liberationist movements of the twentieth century in America: the feminist effort to get women the vote and the civil rights drive to make the black vote a reality. Its spirit is alive today in the calls made by Guinier and others for "major democratic reform" in the wake of election 2000, and in Sunstein's talk of making the "ideals of self-government and political equality" more meaningful. What makes this set of commentaries consistent—or at least compatible—with the moderate defenses of the Supreme Court opinion in *Bush v Gore* is that even the most "starry-eyed" (Posner's word) advocate of "pure and participatory democracy" can accept that the statistical tie from November 7, 2000 had to be broken. But while adherents of the participatory theory of democracy and the vote can also accept the need for technological change and improvement at the ballot box (see Alvarez, Sinclair, and Wilson, this volume; Krosnick, Miller, and Tichy, this volume) they cannot happily stop there.

At the most profound level, the U.S. presidential election of 2000 called attention to the fact that our laws are out of step with the greater promise of a truly participatory democracy. What was so unsettling to the many yearning for “all the votes to count, and to count equally” was the invocation of technocratic and legalistic language---mumbo jumbo about dimpled chads and conflicting courts---in response to their cry: commentators were talking minimalism to groups hungering for participation. To the participatory democrats, accepting—let alone celebrating—voter ignorance and apathy, in the manner of Mueller and the minimalists, is not an option. More needs to be done, to educate and empower voters, to make democracy “real.”

Challenges Ahead

The challenge for participatory democrats is great, and it ought not be understated. The minimalists, feeling that nothing particularly untoward happened in November and December of 2000, can satisfy themselves with comparatively minor, technological changes—better vote counting machines here, clearer ballot design there, and so on. But what is it that will bring satisfaction to the believers in participatory democracy?

Participatory democrats need both to articulate and defend an attractive set of ends, and then to somehow find the means towards these ends. How? In the persistent face of Downs’ voter’s paradox—in a country of millions of voters with more millions of dollars at work—how can we get the act of voting to be more inclusive, more meaningful? The pages ahead give many reasons to be skeptical

of the quest. There are concerns that changing the voting, registration, or electoral rules won't matter, or won't matter much, in the end (Gelman, Katz, and King, this volume; Norris, this volume; Traugott, this volume). There are even concerns that any changes that might be effected may move things in the *wrong* direction (Ortiz, this volume; Traugott, this volume)—giving too much power to the uninformed, continuing to over-represent the over-represented, diminishing the hopes of the most ardent participatory theorists. In the gloomy light of this academic skepticism, however, the enduring dream of somehow finding a government truly “of the people, by the people, and for the people” animates the participatory project. Hope endures.

Clearly the United States and other western democracies began with a far more minimalist, limited democracy than we have today. The government laid down in the U.S. Constitution has proven over time to be a remarkably stable and yet flexible design, protecting commercial interests while making for a general pattern of internal peace and stability. At the same time, the franchise has indeed steadily expanded, and more people have been allowed to participate in the process of governing, all without catastrophic results. There has been a persistent evolution towards a fuller, more meaningful democracy and vision of equality. The challenge today—the challenge of rethinking the vote—is to see where to go next, now that the obvious steps of obtaining nearly universal suffrage and striking down offensive barriers such as poll taxes have been taken. There is no compelling reason to stand still; the great American experiment in democracy never has for very long.

The Pages Ahead

The essays in this volume grapple with the issues we have just described in summary fashion, trying to come to terms with what happened in 2000 and why, and with what can and should be learned from it. The problems are interdisciplinary, and so is our lineup of authors, drawn from the disciplines of law, political science, and communications, and from government practice, journalism, and the academy. Many of these authors were first-hand participants in the story of Bush versus Gore; all of them are keen and interested observers of the democratic project.

Part I wrestles with getting a sense of the problems that might need fixing.

Kathleen Frankovic, a player in the drama of election night 2000 from her post at CBS News, sheds light on a particular and a particularly dark chapter from that fateful eve: the problems of polling and the impact of media coverage and projections on election outcomes. Calls and miscalls stood at the center of the saga of Bush versus Gore. Greater or at least better participation would seem to depend on better or at least more accurate information, but the press of the media's business makes this a challenging goal. Frankovic wrestles with these issues.

Mike Alvarez, Betsy Sinclair, and Catherine Wilson, drawing on personal experience with the Caltech/MIT voting reform project, analyze voting machines

and various methods for counting and recounting ballots. Most dramatically, these authors find a racial and ethnic bias in the pattern of voting machines and vote-counting errors in California's elections in 2000. Here seems to be some direct confirmation of the participatory democrats' worst nightmares—that systematic technical errors and biases made a difference, effectively disenfranchising groups of voters. The result is tentative; the fear is real.

Jon Krosnick, Joanne Miller, and Michael Tichy's chapter suggests that bias in voting results can occur simply because of how the candidates are listed on the ballot. But then who controls the ballot? And what does this bias say about voter rationality? These are themes that later chapters—especially Rick Hasen's and Dan Ortiz's—pick up. Interestingly, the research that Krosnick and others have done on just this point turned out to play an important role in a real-life legal drama in Compton, California, that unfolded as this book was being finalized; Rick Hasen's later chapter comments on this fascinating turn of events. Krosnick, Miller, and Tichy, while noting that the ballot order effect is likely to be highest in low salient elections, offer a tantalizing hint that even Bush versus Gore itself might have been decided because of Bush's prior placement on the Florida ballot.

Finally in Part I, Andrew Gelman, Jonathan Katz, and Gary King, important quantitatively-oriented political scientists, take an analytic look at how voting in the Electoral College in fact works, comparing and contrasting it with direct popular elections. Perhaps counter-intuitively, the chapter finds that, in actual practice, abandoning the Electoral College is unlikely to matter much, and most

likely would decrease the voting power of the average individual citizen. In other words, greater or more powerful participation may not come as a result of more direct participation.

Part II turns to ways to fix the problems. There are many possible players, at different levels (federal, state, local) and branches (executive, legislative, judicial) of government, and a wide array of strategies to pursue, creating a matrix of options.

Erwin Chemerinsky begins this part by taking a hard look at *Bush v. Gore*, the legal case. Rather than celebrate its possible opening of an equal protection door, as Rick Hasen is later to consider, Chemerinsky castigates the Court for its radical departure from principles of federalism—principles for which this, the Rehnquist, Court has become best known. By turning its back on its own cherished doctrine of states' rights, the Supreme Court majority showed the narrowly political bases of its reasoning. Where does this leave hope for fair voting and electoral practices? Can the judiciary be trusted? Where does the ultimate power over elections lie, with the states or the feds? With the courts or the Congress?

Trevor Potter, a former FEC Chairman, and Marianne Holt Viray explore some of the possibilities, hoping to keep or maintain a federal role in the electoral process, but at an administrative level. Along the way, Potter and Viray well describe the lay of the current legal land, and note—as Susan Estrich's chapter will later do, too—the severe limitations of the FEC as currently constituted and funded. To

get to a more participatory place for this important federal agency, more needs be done. But where will the will—not to mention the money—come from?

On a clearly related note, Jeb Barnes focuses on what Congress can and should do. Lending some support to the minimalist school, Barnes speculates that Congressional *inaction* might be the wisest course of all. Barnes also notes that what is more likely to be done—technocratic changes to the formal mechanisms of voting—is apt to matter least; more sweeping changes, such as repealing the Electoral College, are remote possibilities indeed. Most striking, the changes that might matter the most of all—to the rules of choice, the ways that voters are allowed to express their preferences—will most likely never even make it on to any legislative agenda. Barnes includes some simple but thought provoking examples of how outcomes may be skewed by the limited abilities voters have under American voting procedures to signal their true preferences.

Pippa Norris offers important perspectives from abroad. As the world offers surprisingly diverse models of election and electoral systems, Norris's analysis shows what kind of electoral mechanisms have increased participation in other countries. Unfortunately for participatory theorists, Norris finds much the same lesson from other countries that Michael Traugott's later chapter sees in the United States: most reforms have little if any real, demonstrable impact, and the normative evaluation of what impact the reforms do have is unclear at best. But hope at least endures for participatory theorists, as voting reform continues to proliferate around the globe.

Part III's chapters address what might be the hardest question of all: what if anything should be done about the problems of voting and electoral reform, even if we can agree on what these problems are?

Ann Crigler, Marion Just, and Tami Buhr begin this exploration offering some important notes from the real world of flesh and blood citizens. The authors look to public opinion about voting and electoral reform, and discover that the hope for greater participation runs wide and deep. There is a broad, bipartisan consensus that something ought to be done, that voting ought to be made easier and better representative of the body politic. A significant majority of Americans seem to believe in the power of the vote, and in the participatory project, that “all the votes should count, and count equally.” One would think—and hope?—that politicians ignore this popular platform at their peril.

Michael Traugott's chapter, however, begins what turns out to be a series of skeptical notes. Traugott, a leading academic expert in the field, surveys scores of studies and real-world experiments with attempts to increase voter registration and turnout, including such celebrated means as “motor voter” and same-day registration, and mail-in voting. Unfortunately, Traugott finds, the results hold little promise for participatory theorists: the effects are small, and more often than not point in a troubling direction—whatever increases in registration and turnout occur seem to come from the already over-represented demographic groups, namely the white, the better educated, the more affluent. Participatory democrats

have their work cut out for them.

Rick Hasen's chapter picks up the prospect of an invigorated Equal Protection Clause playing a role in actual voting reform cases. After first noting how the Supreme Court's opinion in *Bush v. Gore* was a significant departure from precedent on this (and other) scores, Hasen proceeds to speculate about what, exactly, an emboldened equal protection analysis might mean in the voting context. In particular, Hasen reflects on the role that social scientists—such as Jon Krosnick and his coauthors and Mike Alvarez and his—might play in this brave new world. As noted above, speculation became reality as this book was coming together; a California judge did rely on Krosnick's social science to invalidate an election. But are academics the last best hope for the participatory project, or somehow its enemy? Hasen isn't sure which way it will come out in the end. Indeed, he frets that social science created chaos in the Compton case. In light of the uncertainty, Hasen concludes that “murkiness” in the Supreme Court's equal protection analysis isn't such a bad thing; that the Court ought indeed to “hike slowly in the political thicket,” allowing pragmatic possibilities and consensus to emerge.

Susan Estrich's chapter sounds a deep, skeptical note throughout. Drawing from her own experience in the corporate and political worlds, Estrich compares and contrasts the two realms. She notes that there is little real democracy—and, in particular, little free speech—in corporate boardrooms. But the very same First Amendment that is impotent in the corporate context virtually eviscerates the

ability to regulate the role of money in the political context. A stark contrast masks a deep similarity—the “old boys” with money win in both cases, remaining in corporate *and* political power. Estrich’s one nod at hope—a nod seemingly born as much out of frustration as anything else—is that one day women can come to exercise the political power that their growing economic power suggests, and that maybe they will thereafter change the terms of debates and fair play in both worlds.

Dan Ortiz ends this final part with perhaps the deepest, darkest, most skeptical notes of all for the participatory project: it might just be that greater, wider participation is not a good thing at all. If the marginal voter brought into the process by heightened efforts to turnout the vote is as ill-informed and almost random in her or his approach to voting as some of the earlier chapters (most strikingly, Krosnick, Miller, and Tichy) suggest, should we even try to make voting easier and more participatory? Ortiz, a high-ranking advisor to the Ford-Carter Commission on electoral reform, does not offer any definitive answers, although he speculates on some intriguing options, such as empowering small groups of voters to engage in deeper deliberative democracy. Mainly, however, Ortiz poses some haunting questions for participatory theorists in particular.

We editors return to the scene with a brief postscript, hoping to make at least some sense of the whole and trying to show or find a way through the minimalist and participatory tensions in electoral reform. Perhaps because we are editors after all, we also hope to leave the readers with some hope for better days ahead.

References

- Ackerman, Bruce. 2001. "Anatomy of a Constitutional Coup." *London Review of Books*, 8 February.
- Burke, Edmund. [1790] 1969. *Reflections on the Revolution in France*. Reprint, Baltimore, MD: Penguin.
- Burnham, Walter D. 1982. *The Current Crisis in American Politics*. Oxford: Oxford University Press.
- Dahl, Robert A. 2001. *How Democratic is the American Constitution?* New Haven: Yale University Press.
- De Toqueville, Alexis. [1850] 1990. *Democracy in America*. Reprint, Chicago: Encyclopaedia Britannica.
- Dinkin, Robert J. 1982. *Voting in Revolutionary America: A Study of Elections in the Original Thirteen States*. Westport, CT: Greenwood Press.
- Downs, Anthony. 1957. *An Economic Theory of Democracy*. NY: Harper & Row.
- Fessenden, Ford and John M. Broder. 2001. "Examining the Vote: The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Case the Deciding Vote." *The New York Times*, 12 November.
- Gillman, Howard. 2001. *The Votes That Counted*. Chicago: University of Chicago Press.
- Guinier, Lani. 2000. "A New Voting Rights Movement." *The New York Times*, 18 December.
- Jenkins, Roy. 2001. *Churchill: a Biography*. New York: Farrar, Straus, and Giroux.
- Karlan, Pamela S. 2001. "The Newest Equal Protection: Regressive Doctrine on a Changeable Court." In *The Vote: Bush, Gore & The Supreme Court*, ed. C. Sunstein and R. Epstein. Chicago: University of Chicago Press.
- Keyssar, Alexander. 2000. *The Right to Vote: The Contested History of Democracy in*

- the United States*. New York: Basic Books.
- Kranish, Michael. 1999. "Who's Ahead? N.H., National Polls Diverge in Key Primary State, Exposure Focuses the Fight." *The Boston Globe*, 24 November.
- Locke, John. [1698] 1952. *The Second Treatise of Government*. Reprint, New York: Liberal Arts Press.
- Martelle, Scott. 2000. "Nader Pins Democrats' Woes on Gore." *The Los Angeles Times*, 9 November.
- McDonald, Michael P. and Samuel L. Popkin. 2000. "The Myth of the Vanishing Voter." Paper presented at the 2000 *American Political Science Convention*, Washington DC.
- Mueller, John E. 1992. "Democracy and Ralph's Pretty Good Grocery: Elections, Equality, and the Minimal Human Being." *American Journal of Political Science* 36(4): 983-1003.
- Plato. 1957. *The Republic*. Translated by A.D. Lindsay. New York: Dutton.
- Posner, Richard A. 2001. *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts*. Princeton, N.J.: Princeton University Press.
- Rakove, Jack N. 1996. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: A.A. Knopf.
- Riker, William H. 1982. *Liberalism Against Populism*. San Francisco: Freeman.
- Sunstein, Cass. 2001. "What We'll Remember in 2050." In *Bush v. Gore: the Court Cases and the Commentary*, ed. E.J. Dionne and W. Kristol. Washington, D.C.: Brookings Institute Press.
- "Vindicating the Court." 2001. Editorial, *The Wall Street Journal*, 13 November.
- Wills, Garry. 2002. *James Madison*. New York: Times Books.
- Wood, Gordon S. 2002. "Rambunctious American Democracy." *NYReview of Books* 49: 20-23.
- Wood, Gordon S. 1992. *The Radicalism of the American Revolution*. New York: A.A.

Knopf.

Wills, Garry. 2002. *James Madison*. New York: Times Books.

Cases

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