national Election Day. Of these nations, 34 percent allow early voting for everyone, and the remaining 66 percent limit early voting to electors who are, for a variety of reasons (e.g., in hospitals, living abroad, serving in the military) unable to cast a ballot at the local polling place. The ACE Project has stopped inquiring about early voting as of 2009.

5 Carney (2012) describes the partisan fights in the states over voting reforms, including early voting.

6 This section relies on Fortier (2006) for the historical material.

7 The Soldier Voting Act of 1942 (P.L. 71-561) mandated absentee balloting for armed services personnel during wartime. Interestingly, the law was amended prior to the 1944 election to make such procedures recommended, not mandated (Coleman, 2007).


9 In both Oregon and Washington, the two fully vote-by-mail states, disabled voters may cast their ballots at local jurisdictions using digital recording electronic voting machines. In Oregon, sight-impaired voters may also receive a unique web-based ballot, which is then read and filled out using specially equipped computers. The ballot is then printed out and mailed like any other ballot. This web-based ballot delivery system is also used in some counties for UOCAVA voters.

10 See Stein (1998) for an extended discussion of early in-person voting systems.

11 Information on Larimer County, Colorado’s experiment with vote centers can be found at www.co.larimer.co.us/elections/vote_centers.cfm (accessed July 17, 2012). The turnout impact of these centers has been studied by Stein and Vonahme (2008).

12 In all but two states, absentee ballots must arrive at the election office on or prior to the day of the election. (Washington and Alaska, along with the District of Columbia, allow ballots to be postmarked on Election Day.) In most states, early voting closes on the Friday or Saturday prior to Election Day, although eleven states do not end early voting until Monday, the day before the election. The best illustration of the difference comes from the state of Oregon, one of the few that records the date that a ballot was processed (opened, but not counted). In recent years, between one-sixth and one-fourth of ballots were delivered to county offices on Election Day (see http://www.sos.state.or.us/elections/ballot_return_history.pdf; accessed July 17, 2012). However, Oregon is unusual in that it does not maintain polling places.


RECOUNTS

Elections in Overtime

Edward B. Foley

In the second half of the twentieth century, with the rise of television, Americans developed an expectation that at the end of Election Day—after dinner and after the polls closed—they could turn on their television sets and watch the returns come in. Doing so became something of a national ritual, akin to watching the Super Bowl, particularly in presidential elections. Perhaps watching America’s athletes in the summer Olympics would be a better analogy, as these games occur on the same quadrennial cycle as presidential elections.

Thus, when Americans tuned in on Election Night, they expected trusted broadcasters, such as Walter Cronkite or Tom Brokaw, to announce when each state was declared for one of the competing presidential candidates. At some point into the night—earlier some years, later in others—the announcer would proclaim that one of the candidates had crossed the finish line by winning enough states to achieve a majority of Electoral College votes. With that announcement, the election would be over. The losing candidate would soon appear to make a concession speech. The winner would then make a victory speech, and most Americans would go to bed looking forward to the inauguration of the winner on January 20.

As part of this ritual, however, the three major TV networks—CBS, NBC, and ABC—would compete for viewers.1 A major method of competition was for each network to develop its own formula for “projecting” the outcome in each state, based on exit polls of voters after they had cast their ballots. The networks would announce these projections on Election Night before the government authorities in the states were finished reporting the actual returns from all the polling locations statewide.

Given this practice of making projections, the networks—and thus their viewers—began to distinguish between the entirely unofficial status of their
own projections and the official status of the numbers reported on Election Night by government authorities.

With 60 percent of precincts reporting, Candidate Smith is leading Candidate Jones by 30,000 votes. Our network, however, is not yet prepared to project Smith the winner, as our analysis shows that the remaining 40 percent of precincts are in places where Jones might be able to make up the difference.

This terminology would cause viewers to think that once 100 percent of the precincts had reported, the election would be officially over in the state.

On the contrary, the official vote-counting process is just beginning with the report of precinct returns. At a minimum, the arithmetic tabulation of those returns needs to be verified as part of the “canvassing” of those returns. Absentee ballots that arrived too late to be counted as part of those initial returns—but are still eligible to be counted if postmarked on time—still need to be counted. Depending on the particular rules in a state, an audit or partial recount of ballots needs to be conducted to ensure the accuracy of the vote-counting machines. These steps and others must be conducted before the result of an election can be certified. An election is never officially over until this certification occurs, which may take place days or weeks after the ballots were cast on Election Day.

The average American viewer watching the election returns in 1972 or 1992 most likely would have been unaware of all this. The expectation was that elections were over on Election Night or early the next morning if it took an extra long time for all the official returns to come in. The networks might “jump the gun” by a few hours or so with their projections, but the average television viewer thought that the election was officially over when once the ballots in all the precincts had been counted and these results were announced. After all, the losing candidate always conceded by late that night or early the next day. Therefore, the election must be over.

Thus, Americans were psychologically unprepared for what happened in 2000. They were expecting to know who won that year’s election by the end of Election Night or early the next day. It did not help, of course, that the networks changed their projections during the course of the night or that the Democratic candidate, Vice President Al Gore, called his Republican opponent, Governor George Bush of Texas, on the telephone to concede, only to call Bush back an hour later to retract his concession. However, even if none of that had occurred, the nation still would have been unsettled—in other words, unprepared psychologically to go through the official process of canvassing the returns without knowing which candidate actually won until after the certification of the canvass. The idea that the election was close enough that we just might not know the result for a week or two, while verifying the accuracy of the returns and counting late-arriving but still-eligible absentee ballots, just seemed too much for the American psyche to take. Indeed, even as Americans lived through this experience and the unresolved presidential election of 2000 continued into its fourth and fifth week, the country did not seem to take heart that it could survive this kind of uncertainty. Instead, nerves became increasingly frayed, and the U.S. Supreme Court evidently sensed that it was reflecting the prevailing national mood by bringing the uncertainty to an end.

Recounts, Both Routine and Exceptional

This national need to know who won the presidential election immediately after the polls have closed, if that need indeed still exists after our experience in 2000, is at odds with our attitude about other elections. Inevitably, in each general election, there is some race somewhere in the country that remains undecided for several weeks or maybe even many months. It could be a city council race or a judicial election for a seat on a local court, or maybe even an election for a member of the state legislature or the U.S. House of Representatives.

The idea that such a race could close, to be decided by just a handful of votes, is not alarming or bizarre. Nor is the idea that the legal system would have mechanisms to make sure, before a winner is officially and finally declared, that all the votes have been counted accurately and, in some cases, recounted if necessary. Average citizens accept that these mechanisms may take time and that learning the outcome of the election may be delayed. They even accept that, in some circumstances, there may be credible allegations of mistakes or improprieties in the vote-counting process that would require the involvement of a court to consider the evidence that might either support or refute such claims. Thus, if they gave the matter much thought, they would recognize—and tolerate—the fact that this judicial involvement would add some significant additional delay before a winner of the election could be conclusively declared.

Indeed, these sorts of mechanisms and judicial procedures exist in every state in the nation and are routinely deployed to eliminate uncertainties about which candidate won a particularly close race. Little media attention is given to these recounts and judicial proceedings to settle an election’s outcome. They almost always involve local races where the stakes are not especially high. The existing procedures usually work reasonably well to achieve closure, so that one of the candidates can take office for the remainder of the term and then, when that term is over, the voters will have another chance to express their will about who should get to hold that office.

However, the circumstances are very different when the election concerns not a low-stakes local race but instead a high-stakes statewide office, such as governor. First of all, in each state it is extremely rare to have a major statewide election unsettled after Election Night. The mathematical “law” of large
numbers accounts for this statistical fact. Though a small local election involving only a thousand ballots could easily end up with only a ten-vote margin between the two leading candidates—and thus the necessity of a recount and perhaps a judicial lawsuit to determine whether that ten-vote margin holds up as valid—a large statewide election involving a million ballots or more is much less likely to end up in such an easily disputable ten-vote margin. Think of it this way: Say two candidates run neck-and-neck in a small local election with only 1,000 voters and they split the vote almost evenly 50.1 percent to 49.9 percent; the outcome is a two-vote margin. However, if two candidates receive the same neck-and-neck percentages in a large statewide race involving 1 million ballots, the result is a 2,000-vote margin, which is not as easily contestable. Consequently, states almost never experience a disputed gubernatorial election and, thus, neither their citizens nor their public officials are prepared for such a dispute in the freakish circumstance that it actually happens to them. Like presidential elections, gubernatorial elections virtually always end with a concession speech on Election Night, and when that does not happen, a certain degree of anxiety in the public mind begins to develop.

Moreover, there is a lot of political power in the hands of the governor. It really matters which candidate gets to hold that office. Therefore, if the extraordinarily unlikely event does occur and initial returns show a gubernatorial election to be within 100 votes or so, it is a prize that seems tantalizingly within reach and very much worth fighting for. Thus, almost immediately, the two competing candidates and their campaigns begin to put intense pressure on the state’s legal apparatus for recounting ballots and resolving related vote-counting disputes.

Yet the state’s legal apparatus is inevitably rusty, at least with respect to handling a statewide recount. For the reasons already indicated, there probably has not been another statewide recount for decades. No one in state government is familiar with how the recount should proceed, and yet everyone in state government has an interest in—or at least a predisposition toward—which candidate for governor they would like to prevail in this newly emerging dispute over who got more votes. The combined attributes of inexperience and partiality among the public officials who are supposed to supervise the recount and resolve the uncertainty over the outcome are a recipe for significant controversy.

Indeed, among the relatively small number of disputed gubernatorial elections in the nation’s history, some have not gone well at all. For example, in 1879, even after all the bloodshed of the national Civil War, Maine was on the brink of its own state-specific civil war when the incumbent Democratic governor and his supporters manipulated the canvassing of local returns so he could stay in office despite the apparent defeat at the polls of his reelection bid. Only the heroic and patient intervention of a former Civil War hero, Joshua Chamberlain, who narrowly escaped an assassination attempt, managed to convince the Democrat incumbent and his partisans eventually to step aside without the necessity of shots being fired (Pullen, 1999). A similarly precipitous conflict had occurred over Pennsylvania’s gubernatorial election of 1838, known there as the Buckshot War because of the armed forces arrayed against one another after the incumbent party, the Whigs, attempted to hold on to power by manipulating the returns from polling places in Philadelphia. At the height of that conflict, there was an attempt to kidnap—and perhaps assassinate—Thaddeus Stevens, who was helping to orchestrate the Whigs’ efforts to keep power (and who would go on to become a leading Radical Republican during Reconstruction after the Civil War). Stevens had to jump out of a window and run for his life to escape his assailants (Trefousse, 1997).

William Goebel, the Democratic candidate for governor of Kentucky in 1899, was not so fortunate. He was killed by an assassin’s bullet during the huge dispute that engulfed the state over the outcome of that election. The dispute went all the way to the U.S. Supreme Court but, unlike a century later in Bush v. Gore (2000), the Court in Taylor v. Beckham (1900) explicitly refused to let a claim that the wrongful counting of votes violated the Fourteenth Amendment of the federal Constitution serve as a basis for the nation’s highest Court to become involved in the vote-counting dispute. Consequently, Goebel’s running mate had to serve the term that Goebel, after the Court’s refusal to intervene, conclusively was declared to have won (Campbell, 2006).

Fortunately, not all close gubernatorial elections in the nation’s history go as badly as those just described. In 1839, one year after the awful Buckshot War in Pennsylvania, the Democratic candidate for governor of Massachusetts won the election by just a single vote. Yet, even though the Whigs held power there, as they had in Pennsylvania, there was no imminent risk of violence in Massachusetts. The incumbent Whig governor, Edward Everett, honorably quashed any sentiment of manipulating the canvass to keep him in power when an honest count showed otherwise, even by the literally slimmest of margins (Frothingham, 1923). In 1855, the incumbent Wisconsin governor was not as honorable as Everett and, like the governors of Pennsylvania and Maine in 1838 and 1879, attempted to use the power of his office to manipulate returns to cling to power. However, the Wisconsin Supreme Court issued a strong decision asserting its judicial power to make sure the votes were counted legally and honestly, and the incumbent governor backed down before the dispute there escalated to anything like the dire crises that occurred in Pennsylvania and Maine. The peaceful resolution of this Wisconsin dispute was a major victory of the rule of law to protect the operation of democracy in the specific context of a fight over the counting of ballots to determine who will hold the highest office in the state (Winslow, 1912).

A century later, Wisconsin’s neighbor Minnesota was able to employ its judiciary in an innovative way to conduct a remarkably successful recount of
an exceptionally close gubernatorial race. In 1962, initial returns showed the incumbent governor winning by just 58 votes of more than 1.2 million cast. After some initial procedural skirmishing, which threatened to leave the Justices of the Minnesota Supreme Court looking like they were lining up on either side of the fight depending on each of their own partisan affiliations, the Chief Justice decided that the recount should be conducted by a special three-judge panel whose members were chosen by equal agreement of the two sides. The Chief Justice’s move was not unlike convening an arbitration panel to resolve a dispute between management and labor, where each side must agree upon the arbiters. In any event, the Chief Justice’s gambit worked. Lawyers for the two candidates picked three judges for the special recount court: the key was their agreement on one of these judges as being genuinely independent, whereas each of the other two judges was associated with each of the two major political parties in the state. The recount conducted by this special court showed, in fact, that the challenger had won by ninety-one votes. The incumbent then graciously accepted this defeat. Not only was the entire process peaceful, but it was acknowledged by the losing side to be as fair as feasible (Stinnett and Backstrom, 1964).

**Our Two Disputed Presidential Elections (and Some “Near Misses”)**

The United States has experienced only two presidential elections affected by serious vote-counting controversies: 1876 and 2000. They are, thus, even rarer than seriously disputed gubernatorial elections. The reason is that, given the way the Electoral College works, the vote for president must be extremely close in a particular state, and that state’s Electoral College votes must be crucial to winning an Electoral College majority (as required by the Constitution).

There have been years when the popular vote for president in a particular state has been mired in controversy, but that state’s Electoral College vote did not make a difference in the winning candidate’s ability to achieve an Electoral College majority. For example, in 1872, as a kind of harbinger of what would become consequential four years later, Congress could not figure out which candidate had won the electoral votes of Louisiana and Arkansas. However, Congress decided not to count the electoral votes from those two states at all, because President Grant easily won reelection that year without them. Similarly, in 1960, Hawaii’s initial returns showed Richard Nixon winning that state, whereas a subsequent recount had the state going for John Kennedy. There was a legitimate question whether the result of the recount had occurred soon enough under the U.S. Constitution for Congress to count the state’s electoral votes as going to Kennedy rather than Nixon. However, Congress did not bother to render a formal verdict on this constitutional question as Kennedy did not need Hawaii to achieve an Electoral College majority (Colvin and Foley, 2010).

Apart from 1876 and 2000, there have been a few other presidential elections where initial Election Night returns indicated the possibility of a lengthy battle over which candidate could obtain an Electoral College majority. But in each of these other instances, a protracted outcome-determinative ballot-counting controversy was avoided. In 1884, whichever candidate won New York would win the White House, and the outcome in New York remained unsettled for a couple of weeks while local canvassing boards reviewed their returns under the watchful eyes of representatives of both parties. When the canvass was done, however, Republicans were satisfied that Grover Cleveland’s 1,047-vote victory in the state was valid, and they did not try to contest it any further. Similarly, in 1916, Woodrow Wilson’s reelection bid depended upon the outcome of California, and that state’s results also remained unsettled for a couple of weeks that year. Again, however, after scrutinizing the local returns, Republicans satisfied themselves that Wilson’s 3,420-vote victory in the state could not (and should not) be challenged as an erroneous result (CQ Press, 2009).

Both 1884 and 1916 were before the television era, during a time when the country was apparently untroubled by a presidential election taking two weeks or so to become resolved. 1960 was in the early years of television, and its avoidance of a dispute that had the potential of becoming protracted may have helped develop the expectation, well settled by 2000, that the nation should know the winner of a presidential election soon after the polls close on Election Day. Nixon’s decision to quickly concede, when he might have decided to fight for a while, prevented the kind of intense scrutiny of the nation’s ballot-counting procedures that occurred forty years later.

Although Hawaii was never a factor in determining the Electoral College winner in 1960, both Illinois and Texas were. Based on initial returns from around the country, Kennedy could achieve an Electoral College majority with either state; Nixon needed both to win. Republicans had reasons to be suspicious of the returns from both states. There were rumors of Mayor Daley’s Chicago machine stealing Illinois for Kennedy. Likewise, Kennedy’s running mate, Lyndon Johnson, had gotten to the U.S. Senate as the result of a 1948 election tainted by falsified election returns, and Nixon supporters feared that Johnson’s political friends back in Texas might have done something similar for the Democratic ticket in 1960 (Caro, 1990). However, as Nixon assessed the situation, the odds of overturning the initial returns in both Illinois and Texas seemed too much of a long-shot. Even if he could overturn the narrower margin in Illinois of 8,858 votes, the much larger margin in Texas—46,257—seemed insurmountable, especially considering that Texas’s legal machinery at the time was deemed incapable of conducting any kind of impartial statewide recount. Nixon wanted to give himself the possibility of a political comeback, which in fact would occur in 1968, and he thought he would ruin any chance of that if he fought results in Illinois and Texas and did not prevail. Consequently,
shortly before 10 a.m. California time on the morning after Election Day, Nixon publicly conceded defeat, thereby short-circuiting the possibility of any publicly transparent and rigorous recount of the presidential votes in those two outcome-determinative states (Rorabaugh, 2009; Kallina, 2011).

Thus, 1876 and 2000 remain (at least so far) the only two presidential elections where there developed serious ballot-counting disputes that caused the outcome to remain unresolved for more than a couple of weeks. These two disputes, despite the historical distance of 124 years between them, share some similarities. Florida, for example, played a key role in both, but there are also important differences between the two episodes. The 1876 dispute involved multiple states, not just one, and Congress resolved the 1876 election with the help of a specially created Electoral Commission, whereas the 2000 dispute ended after the U.S. Supreme Court ordered a halt to the recounting of ballots that was then under way in Florida.

1876

The presidential election of 1876 occurred as the South was increasing its resistance to Reconstruction. The Republicans were the party of Reconstruction, and the Democrats were the party of the resistance. The Civil War hero Ulysses S. Grant, the two-term Republican incumbent in the White House, was not running again, and the Republicans nominated another Civil War general, Rutherford B. Hayes of Ohio, as their presidential candidate. The Democrats chose a northerner, Samuel J. Tilden of New York, who had earned a reputation as a reformer fighting political corruption.

Initial returns on Election Night showed Tilden winning enough states to be just one electoral vote shy of a majority, with the outcome uncertain in three southern States: Florida, Louisiana, and South Carolina. Reconstructionist Republicans still controlled the vote-counting process in those three states, and word went out from national party leaders that the local Republicans should use their political power to make sure that Hayes, not Tilden, was declared the winner all three of those states. Hayes needed all three to eke out an Electoral College victory of 185 to 184, whereas Tilden needed just one of the three to put him over the top.

Sure enough, the Republicans did use their control of the canvassing boards in all three states to derive final vote totals that favored Hayes over Tilden. Democrats, both nationally and locally, screamed of the fraud that the Republicans had perpetrated. Republicans retorted, with justification, that in all three states Democrats had committed horrendous acts of voter intimidation aimed at preventing Black citizens from exercising their right to vote, now guaranteed by the Fifteenth Amendment to the U.S. Constitution as part of Reconstruction. Historians have generally concluded that, if the vote-casting process in these three states had been fair, Hayes would have won the three states with the support of Black voters who had been unconstitutionally disenfranchised. Yet, if one asks the question whether the vote-counting was fair, it seems as if—at least in Florida—Republicans improperly manipulated the count of the lawful ballots that had actually been cast to deprive Tilden of a victory that he would have received according to an honest count of those ballots.

In any event, the Democrats were not about to acquiesce in the vote-counting fraud that they believed had been perpetrated against them. In each of the three states, when it came time for the Electoral College to meet and cast the state's electoral votes, the Democrats had their slate of presidential electors hold a separate meeting on the ground that they believed that their electors were the ones who were entitled to cast the state's votes for president. The problem for the Democrats, however, was that the authority for their Electoral College meetings was dubious at best. In each of the three states, on the date that the Republican electors separately met and voted for Hayes, the Republican governor of that state certified that these Republican electors had been duly appointed according to the results as canvassed by the state's official canvassing board. The best that the Democrats could do was in Florida, where the state's attorney general—a Democrat—certified that the Democrat electors were the valid ones according to a proper count of the ballots and that the governor's contrary certification was based on the fraudulent conduct of the state's canvassing board. Later, the Democrats in Florida attempted to bolster their case by winning a lawsuit in state court that their electors were the rightful ones and by then having the state's newly inaugurated governor—another Democrat—issue a new certification that the pro-Tilden electors were indeed the state's properly chosen ones. However, these new developments came long after the date on which, under the U.S. Constitution, the electors were required to have met and voted for president.

Meanwhile, the Democrats thought they had figured out a trick that would guarantee them the one additional electoral vote they needed for the majority that would place Tilden in the White House. Although Hayes had undoubtedly won the popular vote in Oregon, there emerged the question of whether one of the Republican electors in the state was eligible to serve in that perfunctory role. This particular elector was an employee of the U.S. Postal Service, an arm of the federal government, but the U.S. Constitution said that "no Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." Using an available state law, Republicans in Oregon had a way around this problem: This particular elector could resign both his postal position and his status as an elector, and the remaining valid electors could fill the vacancy by reappointing the same person now that the cloud of his federal job had been removed. However, the governor of Oregon was a Democrat, and
the two parties: The ten congressional members were split between five Republicans and five Democrats. Even four of the five justices were understood to be balanced between two Democrats and two Republicans. The fifth Justice was supposed to be David Davis, a Lincoln appointee whom the Democrats perceived as genuinely independent (if not perhaps a little favorable to their side). However Davis refused to serve on the electoral commission, having just been appointed to the U.S. Senate by the Illinois legislature. In his place, Justice Joseph Bradley was chosen as the fifteenth member of the commission, but he was another Republican.

By strictly partisan 8 to 7 votes in each case, the electoral commission ruled in favor of counting the electoral votes cast by the Republican electors (and thus rejecting the electoral votes of the Democratic electors). Justice Bradley explained how he could rule for the Republicans electors in Florida but not the one Democratic elector in Oregon. It was not the governor’s certificate that was dispositive but, instead, the laws of the state in place on the date that the electors were required to cast their electoral votes under the U.S. Constitution. In Florida, as of that date, state law had given its canvassing board the power to declare the winner of the state’s popular vote. Even if that declaration was inaccurate or, worse, fraudulent, the canvassing board’s position was what prevailed according to state law. Bradley acknowledged that a state’s laws could permit a canvassing board’s inaccurate or fraudulent declaration to be overturned by a state court, as in fact happened in Florida, but—and this was the crucial point for Bradley—any such judicial ruling needed to happen by the date on which the electors were constitutionally required to meet. Because the canvassing board’s declaration that the Hayes electors had won the popular vote still stood as the state’s official pronouncement as of the day that the electors met, in Bradley’s opinion this pronouncement must be accepted as authoritative and binding in the federal counting of the state’s electoral votes. With respect to Oregon, conversely, it was clear that state law permitted the reappointment of the Republican elector who had resigned because of his post office job; thus, for Justice Bradley the Democratic governor’s contrary certification carried no weight.

Whether Justice Bradley’s reasoning was analytically sound and constitutionally justified, Democrats viewed it as self-contradictory and motivated either by partisanship or some worse form of corruption.9 For a while, some recalcitrant Democrats considered trying to repudiate the commission’s work by asserting the constitutional prerogative of the U.S. House of Representatives to elect the president directly whenever no candidate wins a majority of electoral votes. However, in the end, enough Democrats acquiesced to permit, based on the commission’s rulings, the president of the Senate to declare that Hayes had won an Electoral College majority. It helped southern Democrats accept this defeat that close confidants of Hayes pledged that he would withdraw federal troops
from the South if and when he was inaugurated president. Once in power, Hayes made good on this pledge; thus, the processes of political compromise that ultimately paved the way for his peaceful entry into the White House brought an end to Reconstruction.

2000

A decade after the Hayes-Tilden dispute, Congress passed the Electoral Count Act of 1887 in case another disputed presidential election might occur. It took ten years to pass the statute because Congress remained divided between the two parties during that period, and neither party wanted to cement into law a vote-counting procedure that might deprive it of an advantage it might obtain if and when the next disputed presidential election arose. However, 1884 had been another exceedingly close presidential election (as mentioned), and Congress did not want to head into 1888, which had all the signs of being very close again (and was, but not as close as 1884), without a statutory mechanism for dealing with a dispute like the one over the 1876 election.

The Electoral Count Act of 1887 is an extremely convoluted and confusing statute, the interlocking clauses of which almost defy human comprehension, but apparently it was the best that Congress could do under the circumstances. Essentially, and necessarily oversimplifying somewhat, the Act replaces the electoral commission that was used to break the Hayes-Tilden deadlock with a procedure by which the governor’s certification of a state’s electoral votes automatically prevails in the event that the Senate and House of Representatives are divided on which of two or more competing certificates represents the state’s authentic electoral votes. However, the statute also contains a provision, known as the safe-harbor section, which purports to bind both houses of Congress to the state’s own resolution of a dispute over a state’s electoral votes if both the state’s resolution is pursuant to procedures that were in place before citizens cast their ballots for presidential electors and the resolution of the dispute is complete six days before the day on which the state’s presidential electors are constitutionally required to meet. Thus, if one of two certificates of electoral votes from a state complies with this safe-harbor provision, under the terms of the statute, both houses of Congress are supposed to accept it (and thus reject the other certificate). Presumably, however, if the two houses of Congress act politically and thus each simply votes for the certificate that supports the presidential candidate of its own party, the statute seems to say that the governor’s certificate prevails, even if one house of Congress were acting in direct defiance of its statutory obligation to honor the certificate that complied with the safe-harbor provision. In this respect (among other problems), the statute is somewhat at odds with itself.

The intricacies and potential inconsistencies of the Electoral Count Act never mattered until 2000. As the dispute over the ballots from Florida unfolded that year, observers began to wonder what would happen if the dispute reached Congress. The prospects did not look pretty. Republicans would control the House of Representatives, with the Senate split fifty-fifty, giving Vice President (and presidential candidate) Al Gore the power to break a tie vote in the Senate. Would he break a tie in favor of himself? If so, and assuming the Senate and House then differed over which of two certificates from Florida to count, the Electoral Count Act seemed to indicate that the certificate bearing the governor’s signature should prevail. The governor of Florida happened to be Jeb Bush, the brother of Gore’s opponent, George W. Bush.

Perhaps the inadequacies of the Electoral Count Act, at least as it applied to the situation unfolding in 2000, is what caused the U.S. Supreme Court to become involved in the dispute. Many have so speculated, although the Court has never explained its reasons for taking the case except to say that it raised important questions of constitutional law in a setting of obvious national significance. In any event, Al Gore’s concession speech the day after the U.S. Supreme Court decision in Bush v. Gore ended the dispute and thus avoided the necessity of Congress’s having to struggle with applying the archaic and untested provisions of the Electoral Count Act.

However, for the U.S. Supreme Court to play the decisive role that it did, the case had to come to it. To understand then how the disputed presidential election of 2000 got to the U.S. Supreme Court, one must follow its journey from November 7, Election Day, to December 12, the day of the Court’s decision in Bush v. Gore.

After Gore retracted his concession to Bush at about 2:30 a.m. (central time) during the morning after Election Day, Gore’s lawyers began to look for ways they could overcome the roughly 1,600-vote deficit that then existed in the initial returns. For a statewide election that close, Florida required an immediate machine recount, meaning that local election officials were required to re-feed paper ballots into their vote-counting machines. This procedure lowered Bush’s lead to only 229 votes, but Gore was still behind.

Gore’s lawyers considered challenging the so-called butterfly ballot, which undoubtedly had confused some elderly voters who, wishing to vote for Gore, accidently voted instead for Pat Buchanan, the ultraconservative commentator who was running as a candidate of the Reform Party founded by Ross Perot. However, Gore’s lawyers concluded that there was no legal remedy available for the butterfly ballot problem. These ballots, after all, had been cast for Buchanan even if the voter intended otherwise, and a Democratic official had specifically approved the butterfly ballot for use in the election. Moreover, there was no way to hold a “do over” just for the voters adversely affected by the butterfly ballot. Consequently, Gore’s lawyers focused their attention on the separate problem of so-called hanging chads, which referred to partially dislodged bits of paper dangling from punch-card ballots. In each instance of a hanging chad, the voter
had attempted to indicate their choice by removing the chad from its perforated box on the ballot but had failed to remove the chad completely. Voting machines often could not read the vote intended by the voter, because the hanging chad blocked the light from going through the hole in the punch-card ballot, which was how the machine recognized a vote on this kind of ballot.

Gore’s lawyers wanted to get local officials in Florida to count by hand votes that the machines may have missed because of the obstruction caused by the hanging chads. This strategy presupposed that ballots with hanging chads could count as valid votes even if not recognizable by the machines. However, if it was the duty of the voter to completely dislodge a chad for it to count as a valid vote, there would be no basis for counting ballots by hand to see whether the machines had failed to recognize valid votes. Republicans began to express this view, arguing that the vote-counting process should be declared finished once the ballots had been run through the machines a second time, as required by Florida law.

Gore’s attorneys, however, pointed to language in Florida law suggesting that a ballot should be counted as long as it was possible for a manual examination of the ballot to discern “the intent of the voter,” even if a machine would be incapable of reading it. However, this argument invited another question: How could one be sure of the voter’s intent with respect to the wide variety of chads that might not be completely dislodged? As it turned out, there were not only hanging chads but dimpled or “pregnant” ones: chads that had been clearly indented by the push of a stylus, and thus perhaps indicating the voter’s intent for that candidate (especially if the voter were frail and the equipment that the voter was using had become clogged with a pile of previously dislodged chads). These dimpled chads, however, had not been punctured through at all, and thus perhaps indicated hesitancy on the part of the voter, who decided in the end not to vote for that candidate. Perhaps, then, there should be a requirement that a chad be punctured to count as a valid vote. Yet, even with respect to punctured chads, not all ballots were the same. Some, indeed, were hanging by two corners, or dangling by just one corner; others were barely punctured at all. If Florida was to consider counting these ballots based on a manual examination of them, should the state use a “two-corner rule” (requiring that the chad indeed be hanging by two corners or fewer to be counted), as some other states did? Or was it enough that there was any puncture to the chad at all, letting through a little bit of light? Such questions might seem nitpicking, but they would prove momentous when the dispute eventually reached the U.S. Supreme Court.

Meanwhile, Gore’s attorneys faced another practical problem in their effort to seek a manual recount of these punch-card ballots. Florida law did not provide for a statewide manual recount. Instead, using a “protest” procedure, Gore was required to petition each county within the state for a manual recount of that county’s ballots. Moreover, the protest rules seemed to give each county little time to complete a manual recount: They were required to submit their results to the secretary of state within a week after Election Day. Alternatively, Gore could let the result of the machine recount become certified and then file a judicial “contest” of the result in state court. Gore, however, did not want Bush’s narrow lead to become certified as an official victory. Therefore, he decided to go the protest route and asked for a hand recount in four predominantly urban counties where manual examination of the ballots would most likely yield the largest gain for him.

The strategy backfired. Three of the four counties were unable to complete a manual recount within the statutorily specified deadline. Gore’s lawyers went to state court to ask for an extension of this deadline. Florida’s Secretary of State Katherine Harris, a loyal Republican, announced that she would certify final statewide results on November 18, after the deadline for the arrival of overseas and military absentee ballots. Gore convinced the Florida Supreme Court to extend the statutory deadline for completing the manual recounts under the protest procedures until Sunday, November 26. However, on Wednesday, November 22, Miami-Dade County (Florida’s most populous county) decided to stop its manual recount after Republicans held a rally claiming that the county’s recount procedures were unfair. When the new November 26 deadline arrived, Palm Beach County still had not finished its manual recount. Therefore, as promised, Secretary of State Harris certified that Bush was the winner in Florida by 537 votes.

At this point, Gore’s attorneys had no choice but to file the judicial contest of the certification, which previously they had hoped to avoid. By this time, however, the safe-harbor deadline under the Electoral Count Act, which would require Congress to accept Florida’s resolution of the dispute if the state could finish its proceedings on or before December 12, was only two weeks away. On Monday, December 4, the state’s trial judge rejected Gore’s judicial contest, but then, on Friday, December 8, by a 4 to 3 vote, the Florida Supreme Court reinstated the contest and remanded the lawsuit for a statewide recount of all “undervote” ballots, where a machine may have missed a vote intended by the voter. In its majority opinion, the Florida Supreme Court sidestepped the question of what specific standard the recount should use to decide whether a ballot contains a valid vote. According to the majority opinion, the general “intent of the voter” standard in Florida law sufficed for the statewide recount to begin.

Bush’s attorneys immediately asked the U.S. Supreme Court to review the Florida Supreme Court’s decision. The next day, Saturday, December 9, by a 5 to 4 vote, the U.S. Supreme Court agreed to take the case and halted the recount pending the outcome of its review. After hearing from the attorneys for both sides on Monday, December 11, the following day—Tuesday, December 12, the date of the safe-harbor deadline—the five-member majority
of the U.S. Supreme Court released an opinion finding, first, that the recount ordered by the Florida Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and, second, that any further proceedings would be contrary to Florida’s self-professed desire to take advantage of the safe-harbor deadline. The majority of the U.S. Supreme Court therefore ordered that no further recount take place.

The U.S. Supreme Court’s reasoning for its decision has been much scrutinized since it was announced. Seven of the Court’s nine Justices agreed that there was an equal protection problem, but only five signed on to the opinion prohibiting any further recount. Justices David Souter and Stephen Breyer, who accepted the majority’s premise of an equal protection violation, thought that the Florida Supreme Court should be given an opportunity to decide whether continuing with a constitutionally valid recount was more important than meeting the safe-harbor deadline.

On the equal protection issue, the majority said that the central flaw was that Florida law could have been more specific in providing when a less-than-fully dislodged chad is entitled to be counted as a valid vote. Because Florida law remained unacceptably vague in providing no more than that ballots should be counted according to the “intent of the voter,” different counties had adopted different specific standards and, indeed, the standard sometimes varied from time to time, or place to place, within a single county. The majority gave the example of Palm Beach County, which at first

precluded counting completed attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to [its earlier rule,] and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal.

After reciting these facts, the high Court pronounced its judgment: “This is not a process with sufficient guarantees of equal treatment” (Bush v. Gore, 2000).

The majority acknowledged that not every variation in voting practices among localities within a single state would violate equal protection. Different localities, for example, routinely use different types of voting technologies for the casting and counting of ballots, and this difference has never been thought to violate equal protection. Indeed, this kind of well-accepted variation among local voting practices is what caused Justices Stevens and Ginsburg to dissent not just from the majority’s decision to preclude any further recounting but from the majority’s predicate determination that an equal protection violation had occurred in this case.

The majority opinion offered nothing further to explain the constitutional distinction between permissible and impermissible variations in local voting practices. Its opinion said only: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” This sentence has been the focus of much criticism. Some have seen it as a confession from the Court that its decision was unprincipled and intended only to end this particular presidential election with a victory for Bush. More likely, it was just a signal from the Court that it was treading very carefully in an area of law in which it did not feel sure-footed.

In any event, the murkiness of the majority opinion in Bush v. Gore leaves the future of recount law very much uncertain. First, with respect to any disputed presidential election in the future, there is the basic question of whether the U.S. Supreme Court will involve itself again or instead will leave the dispute for Congress to handle under the Electoral Count Act. Second, with respect to any type of elective office, high or low, Bush v. Gore opens the door to myriad possible new equal protection claims concerning the differential treatment of similar ballots in the vote-counting process.

As for the resolution of the 2000 presidential election itself, it is doubtful that the U.S. Supreme Court’s decision actually made a difference in which candidate would get to occupy the Oval Office. A study of all the state’s ballots afterward determined that Gore would have lost, even if the recount had gone forward under the most generous version of the “intent of the voter” standard (one that would count any dimpled chad as a vote). Only if the manual recount had also included “over-votes”—where a machine voided a ballot because it detected votes for two or more candidates—would Gore have pulled ahead of Bush, according to this media study. However, Gore never asked for a manual recount of over-votes, and the Florida Supreme Court’s order of a statewide recount extended only to all under-votes and did not include over-votes.

Thus, although more Florida voters who cast ballots on November 7, 2000 may have wanted Gore to win—especially if one factors in the butterfly ballot problem—the legal machinery of the state most likely would have ended with a Bush victory even if the U.S. Supreme Court never halted the recount that was under way.

Recounts since 2000—and in the Future

After 2000, the nation eliminated punch-card voting machines and made other reforms of the voting process, but it did not alter the method for holding recounts even in presidential elections. The Electoral Count Act of 1887 is still in place unchanged (and essentially untested). The 2004 presidential election turned on a single state, Ohio, but the popular vote in that state was not nearly close enough—a margin of 118,601 votes—to fight about. The 2008 election was an Electoral College landslide. Who knows how many times the nation will
There have been two major non-presidential recounts since 2000. One concerned the 2004 election for governor in the state of Washington. The other involved the 2008 election for U.S. senator from Minnesota. Both recounts exposed significant weaknesses in each state’s vote-counting process. In Washington, most egregiously, there were some 1,600 unlawful ballots included in the final certified count of the election, even though the margin of victory for the winning candidate was little more than 100 votes, and thus the unlawful ballots—mostly cast by former felons not entitled to participate under state law—may well have determined the election’s outcome. Local election officials in Seattle had also misplaced hundreds of voter registration forms and would have wrongfully disenfranchised those voters if the forms had not been found during the recount. In Minnesota, the major problem concerned absentee ballots: It turned out that local officials had been treating differently absentee ballots affected by similar clerical errors. Even so, Minnesota’s judiciary ruled that this differential treatment did not violate the new Equal Protection principle of Bush v. Gore because the variation had been caused primarily by some local officials deviating from the strict requirements of an unambiguous statute—not, as in Florida, local officials operating on their own as a result of an insufficiently specific statute.11

Perhaps most troubling about the recounts in Washington and Minnesota is the amount of time it took to resolve those two disputed elections. In neither case did the dispute end until June of the following year (June 6, 2005 for the Washington dispute; June 30, 2009 for Minnesota’s.) Thus, in neither case would the state have been close to resolving the dispute by the day in December that the Electoral College met that year to cast the official votes for president—much less by the safe harbor deadline, six days earlier. Thus, if either the Washington or Minnesota recount had involved a presidential election, neither state would have been able to finish it on time. Indeed, in both cases, if the recount had been cut short to satisfy the constitutionally-mandated date for the Electoral College’s meeting, the apparent winner of the election would have been the candidate who ended up losing the recount eventually.

However, there were good points to the Washington and Minnesota recounts. For one thing, neither involved any threat of political violence. In both instances, partisans supporting each candidate were willing to let the legal process run its course and then abide by its results—a testament to our nation’s increased commitment to the rule of law in the early part of the twenty-first century. Moreover, to resolve the dispute over its 2008 election, Minnesota drew upon the positive lessons learned from the successful recount of its 1962 gubernatorial election: The state’s Supreme Court handpicked three judges to hear the dispute over absentee ballots, and the way in which these three judges were selected guaranteed that this special court would be perceived as impartial by both sides and by the public at large. Although, in this instance, the two candidates did not choose the three judges, the state Supreme Court picked three judges from different partisan backgrounds—including one demonstrating independence from the two major parties—and thus the composition of the three-judge panel as a whole was balanced and neutral.

Whenever another state next experiences a recount in a major statewide election—and one shall surely occur, we just do not know exactly where and when—that recount is likely to expose flaws in the state’s vote-counting process, as did the recounts in Washington and Minnesota. In the field of election law, much attention is devoted to the rules governing campaign practices and voter registration and the casting of ballots, or what we might call the “pre-voting” rules, but comparatively little attention is given to the rules that govern the counting of ballots, or what we can call the “post-voting” rules. The reason for this discrepancy is that the pre-voting rules always matter to candidates and their campaigns. In their efforts to win, one side or the other might gain a little advantage by tweaking the pre-voting rules a little this way or that, and—you never know ahead of time—a little tweak here or there might be just enough to make the difference in a competitive race. However, after the ballots are cast and the initial count is in, it is usually unlikely that the content of the post-voting rules will make a difference in the outcome of the election. Thus, the post-voting rules do not receive the same rigorous scrutiny as the pre-voting rules and instead are allowed to atrophy.

Moreover, there is little ideological incentive for political parties to fight before Election Day over the vote-counting rules that will govern after Election Day. The reason is that the parties do not know which vote-counting rules they would prefer until, in each election, after the ballots are cast and they learn the initial returns. At that point, the candidate who is behind will always favor rules that make it easier to count more ballots, while the candidate who is ahead will always favor just the opposite—a stricter enforcement of the rules that make it more difficult to add previously uncounted ballots to the result. This universal truth applies regardless of whether a candidate is a Democrat or Republican, as a comparison of the arguments in the 2000 and 2008 disputes demonstrates: Democrats favored leniency in 2000, when they were behind, but advocated strictness in 2008 once they took the lead in the Minnesota dispute; Republicans urged strictness in 2000 but preferred leniency in 2008 once they fell behind.

The lack of a partisan preference for particular vote-counting rules before Election Day means, in principle, that it should be possible for Democrats and Republicans in advance to agree upon a set of clear rules to govern the vote-counting process. Everyone familiar with vote-counting disputes agrees that having clear rules in advance to specify exactly what should happen in the
event of a new vote-counting controversy is a paramount value. Yet, precisely because there is little incentive for politicians to focus on vote-counting rules, this advantageous clarity usually does not exist.

Consequently, any state is likely to be in for a rough ride if it gets hit with an exceptionally close race in a major statewide election. However, from a national perspective, no serious damage is done to democracy if every once in a while some state somewhere around the country suffers a difficult recount. Of course, one hopes the vote-counting dispute in any state never gets so bad as to present the threat of political violence, as occurred in some of the nineteenth-century episodes. However, the overall historical trend is to trust the state’s courts to settle such vote-counting disputes, and that trend promises to reduce the risk of serious political ill will, especially if states can adopt Minnesota’s approach of having transparently fair tribunals adjudicate these disputes.

Finally, as for what might happen if and when the nation faces another disputed presidential election, all bets are off. Neither Congress nor the states have seriously examined the obvious gap—made even more evident by the experiences of Washington and Minnesota—between the time under the Electoral Count Act that Congress allocates for the resolution of a disputed presidential election under state law and the time that it actually takes a state to resolve a disputed statewide election involving an important race. Nor have Congress and the states taken steps to ensure that the public would perceive the resolution of a disputed presidential election to be fair and worthy of respect.

The nation was very fortunate that there was no political violence over the outcome of either the 1876 or 2000 election. There was a serious risk of violence over the Hayes-Tilden dispute. There were some calls for armed resistance, or even another civil war, if Tilden were not declared the winner. Outgoing President Grant even declared martial law on the eve of Hayes’s inauguration to prevent risk of insurrection but, in the end, the transition of power was peaceful, as it also was on January 20, 2001. In addition to hoping that the next such circumstance is also peaceful, the nation would be well served if Congress and the states took steps to increase the likelihood that a vote-counting dispute in any future presidential election would be resolved smoothly, predictably, and with transparent fairness to both sides in the dispute.

In the meantime, perhaps the public—with the help of the media—can become more comfortable with the notion that it may not know the decisive winner of a presidential election immediately after the polls close on Election Day. However, the beginning of the primary process for the 2012 presidential election does not give one reason to be especially optimistic in this regard. For the Iowa caucus, there was a rush to declare Mitt Romney the winner over Rick Santorum, by just eight votes, on the same night that the caucuses were held. Even after the canvassing of the caucus’s results was complete, and it was impossible to be certain which candidate actually had prevailed because the official tallies from some precincts remained missing, the media insisted on pronouncing Santorum the decisive “winner” because he received more of the votes that could be tallied. Ambiguity in the outcome appeared to be a concept too difficult for the media to grasp, even though ambiguity in the outcome was what the reality of the vote-counting process had revealed.

The voters, one might surmise, are smarter than the media (at least the televised media) give them credit for. It would improve the public’s understanding of the vote-counting process—and thus, the public’s understanding of its own democratic self-government—if the media helped the public achieve a more sophisticated, and hence more accurate, appreciation for exactly when and how official election results are determined.

Notes

1 In this respect, election coverage differs from sporting events, for which one network would have purchased exclusive broadcast rights.
2 On November 12, 2000, five days after the casting of ballots in that year’s presidential election, the celebrated New York Times columnist R. W. Apple wrote a piece with the subtitle “The Limits of Patience.” The column opened with these lines: “Another week and no more. By next weekend, a group of scholars and senior politicians interviewed this weekend agreed, the presidential race of 2000 must be resolved, without recourse to the courts” (2000).
3 In a study of all statewide elections from 2000 to 2009 in the United States, which tallied 2,884 races, the organization FairVote found that only eighteen ended up in a recount and, of these, only three resulted in a reversal of the original outcome (Richie and Hellman, 2011).
4 At the time, it was necessary under Massachusetts law for a gubernatorial candidate to win a majority, and not just a plurality, of the votes cast to win the election outright; otherwise, the state’s legislature was entitled to choose which candidate it preferred. Edwards’s Democratic opponent won the exact number necessary to make a majority; one fewer vote would have put the election in the hands of the legislature, which would have chosen Edwards as both houses were in the hands of his party, the Whigs.
5 Texas, one must recall, was essentially a one-party state, with Democrats in complete control.
6 Although obviously a product of its era and thus not reflecting a contemporary understanding of racial equality, the most comprehensive single book on the political battle to prevail in the controversy over counting votes in the 1876 election—and one that is fair in its description of both the Democrats and Republicans involved in the fight—is Paul Haworth, The Hayes-Tilden Disputed Presidential Election of 1876 (1906). For more modern accounts written in the aftermath of 2000, see William H. Rehnquist, (2005) (written by the Chief Justice of the United States during Bush v. Gore), and Michael F. Holt (2008; an incisive analysis by an eminent contemporary historian but ultimately somewhat more selective in its coverage of the post-voting dispute than Haworth). The literature on Bush v. Gore and the presidential election of 2000 is voluminous. For a journalistic approach that reads like a “page-turner” novel, although told largely from the perspective of the Gore campaign, see Jeffrey Toobin (2002). If one prefers a movie version of this story, even more favorable to the lawyers who fought to count more votes for Gore, there is HBO’s Recount.

As the Democrats' position in Florida was stronger than in Louisiana or South Carolina, there is no need to consider the details of these two other southern states.

There were allegations, never proved and most probably without any foundation, that Bradley accepted Republican railroad money in exchange for his rulings on the Commission.

The Court has no power to reach out and grab cases that it wishes to decide if no one files the case in the Court.

For political reasons, Gore decided to abandon any possible legal challenges concerning the validity of military ballots that might not have complied with the requirements of state law.

I have written on lessons to be learned from Minnesota's 2008 election and Washington's in 2004. See Foley (2011a, 2011b). At least one federal court of appeals has interpreted Bush v. Gore differently—saying, in the context of a dispute over a local judicial election, that variations in vote-counting caused by mistakes may still amount to Equal Protection violations (Hunter v. Hamilton County Board of Election, 2011)—and thus at some point the U.S. Supreme Court may need to sort out the conflicting judicial interpretations of Bush v. Gore.

8

DIRECT DEMOCRACY

Regulating the "Will of the People"

Daniel A. Smith

As with other arenas of electoral law, opposing lawyers in courthouses across the United States are battling over ballot measures. The most commonly used mechanism of direct democracy, the initiative, allows individuals to petition a requisite number of signatures to place a statutory or constitutional measure on the ballot for citizens to adopt or reject at the polls. From the recent decision by the Supreme Court of the United States, Doe v. Reed, upholding the state of Washington's public disclosure of signatures on ballot measures, to the upcoming hearing by the high court on the constitutionality of Proposition 8, California's 2008 initiative banning same-sex marriage, judicial challenges are a central part of direct democracy. If the flurry of legal challenges seems almost as commonplace as the ballot measures themselves, the level of vitriol between defenders of citizen lawmaking and those who wish to provide safeguards on the process is equally intense. The push-and-pull to regulate the "the will of the people" is as heightened today as ever over the century-old practice of direct democracy in the American states (Cain and Miller, 2001; Smith and Tolbert, 2004).

To supporters of direct democracy, even the slightest regulation placed on the plebiscitary processes by state and local actors constitutes a frontal assault on the exercise of their First Amendment rights. In particular, efforts to regulate the initiative process are seen as punitive, intended to diminish the fundamental rights of citizens to petition their government. Paul Grant (2001, p. 195), a long-time direct democracy booster, writes, "State officials regulating I and R [Initiative and Referendum] processes are like all government agents," and "they will fight to preserve their power" at virtually any cost. They claim that legislation ostensibly to reduce fraud in the signature-gathering phase or