US Supreme Court embraces a century-old legacy of racism and reaction

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Editor's note: The following article was written before the Supreme Court halted the counting of votes in Florida. That development, in our view, has only underscored the correctness of the analysis made by the author.

On December 4 the US Supreme Court vacated a decision of the Florida Supreme Court ordering Secretary of State Katherine Harris to extend the deadline for certifying the Florida election result in order to allow a manual count of ballots. The US high court directed the Florida Court to clarify the extent to which its ruling in the Harris case had relied on sections of the Florida state constitution. Those sections provide that all political power is inherent in the people—that the people are sovereign—and that elections shall be determined by popular vote.

The US Supreme Court sought clarification not to promote these fundamental democratic principles. On the contrary, the US high court suggested that applying them would infringe the prerogative of the Florida legislature, granted under Article II of the US Constitution, to determine the manner of selecting Florida's presidential electors.

The US high court purported to find its support for this startling position in a single case, *McPherson v. Blacker*, which was decided by the US Supreme Court in 1892. According to the Court in the McPherson case, the state legislatures have plenary (complete) power to determine their state's presidential electors, a power with which the people of the states or their state constitutions cannot interfere.

At the hearing of the Florida Supreme Court on December 7 to consider Gore's appeal of the denial of his contest of the election by Florida Circuit Court Judge N. Sanders Sauls, some of the Florida justices were plainly cowed by the US Supreme Court's warning. Gore's lawyer David Boies had barely opened his mouth when Chief Justice Wells questioned whether the Florida Supreme Court even had jurisdiction to hear Gore's appeal of Judge Saul's ruling. Wells worried out loud whether the Florida Court would be in troubled constitutional waters if it relied on the general appellate power granted it by the Florida Constitution to hear the case, given that the Florida legislature had not expressly stated in a statute that an election contest decision could be appealed to the Florida Supreme Court.

Such a view would essentially ignore the historical role of the judiciary as the final arbiter and interpreter of what state law is in a presidential election, a power that is a fundamental underpinning of the American tradition of the rule of law. Even Bush's lawyers would not go that far in the December 7 hearing, conceding that an appeal to the Florida Supreme Court in a presidential election contest was proper.

Taking the plenary power rule of the McPherson case to its logical extension raises a more immediate threat to popular sovereignty. If the Florida high court ultimately declares Gore the winner in Florida, can Florida's legislature ignore that ruling, and the popular will, and decide to seat electors committed to Bush? This is precisely what the Florida Republican-controlled legislature is threatening to do in a special session. If the Florida legislature does not do that, could, for example, the Republican-controlled legislature in Michigan, a state that voted for Gore, then decide to certify Bush electors to ensure his election?

The McPherson case was decided by one of the most reactionary Supreme Courts in US history. It is a court that stood for unfettered rights of business, and against any governmental regulation of capital or the market. It is also the same court that decided the infamous case, *Plessy v. Ferguson*, where the court held constitutional the "separate but equal" treatment of black citizens, a rule that sanctioned and fostered Jim Crow segregation (and which survived unscathed until the US Supreme Court's seminal 1954 decision overturning school segregation in Brown v. Board of Education).

McPherson's absolutist view of the power of state legislatures was profoundly anti-democratic and legally specious, both as a matter of the original understanding of the founders of the Constitution, and in light of the substantial guarantees of democratic rights, including the right to an equal vote, embodied in the Fourteenth Amendment to the US Constitution, which was enacted following the Civil War.

The centrality of voting rights was further solidified in other constitutional amendments this century, and elaborated in a series of US Supreme Court decisions starting in the 1940s.

For the present US high court to reach back to the reactionary McPherson decision, itself issued by a reactionary court, and without considering the development of democratic rights subsequent to the McPherson case, speaks volumes about the hostility to democratic principles within a substantial and growing faction within the American ruling elite. Yet the presidential election may hinge on this shoddy and wholly anti-democratic jurisprudence.

The original Constitutional arrangement and its implementation

It is true that at the constitutional convention of 1787 there was substantial disagreement about whether the branches of the federal government should be selected by popular vote, even as to the legislative branch. This reflected differences within the ruling strata between trust and fear of the masses of people.

Congress was divided into two houses, the House of Representatives and the Senate. Under Article I, House representatives were to be chosen "by the People of the various States" according to population—the voters were themselves the "electors." In contrast to that highly democratic method, senators were to be chosen by the legislature of each state. (In 1913 the Seventeenth Amendment changed the process to provide that senators be "elected by the people.")

As to selecting the president, the founders expressed views including national popular election, state voters choosing electors (the winner-takes-all "general ticket"), state voters choosing electors by district, state legislatures choosing electors without any popular vote, and Congress making the choice. The compromise reached in Article II, Section 1 provided that the legislature of each state would determine the method of selection for that state: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole

number of senators and representatives to which the state may be entitled in the Congress."

Although at the time of the constitutional convention not all of the legislatures of the states were popularly elected, it was widely recognized that the people were sovereign in the various states. Indeed, political theory at the time held that states were only established with the consent of the governed and under a written constitution or compact.

As stated by Chief Justice Chase in *Texas v. White* in 1867, "A state ... is a political community of free citizens, occupying a territory of defined boundaries, and organized and sanctioned under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The McPherson decision itself recognized that "The legislative power is the supreme authority, *except as limited by the constitution of the state*, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed" (emphasis added).

It is unlikely that in giving state legislatures say over the manner of appointing presidential electors the founders sought to fundamentally restructure the allocation of power in state governments, thereby depriving the people of the states of the right to direct their legislatures through their constitutions, including in the matter of presidential elections. A more likely reading is that the US Constitution merely did not require states to adopt popular election of the president, leaving it to each state to determine its own method of selection. While the legislatures were required to adopt a method, that said nothing about whether they could be directed by the people of their state as to that method.

This view is more in keeping with federalism—the concept that the federal government would not intrude into core state affairs. In fact, the language of Article II, Section 1 closely tracks that of the strongly pro-states rights provisions of the Articles of Confederation—which was supplanted by the US Constitution—and which provided that confederation "delegates shall be annually appointed in such manner as the legislature of each state shall direct."

The states, in fact, followed many different methods of selecting electors during the first few presidential elections. However, by the 1820s almost all states utilized popular vote, either by district voting or by voting on a general ticket. By the 1832 election all states followed the general ticket method, save South Carolina, which adopted it in 1860. (Florida reverted to selection by the legislature in 1868 for some period of time.)

Adoption of the Fourteenth Amendment

The defeat of the Southern slave owners gave an enormous impetus to expansion of democratic rights. Following the Civil War the Thirteenth Amendment abolished slavery. The Fourteenth Amendment was proposed in 1866 and ratified by 1868. Its chief purpose was to establish that freed slaves and their descendants were citizens with full rights of citizenship. Blacks were to be equal with whites before the law.

Section 1 of the Amendment provided that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This meant that no state could deprive a citizen of the right to vote.

Section 2 provided that when the right to vote at any election, including the choice of electors for president, is denied to any adult male inhabitants of a state, or in any way abridged, the basis of that state's representation shall be proportionately reduced. This reflected the fact that popular election, including of presidential electors, had become recognized as a fundamental right, which no state could abridge.

The Fuller Court

The Chief Justice of the Supreme Court that decided the McPherson case was Melville Weston Fuller, a singularly undistinguished jurist. Bernard Schwarz has written extensively about the Fuller court in his notable *A History of the Supreme Court* (Oxford University Press, 1993) and about the economic and ideological forces it represented:

"The Court's decisions reflected the Spencerean laissez faire that had become dominant in the society as a whole at the time. However, the Court also helped to mold the society and economy in the Spencerean image. It furnished the legal tools to further the period's galloping industrialism and ensure that public power would give free play to the unrestrained capitalism of the era" (p. 174).

"This was the time when the Court apparently believed in everything we now find it impossible to believe in: the danger of any governmental interference with the economy, the danger of subjecting corporate power to public control, the danger of any restriction upon the rights of private property, the danger of disrupting the social and economic status quo—in short, the danger of making anything more, the danger of making anything less" (pp. 174-75).

(The reference to Spencer is to Herbert Spencer, who authored the notions of social Darwinism, which mechanically extrapolated Darwin's theories of natural selection and survival of the fittest onto the society of the time. This outlook was used to justify the ruthless and unbridled exploitation of the working class by capital, and the increasing hegemony of giant monopolies and trusts.)

Perverting the notion of the due process clause of the Fourteenth Amendment, the Fuller Court enthroned the doctrine of "substantive due process," under which business entities and corporate monopolies were defined as "persons," and all forms of government regulation and social legislation were deemed to be infringements on the due process guaranteed to all "persons" under that Amendment. In the name of "liberty of contract" the Fuller Court struck down all attempts by the government—state as well as federal—to regulate the operations of big business.

Schwartz writes: "If a 1900 American Bar Association paper could proclaim 'there is ... complete freedom of contract; competition is now universal, and as merciless as nature and natural selection,' that was true largely because of the Fuller Court opinions in the matter" (p. 180).

Later, Schwartz writes: "The result was that due process became the rallying point for judicial resistance to the efforts of the states to control the excesses and relieve the oppressions of the rising industrial economy.

"In the Fuller Court jurisprudence, the 'liberty' protected by due process became synonymous with governmental hands-off in the field of private economic relations. 'For years,' Justice William O. Douglas tells us, 'the Court struck down social legislation when a particular law did not fit the notions of a majority of Justices as to legislation appropriate for a free enterprise system.'

"Substantive due process now became the businessman's first line of defense. Behind it, corporate power could operate free from legal interference. In the Fuller Court, the negative conception of law reached its judicial climax. The Court now saw its task as one not of further innovation but of stabilization and formalization. The law itself had become the great bulwark against economic and social change" (p. 182).

On the Fuller Court's *Plessy v. Ferguson* decision of 1896 that enshrined the doctrine of "separate but equal," Schwartz notes:

"While the Fuller Court developed the Fourteenth Amendment's Due Process Clause as the principal safeguard of property rights, its *Plessy* decision ensured that the amendment was of little value to the blacks for whose benefit it had primarily been adopted."

The McPherson case

In 1891 the Michigan legislature passed a statute changing the method of electing presidential electors to districts rather than by state-wide vote. Plaintiffs challenged the statute under Article II, Section 1 and the Fourteenth Amendment of the US Constitution (as well as under the 1887 Congressional statute that provides a "safe harbor" to states if they timely select their presidential electors under rules they have put in place before

the election). The Michigan Supreme Court ruled against the plaintiffs and upheld the new law.

The McPherson decision, which was written by Chief Justice Fuller, recognized at the outset that the US high court had no jurisdiction to second guess the decisions of Michigan's Supreme Court as to what was or was not proper under Michigan law. Also, as noted above, the McPherson court recognized that state legislatures only had such power as the citizens of that state granted it through its constitution.

Thus, the issue of the power of the people of the state or a state constitution to direct the state legislature as to how to proceed in determining presidential electors was not before the US Supreme Court in *McPherson*. Under a longstanding rule of legal precedent, any comments in the court's decision regarding that issue would therefore be considered non-binding "dictum."

In Fuller's decision, the chief justice did go on to state that: "[Art. II, §1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, *while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power*, cannot be held to operate as a limitation on that power itself" (emphasis added).

This is the opaque, convoluted language quoted in the decision handed down four days ago by the current US Supreme Court. The extreme right-wing faction on the Court, headed by Chief Justice William Rehnquist and Associate Justice Antonin Scalia, seized on Fuller's dictum in *McPherson* to vacate the Florida high court ruling and attack the right of the people to elect the president.

In his ruling in *McPherson*, Chief Justice Fuller distinguished between the constitutional language establishing the "People" as the "Electors" of the House of Representatives the language stipulating that presidential electors be appointed by the states "in such manner as the Legislature may direct." He reasoned that the Constitution "recognizes that the people act though their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." The Court concluded "that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislature in the matter of the appointment of electors."

The court also quoted a report by Senator Morton in 1874 at the time of a proposed congressional amendment to select presidential electors by electoral district through popular vote: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the Supreme Court of the state, or any other agent of its will to appoint these electors. This power is conferred upon the legislatures of the states by the Constitution of the United States *and cannot be taken from them or modified by their state constitutions*, any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, *there is no doubt of the right of the legislature to resume the power at any time*, for it can neither be taken away nor abdicated" (emphasis added).

This language suggests that a state legislature could even ignore the results of a presidential election conducted under its own rules—the very statutes it enacted. Thus, in quoting *McPherson*, the present US Supreme Court is inviting the Florida Legislature to choose Bush electors even if the Florida high court establishes that Gore prevailed in the popular vote under the Florida election statutes. As explained below, such a result would run far afoul of not only the Florida constitution, but of the US Constitution itself.

Subsequent protection of the right to an equal vote

Reflecting the evolving centrality of the right to vote as a core democratic principle, the twentieth century saw no less than three constitutional amendments designed to guarantee that right to all citizens of the US. The Nineteenth Amendment, ratified in 1920, outlawed denying the vote on account of sex. The Twenty-fourth Amendment, ratified in 1964, provided that the right to vote in federal elections, including presidential elections, could not be denied or abridged on the basis of a poll tax or any other tax. This amendment very explicitly recognized that such a right to vote existed. Finally, the Twenty-sixth Amendment, ratified in 1971, mandated that the right to vote be extended to all citizens over the age of 18.

These were fundamental advances beyond the founding of the republic, when voting was denied to many classes of people, including white males who did not meet certain property qualifications, and even further than the monumental advances that followed the Civil War.

The jurisprudence of the US Supreme Court likewise reflected this evolution. In *US v. Mosely* the Court in 1915 decided that the right to vote included the right to have one's vote counted. The Court also developed the rule that the powers granted to the states under the US Constitution, including powers regarding elections, were always subject to the limitation that they could not be exercised in a way that violated other specific provisions of the Constitution.

As stated in *Williams v. Rhodes* in 1968:

"The State also contends that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ...' to choose a President and Vice President. There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote 'for electors for President or Vice President.' Obviously we must reject the notion that Art. II, 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall ... deny to any person ... the equal protection of the laws.'"

Federal court challenges to practices denying the one-man, one-vote basis of government became common. For example, in 1983 in *Anderson v. Celebrezze*, the Court found that an Ohio filing deadline for third party candidates for president amounted to an unconstitutional state-imposed restriction on a nationwide electoral process. Other cases found violations of equal protection in weighing votes differently on geographic grounds.

In 1969 in *Moore v. Ogilvie* the Court struck down an Illinois statute requiring of independent presidential candidates that their nominating petitions contain at least 200 signatures from each of Illinois' 50 counties.

The Court found that this unconstitutionally favored voters in sparsely populated counties over heavily populated counties, such as Cook County. (These are the cases that Bush is attempting to pervert in his equal protection and due process challenges to recounts currently pending before the 11th Circuit Court of Appeals).

These decisions made it quite clear that the power of a state legislature to determine the manner of selecting presidential electors was not so "plenary" after all. If the Florida legislature, in violation of its own constitution and statutes protecting popular suffrage based on the principle of one-man, one-vote, ignores the lawful result determined by a Florida court, it will violate the equal protection clause of the US Constitution. It will, in effect, treat the class of Gore voters in Florida differently than Bush voters, and treat Florida voters differently than voters in other states. Moreover, ignoring the rights of Gore voters under the election statutes as they existed at the time of election will be a denial of their due process rights.

The US Supreme Court decision in the Harris case

At the hearing on Friday, December 1 in the Harris case, Chief Justice William Rehnquist and Associate Justice Antonin Scalia assailed Gore's lawyer with questions and interjections premised on the assumption that there is no constitutional right of suffrage in the election of the president, and that state legislatures have the legal power to choose presidential electors without recourse to a popular vote.

In its per curiam decision handed down on December 4, the US Supreme Court, after citing *McPherson*, criticized the Florida Supreme Court's November 21 ruling extending the certification deadline and ordering the inclusion of the results of manual recounts in the following words:

"There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, Section 1, clause 2 [of the US Constitution] 'circumscribe the legislative power.' The opinion states, for example, that '[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage' granted by the state constitution...

"The opinion also states that '[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote...'"

In adopting wholesale *McPherson*'s dubious and literalist dictum concerning the plenary power of the state legislature, the US high court ignored the fact that the Florida legislature granted Florida citizens the right to vote for presidential electors by general law, and that, as US Justice Ginsburg had pointed out, it was the province of the Florida Supreme Court to interpret that general law. Even under *McPherson*, the Florida court's decision was unobjectionable.

More significantly, the US court ignored the whole evolution of democratic rights after the Civil War, including the equal protection and due process clauses, in the light of which Article II, section 1 must be read today. In reality, the Florida constitutional provisions so troubling to the court are in complete harmony with those US constitutional provisions.

The immediate objective significance of the ruling in the Harris case is immense. It will embolden the Florida Legislature or other state legislatures to flout the popular will.

In no uncertain terms this is legal larceny designed to sanction the hijacking of the election.

It is by no means accidental that the extreme right-wing cabal that dominates the US Supreme Court today harks back to the reactionary Fuller Court of 1888-1910 in order to provide a legal façade for its attack on democratic rights and the social gains won by generations of working people in the course of the past century, including the right of blacks in the South to vote. The McPherson decision of 1892, denying any constitutional protection or sanction for popular sovereignty in the election of the highest officer of the US government, is entirely in line with the general defense of corporate interests and hostility to the interests of working and oppressed people in the US of the Rehnquist-Scalia faction of the current Court.

That Rehnquist, Scalia and their ally on the extreme right, Associate Justice Clarence Thomas, should overlook the historical development of American jurisprudence, and particularly the democratic provisions of the Fourteenth Amendment, should come as no surprise. These justices have been relentless in their assault on fundamental democratic rights.

The fact, however, that this ultra-right faction was able to obtain a unanimous ruling challenging the principle of popular sovereignty on reactionary and superficial grounds testifies to the cowardice and lack of principle on the part of the Court's centrist-liberal wing. This shows the degree to which large sections of the ruling elite in the US have abandoned any allegiance to democratic norms, and the degree to which the liberal elements within the political establishment are prepared to capitulate to the openly authoritarian forces.

It is becoming ever more clear that working people cannot rely on any section of the bourgeois elite to protect their democratic rights, but must rely instead on their own independent political action.