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WHEN SELF-GOVERNANCE IS A GAME*

Steven L. Winter[†]

No. 6: "It looks like a unanimous majority. . . ."

No. 2: "Exactly. That's what's worrying me. Very bad for morale. Some of these good people don't seem to appreciate the value of free elections. They think it's a game. . . ."¹

I. SORE LOSERMAN

I expect that everyone has an iconic memory, image, or picture from the extraordinary five-week period following the 2000 presidential election. The image that stands out for me is that of the "Sore-Loserman" placard which started popping up above crowds of Republican demonstrators in Florida toward the end of the second week of the post-election contest.² I like a good pun, and the sign struck me as clever. Not only did it mimic in color and script the design of the Gore-Lieberman banners of the campaign, but the pun made vivid what had previously been only implicit in the rhetoric of Bush campaign officials.³ These signs—and, later, T-shirts—showed up with increasing frequency over the next two weeks. One often heard much the same sentiment in the everyday debates that characterized the period. One email from a colleague

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¹ "Free for All," *The Prisoner* (Episode Four, originally aired October 29, 1967)

² See David Barstow, *Voting Battle Threatens Florida's Uneasy Truce Between Political Parties*, N.Y. TIMES, Nov. 20, 2000, at A15.

³ Frank Bruni & Jim Yardley, *Bush Aides, Casting Gore Camp as Sore Losers, Plot Next Steps*, N.Y. TIMES, Nov. 10, 2000, at A28 ("Mr. Bush's advisers . . . came to a news conference here armed with voter registration statistics, visual aids and pointed implications that Vice President Al Gore and his allies were acting like sore losers.").

analogized the Democrats' post-election challenge to the Mets trying to reopen the World Series because of a bad call by an umpire or on the ground that the lights were too dim at one of the night games.

The analogy struck me as terribly inapt. Surely, I replied, there is a difference between a sports contest—even one so important as the World Series—and the solemn exercise of the franchise in a presidential election. True, the World Series is not without consequence: The emotional stakes for the fans are high and the financial stakes for the players and their teams are both real and substantial. But it is still a *game*, and—while its rewards ought to be dispensed fairly according to the rules—there is no substantive moral, ethical, or political value to the rules in-and-of themselves. With or without the ground-rule double, the designated hitter, or the infield fly rule,⁴ baseball would still be a fair contest. Without the ground rules provided by the First Amendment, in contrast, no election could be deemed fair. Elections, it should have gone without saying, are different because they *do* have a moral point: They are about democracy and self-rule.⁵ We hold elections to register the will of the governed (as best we can) in choosing (as best we can) how we shall be governed and by whom. The content of the rules matter—that is, they have an ethical dimension—precisely because they may conduce to results that reflect either more or less well the will of the people and, therefore, render the resulting government more or less legitimate.

We can highlight the difference between games and elections by considering some salient differences in their rules. Both games and elections have rules that regulate who is eligible to participate and how errors are to be ascertained and corrected. But we would neither expect nor tolerate the same sort of rules in both contexts. Because competitive games are

⁴ See Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

⁵ When the manual recount in one Florida county found 320 ballots that hadn't been processed by the machines at all, yielding a net gain for Bush of fifty-two votes, one Democrat observed: "This is a good example of why you ought to have a hand count. . . . This is not a game of up and down at any moment. This is a matter of a very, very important franchise." Somini Sengupta, *Volusia County Workers Race the Clock to Hand-Count Votes*, N.Y. TIMES, Nov. 13, 2000, at A9.

played to win, we characteristically expect—and always tolerate—meritocratic selection procedures. Professional sports teams pay top dollar to get the most able players; if there is a draft, they are expected to select the best available players in the pool. Even in choosing up sides on the playground, it is common (though certainly not mandatory) for the respective captains to choose players on the basis of ability rather than friendship. Meritocratic participation rules for elections, in contrast, are today considered objectionable. Once common restrictions on the franchise such as poll taxes, literacy tests, and property requirements have been repudiated on largely egalitarian grounds.⁶ So, too, meritocratic qualifications for candidates—that is, qualifications other than the standard citizenship, age, and residency requirements—would be invalid under the Equal Protection Clause or First Amendment.⁷ Conversely, we tolerate much more arbitrary and unreliable error-correction mechanisms in games than in elections. In baseball, for example, the umpire's call will stand even when the instant replay has conclusively shown it to be wrong. But, every state provides for some form of recount in a close election; thirty-five states require the courts to give effect to the intent of the voter if it is at all discernable from the ballot.⁸

One would have thought all this perfectly obvious but for the course of the 2000 presidential contest and the muted reaction to its resolution. The rhetoric of the period reveals that, for many Americans, it was the game metaphor—and not the substantive values of democracy and self-governance—that structured how they perceived, understood, and evaluated the election process. The game metaphor, in other words, did not

⁶ See *Kramer v. Union Sch. Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). As Dean Kronman explains, classical republicanism, assumed that

a person's capacity for self-rule depends on fixed attributes like sex and intelligence in such an obvious, regular, and important way that these may themselves be used as criteria for determining who shall be allowed to participate in the political life of their community. Like nearly everyone else today, the new republicans reject this assumption and the egalitarian implications that flow from it.

ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 37 (1993).

⁷ See *Lubin v. Panish*, 415 U.S. 709 (1974) (equal protection); *Powell v. McCormack*, 395 U.S. 486 (1969); *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring) (First Amendment).

⁸ *Bush v. Gore*, 531 U.S. 98, 124 n.2 (2000) (Stevens, J., dissenting).

just characterize how they talked about the post-election process, it animated their *normative judgments*. And, as we shall see, this was true not just for ordinary Americans, but also for respected political commentators, distinguished legal scholars, and several members of the Supreme Court majority in *Bush v. Gore*.⁹

To be clear, I am not making a monistic *causal* claim, but an *ontological* one—i.e., that the game metaphor shaped, structured, and animated how many Americans understood and evaluated the post-election process.¹⁰ My purpose is not so much to explain the outcome of the post-election contest as it is to expose some fundamental and disturbing fault lines that run through the very heart of contemporary American democracy.

There were, of course, many reasons for the failure of the Democrats' competing rhetoric insisting on a "full, fair and accurate count." For one thing, the Gore campaign was unconscionably late in coming to it—focusing in the early days on the butterfly ballot in Palm Beach County and the unwitting Buchanan votes that it produced.¹¹ Gore, moreover, waited much too long before personally making the case for a full and fair count to the American people. Most devastating of all was the fact that the Democrats' insistence that every vote count was belied by their decision to seek recounts only in counties with Democratic majorities.¹² So, too, there were other

⁹ *Id.* at 111 (Rehnquist, C.J., concurring).

¹⁰ Here, we see the problem with the conventional academic practice of distinction drawing: Obviously, the claim that the game metaphor predisposed the relevant actors toward a particular outcome (the ontological claim) is a claim that the game metaphor was a contributing cause of the outcome of the post-election contest. Thus, the distinction between an ontological claim and a causal one is not an all-or-nothing distinction on the model of P and not-P, but merely a matter of degree.

¹¹ *The 2000 Election: Statements by Daley and Christopher on Their Findings on the Florida Vote*, N.Y. TIMES, Nov. 9, 2000, at A29. In fact, a subsequent study of the Florida ballots commissioned by a consortium of news media found that the butterfly ballot *did* cost Gore the election. Five thousand, three hundred and ten Palm Beach County voters voted for both Gore and Buchanan and 2600 voted for Bush and a second presidential candidate, which would have yielded a net gain for Gore of 2710 votes—far in excess of the 537 vote margin by which Bush carried Florida. Ford Fassenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1, A16.

¹² On November 14th, a *New York Times*/CBS News poll found that "50 percent of the respondents said they thought the Gore campaign was challenging the result in Florida because they disliked the outcome; only 37 percent thought it was doing so because it thought the election may have been conducted unfairly in some

reasons for the quiescence of the American public and its acquiescence in the Supreme Court's resolution of the contest. For one thing, the Gore team had no endgame: A prolonged contest would most probably have thrown the election to the Republican-controlled House where Bush would almost certainly have won. In addition, the relentlessly centrist campaigns run by both candidates no doubt left many Americans with the dispiriting—though (sadly) mistaken—impression that it didn't matter who was selected given that there seemed little difference between the candidates on most issues.

But, however feckless the Democrats and however uninspiring the campaign, the electorate still had every reason to insist that the presidency is not the World Series and that the post-election contest ought to be resolved in a way that accords with core democratic values. After all, we hold elections to ascertain the will of the voters not the sportsmanship of the candidates or the preferences of our Supreme Court Justices.¹³

So, the question remains: Why, despite what would seem to be its obvious normative inappropriateness, was the game metaphor so powerful? I take up this question in the sections that follow. I first examine the rhetoric of the post-

jurisdictions in the state." R.W. Apple, *Motivation: Behind a "Noble Toga" Find Naked Ambitions*, N.Y. TIMES, Nov. 14, 2000, at A23.

Ironically, a subsequent study of the Florida ballots commissioned by a consortium of news media found that a recount of the four majority-Democratic counties would *not* have altered the outcome of the election, but that a statewide recount *would have* regardless of what standard was used to evaluate the ballots. Fassenden & Broder, *supra* note 11, at A16.

¹³ In a similar vein, consider the post hoc rationalization—commonly heard since the September 11th attacks—captured by the following exchange:

Rob Schneider: I hate to tell you the truth. The truth is the military is much happier having . . .

Carol Whitney: Oh, absolutely!

Schneider: . . . President Bush.

Whitney: . . . and Rumsfeld.

Schneider: Believe me! Believe me! . . .

Bill Maher: Okay. Yeah.

Jeffery Toobin: The military are patriotic Americans who support their country, I think regardless of who the political leadership is.

Whitney: But, they prefer . . .

Toobin: Well that's right, "they prefer." But, you know what? It's not up to the military. It's up to the voters. And the voters decide who the President is.

Politically Incorrect (ABC television broadcast, Nov. 29, 2001).

election period. I show how the game metaphor works and explore its operation in the rhetoric and decisions of the post-election contest. I then take up the question of why the game metaphor should be so compelling in this context. This discussion will yield some rather distressing conclusions about the state of our contemporary "democratic" society and a radical recommendation about what we might do about it.

II. THE GAME IS AFOOT

The game metaphor emerged in public discourse the morning after the election. Commenting on the discrepancy between the popular vote and the projected winner of the Electoral College, a Republican supporter admonished: "If you don't want to follow the rules, don't play the game."¹⁴ In a letter to the Editor of the *New York Times* written the following day, another Republican supporter argued that: "Both candidates knew the rules ahead of time. . . . They both knew they needed electoral votes; that's how they played the game. You can't change the rules during the game."¹⁵ That same day, the *Times* reported that the Gore team hoped that the Vice President's return to Washington from his campaign headquarters in Nashville would allow him "to maintain some distance from the escalating political battle and any public perception that he is

¹⁴ Jodi Wilgoren, *Dead Center: Eternal Spotlight Yields to Infernal Wait*, N.Y. TIMES, Nov. 9, 2000, at B4.

¹⁵ James W. Sampair, Jr., *In Palm Beach County, Crucible of an Election*, N.Y. TIMES, Nov. 10, 2000, at A32. Judge Posner makes the same point in his recent book on the election.

Shortly before the election it was believed that Bush might gain a popular vote majority and that Gore a majority of the electoral votes. If that was Bush's perception, he must have redoubled his efforts to win electoral votes, and the popular vote be damned. To call the winner of the popular vote for President the "real" winner, to accord *constitutional* status to the winner of the popular vote, and to question the legitimacy of the candidate who won the electoral vote and so became President are further examples of changing the rules of the game after the game has been played.

RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 225 (2000).

not prepared to abide by the rules of the game."¹⁶ The following Sunday, the *Times* summed up the national mood this way:

Americans do not like ties. Virtually none of the sports that dominate national life allow them. If it takes overtime, a penalty kick, a sudden death playoff or extra innings, everyone expects a winner and everyone knows that the Mets and the Yankees cannot both be World Series champs.

So it is perhaps no surprise that the political system seems challenged by an election that is as close as it ever comes to a tie, and whose outcome may take time to determine and never be resolved with scientific certainty.¹⁷

Clearly, the game metaphor was in play (pun intended) even before the subject of hand recounts, hanging chads, and how best to discern the intent of the voters had come to dominate the public discourse.

The Republicans filed suit November 11th, seeking to enjoin manual recounts. The suit, filed just as hand counts were beginning in Palm Beach County, alleged (among other things) that the standards for ascertaining the intent of the voters would be applied differently in different counties in violation of the Equal Protection Clause.¹⁸ Initially, the Palm Beach County board of elections counted only those ballots containing chads with at least two detached corners.¹⁹ After rulings in several of the Democrats' state court challenges, the Palm Beach and Broward boards decided to count as well chads that were merely indented and not perforated (so-called dimpled or pregnant chads).²⁰ It was at this point that the

¹⁶ Katharine Q. Seelye, *The Vice President: Gore Withdraws From the Field as Aides Prepare for Battle*, N.Y. TIMES, Nov. 10, 2000, at A29. The article also reports Gore aides as observing that the fact that their candidate had won the popular vote allowed him to "demand an accurate count without appearing to be, in the words of one adviser, 'a cranky spoilsport.'" *Id.*

¹⁷ Todd S. Purdum, *The System: National Psyche Hates a Game No One Wins*, N.Y. TIMES, Nov. 12, 2000, §1, p 1.

¹⁸ David Firestone & Michael Cooper, *Bush Sues to Halt Hand Recount in Florida: Palm Beach Tally Starts as G.O.P. Cites Risk of Flaws in Process*, N.Y. TIMES, Nov. 12, 2000, at A1.

¹⁹ Rick Bragg, *Palm Beach County: At Long Last, Army of Volunteers Gets Its Orders to Begin Recount*, N.Y. TIMES, Nov. 17, 2000, at A29.

²⁰ Kevin Sack, *Palm Beach County; Key Recount Waits Again For Approval From Court*, N.Y. TIMES, Nov. 16, 2000, at A31; Dana Canedy & David Gonzalez, *Broward County: Judge Leaves Chads, Dimpled or Otherwise, to Discretion of Recount Team*, N.Y. TIMES, Nov. 18, 2000, at A15; Don Van Natta, Jr., *Recounts Drag On: Court Battle Lines Are Drawn*, N.Y. TIMES, Nov. 20, 2000, at A1.

game metaphor became the linchpin of the Republicans' rhetorical strategy. For the next several days, Republicans repeatedly accused the Democrats of changing the rules in the middle of the game in order to manufacture additional votes for Gore.²¹

Not surprisingly, the truth was more complicated. The decision of the Broward board was by unanimous vote of its two Democratic and one Republican members.²² The change in the Palm Beach policy was pursuant to court order.²³ Nevertheless, the charge stuck. When the Florida Supreme Court extended the deadline for hand recounts, the sense of a partisan breach of the ground rules was exacerbated. Republican spokesman James Baker declared: "It is simply not fair, ladies and gentlemen, to change the rules, either in the middle of the game or after the game has been played."²⁴ The *Indianapolis Star* complained: "In poker, if a player declares deuces wild after the cards are dealt and bets are placed, it's no longer a fair game. It's a rip-off."²⁵

This sentiment was so strongly and widely held that, at oral argument before the Supreme Court, Laurence Tribe chose to address it first:

²¹ Canedy & Gonzalez, *supra* note 20, at A15; Van Natta, *supra* note 20, at A1; Robin Toner, *The Conservatives: From the Anti-Gore Right, A Battle Cry of 'Stop, Thief!*, N.Y. TIMES, Nov. 26, 2000, A37 ("The conservative message these days is simple and laced with the anger of eight long years out of the White House: the Democrats are trying to steal this election, they say. They're trying to hold on, to change the rules of the game, to thwart the will of the people.").

²² Van Natta, *supra* note 20, at A1 ("The board, made up of two Democrats and a Republican, voted unanimously to consider dimpled or one-corner chads, the tiny pieces of paper that are normally dislodged from punch cards when a voter makes a choice. . . . Previously, the board had counted only chads with two or more corners punched through as votes.").

²³ Sack, *supra* note 20, at A31. See also Ford Fessenden & Christopher Drew, *The Voting Cards: Chads Have Their Place in Annals of the Law*, N.Y. TIMES, Nov. 16, 2000, at A32 (reporting similar rulings by courts in Alaska, Illinois, Massachusetts, and South Dakota).

²⁴ Baker's Response to Ruling, N.Y. TIMES, Nov. 22, 2000, at A24. See also Frank Bruni, *The Reaction: Bush Camp, Outraged, Vows to Seek Recourse to Ruling*, N.Y. TIMES, Nov. 22, 2000, at A1.

²⁵ Felicity Barringer, *The Reaction: Editorials Blend Bitterness and Calls for Common Sense*, N.Y. TIMES, Nov. 24, 2000, at A42.

I think I would want to note at the outset that the alleged due-process violation, which keeps popping up and then disappearing, . . . is really not before the Court, and for understandable reasons, because although it is part of the popular culture to talk about how unfair it is to change the rules of the game, I think that misses the point when the game is over . . . in a kind of photo-finish. . . . A manual recount, sometimes taking more time, . . . would be rather like looking more closely at the film of a photo finish.

It's nothing extraordinary. It's not like suddenly moving Heartbreak Hill or adding a mile or subtracting a mile from a marathon.²⁶

This argument is revealing for at least three reasons. First, it acknowledges how much the game metaphor dominated public opinion. So much so, in fact, that though Tribe dismisses the legal relevance of the sentiment he nevertheless feels constrained to respond to it. Second, though Tribe shrewdly tries to turn the metaphor to his advantage, he does so only at the expense of confirming it—a form of what, in the book I refer to as “antinomalous capture.”²⁷ For, in using the “photo finish” and “marathon” tropes, Tribe is invoking the metaphor in its purest, most conventional, most prototypical form: It is, after all, a presidential *race* in which competing candidates *run* for office. Tribe extends the conventional metaphor by modeling other aspects from the source domain of races to elaborate conceptions not part of the metaphor's standard stock of entailments: *This* race, he says, is the exceptional case; it is like a photo finish; if the race is too close to call, then some special mechanism—obviously requiring additional time—will be needed to decide it.

Third, and this follows closely from the previous point, Tribe's argument underscores how deeply entrenched the game metaphor really is. Not only does Tribe employ it in its most prototypical form, but he pays a particularly steep price for doing so. For, though Tribe is conscious and careful about how he extends the metaphor, he cannot control its implications once invoked. Once invoked, the metaphor inevitably and

²⁶ *Contesting the Vote: A Transcript of Arguments in the Supreme Court over the Florida Recount*, N.Y. TIMES, Dec. 2, 2000, at A12.

²⁷ STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 11 (2001) (“[M]ore often than not, the price of opposition is that one is defined precisely by what one most vehemently rejects.”).

unconsciously prompts all of its more prototypical entailments. Both the image of a photo finish and the trope of adding (or subtracting) a mile from the course of a marathon imply a race with a definite and determinate end. And that, precisely, is what the recount and ensuing litigation was obviously not providing. From all outward appearances—the lawyers, the spokespersons and spin doctors, the handlers and political ops, the press coverage and public attention—the race was still very much on.²⁸

We are now in a position to make our first pass at the question raised at the outset: Why did the game rhetoric seem to have greater resonance than arguments premised directly on substantive democratic values? One reason is that the game metaphor is constitutive of our very concept of elections. This is manifest in the conventional linguistic construction of an election as a *race* in which the candidates *run for office*. By the same token, we speak of *dark horse* and *stalking horse* candidates. And a political race is constantly handicapped by public opinion polls so we can determine at any moment who is *ahead*. The game metaphor can also be seen in such iconographic representations as the 1876 political cartoon by Thomas Nast entitled “A National Game that Is Played Out.” (Figure 1.) We can test this conclusion further by considering the overall shape of the game metaphor and then seeing how its entailments are reflected in American political culture, generally, and in the post-election discourse, in particular.

The classic, still influential study of play is Johan Huizinga’s *Homo Ludens*.²⁹ Huizinga describes play—more specifically, agonistic games (i.e., games involving a contest against an opponent)—as characterized by five, overlapping elements. First, play is voluntary; as Roger Caillois observes, compelled play loses its spontaneous devotion and becomes

²⁸ Indeed, while the case wound its way through the Florida courts, David Boies said: “You don’t call the end of the game after the first inning or the second inning”—leading the *Times* to conclude “that the 2000 campaign is now in a litigation phase that may not end soon.” William Glabers, *On the Law: A Method to the Logic of the Court Rulings*, N.Y. TIMES, Nov. 18, 2000, at A13.

²⁹ JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* (1950) (original Swiss publication in 1944). Huizinga’s study, with its emphasis on agonistic forms of play, has been criticized as parochially Western and masculine. See BRIAN SUTTON-SMITH, *THE AMBIGUITY OF PLAY* 79-80 (1997). See also discussion *infra* text accompanying nn. 89-91.

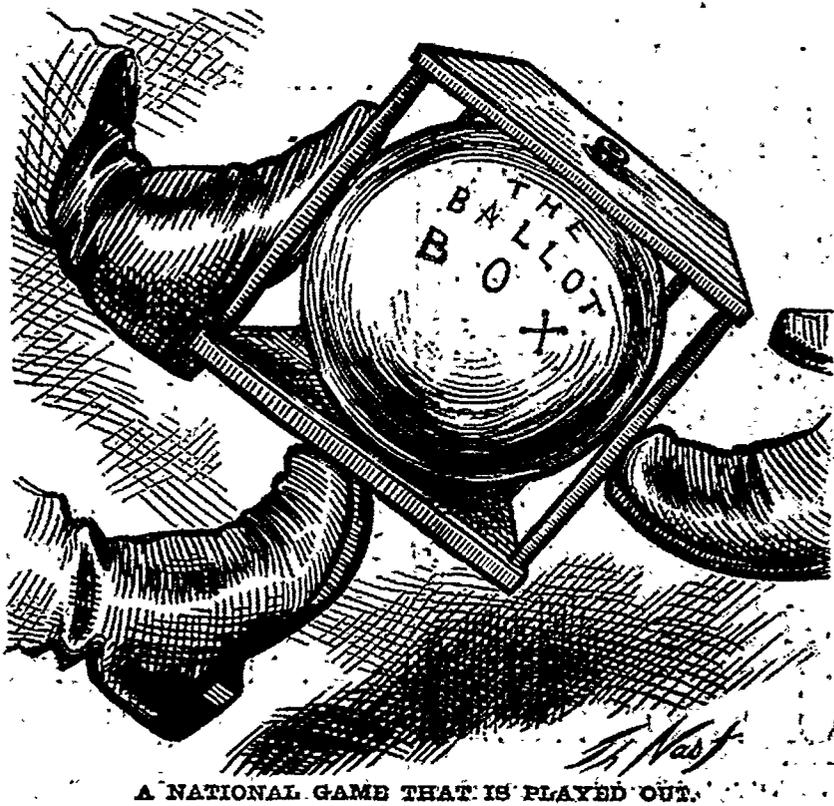


Figure 1: Thomas Nast, A National Game that is Played Out (1876).

drudgery.³⁰ "Only when play is a recognized cultural function," Huizinga adds, "is it bound up with notions of obligation and duty."³¹

Second, play defines its own, specialized domain: "It is rather a stepping out of 'real' life into a temporary sphere with a disposition all its own. . . . It interpolates itself as a temporary activity satisfying in itself and ending there."³² Third, and relatedly, play is distinct in location and duration: "It is 'played out' within certain limits of time and place. It contains its own course and meaning."³³ Play thus constituted immediately assumes a fixed, repeatable form—it becomes a game—typically with an internal structure that is itself characterized by "repetition and alternation."³⁴ This formal quality of games, Arthur Leff explains, also has substantive implications: "The players in any game are treated for purposes of the game as formally identical. They have each the same access to the field and the mechanisms of play, and the same formal entitlements (if not simultaneously, then at least in equal succession)."³⁵

Fourth, the special temporal and spatial domain of the game is characterized by "an absolute and peculiar order."³⁶ In Huizinga's words, play "creates order, *is* order. Into an imperfect world and into the confusion of life it brings a temporary, a limited perfection. The least deviation from it 'spoils the game'. . . ."³⁷ The virtual identity between a game and the formal order of its rules is what accounts for two of the most distinctive, otherwise paradoxical qualities of games: that the rules of the game are essentially arbitrary and, at the same time, utterly authoritative.³⁸ Within the fixed space or given time of the game, the confusion and chaos of the real world is replaced "by precise, arbitrary, unexceptionable rules that

³⁰ ROGER CAILLOIS, *MAN, PLAY, AND GAMES* 6 (Meyer Barash trans., 1961).

³¹ HUIZINGA, *supra* note 29, at 8.

³² *Id.* at 8-9.

³³ *Id.* at 9.

³⁴ *Id.* at 9-10.

³⁵ Arthur A. Leff, *Law and*, 87 *YALE L.J.* 989, 999-1000 (1978).

³⁶ HUIZINGA, *supra* note 29, at 10.

³⁷ *Id.*

³⁸ "All play has its rules. They determine what 'holds' in the temporary world circumscribed by play. The rules of a game are absolutely binding and allow no doubt." *Id.* at 11.

must be accepted *as such*.³⁹ The spoilsport who withdraws from the game or denounces the rules as absurd is, therefore, worse than the cheat. The cheat may violate the rules, but at least pretends publicly to respect them. The spoilsport, in contrast, “shatters the play-world” by revealing its “relativity and fragility.”⁴⁰ Caillois elaborates: “The game is ruined by the nihilist” because “his arguments are irrefutable. The game has no other but an intrinsic meaning. That is why its rules are imperative and absolute, beyond discussion. There is no reason for their being as they are, rather than otherwise.”⁴¹

Fifth, and finally, play has a necessary element of tension or doubt. Huizinga explains:

Tension means uncertainty, chanciness; a striving to decide the issue and so end it. The player wants something to “go”, to “come off”; he wants to “succeed” by his own exertions. . . . It is this element of tension and solution that governs all solitary games of skill and application such as puzzles. . . . Though play as such is outside the range of good and bad, the element of tension imparts to it a certain ethical value in so far as it means a testing of the player’s prowess: his courage, tenacity, resources. . . .⁴²

For this tension to persist, Caillois says: “Doubt must remain until the end, and hinges upon the denouement.”⁴³ Leff explains: “The most significant thing about games, therefore, is that they have a resolution. . . . A game is an activity in terms of which you can know with some precision what you did and how you came out.”⁴⁴

Surely you recognize in this description all the major features of American elections, in general, and of last year’s post-election political rhetoric, in particular.⁴⁵ In our country, voting is certainly bound up with notions of civic duty. But, unlike many Western European democracies, we staunchly resist the idea that voting should be made compulsory. Unlike

³⁹ CAILLOIS, *supra* note 30, at 7 (emphasis added).

⁴⁰ HUIZINGA, *supra* note 29, at 10.

⁴¹ CAILLOIS, *supra* note 30, at 7.

⁴² HUIZINGA, *supra* note 29, at 10-11.

⁴³ CAILLOIS, *supra* note 30, at 7.

⁴⁴ Leff, *supra* note 35, at 1000.

⁴⁵ Lest you think that I have made any of this up or that the definition is in any way tailored to the election context, let me remind you that Huizinga, who was German-Swiss, wrote in 1944; that Caillois, who was French, wrote in 1960; and that Leff was writing about adjudication.

parliamentary systems, our elections are at repeated, fixed intervals. We expect election decisions to be made on a particular day and in an all-or-nothing fashion: For us, there is no waiting period during which the winning party puts together a coalition to form a government. American elections are winner-take-all affairs, no matter how close the vote; few, indeed, are the electoral schemes that smack of any form of proportional representation.⁴⁶ And presidential races, at least, are about prowess and tenacity: It is a staple of American politics that a presidential candidate must have the proverbial “fire in the belly.”

More interesting for our purposes are the decisions, arguments, and exhortation of the post-election period in which the impress of this conventional conception of games is clearly reflected. Some cases, such as the “Sore-Loserman” reference and the “can’t change the rules in the middle of the game” refrain, are sufficiently obvious that they do not require discussion (though I shall have more to say on the latter in a moment). Others, though more marginal to the public discourse, are nonetheless striking. One such example is Thomas Friedman’s Op-Ed column the morning of the final Supreme Court decision in *Bush v. Gore*.⁴⁷ Echoing Caillois’s observation that “doubt must remain until the end,” Friedman argued that the “fairest way to handle this too-close-to-call vote in Florida would have been the one solution by which, if you adopted it, you would not know who would win.”⁴⁸ He encouraged the Supreme Court to adopt “a solution—a statewide hand recount by a uniform standard—that would leave both Mr. Gore and Mr. Bush with a sick feeling that once the recount has started they don’t know who will win.”⁴⁹ Only when the Court “has re-established that sick feeling in both men” will it “have ensured a legitimate outcome and restored

⁴⁶ The principal exceptions are the two states (Maine and Nebraska) that, by statute, proportion their Electoral College votes. See Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241, 241 (2001).

⁴⁷ Thomas L. Friedman, *Foreign Affairs: A Tally of Two Countries*, N.Y. TIMES, Dec. 12, 2000, at A33.

⁴⁸ *Id.*

⁴⁹ *Id.*

the authority of this election to where it belongs—with ‘We the people.’”⁵⁰

Friedman’s argument is arresting in its insistence that the adequacy of a remedy is to be measured by the sick feeling it engenders in the candidates. At first blush, he seems quite sensibly to be saying that a remedy which leaves the candidates in doubt is most likely to be a fair one.⁵¹ If neither side can predict a win, then one can reasonably infer that the chosen remedy advantages neither candidate. But Friedman is also saying something more and different. Earlier in the piece, he discusses the substantive adequacy of the standard that should be employed on any recount: “‘Any dimple will do’ is no way to recount votes, and no recount of votes in an impossibly close election is no way to win.” His proposal is “the sunshine rule—that only punch ballots that are perforated so that you can see light through them can be counted.”⁵² But, at the close of the piece, he does not equate the democratic legitimacy of the election with the fair and meticulous counting procedures that he has just proposed. Rather, it is the restoration of tension and doubt—“when the court has *re-established* that sick feeling in both men”⁵³—that ensures a democratic and legitimate outcome. This is not a proposal to check more carefully the outcome of a race already completed as in a photo finish, but rather a bid to reinstate the tension and doubt of the competition itself. And, not coincidentally, it is a proposal

⁵⁰ *Id.*

⁵¹ Friedman’s argument points out the bivalent nature of the game metaphor, which has good entailments as well as bad. Because the focus of my argument has been on the ways in which the game metaphor skewed the debate during the post-election contest—supplanting the fundamental democratic values that should have informed the outcome—some might conclude that the game metaphor (or metaphor, generally) is inherently distorting. But that conclusion follows only upon discredited objectivist assumptions about language as reference to a mind-independent reality that the metaphor could, then, “misrepresent.” Once we understand metaphor as constitutive of our reality, the only relevant question is the pragmatic one whether the particular metaphor enables useful or harmful perceptions, insights, and actions. WINTER, *supra* note 27, at 65-67. Friedman’s argument—that a recount procedure that would engender a “sick feeling” in the candidates would be a fair one—illustrates the positive value of the game metaphor in structuring notions of “fair play.” See CAILLOIS, *supra* note 30, at 47 (“There is no better example of the civilizing role of play than the inhibitions it usually places on natural avidity.”); HUIZINGA, *supra* note 29, at 207 (“There can be no doubt that it is just this play-element that keeps parliamentary life healthy. . . .”).

⁵² Friedman, *supra* note 47.

⁵³ *Id.*

that would further test the mettle of the candidates—that is, their courage, tenacity, sportsmanship, etc.

More interesting still are two sets of legal arguments that, upon examination, depend upon the entailments of the game metaphor. The per curium opinion in *Bush v. Gore* held that, because the Florida Supreme Court had indicated “that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5,” no remand to the Florida Supreme Court for a further remedy was possible.⁵⁴ Chief Justice Rehnquist’s concurring opinion went further, arguing that Article II constrained state judicial interpretation of state legislative action with respect to presidential elections.⁵⁵ According to the concurring opinion, the contest period provided by state statute “necessarily terminates on the date set by 3 U.S.C. § 5 for concluding the State’s ‘final determination’ of election controversies.”⁵⁶ Entirely absent from the opinion is any explanation of why the safe harbor provision provides a necessary terminus for the recount. Instead, we are offered the assertion that: “Surely when the Florida Legislature empowered the courts of the State to grant ‘appropriate’ relief, it must have meant relief that would have become final by the cut-off date of 3 U.S.C. § 5.”⁵⁷ Exactly why “it must have meant” a final cut-off of December 12th is unclear. Neither the state legislature nor the Florida Supreme Court in its prior interpretation of the statute provided any indication of how one should handle the trade-off between finality (as ensured by the safe harbor provision) and accuracy (as proposed by the statewide recount).

It is easy enough to explain this lapse cynically as nothing more than a result-oriented argument by the Court’s three most conservative members. Personally, I am sympathetic to that explanation though, for reasons I will explain in a moment, I cannot accept it as complete. Alternatively, one could argue, as Judge Posner does, that the Court was right to let considerations of finality dictate the result so as to avoid the uncertainties of possibly throwing the

⁵⁴ *Bush v. Gore*, 531 U.S. at 111.

⁵⁵ *Id.* at 112-16 (Rehnquist, J., concurring).

⁵⁶ *Id.* at 117.

⁵⁷ *Id.* at 121 (emphasis added).

election to the House.⁵⁸ (I am, as you might imagine, less sympathetic to this one.) In any event, there is nothing surprising in the Court raising concerns about finality five weeks after election day.

But, whether one is cynical or approving, there are two problems with these result-oriented explanations. The first is that the rhetoric of finality had been a staple of Republican rhetoric *from day one*. The morning after the election Bush insisted that “the final vote count there shows that Secretary Cheney and I have carried the State of Florida.”⁵⁹ The next day, his campaign chairman, Donald Evans, said that: “Our democratic process calls for a vote on Election Day. It does not call for us to continue voting until someone likes the outcome.”⁶⁰ That Saturday, after the initial recount had been completed and the Republicans had filed suit to enjoin the manual recount, James Baker urged “the Gore campaign to accept the finality of the election” even though, as he noted, the absentee votes had yet to be counted.⁶¹ Both Baker and others made frequent references to Presidents Nixon and Ford who chose to concede close elections in 1960 and 1976, respectively, rather than polarize the country by prolonging the contest.⁶²

The second problem is the one I raise in the book under the rubric of “law as persuasion.”⁶³ As the plurality in *Planned Parenthood v. Casey*⁶⁴ so painfully recognized, judicial decisions must at the least be “sufficiently plausible to be accepted by the Nation”⁶⁵ on the terms claimed for them, as grounded in law, and “not as compromises with social and political pressures having, as such, no bearing on the principled choices

⁵⁸ POSNER, *supra* note 15, at 143-60.

⁵⁹ *The 2000 Election: Bush's View of the Election*, N.Y. TIMES, Nov. 9, 2000, at B3.

⁶⁰ “We Are Confident”: *Statements by Officials of the Bush Campaign*, N.Y. TIMES, Nov. 10, 2000, at A28.

⁶¹ *Counting the Vote: Baker Calls for “No Further Recounts,”* N.Y. TIMES, Nov. 12, 2000, A24; see also *The 2000 Election: Statements by Daley and Christopher on Their Findings on the Florida Vote*, N.Y. TIMES, Nov. 10, 2000, at A29 (reprinting statement by Daley accusing the Republicans of “put[ting] a demand for finality ahead of the pursuit of fairness”).

⁶² See, e.g., Firestone & Cooper, *supra* note 18; Walter A. McDougall, *The Slippery Statistics of the Popular Vote*, N.Y. TIMES, Nov. 16, 2000, at A35 (Op-Ed).

⁶³ WINTER, *supra* note 27, at 152-56, 309-31.

⁶⁴ 505 U.S. 833 (1992).

⁶⁵ *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 865-66 (1992) (Opinion of O'Connor, Kennedy, & Souter, JJ.).

that the Court is obliged to make.”⁶⁶ Even if we were to accept the cynical account, there would remain the questions of how the Justices came to make the characterizations they did and why others might find those interpretations plausible. In other words, as I argue in the book, the need to make judicial decisions credible operates as a constraint on what those positions can reasonably be. And this constraint is operative regardless of the judge’s result-orientation or political motivation.

Here, both problems point inexorably to the finality entailment of the game metaphor. A game, Huizinga admonishes us, “proceeds within its own proper boundaries of time and space according to fixed rules and in an orderly manner.”⁶⁷ Indeed, as Leff says: “The most significant thing about games, therefore, is that they have a resolution.”⁶⁸ Finality, then, is more than a pragmatic necessity of presidential elections—though that it surely is. Finality is an expectation of the electorate; a rule of the game. A race is run and must be won. “It ain’t over ‘til it’s over,” as the saying goes; but once it’s over we are supposed to know who the winner is. Like a game, an election is an activity in which, to paraphrase Leff, you are supposed to know with some precision and immediacy how your guy did and how things came out.

There is another legal argument that implicitly trades on the expectations engendered by the game metaphor. It is the claim, variously made, that only a properly marked ballot is a “legal vote” and, therefore, that overvotes and dimpled chads should not properly have been counted. The Florida statutes contain no definition of a legal vote. Rather, the Florida Supreme Court defined a legal vote in terms of the statutory provision which says that no vote is to be declared invalid if there is “a clear indication on the ballot that the voter has made a definitive choice as determined by the canvassing board.”⁶⁹ The *per curiam* decision declined to revisit this decision, finding instead that the recount did “not satisfy the

⁶⁶ *Id.*

⁶⁷ HUIZINGA, *supra* note 29, at 13; *see also* CAILLOIS, *supra* note 30, at 9 (explaining that games are “circumscribed within limits of space and time, defined and fixed in advance”).

⁶⁸ Leff, *supra* note 35, at 1000.

⁶⁹ FLA. STAT. ANN. § 101.5614(5) (West Supp. 2001).

minimum requirement for non-arbitrary treatment of voters. . . .⁷⁰

The concurring Justices, however, argued that the Florida Supreme Court's definition of a legal vote "departed from the legislative scheme" in violation of Article II.⁷¹ Voters, they argued, are instructed to take care to punch the ballot "clearly and cleanly" and to make sure that "there are no chips left hanging on the back of the card."⁷² (Having voted in Florida for many years, I can confidently say that that is good advice—though I cannot recall ever seeing such instructions at my local polling place in Coral Gables.) For the concurring Justices, there was no legal reason for a recount because there had been no rejection of legal votes. The machines merely did what they were supposed to do, counting only such ballots as were "marked in the manner that these voting instructions explicitly and prominently specify."⁷³

Judge Posner makes a more sophisticated variant of this argument when he contends that:

A voting error is not a natural kind, like a star or a penguin or a blade of grass, which are things that exists independently of human cognition. A voting error is a legal category. The belief that it is possible without reference to law to determine who won the popular vote in Florida is the most stubborn fallacy embraced by the critics of the U.S. Supreme Court's intervention to resolve the deadlock.⁷⁴

He then argues that a proper understanding and application of the law suggests that Bush probably won a majority of the popular vote in Florida.⁷⁵ He concludes that the Florida Supreme Court not only "flouted," but "butchered the state's

⁷⁰ Bush v. Gore, 531 U.S. at 105 ("For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme . . . to define what a legal vote is and to mandate a manual recount. . . .").

⁷¹ *Id.* at 118-19 (Rehnquist, C.J., concurring).

⁷² *Id.* at 119.

⁷³ *Id.*

⁷⁴ POSNER, *supra* note 15, at 73-74.

⁷⁵ *See, e.g., id.* at 15-16 ("The Democrats' belief that Gore would probably have won the popular vote in Florida had more counties used a more user-friendly voting technology is not groundless, but it does not follow that he was the "real"—that is, the legal—winner.").

election statute" in (among other things) ordering the recount and allowing the counting of improperly marked ballots.⁷⁶

Both these arguments are well within the range of respectable legal argumentation—normal science, as it were. The concurring opinion's argument that only a properly marked ballot is a "legal vote" is a straightforward legal formalism. A valid will needs two witnesses; a check must be signed; a chad must be completely punched out. Posner's argument is closely related, but takes a philosophically and jurisprudentially more sophisticated form. Since the 1920s, it has been a staple of argument by legal academics on the left that things we take as "givens" are not natural kinds but the social construction of particular legal rules. The argument was initiated by the legal realists,⁷⁷ and more recently taken up and extended by feminist and critical legal scholars.⁷⁸ Posner adapts this point to conservative rhetorical ends, though that hardly detracts from its cogency or validity.

Still, the argument is too clever by half. The problem is that the social construction gambit which Posner invokes is the engine of a critique that *deconstructs* all formalisms—including such formalisms as "property," "freedom of contract," "gender roles," and "legal vote." Thus, the legal realist critique was that there could be no coherent notion of freedom of contract when the previous distribution of legal entitlements always already affected the relative bargaining positions of the parties. So, too, feminist critical scholars have argued that one cannot defend traditional gender roles on the ground that people choose them

⁷⁶ *Id.* at 159.

The Florida statute is vague. . . . All the statute says on this score is that if the court finds that enough "legal votes" were rejected to "change or place in doubt the result of the election," it can "provide any relief appropriate under such circumstances." "Appropriate" is not defined. . . . But even a term as vague as "appropriate" does not give a court carte blanche.

Id. at 138.

⁷⁷ See Robert Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451, 452-53 (1920); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

⁷⁸ See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1748 (1976); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1508-13 (1983). See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (fin de siècle)* 246-63 (1997).

when “the state is responsible for the background rules that affect people’s domestic” choices.⁷⁹ Posner’s argument is too clever by half because he is invoking the social construction point to justify what is, at base, the same formalism indulged in by the concurring Justices.

One can readily concede both that a vote is not a natural kind like a star or a penguin and that one cannot determine who won the popular vote in Florida without reference to law. But that still does not tell us whether we should read that law formalistically or realistically to accomplish its underlying purpose. The Florida Supreme Court plainly did the latter. In holding that a “legal vote” is any ballot that provides “a clear indication of the intent of the voter,”⁸⁰ the Florida court merely sought “to reach the result that reflects the will of the voters, whatever that might be.”⁸¹ Posner charges that “[w]hen the Florida supreme court drew upon the ‘people power’ clause of the state constitution to construe the state’s election code, it was imposing its own populist values. . . .”⁸² But that’s hyperbole. The Florida court was just applying the fundamental democratic value that government should be by the actual will of the people as best we can determine it, rather than by the will of only those people who—like me—are meticulous about punching out their chads.

The heart of Posner’s statutory reading is that the “intent of the voter” provision neither applies nor modifies the provision that provides for a recount only when there has been an “error in the tabulation of the vote.”⁸³ In this, too, he echoes the position of the concurring Justices.⁸⁴ But the argument is either circular or just another formalism because it too

⁷⁹ Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 837 (1985).

⁸⁰ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1229 (Fla. 2000).

⁸¹ *Id.* at 1228.

⁸² POSNER, *supra* note 15, at 123.

⁸³ *Id.* at 95-99.

⁸⁴ *Bush v. Gore*, 531 U.S. at 119 (“No reasonable person would call it ‘an error in the vote tabulation,’ FLA. STAT. § 102.166(5) (West 2000), or a ‘rejection of . . . legal votes,’ FLA. STAT. § 102.168(3)(c) (West 2000), when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.”).

presupposes that one knows what a vote is. Since a vote is not a natural kind like a star or a penguin, we cannot determine whether there is an error in the tabulation of the vote unless and until we define the term "vote." Once again, one can define a vote either formalistically or realistically in light of its underlying democratic purpose.

But Posner is no formalist, as even a cursory reading of his *Problems of Jurisprudence* reveals.⁸⁵ Posner is a pragmatist, which means amongst other things that he endorses judicial reasoning that is purposive and consequentialist. So we are left with the questions broached earlier: How did Posner and the concurring Justices come to make the characterizations they did and why should they and others find those arguments plausible?

Here, too, the answer is that the arguments trade on the expectations engendered by the game metaphor. Games are defined by the formal order of their rules—which are essentially arbitrary and, for that very reason, utterly authoritative. You can't ask why the Queen in chess can move in any direction; there's no reason for it, that's just the rule. In just the same way, when the Florida court asks why it is that we count votes and, then, takes that into account in deciding what constitutes a legal vote, Posner treats the question as out of bounds; it seems obvious to him that the decision is a case of the court imposing its own populist values. But it isn't; it's just standard-order, purposive legal reasoning. It occurs every day in law, and is ordinarily celebrated by a pragmatist like Posner. Thus, Posner has previously written that:

The contestability of legal rules stand in contrast to that of . . . the rules of the game. . . . Although the rules of the game are changed from time to time, it is unthinkable (in a "serious" game) to change the rule during the game. . . . But legal rules do not so completely define the activities which they enable or facilitate that those activities lose their purpose if the rules are changed while the

⁸⁵ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 40-41 (1990): [T]oday when used pejoratively, "formalism" is more likely to refer to an exaggerated belief in the transparency of statutory or constitutional language and hence in the possibility of definitively correct answers to difficult interpretive questions. . . . [It] spares the lawyer or judge from a messy encounter with empirical reality.

activities are in progress. A chess player who announces in the middle of the game that he will not allow his rook to be captured by his opponent's queen, because queens have too much power in chess, might just as well sweep all the pieces from the board; and it would not make the slightest difference whether . . . the player waited until he lost the game and then asked the umpire to order it replayed under rules reflecting a more equitable distribution of power among the pieces. These sorts of appeals are allowed in law, however.⁸⁶

In law, the refrain "you can't change the rules in the middle of the game" is always vulnerable to a normative challenge based on a higher order principle implicit in the law itself. Posner's criticism loses track of the important truth that an election is not a game. It is a legal process that we engage in for very important, very solemn, very democratic reasons.

III. AND ALL THE MEN AND WOMEN MERELY PLAYERS

Why, then, is our core concept of elections constituted by our experience and understanding of games? And why, in the final analysis, should our metaphorical understanding of elections trump more fundamental values of democracy and self-rule?

On Huizinga's theory, the answer is straightforward. Huizinga sees civilization as evolving through and elaborated by play. "It does not come *from* play like a babe detaching itself from the womb: it arises *in* and *as* play and never leaves it."⁸⁷ The game quality of American elections is, for Huizinga, merely a commonplace.⁸⁸

Long before the two-party system had reduced itself to two gigantic teams whose political differences were hardly discernable to an outsider, electioneering in America had developed into a kind of national sport. The presidential election of 1840 set the pace for all subsequent elections. The party calling itself Whig had an excellent candidate, General Harrison of 1812 fame, but no platform. Fortune gave them something infinitely better, a symbol on which they rode to triumph: the log cabin which was the old warrior's modest abode during his retirement.⁸⁹

⁸⁶ *Id.* at 49-50. Cf. POSNER, *supra* note 15, at 225 (quoted *supra* note 15).

⁸⁷ HUIZINGA, *supra* note 29, at 173.

⁸⁸ *Id.* at 207 ("We need hardly add that this play-factor is present in the whole apparatus of elections.")

⁸⁹ *Id.*

Though Huizinga's account has its attractions,⁹⁰ it is problematic in at least two ways. First, Huizinga's concept of play is, as Caillois first noted,⁹¹ much too narrow in its focus on games with agonistic structure. There are other, familiar forms of play—ring-around-the-rosie, the child's game of "putting on a show," games of chance—common in our own culture. Huizinga's account concentrates our attention on the obvious agonistic elements of American elections. But, there are other dimensions of play that, upon analysis, turn out to be equally important in understanding the phenomenon of American elections. Second, it would seem difficult to root the game-concept of elections in a foundational spirit of play when Huizinga himself argues that "the play-element in culture has been on the wane ever since the 18th century. . . . Civilization to-day is no longer played, and even when it still seems to play it is false play."⁹² Huizinga is particularly harsh on modern sports which, on his view, have been transformed by systematization, regimentation, and professionalization. "Between them they push sport further and further from the play-sphere proper until it becomes a thing *sui generis*. . . ." ⁹³ The same might well be said of presidential campaigns, where the sports analogy is particularly powerful.⁹⁴

We can begin to address these shortcomings by considering the richer conceptual vocabulary offered by Caillois's typology of play. Caillois identifies four categories of play that he designates as *agôn* (i.e., conflict based), *alea* (i.e., governed by chance), *mimicry* (i.e., forms of make believe), and *ilinx* (i.e., vertiginous or "limnal" forms of play such as whirling, roller coaster rides, or Dionysian revelries such as

⁹⁰ If nothing else, it suggests something of the cognitive and historical depth of the game-concept of elections.

⁹¹ CAILLOIS, *supra* note 30, at 3-5.

⁹² *Id.* at 206.

⁹³ *Id.* at 196-98.

⁹⁴ See, e.g., Apple, *supra* note 12, at A23 ("[W]inning, as Vince Lombardi said in another context, is not the main thing but the only thing."); Eric Schmitt & Irvin Molotsky, *Congress: Joy and Bitterness, Along Party Lines*, N.Y. TIMES, Dec. 13, 2000, at A25 ("Senator Byron L. Dorgan, Democrat of North Dakota, agreed, saying, 'If the Supreme Court rules against Mr. Gore, I think it's been game, set, match.'"); Purdum, *supra* note 17 (quoted text accompanying note 17, *supra*).

Mardi Gras and Carnival).⁹⁵ Each of these forms of play is defined not by a structure, but an attitude:

the desire to win by one's merit in regulated competition (*agôn*), the submission of one's will in favor of anxious and passive anticipation of where the wheel will stop (*alea*), the desire to assume a strange personality (*mimicry*), and, finally, the pursuit of vertigo (*ilinix*). In *agôn*, the player relies only on himself and his utmost efforts; in *alea*, he counts on everything except himself, submitting to the powers that elude him; in *mimicry*, he imagines that he is someone else, and he invents an imaginary universe; in *ilinix*, he gratifies the desire to temporarily destroy his bodily equilibrium, escape the tyranny of his ordinary perception, and provoke the abdication of conscience.⁹⁶

Because each form of play manifests a different *attitude*, it also represents a different *character* in the sense that it involves particular beliefs, feelings, values, and behavioral dispositions. Thus, for Caillois, "the destinies of cultures can be read in their games. The preference for *agôn*, *alea*, *mimicry*, or *ilinix* helps decide the future of civilization."⁹⁷

In his well-known *Law and*, Arthur Leff applied Caillois's sociological theory to explain the structure of the American judicial trial.⁹⁸ Leff argued that neither the adversary structure nor the winner-take-all format of the trial seem particularly well suited to a procedure designed to elicit truth and achieve justice.⁹⁹ But, he concluded, they make perfect sense as a product of larger cultural themes in which agonistic games dominate daily life. Americans, Leff observed, are virtually obsessed with games: "they take part, either as participants or spectators, in a vast array of activities they call 'sports' and 'games.' They have 'baseball,' 'football,' 'basketball,' 'tennis,' and 'golf.' They have 'chess,' 'checkers,' 'bridge,' and 'Monopoly.' And these lists hardly begin to exhaust the scope of the activity."¹⁰⁰ The trial, he concluded, is "an amphibian cultural artifact that embodies, simultaneously, at least two

⁹⁵ CAILLOIS, *supra* note 30, at 44.

⁹⁶ *Id.*

⁹⁷ *Id.* at 35.

⁹⁸ Leff, *supra* note 35, at 998-1005.

⁹⁹ *Id.* at 1004 ("It is, after all, inherently implausible that an epistemological inquiry in the form of an agonistic game maximizes thoroughness and accuracy of factual determination.")

¹⁰⁰ *Id.* at 998.

different social mechanisms.”¹⁰¹ It is both a more-or-less effective solution to the practical problem of determining “what happened” and, at the same time, the enactment of a deeply held cultural aesthetic.¹⁰²

The American obsession with games has, if anything, increased since Leff wrote. Professional sports seasons have been so far extended that we often seem to have football, baseball, basketball, and hockey all at the same time. Video and computer games can be found in most every home—and in multiple technological formats that include television consoles, personal computers, and handhelds. While gambling in various forms has always been with us, it is no longer the special province of Las Vegas or the neighborhood numbers racket. Fabulous gambling casinos have now sprung up in Atlantic City and on numerous Indian reservations. We have also seen the explosion of state-run lotteries—often sold as a means of financing local education. These government-run lotteries are heavily promoted in television, radio, and billboard advertisements that multiply as the jackpots build. Drawings are covered live on the local news.

The saturation of American life by games and game playing is hardly a surprise. After all, by mid-century, baseball was firmly entrenched as the “national pastime”; it was a standard trope of World War II era movies that one could always identify a German infiltrator by asking “Who won the World Series?” In the post-war era, the simultaneous increase in leisure time (the forty-hour work week now a standard of American working life) and the advent of television (with its voracious appetite for programming) have fueled the further penetration of games—particularly professional sports, but also game shows of many varieties—in American culture. More surprising is the explosion of lotteries and gambling over the last twenty-five years. A scant century ago, the idea that lotteries were a “widespread pestilence” justifying nearly universal state prohibition as well as congressional action barring the movement of lottery tickets in interstate commerce

¹⁰¹ *Id.* at 1005.

¹⁰² *See id.* at 1003 (“[I]t is the nature of the game solution that it be, so to speak, an aesthetic solution to a practical problem: one does something and can be seen to do something that ‘fits’ the rule that gives it significance.”).

was simply a truism of constitutional law.¹⁰³ Today, one can scarcely find a state that does not run a lottery.

There is another way in which the explosion of gambling seems—superficially, at least—to be at odds with American culture. The heart of the Huizinga-Caillois argument is that the dominance of agonistic forms of play in Western culture conduces to competitive, meritocratic forms of social ordering in the economic, social, and political institutions of everyday life. Conversely, Caillois argues that societies which manifest a marked preference for *alea*, *mimicry*, or *ilinx* tend toward very different forms of social ordering.¹⁰⁴ From this perspective, the rise of institutionalized gambling appears at first blush as an aberration in our market-based, highly competitive, careerist, work-oriented culture.

I do not want to make too much of this purported anomaly, for there are many ways in which the inconsistency is only apparent. For one thing, the “get rich quick” impulse behind the popularity of state-run lotteries is perfectly consonant with the materialist values and “rags to riches” folk model (conventionally identified with the Horatio Alger story¹⁰⁵) that characterize American culture. For another, there are innumerable games from backgammon to Monopoly that combine *agôn* and *alea*. Indeed, the combination of competition and chance is integral to the meaning and psychological resonance of the play

¹⁰³ *Champion v. Ames*, 188 U.S. 321, 357 (1903).

¹⁰⁴ See CAILLOIS, *supra* note 30, at 83-86:

[I]f games are cultural factors and images, it follows that to a certain degree a civilization and its content may be characterized by its games. They necessarily reflect its culture patterns and provide useful indications as to the preferences, weakness, and strength of the given society at a particular stage of its evolution. . . .

I do not mean to insinuate in any way that cultures are like games and therefore also governed by *agôn*, *alea*, *mimicry*, and *ilinx*. . . . However I also suspect that the principles of play, persistent and widespread mainsprings of human activity, . . . must markedly influence different types of society.

Id.

¹⁰⁵ In popular culture, Horatio Alger is often mistaken for the hero of these stories; in fact, Alger was the author of over forty novels and short stories with this theme. See Steven L. Winter, *The Cognitive Dimension of the Agôn Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2268 (1989).

in which the player's pleasure derives from having done as well as possible in a situation not of his creation, the course of which he alone can only partly control. Chance is represented in the resistance offered by nature, the external world, or the will of the gods to his strength, skill, or knowledge. The game seems like the very image of life, yet an imaginary, ideal, ordered, separate, and limited image.¹⁰⁶

In this way, success in the game provides the psychological satisfaction of obstacles overcome and mimics for the player the satisfaction from mastery that may elude him or her in real life.

From a psychological point of view, in other words, play serves a *compensatory* function. The psychological centrality of games derives from their capacity to create order in a chaotic, unpredictable, imperfect world. The precise, often arbitrary rules of a game are comforting because they define time and space, the permissible and impermissible, winners and losers. Games provide structure, aesthetic order, and closure. Play, in other words, provides respite from the conditions and uncertainties of ordinary life.

But, for play to work as escape from life's pressures, it must take a particular, psychologically resonant form: It must mimic the life-world, and it must do so in a way that is both psychologically "safe" and, at the same time, allows that world to be mastered or overcome. In agonistic games, the players rely on their merit in regulated competition governed by conditions of formal equality. Here, unlike life, it is only who you are and not who you know that determines success. In games of chance, the players submit to powers that elude them—subsuming their will-to-power in anxious and passive anticipation of where the wheel will stop. In games of mimicry (i.e., play acting), the players imagine themselves as someone they are not (but long to be), inventing and inhabiting an imaginary proxy universe.

The need for this psychological compensation is intensified under the highly competitive conditions of late-capitalist societies such as the United States.¹⁰⁷ Modern society

¹⁰⁶ CAILLOIS, *supra* note 30, at 75. See also *id.* at 121 ("There is doubtless no combination more inextricable than that of *agôn* and *alea*.").

¹⁰⁷ By "late capitalism," I refer to the social conditions and practices characteristic of postmodernity in so-called "post-industrial" economies such as ours.

presents itself as rewarding merit expressed under conditions of competitive equality. Nearly every aspect of the social and economic world is organized by competition in markets that are presumptively open, fair, and governed only by merit.¹⁰⁸ But, there is inevitable discordance between expectation and reality. Everyone wants to be first; but, by definition, everyone cannot be. "Daily competition is harsh and implacable as well as monotonous and exhausting. It provides no diversion and accumulates rancor. It abuses and discourages. . . ."¹⁰⁹ Thus, the injunction to "pull yourself up by your bootstraps" implies to those who fall behind that they have only themselves to blame. At the same time, the sheer complexity of late-capitalist societies requires enormous endowments of social capital—the right schools, the technical know-how—just to have a fair chance to compete. Eligibility (i.e., formal equality) simply does not suffice for meaningful participation in the rigors of real-world social and economic contest.¹¹⁰ "Wealth, education, training, family background are all external and often decisive conditions which in practice may negate legal equality."¹¹¹ To those without such advantages, it will often seem that success is governed more by chance than by merit. And, in any event, "Chance, like merit, selects only a favored few."¹¹²

In this context, play assumes the starkly political functions of *legitimation* and *pacification*. For those with the physical skill to compete successfully, agonistic games like sports provide an opportunity to triumph that might otherwise be absent from their day-to-day experiences in the economic

These practices and processes include techno-bureaucratic rationalization, commodification, consumerism, media saturation, and social fragmentation. See, e.g., Steven L. Winter, *For What It's Worth*, 26 LAW & SOC'Y REV. 789, 793-99, 811-12 (1992).

¹⁰⁸ See CAILLOIS, *supra* note 30, at 114 ("modern society tends to enlarge the domain of regulated competition, or merit, as the expense of birth and inheritance, or chance, an evolution which is reasonable, just, and favorable to the most capable.").

¹⁰⁹ *Id.* at 119.

¹¹⁰ See *id.* at 112:

The equality of citizens is proclaimed, . . . [but i]nheritance continues to weigh upon everybody like a mortgage that cannot be paid off—the laws of chance that reflect the continuity of nature and the inertia of society. . . . Laws and constitutions seek to establish a fair balance. . . . However, it is obvious that the competitors are not equal in opportunity to make a good start.

¹¹¹ *Id.* at 112.

¹¹² *Id.* at 120.

and social sphere. Even when the player is not successful, the game nevertheless provides the comfort and reassurance of regulated competition under conditions of absolute formal equality—i.e., that the rules are fair and the playing field even.¹¹³ Thus fortified, the player can return to the larger arena of real-world contest with the sense (or illusion) that things are as they should be—i.e., that competition is fair and success still possible.

For those who cannot effectively compete, gambling and other games of chance provide “a necessary compensation for *agôn*. . . . Recourse to chance helps people tolerate competition that is unfair or too rugged.”¹¹⁴ As in agonistic games, gambling and other games of chance provide formal equality; in *alea*, Caillois observes, formal equality is all the more rigorous for its mathematical precision.¹¹⁵ Games of chance are more radically leveling—and, hence, yet more effective in their legitimating function: “[E]ven the least endowed . . . may be equal to the most resourceful and perspicacious as a result of the miraculous blindness of a new kind of justice.”¹¹⁶

Much the same process is at work in the cult of celebrity characteristic of contemporary mass culture. Caillois refers to it as a form of “alienation,” arguing that this form of “identification constitutes one of the essential compensatory mechanisms of democratic society.”¹¹⁷ By identification with the sports hero or movie star, ordinary citizens can share vicariously in the triumphs, adulation, and lavish lifestyle they could never achieve themselves. (Hence, the appeal of such shows as *Lifestyles of the Rich and Famous*.) It is a crucial part of this compensatory process, however, that the fans be able to see themselves in these proxies. This is what accounts for two

¹¹³ This will be true, moreover, whether the game is one of pure skill or one that combines competition and chance. See Caillois, *supra* note 30, at 74-75 (“In play and games, *agôn* and *alea* are regulated.”).

¹¹⁴ *Id.* at 115; see also *id.* at 114:

[M]any people do not count on receiving much from personal merit alone. They are well aware that others are abler, more skillful, stronger, more intelligent, more hardworking, more ambitious, healthier, have a better memory, and are more pleasing or persuasive than they are. . . . They therefore turn to chance, seeking a discriminatory principle that might be kinder to them.

¹¹⁵ *Id.* at 74.

¹¹⁶ *Id.* at 114.

¹¹⁷ Caillois, *supra* note 30, at 122.

of the singular aspects of celebrity culture: (1) the mythos of the rise from obscurity—the starlet discovered at the drugstore counter, the body-builder turned movie star (and Kennedy in-law), the boy from Tupelo, Mississippi becomes the King of Rock and Roll or the one from Hope becomes President;¹¹⁸ and (2) the voracious appetite for gossip about celebrities—their affairs, divorces, weight problems, personal tragedies, and other melodramas—that fuels the enormous industry of tabloid journalism. On one hand, as Caillois remarks, the meteoric rise from obscurity of “the champion and the star illustrate the dazzling successes possible even to the most underprivileged. . . .”¹¹⁹ On the other hand, there is an underlying envy and resentment that revels in the foibles and failings of the rich and famous—the concomitant need to pull one’s idols down off the pedestal and prove that they are, after all, really no better than the rest of us.¹²⁰

Under conditions of late-capitalism, *agôn* tends to merge with *mimicry* as play is rationalized, professionalized, and commodified. “While Americans are spending less time *doing* sports,” Putnam observes, “we are spending more time and money *watching* sports. . . .”¹²¹ Watching professional sports—especially on television—has increasingly supplanted actual play.¹²² Just as the cult of celebrity allows even the lowliest to “succeed” through identification with sports heroes and movie stars, a culture of spectator sports enables fans to “win” vicariously via the professional teams they root for. So, too, with other forms of play: More and more, people *observe* it rather than participate themselves. For example, while attendance at museums and concerts is up, the proportion “of

¹¹⁸ This folk model is probably as old as culture: It can be found in fairytales such as *Cinderella* and, in a variety of forms, in both the Old and New Testaments.

¹¹⁹ CALLOIS, *supra* note 30, at 124.

¹²⁰ See *id.* at 123 (“One also imagines such a career to be somewhat suspicious, impure, or irregular. The residue of envy underlying admiration does not fail to see in it a triumph compounded of ambition, intrigue, impudence, and publicity.”).

¹²¹ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN PUBLIC LIFE* 109-13 (2000).

¹²² “[A]s a fraction of the population, participation in all of the following sports has fallen by 10-20 percent over the last decade or two: softball, tennis (and other racket games, like table tennis), volleyball, football, bicycling, skiing (downhill, cross-country, and water), hunting, fishing, camping, canoeing, jogging, and swimming.” *Id.* at 109. The same is true for youth sports, with the exception that there has been an increase in organized school sports for young women. *Id.* at 110.

households in which even one person plays an instrument has fallen from 51 percent in 1978 to 38 percent in 1997.¹²³ Play still provides psychological escape, but it is progressively passivized—even alienated.

The increasing passivity of play is mirrored in the political sphere. In the last quarter of the twentieth century, fewer Americans signed a petition, wrote to their elected representatives, attended a town or school board meeting, belonged to a political club, worked for a party, ran for political office, participated in a public rally, or went to hear a political speech than in decades past.¹²⁴ For most Americans, participation in self-governance subsists in the occasional, formalistic act of voting on election day. And, of course, even that is declining:

Throughout most of the twentieth century, voting rates in the United States were much lower than in almost all other advanced democracies. From 1960 to 1995, the average election turnout in thirty-seven other countries almost invariably exceeded 70 or 80 percent of the eligible citizens, with only a modest decline in recent years. During the same period, turnout in American presidential elections was 20-40 percent lower than the average for most of these nations, and declined much more sharply. From the early 1960s to 1996, voting in presidential elections fell by 25 percent, from well over 60 percent to slightly less than 50 percent. In off-year elections for Congress and for governorships, turnouts dropped from 48 percent in the mid-1960s to 36 percent in 1998. Over the same period, voting rates in midterm primary elections plummeted from approximately 30 percent to barely more than 17 percent. These trends are all the more remarkable since they occurred in a period when registration barriers were falling and education levels were increasing throughout the population.¹²⁵

Even more striking than these bare statistics is the fact that declining voter participation has coincided with the professionalization of politics. In the last third of the twentieth century, American political parties experienced phenomenal growth in financing, organization, size of professional staff,

¹²³ *Id.* at 114-15.

¹²⁴ *Id.* at 40-41.

¹²⁵ DEREK C. BOK, *THE TROUBLE WITH GOVERNMENT* 387 (2001).

sophistication of their polling and advertising even as party loyalty and citizen participation steadily declined.¹²⁶

But, if politics and play seem largely parallel in their increasing passivity, they remain sharply different in their degree of penetration in daily life. In sharp contrast to the pervasiveness of games in American culture, the experience of self-governance is abstract, theoretical and alien. Frank Michelman explains that in republican theory: "Freedom in its fullest sense *is* self-government, active engagement in a self-directive process that is cognitive as well as volitional."¹²⁷ But, in that sense, most of us are not free. Most of us live and work in social institutions that are hierarchical and bureaucratic. Very, very few of us live in municipalities governed by town meetings, attend democratically organized houses of worship, or labor in self-governing workplaces. Nor are our families democratically organized. From dawn to dusk, except perhaps on election day, democracy and self-governance are strangers—no real part of our day-to-day experience. Indeed, as we have seen, Americans increasingly lack self-governance even in their play. It should hardly seem surprising that, as Frank Michelman observes, "active self-government" is something "that citizens find practically beyond reach."¹²⁸

We can now see why our core concept of elections is constituted by our experience of games rather than our understanding of democracy. First, for us as Americans, the practice of game-playing is concrete, immediate, and familiar. But, if we have a robust, well-developed understanding of games, we are not equally well versed in the practices of self-government. Simply put, we do not truly understand democracy and self-rule because we have little or no experience of it. To paraphrase something I said in the book, a better election law can always be promulgated, but *self-governance*

¹²⁶ PUTNAM, *supra* note 121, at 37-40.

¹²⁷ Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 73 (1986).

¹²⁸ *Id.* at 74; *see also id.* at 75 ("For a citizen of Geneva it was perhaps imaginable that positive freedom could be realized for everyone through direct-democratic self-government, a sovereignless civic process of ruling and being ruled, with no place for legal authority beyond the process itself. But for citizens of the United States, national politics are not imaginably the arena of self-government in its positive, freedom-giving sense.")

must be lived if it is to continue to be recognized as such.¹²⁹ No wonder the rhetoric of games and game-playing seemed more resonant than arguments premised on substantive democratic values: The latter had nothing to resonate *with*.

Second, one can hardly expect fundamental values of democracy and self-rule to trump the expectations of the game metaphor when, in both social spheres, we have internalized a passive ethic of spectatorship and consumerism. For most Americans, politics *is* a game that—like most games—is played by others.

Barely two decades ago election campaigns were for millions of Americans an occasion for active participation in national deliberation. Campaigning was something we did, not something we merely witnessed. Now for almost all Americans, an election campaign is something that happens around us, a grating element in the background noise of everyday life, a fleeting image on a TV screen. Strikingly, the dropout rate from these campaign activities (about 50 percent) is even greater than the dropout rate in the voting booth (25 percent).¹³⁰

Here, as elsewhere in contemporary culture, voters are reduced to mere consumers. "Participation in politics is increasingly based on the checkbook, as money replaces time."¹³¹ As consumers, satisfaction is achieved not in civic participation, but indirectly through identification with one's candidates or as spectators of staged campaign events and content-free televised debates. And, just as the cult of celebrity comprises a resentment that relishes the failings of the famous, the practice of our postmodern, non-participatory democracy entails a corrosive cynicism about a political game in which the average citizen cannot compete (and, therefore, can never win). Little wonder that Americans are apathetic about politics, cynical about politicians' motivations, and suspicious of their government.

The judicial resolution of the 2000 presidential contest and the muted public reaction to the Court's usurpation in *Bush v. Gore* pose a seemingly overwhelming challenge. For those who care about democracy, the picture seems bleak

¹²⁹ See WINTER, *supra* note 27, at 352.

¹³⁰ PUTNAM, *supra* note 121, at 41.

¹³¹ *Id.* at 40.

indeed. One thing, however, seems clear: If we are ever to reclaim the values of democracy and self-governance, it will be only because we have begun to practice and live those values in our communities, our workplaces, and our everyday lives.

Now, perhaps, is the time to begin.

