In 1953, Justice Robert Jackson wrote of the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." Americans don't believe the court is infallible, but they do respect the finality of its decisions. If the court were to lose that respect, its very authority could dissipate, damaging our constitutional order.

That possibility is in the air this fall, as the nation goes through an election that could end up with disputed results in multiple states. Already, we hear rumblings of problems in Florida similar to those that spoiled the 2000 voting. Ohio, where the polls are very tight, is also a potential trouble spot, as is Colorado, where a measure on the ballot may change the rules governing electoral votes after the voting is over. Both the Republican and Democratic parties are assembling flying squads of lawyers to be deployed anywhere on a moment's notice.

One party or the other could end up seeking the court's intervention in the 2004 election. But whatever you think of the *Bush v. Gore* decision of four years ago, the court would be making a terrible mistake if it let itself become involved in determining the outcome again. And it isn't necessary. There are established political procedures for dealing with disputed elections, and that's the right way to settle a political problem.

I am convinced that the negative reaction to *Bush v. Gore* took the court's majority by surprise. Working in isolation, with almost no time for reflection, these conscientious but somewhat naïve judges thought they were saving the country. In fact, they short-circuited the political process and did serious damage to the American sense that "we the people" are the rulers and not the ruled. And the dire emergency the justices may have thought they were curing was largely a mirage. Like much of democratic government, the Florida recount was by turns crass, vulgar and confusing -- but it was on its way to producing a victor without judicial help.

Article II of the U.S. Constitution and Title 3 of the U.S. Code lay out the procedure that Florida was following. The Constitution says that a state shall "appoint" electors "in such manner as the Legislature thereof may direct." A state need not even hold an election, and if it does, the legislature may still decide to "appoint" its own slate. That's particularly true if the state has held an election to choose electors "and has failed to make a choice on the day prescribed by law" -- perhaps because the vote is so close that an accurate recount is impossible. In that case, the statute says that the state legislature may appoint the electors "on a subsequent day."

Once electors are "appointed" -- however that may be done -- their names are to be sent by the governor to the Archivist of the United States. If there is a "controversy or contest" concerning the electors -- as there was in Florida -- the governor must also send the Archivist a statement of how it was resolved. The electoral votes are to be opened on "the first Monday after the second Wednesday in December" and officially counted on Jan. 6. If the state has resolved its controversy by the December date, then the statute pledges that Congress will abide by the governor's certification of the state's choice. If the state has not resolved its internal dispute by the deadline and there are two sets of electors claiming victory,
the issue goes to Congress. If the House and Senate both choose the same slate, then those electors' votes will be counted. But if the two houses disagree on the proper slate, the statute requires Congress to abide by the governor's certification.

Can you see how that statutory scheme would have played out in 2000?

The Florida legislature was already moving to "appoint" the Bush electors. George Bush's brother Jeb would have certified that result. Even if Al Gore had "won" a recount, all that victory would have gotten him was the right to present his rival slate to Congress (perhaps with the backing of the Florida Supreme Court). But the Republican-controlled House in Washington would surely have refused to overturn Jeb Bush's certificate.

If that's the case, did the court do any real harm? After all, by acting when it did, it cut off the turmoil on Dec. 12, while following the statute would have delayed the result until Jan. 6, 2001.

But the better question is whether the court did any good at all -- let alone enough good to justify the risk to its own legitimacy. Remember that Bill Clinton would still have been president until Jan. 20, 2001 -- two weeks after Congress convened to count the electoral votes. The rules governing congressional voting on electors limit debate, so the vote on the dueling slates would almost certainly have been completed before Clinton left office, and Bush would have been sworn in right on time.

I have seen articles detailing a number of ways the process could have gone off the rails (we law professors delight in generating nightmare scenarios). It's theoretically possible that Congress might have rejected both sets of electors or in some other way botched the process so that no candidate would have had a majority of the electors by Jan. 20. But looking at the numbers, I don't see much practical chance of that having happened. And even if it had, the statutory scheme would then have given way to Article II again -- the final choice of the new president lies in the House of Representatives voting by states. Bush would have needed 26 votes, and the makeup of the Congress elected that year shows he would have won handily.

It's no accident that the statutory scheme puts the decision squarely in the hands of elected officials, state and federal. Choosing the president is a political, not a legal matter, and voters who disagree with the choice should be able to hold those who make it to account. If the people objected to the scenario above, they would have had the chance to make their feelings known in 2002. President Bush scored a huge success in the mid-term elections that year; had the members of Congress also been the ones who anointed him, he might then legitimately have claimed those results as the seal of popular approval. As it is, they gave him more power, but not more legitimacy.

The Supreme Court had no obligation to become involved. Every first-year law student studies the "avoidance" and "political question" doctrines, which permit the court to dismiss actions that really belong in another branch of government. Even if you think (as I do not) that the Florida Supreme Court was acting in a partisan manner, the court should have stopped that behavior without deciding the winner. All it had to do was vacate the lower court's decision, set out the proper legal rule, and send the case back to the state court. The Florida court had no way of forcing either the legislature or the governor to certify Gore's electors.

By acting as it did, the Supreme Court may have fixed a temporary crisis; but by lodging the presidential choice in the only branch that is not -- and should not be -- accountable to the voters, it may have sown the seeds of a more corrosive long-term crisis.

Millions of Americans (or at least millions of Democrats) still believe that Bush took office through a judicial coup d'etat. It has shaken their faith in our system. That is unfortunate, but it is done. The question for the nation and the court is what to do if, 10 days from now, the returns from one or more crucial states are inconclusive again.
Once again, there is little actual danger in allowing Congress to resolve the question. The greater danger is to our system and to the court's prestige. The past four years have seen no retirements from the high court; some court watchers have speculated that some of the justices have stayed on so as not to be accused of having picked Bush in order to help select their own successors. But courthouse gossip and the actuarial tables suggest that the next president may pick as many as four new justices. Should five Republican appointees once again turn the election to Bush, we will hear anew the accusation that the justices made their choice so that they could determine the philosophy of their successors.

_Bush v. Gore_ was a mistake -- one the people will over time forgive. If the court should make the same mistake again, forgiveness may be more elusive. It would be disastrous for our system if recourse to the Supreme Court became a feature of every presidential race; the already-politicized confirmation process for nominees to the court would become a guaranteed blood bath every time.

The court's prestige has been hard-won. In the early 1800s, Chief Justice John Marshall made the court respected; his successor, Roger Taney, forfeited that respect with his opinion in _Dred Scott_. Later justices like Oliver Wendell Holmes, Charles Evans Hughes and Louis Brandeis rebuilt the mystique; the partisan conservative majority of the 1930s shattered it again. In 1937, President Franklin Roosevelt tried to clip the court's authority by granting himself extra appointments. That "court-packing plan," which nearly succeeded, is a stark reminder that a court that loses public respect risks losing its independence as well.

On Dec. 9, 2000, the Supreme Court stopped the Florida recount. In his opinion that day, Justice Antonin Scalia explained that allowing the recount to proceed would harm Bush "by casting a cloud upon what he claims to be the legitimacy of his election." Political legitimacy, however, is not a gift the court can bestow. At stake this year is the court's own legitimacy; a wrong decision may tumble it from its high seat, into a place where it will be regarded as neither infallible nor final.

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