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# We Don't Count: Rousseau's General Will as a Tool to Judge the Legitimacy of the Judicial Decisions Relating to the Presidential Elections in Mexico and the United States

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# WE DON'T COUNT! ROUSSEAU'S GENERAL WILL AS A TOOL TO JUDGE THE LEGITIMACY OF THE JUDICIAL DECISIONS RELATING TO THE PRESIDENTIAL ELECTIONS IN MEXICO AND THE UNITED STATES

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THE presidential elections of the United States in the year 2000 and of Mexico in the year 2006 were decided by the narrowest margins in both countries' recent electoral histories.[1] Both elections gave rise to distrust, protest, and resistance among citizens despite—or perhaps because of—judicial decisions from the countries' highest courts.[2] As a result, scholars continue to disagree over the consequences that these decisions have caused to the institutional legitimacy of their respective countries.

This paper's object is to defend two propositions through a process of reflective equilibrium. The first proposition is the notion that the general will, as expressed by Rousseau, is an adequate mechanism to both measure the legitimacy of any state action or judicial decision and predict the effects and repercussions of such actions. The second is the idea that the performance of the courts in relation to the presidential elections in Mexico in 2006 and the United States in 2000 was poor because the tribunals

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1. Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court after* Bush v. Gore*: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101 (2002).

2. *See* JENARO VILLAMIL & JULIO IBARRA SCHERRER, LA GUERRA SUCIA DE 2006: LOS MEDIOS Y LOS JUECES (2007); ANDRÉS MANUEL LÓPEZ OBRADOR, LA MAFIA NOS ROBO LA PRESIDENCIA: "SÓLO LE HAN QUITADO UNA PLUMA A NUESTRO GALLO" 91 (2007). Perhaps the main cause of distrust and protest were the irregularities in the electoral process, but many pages have been dedicated to that topic. In Mexico, the highest court on electoral matters is not the Supreme Court, but rather the Electoral Tribunal of the Federation's Judicial Power (TEPJF).

damaged the institutional legitimacy in their countries by separating themselves from the general will of their citizens.

To defend these propositions, this paper will interpret Rousseau's view on the general will in conjunction with the thoughts of John Rawls regarding the original position under a veil of ignorance. This paper will first state the definition of general will it proposes and then apply this definition to criticize the judicial decisions of the Electoral Tribunal of the Federation's Judicial Power (TEPJF) during 2006 and the decision of *Bush v. Gore* pronounced by the Supreme Court in the United States in December 2000. Finally, it will use the same definition to explain why there was greater damage to the institutional legitimacy in Mexico than in the United States. If Rousseau's definition of general will can justify the criticism of the courts and explain the difference in damages, then, the definition itself acquires validity.

## I. ROUSSEAU AND THE SOCIAL CONTRACT AS A TEST TO EXAMINE THE HEALTH OF A POLITICAL SYSTEM.

In Rousseau's *Social Contract* we can see a clear standard by which to grade the legitimacy of a political organism: the general will. Rousseau wrote:

> There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former is no more than a sum of particular wills: but take away from these same wills the pluses and minuses, which cancel one another, and the general will remains as the sum of the differences.[3]

Some scholars have tried to explain this initial definition provided by Rousseau to give it a more clear and practical sense.[4] One of these explications says that in the world of Rousseau each citizen has desires and designs based on what they hold to be good for the community ("common good will") independent of what is in his own interests or how it affects his welfare ("particular will"). When faced with any problem, therefore, each citizen is conscious of both 1) a resolution to the problem that most benefits him as an individual and 2) a resolution to the problem that most benefits the community irrespective of how it affects him. These scholars then hold that a community expresses its general will in so far as its decisions are based on the common good will, and not on the particular will, of each citizen.[5] In this two-will world, where the general will of a community is understood based on the common good will's of its citizens, necessarily one must question the epistemology of the common good will. How do we, or worse, can we, know the common good will?

This paper proposes that the thoughts of John Rawls on the original position under a veil of ignorance may help us understand a person's

3. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, 24 (Edicions Leyenda 2006).
4. Gopal Sreenivasan, *What is the General Will?*, 109 THE PHIL. REV. 545-81 (2000).
5. *Id.* at 547-48.

common good will and therefore the general will of a community. Rawls, in *Justice as Fairness,* proposes that the best way to uncover would-be agreements between citizens is through an analysis from the perspective of the original position.[6] The original position is nothing more than a hypothesis of a pre-socialized world, just as the state of nature was for Hobbs, which facilitates the analysis of social agreements. Rawls suggests that the original position requires that citizens be under a veil of ignorance.[7] This means that the citizens do not know their social rank, the doctrines to which they adhere, their race, gender, strength, intelligence and, in our case, whether a certain judicial decision favors them or not. Rawls holds that from this position, citizens adopt decisions that adhere to the maximin rule; that is, they choose the alternative whose worst possible outcome is better than the worst possible outcome of every other alternative.[8] For example, in a community with a limited number of computers, the citizens will choose a resolution whereby the computers are distributed one per each young person and none to the rest over a resolution that distributes the same computers arbitrarily. The reason is that when we compare the possible outcomes of both resolutions it becomes obvious that the worse result of the second resolution (i.e. that all the computers end up in the hands of one person only) is far worse that the worst outcome of the first resolution (i.e. that you may be one of the persons that does not get a computer). For Rawls this is the first fundamental comparison in the process of public reasoning.[9] In our analysis, we will use Rawls' first fundamental comparison to identify the general will of Mexico and the U.S. with respect to the judicial claims made in relation to their respective disputed presidential elections.

With this definition in mind we may propose that the level of institutional legitimacy within a country depends positively on the level of conformity of state actions to the general will. It is consistent with this principle to expect that every state organ strive to assure that its actions are in conformity to the general will. Under this standard, the judicial decisions of courts are good only when their reasoning is supported by the general will; decisions to the contrary hurt the institutional legitimacy within the country.

## II. GORE V. BUSH

### A. ANTECEDENTS

The narrow results of the U.S. presidential election in the year 2000, in which despite winning the popular vote, Al Gore lost to George W. Bush in the electoral college by four votes, including the twenty-five corresponding to the state of Florida, are well known. The Bush victory in

6. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 15 (Erin Kelly ed., The Belknap Press of Harvard University Press 2001) [hereinafter RAWLS].
7. *Id.*
8. *Id.* at 94-95.
9. *Id.* at 92-94.

Florida was by less than .01 percent, or 537 of the 5,963,110 votes cast.[10] The result of the Florida election, for obvious reasons, was the origin of judicial decisions to be analyzed.

The post-electoral process in Florida is governed by state laws on the matter.[11] This process includes two opportunities to challenge the results and to have a recount of votes: the first during the protest period and the second during the complaint period. Within the protest period, the county canvassing boards may, under their sole discretion, conduct a manual recount of votes, in addition to the mandatory recounts when the difference between first and second place is less than 0.5 percent.[12] During the complaint phase the candidates may claim that there were counting errors by the county canvassing boards and petition for a manual recount.[13]

It was during the complaint period that the principal complaint arose-valid votes had been left uncounted.[14] Florida's election laws state that there should be a recount if a number of legal votes sufficient to modify or place in doubt the electoral results were not counted or were rejected for some other reason.[15] In consideration of this law, the Florida Supreme Court determined that the Florida courts may order recounts de novo without considering the previous decisions or rationales of the county canvassing boards. Furthermore, the Florida Supreme Court ordered a manual recount of all the uncounted votes[16] because there was no doubt that there were enough legal votes within the 9,000 uncounted votes to place the electoral results in question.[17] The assignment of a vote to a particular candidate, ordered the Court, would be done in such manner as the "intention of the voter" is respected.[18]

The Supreme Court of the United States intervened.[19] After review, the Court determined that the recount plan of Florida's highest court, under the principle of "intention of the voter," was contrary to the equal protection clause of the 14th amendment of the U.S. Constitution,[20] and dismissed the controversy. Instead of remanding the case to the Florida

10. Yates, *supra* note 1, at 101. For all results *see* 2000 Presidential Electoral and Popular Vote, www.fec.gov/pubrec/fe2000/elecpop.htm (last visited Dec. 19 2008).
11. James A. Baker III, *Observations on the Florida Electoral Dispute,* 13 STAN. L. & POL'Y REV. 15, 17 (2002); Hugh M. Lee, *Oasis or Mirage? Does Bush v. Gore's Promise of Due Process in Federal Presidential Elections Create a Right Without a Remedy?,* 13 STAN. L. & POL'Y REV. 53, 54 (2002). To contrast with México, which is governed by federal laws, *see infra* III.A.
12. Michael W. McConnell, *Two and Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 667 (2001); Bush v. Gore, 531 U.S. 98, 116 (2000) [hereinafter *Bush*].
13. McConnell, *supra* note 12, at 657.
14. As opposed to Mexico, where there were complaints of arithmetic errors in addition to intentionality errors (not counting votes), in the United States, the principal complaint was about intentionality errors (hanging chad).
15. *See* Florida's election laws, Fla. Stat. Ann. § 101.168(3), (3)(c) (West 2006).
16. McConnell, *supra* note 12, at 670.
17. Yates, *supra* note 1, at 102.
18. Gore v. Harris, 772 So.2d 1243, 1256 (Fla. 2000).
19. Bush v. Gore, 531 U.S. 1046 (2000).
20. Bush, *supra* note 12, at 116.

court to resolve pursuant to its finding, as is customary, the Court surprisingly determined that it was not possible to make any recount because the Florida legislature wished to terminate the complaint period in conformity with 3 USC § 5.[21]

### B. The Reasoning of the Supreme Court's Decision and the General Will

The decision of the Supreme Court in *Bush v. Gore* follows the general will in its holding but defies the general will in its remedy. The Court held that the recount ordered by the Florida Supreme Court did not meet the minimum requirements of the equal protection clause because while the "intention of the voter" standard is unobjectionable as an abstract proposition, it requires specific standards in order to assure its equal application.[22] This holding seems consistent with the general will of the United States. An example of this can be found in the area of free speech where it has been established that the common good is generally furthered when there are clear restrictions on the discretion that the authorities have to limit rights.[23] Obviously, without a process that is not detailed and does not have a clear standard by which to evaluate and assign the intention of the voter, the recount ordered by the Florida Supreme Court was subject to and perhaps even prone to the abuse of discretion by the persons that were counting votes. Moreover, it is justified to say that Americans from an original position would choose to limit the discretion of their authorities. In general it seems unobjectionable to hold that limiting the discretion of authorities favors the public interest because it helps to avoid abuse of power and arbitrariness, and as discussed *infra* in III.B. In relation to the Mexican election, arbitrariness is undesirable from the original position under a veil of ignorance. Therefore, the holding the Supreme Court follows the general will of the United States.

Unfortunately, the Supreme Court did not limit itself to the holding and designed a remedy contrary to the general will. Instead of remanding the case back to Florida's highest court to resolve in conformity to its holding, as the Supreme Court usually does, it terminated any possibility of a recount when it determined that the Florida legislators wished to end the complaint process by December 18 in order to take advantage of the safe-harbor of 3 U.S.C. § 5.[24] The majority decision of the Supreme Court is questionable not only because it attributed to the Florida legislators the intention to adhere to section 5, but also because it determined

21. Bush, *supra* note 12, at 122. 3 USC § 5 states that when the states make a final pronouncement on the appointment of electors at least six days prior to December 18 such pronouncement will be conclusive on the federal Congress.
22. Bush, *supra* note 12, at 106.
23. Gold Diggers, LLC v. Town of Berlin, Conn., 469 F.Supp.2d 43, 55 (D. Conn. 2007).
24. David A. Strauss, Bush v. Gore*: What Were They Thinking?,* 68 U. Chi. L. Rev. 737, 741 (2001).

that the Florida legislators wanted to adhere to section 5 at any cost, including leaving election results in uncertainty.[25] Such attribution defies logic and is not supported by any law or judicial decision of the Florida courts.[26]

This remedy is contrary to the general will of the people of the United States. First, the remedy is contrary to the precept that historically and contemporaneously has been used in many public speeches that aspire to the common good, about the supremacy of state rights over the federal government. One modern example is the discussion around same-sex marriages where the conservative Vice-President Dick Cheney is opposed to the intervention of the federal government because the regulation of marriages belongs to the states and not the federal government.[27] The precept of a limited federal government is based on the idea that it is necessary to prevent the tyranny of the majority, or of private wills, from developing at a level far from local associations because it will be harder to revert such impositions thereafter.[28] Therefore, a limited federal government satisfies the maximin rule because an error at the federal level is worse than an error at a local level considering that an error at the federal level is harder to revert. Moreover, because each individual has greater control over her own locality than over the federation, we would expect that there would be less distancing from the will of citizens at the local level than the federal (including the citizens' common good will). In consequence, the remedy of the Supreme Court was contrary to the general will of Americans.

Second, it was clear that private wills were part of the Supreme Court remedy, which is contrary to the general will per se.[29] The division between the justices reflected a political division in the Supreme Court more than an ideological division because the justices that usually support the supremacy of state rights, i.e., Rehnquist and O'Connor, supported the decision that gave the victory to the republican Bush even though it weakened the principle of limited federal government and the supremacy of state rights.[30] The Supreme Court acted based on its private will without considering that the general will calls for an impartial tribunal which seriously considers the law and which provides a certain

25. *Id.* at 740.

26. *Id.* at 740-42; Hugh M. Lee, *Oasis or Mirage? Does Bush v. Gore's Promise of Due Process in Federal Presidential Elections Create a Right Without a Remedy?*, 13 STAN. L. & POL'Y REV. 53, 54 (2002).

27. In opposition to the intervention of the federal government through a constitutional amendment that limits marriage to the union of a man and a woman, *see* Michael Foust, *Edwards: Same-sex 'Marriage' Issue Should Be Left to States*, BAPTIST PRESS, Feb 16, 2004, www.bpnews.net/bpnews.asp?ID=17644; *Cheney Describes Same-sex Marriage as State Issue*, Cnn Politics, Aug. 25, 2004, http://edition.cnn.com/2004/ALLPOLITICS/08/24/cheney.samesex/index.html.

28. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 25-28 (1835) (especially his citation to James Madison).

29. Strauss, *supra* note 24, at 737-38; Yates, *supra* note 1, at 104.

30. Yates, *supra* note 1, at 103.

result.[31] On the issue, the district court of New York commented in *Donohue*: "It is difficult to image a more damaging blow to public confidence in the electoral process than the election of a president whose margin of victory was provided by. . . foreclosing injunctive relief."[32]

The Court's partiality is against the general will from the original position under a veil of ignorance because citizens ex-ante, following the maximin rule, would choose the option that produced the maximum gain in the worst of the outcomes. Assuming that the worse outcome is an extremely competitive election, it would seem that citizens, without knowing their position in the election results, would choose a clear election that resulted in an unquestioned president with a long process of dispute over a short process that resulted in a questioned president.[33] The risks of a disputed presidency are too grave to ignore; a public mobilization is always a possible consequence. Moreover, the long-term repercussions are also notable. Six years after the Court's decisions, Americans are more susceptible to distrust their own democracy.

## III. THE JUDICIAL DECISIONS ON THE MEXICAN ELECTION

### A. ANTECEDENTS

While most Mexicans slept during the night of July 2, 2006, questions about the results of their presidential election began to come afloat, in spite of the fact that the first official count of votes, the district count, would not take place until July 5. The questions arose in the same way as they did in the American election, as a result of a very competitive race; the difference between Felipe Calderón, the winner, and Andrés Manuel López Obrador (AMLO) was around 0.5 percent.[34]

The post-electoral process in Mexico, unlike the United States, is governed by federal laws. But, the process itself is very similar. Perhaps a notable difference is that the votes are initially counted by citizens acting pro tem as polling officials and not personnel of the district councils. This difference is notable because "the citizen participants in the boards of the polling places . . . made a great quantity of arithmetic errors,"[35] in counting votes and because the counting done at polling sites are not recounted except for certain extraordinary situations.[36] Thus, while Pliego estimates that there were arithmetic errors in 60 percent of the polling places, the

31. Yates, *supra* note 1, at 105.
32. Donohue v. Board of Elections, 435 F.Supp. 957, 967 (E.D. N.Y. 1976).
33. RAWLS, *supra* note 6; JOHN RAWLS, JUSTICE AS FAIRNESS (2d. ed., Belknap Press 2001).
34. *Dictamen relativo al computo final de la elección de Presidente de los Estados Unidos Mexicanos, declaración de validez de la elección y de Presidente electo*, 28-35, 5 de septiembre de 2006, *available at* mxvote06.ife.org.mx/pdf/boletin_lazos/46.pdf [hereinafter *Dictamen Final*]; FERNANDO PLIEGO CARRASCO, EL MITO DEL FRAUDE ELECTORAL EN MÉXICO 54 (2007).
35. PLIEGO CARRASCO, *supra* note 34, at 33.
36. *Id.* at 54.

district councils made a recount in only 0.02 percent of these places.[37] Aside from this difference, the Mexican system, like the American one, provides two possibilities for recount. The first, as mentioned, is during the district council counts pursuant to the judgment of the officials.[38] The second is as a result of a legal challenge to the district council counts.

Of the 300 district counts, 281 were challenged by the parties or citizens.[39] Therefore, the decisions of the TEPJF on the election faced a reality where the election was highly competitive, questioned, and perhaps worst of all, with certain irregularities and suspicions of illegality.[40]

### B. The Decisions of the TEPJF and the General Will

The decisions of the TEPJF are contrary to the general will of Mexicans. In spite of recognizing that there were illegalities and irregularities, including arithmetic errors, the illegal meddling of then President Vicente Fox and the illegal participation in advertisement by private enterprise and the national business council, the tribunal in its decision concerning validity (*dictamen de validez*) dated September 5, 2006, determined that the irregularities only affect the validity of the elections if their "effects measure" in such way that they would have affected the electoral process "preponderately."[41] Some scholars defend the decision, arguing that the court was unable to determine the magnitude with which these irregularities could have determined the result of the election. But, is it not pointless to ask how we can measure such effects in order to conclude that they "preponderately" affected the result of the election?

The standard adopted by the TEPJF is arbitrary. The same tribunal recognizes that it is nearly impossible to design a method by which to measure such effects that are not arbitrary.[42] Moreover, the standard is arbitrary, at least with respect to the meddling of President Fox, because requiring evidence of "grave or preponderate effects" with respect to the illegal meddling of the federal executive, is contrary to previous decisions of the TEPJF, where the same tribunal annulled elections in the state of Colima based on the interventions of the executive of the state. In the Colima case the TEPJF held that irregularities performed by the executive, as opposed to irregularities committed by other citizens, are considered grave eo ipso.[43] In consequence, aside from being legally questionable,[44] the arbitrariness of the standard cannot represent the

37. *Id.* at 35, 54
38. *Id.* at 54-55. During this period 2,864 polling place bundles were opened of the 130,477 polling places installed in the country.
39. Dictamen Final, *supra* note 34, at 25-26; Pliego Carrasco, *supra* note 36, at 57.
40. For a good starting point over the discussion on the questions and suspicions revolving around the Mexican electoral process, see Villamil & Scherrer Ibarra, *supra* note 2.
41. Villamil & Scherrer Ibarra, *supra* note 2, at 162.
42. Dictamen Final, *supra* note 34.
43. Villamil & Scherrer Ibarra, *supra* note 2, at 199.
44. Scherrer Ibarra describes how the standard of gravity and preponderance is not applicable to the declaration of validity pursuant to article 99 of the Constitution,

general will because it would be ridiculous to hold that ex-ante the citizens, under a veil of ignorance over their position in relation to an electoral dispute, would prefer arbitrary standards.[45] Arbitrariness is unstable, fragile, and dangerous.[46] The tribunal contravened the general will when it chose a standard that is necessarily arbitrary.

In the same fashion, the decision on the challenges (*dictamen sobre las impugnaciones*) dated August 5, 2006, is contrary to the general will of Mexicans with respect to two possible counting errors: arithmetic errors and intentionality errors.[47] The arithmetic error concerns those errors that occur when totaling votes per candidate in the polling places and in the district councils. The intentionality error relates to votes that were not counted because they were not clear in their intention or because they did not meet certain legal requirements. The TEPJF opts for a standard that opens the door to arbitrariness in its discussion of intentionality errors and uncertainty and conflict in its discussion of arithmetic errors.

Mexican law on the intentionality of votes states that the ballots that contain a mark in more than one square shall be null.[48] Such law refuses to consider a reality, detailed by Zavala, where citizens often identify their vote in different but equally clear ways. One example is when citizens, after making a mark on the square of the party or coalition they favor, they also write out the name of the candidate of the same party or coalition in the space allocated to non-registered candidates.[49] Another more recurring example occurs when citizens check the square of one party and cross-out the squares of all other parties.[50] It is not surprising, therefore, that despite the clarity of the law at issue; it was on this issue alone that the magistrates of the tribunal were in disagreement. Despite the disagreement, nonetheless, neither of the two positions within the tribunal could satisfy the general will of Mexicans.

The minority of the TEPJF would have applied the law literally, making an argument similar to the one employed by the U.S. Supreme Court on the principle of equality (equal protection), and therefore suffers from the same ailments because it refuses to implement a method that guarantees that each vote takes its merited effects without intrusions by arbitrary opinions.[51] The majority recognized that the opinion of the minority would have marginalized thousands of voters, but it was incapable of designing a specific method that evaded the problems of inequality

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but also in relation to the decisions relating to the challenges. This is to say, that by requiring evidence of grave effects that "preponderately" affect the election, the TEPJF legislated. VILLAMIL & SCHERRER IBARRA, *supra* note 2, at 138, 141-42, 162, 190-92, 199.

45. *See* TOCQUEVILLE, *supra* note 28.

46. RAWLS, *supra* note 6, at 106. *See* particularly his discussion on uncertainty.

47. PLIEGO CARRASCO, *supra* note 34, at 37.

48. Marco A. Zavala, *Cuando cuenta un voto*, NEXOS, Oct. 2006, at 10.

49. *Id.* at 11.

50. *Id.*

51. *Id.*

and arbitrariness.[52] Without specific standards to evaluate voter intention, the majority left the determination to the individual standards of the district councils. It is no surprise, therefore, that some would question the decisions of the officials in the districts, as there is no way to know the standards applied or if the standards were applied in a reasonable and consistent manner. The TEPFJ decision on the intentionality error facilitated arbitrariness, and as discussed previously, arbitrariness is contrary to the general will.

With respect to the arithmetic error, the TEPJF determined that certain electoral packages (vote bundles from polling places) could be opened and recounted if there was a "clear error" that could not be cured with one of the documents attached to the electoral package. This ruling led to the recount of 11,839 polling places.[53] It should be remembered that while Pliego estimated that there existed arithmetic errors in 60 percent of the polling places, the 11,839 polling places revised represented only 8.98 percent of the total polling places installed across the country.[54] Given the importance of the process for the country, the reasons given by the tribunal for rejecting the recount of the other challenges are unsatisfactory. For example, it seems judicially ridiculous that the tribunal did not apply leave to amend to various challenges that contained certain technical mistakes, such as dismissing several challenges because the complaints did not identify the polling places being challenged.[55] Would it be improper to let AMLO include polling places to the complaint during the judicial process? Is not certainty worth more?

Ex-ante, in the original position under a veil of ignorance, the general will of Mexicans would prefer certainty over observing the rules of the game as some Mexican thinkers hold.[56] The reasons being that the rules are often imperfect, that the certainty resulting from a total recount tends to dissipate tensions between private wills confronted, and that a total recount would weaken any accusation of fraud. Comparing the possible outcomes of a total recount and the possible outcomes of the tribunal's decision, we can observe that following the maximin rule a total recount would be preferable from the original position. The worse outcome of the tribunal's decision occurred. A great segment of the population distrusts the decision. The electoral body in charge of all federal elections, the Federal Electoral Institute (IFE), suffered damage to its legitimacy and was eventually renovated. The decision provoked uncertainty and conflict. The worst possible outcome of a total recount, by comparison, could have also resulted in an institutional rupture, but without a doubt the rupture would have been less severe. Assuming that a total recount would have been contrary to the election laws in place, which is a large

52. *Id.*
53. *Id.* Of these recounts there resulted a net gain for AMLO of 10,103 votes.
54. *Id.*
55. PLIEGO CARRASCO, *supra* note 34, at 61.
56. Lorenzo Cordova y Pedro Salazar, *Un tribunal garantista*, NEXOS, Sept. 2006, at 12.

supposition, the damage to the administration and rule of law are overestimated. Such damages had already occurred and were commonplace in Mexico. What's one more! With or without a total recount, Mexicans often read stories of courts that depart from the law and thereby the public trust in the administration of law is regularly undermined in Mexico. The maximin rule also dictates that it is better to perform a recount that includes all clear votes—even if the recount is not literally in conformity with the election laws—than to apply election laws that clearly marginalize hundreds of thousands of voters. It is far worse to marginalize hundreds of thousands of voters than to suffer the problems in administration resulting from a judicial decision that includes the voice of all Mexicans. The worse outcome is not a future prediction anymore: it is occurring now in the marginalization of thousands of voters. Therefore, the tribunal distanced itself from the general will of Mexicans.

## IV. DAMAGE TO INSTITUTIONAL LEGITIMACY

### A. The United States

The scholars Yates and Whitford suggest that the legitimacy of the U.S. Supreme Court and the Presidency of the United States did not suffer irreparable damage as a result of *Bush v. Gore*.[57] Principally, these scholars base their assertions on polls that show that the American public continues to support these institutions.[58] The problem, as they themselves admit, is that an abyss between two positions within the same public has been created. While 80 percent of republicans support the Court, only 42 percent of democrats do.[59] While more than 80 percent of republicans believe Bush won legitimately, only 18 percent of democrats do.[60] In truth, America has become a country of particular (private) wills.

It is without argument, nonetheless, that the relevant institutions did not suffer the damage to their legitimacy that could have been expected because of the decision of *Bush v. Gore*. The lesser-than-expected damages in the United States is in large part attributable to one man's decision to leave behind party sentiments and instead follow his common good will, and what he perceived to be the general will of Americans, by calling on his followers to respect "the honored institutions of our democracy."[61] This message was instrumental in order to avoid damages to the institutional legitimacy in the United States because it facilitated the conciliation of the American people by pursuing a resolution to the dispute that follows the general will.[62] Thus we can say that while the decision of the Supreme Court provoked an institutional crisis because it departed

57. Yates, *supra* note 1, at 116.
58. *Id.* at 108-10.
59. *Id.* at 112.
60. *Id.* at 115.
61. Al Gore, Vice President of The United States, Gore Concedes Presidential Election (Dec. 13, 2000) (transcript *available at* http://www.cnn.com/ELECTION/2000/transcripts/121300/t651213.html).
62. Baker, *supra* note 11.

from the general will of the American people, there was no substantial damage because one of the parties to the dispute ultimately discarded its private will in favor of the common good. Such a scenario reinforces the credibility of the general will as a test for the legitimacy of actions taken by state institutions.

### B. MEXICO

It is not surprising that the decisions of the TEPJF caused a weakening of the institutional legitimacy in Mexico when it validated an election with irregularities that affected the "formation of a free public opinion," as well as, an election where 772,326 votes were left uncounted.[63]

Three pieces of information demonstrate such a weakening. First, many Mexicans continue to believe that there was fraud or otherwise disagree with the decision not to count all the votes; this attitude is illustrated by many polls and the production and interest in the film *Fraude: Mexico 2006*.[64] Second, the election laws in Mexico have suffered substantial reforms as a result of the 2006 election.[65] Third, the directors of the IFE, the body in charge of the administration of federal election in Mexico, have been or will be substituted prematurely, including the president-director.[66]

One explanation for the greater weakening of the institutional legitimacy in Mexico than in the United States, aside from fragile state of the burgeoning Mexican democracy, is the lack of an institution or individual to act in view of the general will. In both countries, the courts acted contrary to the general will and engendered the possibility of a political crisis, but while Al Gore sought the common good with his gesture of conciliation, in Mexico neither AMLO nor Calderón subordinated their private wills, which they had promoted during the campaign, in favor of the common good. Calderón, clinging to his own pride, or perhaps not aware of what was occurring in the streets of Mexico after the election, bragged that the elections had been "the cleanest and most democratic in the history," and rejected AMLO's invitation to perform a full recount.[67] Aside from this invitation for a full recount, AMLO equally continued his arduous defense of the particular interest of the marginalized through polarizing actions such as the sit-ins on Reforma, the constitution of the legitimate government and the dismissal of the institutions in general.[68] Therefore, both candidates acted under the belief that they represented

63. Dictamen Final, *supra* note 34.
64. PLIEGO CARRASCO, *supra* note 34, at 132; *see also El Pueblo No es Tonto, Encuesta en W Radio Sobre Fraude Mexico 2006*, http://elpueblonoestonto.blogspot.com/2007/11/encuesta-en-w-radio-sobre-fraude-mexico.html.
65. *See* ElUniversal.com.mx, *Aprueba Senado la Reforma Electoral* http://www.eluniversal.com.mx/notas/448801.html.
66. *Id.*
67. Manuel Camacho Solís, *Solución a la crisis*, NEXOS, Aug. 2006, at 23.
68. For a common critique of AMLO, *see* Terra.com, *The Washington Post Critica a AMLO*, http://www.terra.com.mx/articulo.aspx?articuloid=196896.

the particular wills of the majority without realizing that the true goal was to defend the general will of Mexicans; only the latter aspires to the common good rather than the good only for a particular group. Consequently, as a result of the confrontation of particular wills, the Mexican institutional system squandered legitimacy.

## V. CONCLUSION

The definition which we have adopted of the general will (the aggregation of the community's citizen's wills that aspire to the common good, rather than their own good, from an original position under a veil of ignorance following the maximin rule) has allowed us to arrive at a point of reflective equilibrium between our intuition on the poor performance of the courts in the post-electoral process in Mexico and the United States, and the notion that the general will is an adequate mechanism to measure the legitimacy of a state action and predict the effects on the institutional legitimacy of the same state. The decisions of the TEPJF in Mexico and the Supreme Court in the United States contravened the general will from this perspective. The effects on the legitimacy as a result of these decisions can be equally explained considering the general will. This means that Rousseau's general will is a useful tool to predict the legitimacy of political institutions in a state and also suggest that the decisions of the TEPJF in Mexico and the Supreme Court in the United States were incorrect in so far as they acted contrary to the general will of the citizens of their respective countries.