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**Richard A. Posner: Breaking the Deadlock**

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## Introduction

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THE TUMULTUOUS political and legal events (in a word, the “deadlock”) that are the subject of this book ran their course in only five weeks—from November 8, 2000, the day after the 2000 Presidential election, to December 13, 2000, the day that Al Gore conceded the election to George Bush. This short period was dense with incident, and the book will be more intelligible if I supplement the chronology at the front of the book with a brief narrative. That is one task of this Introduction; the other, with which I begin, is to outline the book itself.

To understand and appraise the deadlock, and trace out its origins and likely consequences, we need to place it within a broader framework than a blow-by-blow account of the five weeks can provide. (Such accounts are in any event available from journalists.)<sup>1</sup>

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1. See, for example, Correspondents of the *New York Times*, *36 Days: The Complete Chronicle of the 2000 Presidential Election Crisis* (2001); Political Staff of the *Washington Post*, *Deadlock: The Inside Story of America's Closest Election* (2001). The first of these books, however, is merely a compendium of *New York Times* articles that were published during the deadlock; the second is a lively and balanced narrative written after the deadlock was resolved.

The building of that broader framework, partly historical and partly theoretical, is the project of Chapter 1. I survey the early history of voting, its place in democratic theory, the relevant provisions of the U.S. Constitution (with particular emphasis on the provisions dealing with the election of the President, and hence on the Electoral College), and the evolution of voting from the adoption of the Constitution to the eve of the 2000 election. The last deadlocked Presidential election before 2000—the Hayes-Tilden election of 1876—figures here, along with the other close calls in Presidential election history and the emergence of modern voting law. A number of issues presented by, and responses to, the deadlock, including the racial aspect, cannot be fully understood without reference to history and democratic theory.

Chapter 2 looks at the Florida popular vote and the recount results and asks whether it is possible, through the use of statistical analysis, to determine who the “real” winner was. The answer is no. The election in Florida was an unbreakable statistical tie. And in any case determining the “real” winner of an election is a legal rather than a factual matter. One of the most persistent fallacies in the public, especially political, commentary on the deadlock has been the notion that the winner of an election can be determined without reference to election rules.

The chapter also tries, by means of statistical analysis, to discover why there were so many “spoiled ballots” (that is, ballots that the tabulating machinery did not record as votes, whether because of voter error, machine defects, or other factors) in some Florida counties. The nature of the voting technology, and whether votes are counted at the county or the precinct level, turn out to be important factors, and likewise the correlated factors of literacy, income, and race. 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.

In Chapter 3, I turn to the litigation over the election. The chapter is partly descriptive, an effort both to explain an exceedingly complex series of cases interpreting and applying complicated federal and state statutes and difficult constitutional concepts and to map the likely consequences had the Supreme Court not intervened and stopped the recount on December 12. But the chapter is critical as well. I emphasize the discrepancies between the text, structure, and other clues to the meaning of the Florida election statute, on the one hand, and the interpretation placed on the statute by the Florida supreme court, on the other, and on the possible constitutional significance of such discrepancies. These discrepancies enable me to offer a tentative answer to the question, left open at the end of Chapter 2, of who the *legal* winner of the Florida popular vote for President was, and to offer a preliminary assessment of the soundness of the U.S. Supreme Court's decision of December 12, in *Bush v. Gore*, that ended the deadlock. I argue that the Florida supreme court's abrogation of the discretionary authority that the state legislature had unmistakably vested in state and local election officials furnished a plausible ground for concluding that the state supreme court had violated the requirement of Article II of the U.S. Constitution that each state's Presidential electors be appointed in the manner directed by the state's legislature.

Chapter 4 is a critique of the participants in the litigation—the judges and the lawyers, but also the professors of constitutional law who commented on the litigation either while it was going on or afterwards. There has been a great deal of criticism of the judges, mainly the five-Justice majority of the U.S. Supreme Court. That criticism is largely unjust. The Court was operating under great time pressure—and it shows. But there was no injustice. There has also been much criticism of Gore's legal team for tactical decisions that it made over the course of the litigation. I argue that these criticisms are also unfounded. The critics fail to appreciate that in

political litigation, tactics designed solely to increase the probability of winning the lawsuit may be unsound when the political context is given proper weight.

The harshest criticisms, however, have been leveled against the Supreme Court. The Court could have deflected some of them by adopting the ground of decision advocated by three concurring Justices—the ground I have mentioned already—that Article II of the Constitution limits the extent to which a state court can in the name of “interpretation” alter the provisions in the state’s election code *after* the Presidential election has taken place. The narrow perspective of the typical legal professional is inadequate for evaluating the performance of the Supreme Court in so “big” a case as *Bush v. Gore*—“big” in the sense of involving a dispute whose consequences seem to dwarf the strictly “legal” considerations bearing on its sound resolution. In Chapter 4 I defend, as I have done in previous books, a conception of constitutional jurisprudence that places pragmatic considerations front and center and that—if my conjectures about what might have happened had the recount ordered by the Florida supreme court continued are correct—provides a substantial basis for the suggested interpretation of Article II’s “Manner directed” clause. I relate the pragmatic approach to the Supreme Court’s “political questions” doctrine, and I argue that the Article II ground of decision, which unfortunately failed to capture the support of a majority of the Justices, is not only plausible (as I argue in Chapter 3) but also, when a pragmatic approach to law is taken, persuasive. The decision averted what might well have been (though the Pollyannas deny this) a political and constitutional crisis—a crisis precipitated by an interbranch struggle within the Florida government that the “Manner directed” clause could properly be used to prevent.

Among the most vehement critics of *Bush v. Gore* have been professors of law, especially of constitutional law, though other law professors have not hesitated to chime in. The precipitance and

shallowness of many of these criticisms cast a shadow over constitutional law as a subject of law school teaching and research. As an academic field, constitutional law is both overpoliticized and underspecialized. The phenomena are related. Professors of constitutional law have little command of the full range of subjects encompassed by modern constitutional law. Their reaction to a subject within that range that eludes their understanding tends to be driven by their politics rather than by their expertise.

Chapter 5 takes up the related topics of the likely consequences of the deadlock and of the ensuing litigation, and the path to reform. The consequences necessarily are speculative at this time. They seem most likely to involve damage to judicial prestige, racial harmony, and Presidential legitimacy, but are likely to be short-lived because of the rapidity with which the deadlock was resolved, the complexity of the issues, and the short attention span of a busy populace.

I turn next to an analysis of reforms that might prevent a repetition of the deadlock and of the ensuing crisis narrowly averted. Many of the proposals that have been floated in the wake of the deadlock, including abolition of the Electoral College and the creation of a national ballot for federal elections, seem unwise for a variety of reasons. Others—having to do with reforms in election law (both state and federal, including constitutional and statutory provisions relating to the Electoral College), election administration, and voting technology—are both feasible and desirable, though they may be opposed by incumbents, who have adapted to and are comfortable with the imperfections of the existing system. A particularly delicate question is whether voting should be made easier for people of limited literacy; I argue that it should be.

To make the analysis in the book easier to follow, let me take a moment to remind the reader of the crucial stages of the deadlock.

On the eve of the 2000 Presidential election, Bush was holding a slight lead over Gore in the public opinion polls, as he had been

for months; he was generally expected to win. Although neither candidate was from the extreme wing of his party, and the area of agreement between them on the larger issues of domestic and foreign policy was in fact broad, the dynamics of the campaign, and in particular the inroads made by Ralph Nader's third-party candidacy on Gore's base of support, had led to a certain polarization. Gore had increasingly—and, as it seemed to some observers, stridently—sounded liberal themes. Noting Bush's public praise of Supreme Court Justices Antonin Scalia and Clarence Thomas, Gore had made clear that his model Justices were William Brennan and Thurgood Marshall; indeed, he had tried to frighten voters with the prospect that, if elected President, Bush would appoint Justices in the mold of Scalia and Thomas. Gore had striven mightily to increase the turnout of black voters, while Joseph Lieberman, his running mate, had worked hard to increase Jewish turnout in Florida, recognized as a state that might be vital to Gore's chances of winning.

On the night of the election, it became apparent that Florida's 25 electoral votes were indeed the key to victory. At first, as the returns came in and were combined with the results of exit polling to generate projections of the outcome, Gore was thought to have a commanding lead in Florida, and the television networks incautiously announced him the winner. They did this shortly before the polls closed in the Florida panhandle, which is in the Central time zone, and thus may have discouraged some Republicans from bothering to vote. Then the lead swung to Bush, and he was proclaimed the winner; Gore actually called him and conceded. But Bush's lead began to erode, Gore retracted his concession, and the embarrassed networks announced that the election in Florida was too close to call.

When the tabulation of the Florida vote (minus late-arriving overseas ballots, for which the deadline was November 18) was completed on November 8, Bush was ahead of Gore by 1,784 votes.

As this was less than 0.5 percent of the total number of votes tabulated for the Presidency in Florida, a recount was automatic unless Gore refused it.<sup>2</sup> He did not refuse, and the recount was conducted. This was a mechanical recount, designed to correct any errors in the tabulation of the vote by the machines used for tabulation. Within days, Bush's lead dropped to 327 votes.

Already a controversy had arisen over the ballot used in Palm Beach County: the so-called "butterfly ballot," which Gore's supporters claimed was confusing and had led a number of elderly Jewish voters to vote for Patrick Buchanan, the right-wing candidate of the Reform Party, thinking they were voting for Gore. (Not only Jews; but along with blacks they were the demographic group least likely to vote for Buchanan deliberately.) There were calls for a revote in Palm Beach County.

Gore's legal team, however, focused not on the "Jews for Buchanan" issue (which only a revote, quickly dismissed as infeasible and probably unlawful, might have resolved), but rather on the unusual number of "undervotes" (ballots that the tabulating machines had not counted as a vote for any Presidential candidate) in counties that used punchcard voting machines. On November 9, even before the statewide machine recount was completed, Gore demanded a hand recount in four of those counties—Broward, Miami-Dade, Palm Beach, and Volusia, all ones that he had carried by healthy margins. The Republicans denounced the demand, urging the importance of finality ("closure") in a Presidential election.

The voter who votes on a punchcard voting machine uses a stylus or the equivalent to punch out a "chad" (a small perforated rectangle or circle) in a paper ballot that is placed on a tray that has a space between the ballot and the bottom of the tray, to which the chad falls. The punched ballot is placed in a computer that counts the votes in the ballot by shining a light on it. If a chad has been

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2. Fla. Stat. § 102.141(4).

punched through, the light will shine through the hole, registering a vote for the candidate whose chad it was. If the chad is still clinging to the hole, it may obstruct the beam of light, and so a vote will not be counted. That is an “undervoted” ballot. And if the chads of more than one candidate for the same office have been punched through, or if the chad for one candidate has been punched through and the name of a candidate for that office has been written in the space for a write-in candidate—even if it is the name of the punched candidate—the computer is programmed to record no vote for that office. That is an “overvoted” ballot.

Florida’s election statute requires the county canvassing boards to submit their final counts within seven days after the election—thus, in 2000, by November 14—although late-arriving overseas ballots were, as already mentioned, to be counted until November 18. Only Volusia County completed its hand recount by the November 14 deadline. Katherine Harris, who as the secretary of state of Florida is the state’s highest election official, refused to extend the statutory deadline for the other counties. Had this refusal stood, Bush would have been certified as the winner of the popular vote in Florida by 930 votes on November 18 after receipt of the last overseas ballots—which, strongly favoring Bush, had boosted his earlier 327-vote margin. But the Broward, Palm Beach, and Miami-Dade canvassing boards sued Harris to extend the deadline, and though she prevailed in the trial court, the Florida supreme court (after granting a stay to prevent her from certifying a winner during the court’s consideration of the canvassing boards’ appeal) reversed the trial court on November 21. The court ordered the deadline for the recounts, and thus the earliest date for the certification, postponed to November 26.

To the surprise of most observers, only Broward County completed its recount by the newly extended deadline, the Florida supreme court having refused to grant a further extension. Harris refused to include the incomplete totals from the recounts con-

ducted by the other two counties. One, Palm Beach, had worked diligently to complete the recount and did so a few hours after the deadline; but that was too late, Harris ruled. Miami-Dade had abandoned its recount earlier in the week, deciding that it would not be able to make the deadline. (Volusia's recount totals, having been submitted by November 14, had already been included.) After adding in the Broward recount results, Harris on November 26 certified Bush the winner of the popular vote in Florida by 537 votes. Inclusion of the Palm Beach recount totals would have cut down Bush's lead to little more than 300 votes. Although Bush's lead fluctuated throughout the five weeks of the deadlock, at no point did he lose the lead.

Bush had asked the U.S. Supreme Court to review the November 21 decision of the Florida supreme court. The Court had agreed, and on December 4 it vacated (that is, set aside) the Florida court's decision and sent the case back to that court for clarification of its grounds. It wanted to know whether the court had taken forbidden considerations into account in deciding to extend the statutory deadline for recounts (see Chapter 3) and by doing so had usurped the state legislature's authority, conferred by Article II of the U.S. Constitution, to determine the manner in which a state's Presidential electors are appointed.

Meanwhile, on November 27, the day after Harris had certified Bush as the winner of the popular vote in Florida, Gore had brought suit in a Florida state court to contest the certification. Bush had already filed suit in a federal district court to halt the recounts; that suit went nowhere. The trial judge in Gore's case ruled against Gore on December 3 and 4, after a short trial. Gore appealed and on December 8 the Florida supreme court reversed the trial judge and ordered that the untimely Palm Beach recount results and the partial recount results from the interrupted recount in Miami-Dade County be added to the certified totals, thus whittling Bush's lead down to as few as 154 votes. The court also

ordered that all the undervotes (some 60,000) statewide be recounted by hand, but it refused to specify criteria for counting undervoted ballots as votes. The counters were left free to pick whatever criteria they wanted, subject however to judicial review at the end of the recount. In the original hand recounts, Broward County apparently had counted all dimpled as well as dangling chads as votes for whichever Presidential candidate had a dimpled or dangling chad. (A dimpled chad is a chad that has an indentation, but is still attached at all four corners to the ballot; see the Glossary of Election Terms.) Palm Beach County's canvassing board had used a somewhat more conservative method of recovering votes from undervoted ballots (see Chapter 2).

Bush immediately sought review of the Florida supreme court's decision in the U.S. Supreme Court and asked the Court to stay (enjoin) the recount pending its review. The Court issued a stay the next day, December 9, by a vote of 5 to 4, with Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Anthony Kennedy, Scalia, and Thomas in the majority and Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer in the minority. Three days later, on December 12, by the same vote and the same lineup, the Court declared the recount ordered by the Florida supreme court unconstitutional as a denial of the equal protection of the laws, and added that under Florida law December 12 was the outside deadline for a recount in a Presidential election; therefore the recount could not resume.

Actually seven Justices, not five, had agreed that the recount ordered by the Florida court was so standardless as to deny Florida's voters the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution. But two of the seven, Souter and Breyer, believed that the proper remedy was to send the case back to the Florida supreme court and let that court decide whether, consistent with Florida law, there was time to conduct a recount that would comply with the Constitution. Three of the

other five Justices in the majority (Rehnquist, Scalia, and Thomas) concluded in a concurring opinion by Rehnquist that the Florida supreme court had also violated Article II of the Constitution.

There had been other legal challenges to the election results. In particular, supporters of Gore had sought to invalidate thousands of votes for Bush in Seminole and Martin Counties, where Republican campaign workers had been permitted to fill in required information on absentee ballots cast by Republican voters. But the Florida courts had already rejected these challenges when the U.S. Supreme Court decided *Bush v. Gore*; and so, the day after the Court ruled in that case that the recount which the Court had stayed could not resume, Gore, his litigation remedies exhausted, conceded the election. The case was formally dismissed by the Florida supreme court on December 22.

Because of the bitterness in political and minority circles that the election and its aftermath had engendered and the fact that Bush had only one electoral vote more than a bare majority, there was some concern that when the Electoral College electors cast their votes, on December 18, some of Bush's electors might defect to Gore. But this did not happen—though, ironically, one of Gore's electors refused to cast her vote, as a protest against Congress's refusal to grant statehood to the District of Columbia. On January 6, 2001, when Congress met to count the electoral votes, several black members of the House of Representatives objected to counting Florida's electoral votes for Bush. But because no Senator would join in the objection, it was not considered,<sup>3</sup> and Bush was declared the winner of the Presidential election at last.

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3. Under section 15 of Title III of the U.S. Code, an objection to electoral votes may be considered by Congress only if it is signed by both a Senator and a Representative.