Overcoming Democracy:
Richard Posner and Bush v. Gore

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The presidential election of 2000 is, at last, truly over. In the wake of the tragedy of September 11, 2001, no one doubts George W. Bush’s legitimacy as president of the United States. Our national attention is focused, and rightly so, on the safety of the Republic and on what just and appropriate steps we should take in response to the brutal attack we suffered on September 11. In addressing those pressing concerns, it matters little that our president is Mr. Bush rather than former Vice President Al Gore. It is, however, precisely because our partisan divisions are at a low ebb that it may be possible to think constructively about those issues which the 2000 election raised that go beyond the question of who should serve as president. Indeed, President Bush’s wise call for Americans to go about our daily lives and live by our principles is a reminder that a vital part of our response to terrorism must be a refusal to permit it to disrupt the ongoing process of democratic self-governance.¹

One such issue is the role we permit the judiciary to play in the governance of the Republic. The legal battles over the disputed vote count in Florida brought forcibly home the importance of courts in the American political system. The Florida state courts’ interactions with the state’s local election authorities and with the Florida secretary of state often seemed to add more confusion than clarity to an already murky electoral outcome; for many Americans the state supreme court’s decisions raised the specter of a partisan bench seeking advantage for the presidential candidate of its choice. Although these issues and many others touching on our system of elections deserve careful consideration, they are not my concern in this essay. Instead, I want to

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¹ “Americans are asking: What is expected of us? I ask you to live your lives, and hug your children. I know many citizens have fear tonight, and I ask you to be calm and resolute, even in the face of a continuing threat. I ask you to uphold the values of America, and remember why so many have come here. We are in a fight for our principles, and our first responsibility is to live by them.” President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001).
examine what one of the major accounts of the election controversy, Judge Richard A. Posner's book *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*,\(^2\) may tell us about the health of federal constitutional law.

Although *Breaking the Deadlock* ranges widely over the issues arising out of the 2000 election, Judge Posner's central concern is with *Bush v. Gore*,\(^3\) the decision by the United States Supreme Court that effectively ended the battle over Florida's electoral votes. Several members of the Supreme Court are reported in the media to have expressed strong views on the Court's decision,\(^4\) along somewhat predictable lines, but unsurprisingly no justice has elaborated in print on *Bush v. Gore*—except, to be sure, in the opinions filed in the case, and those are no exception to the general rule that judges craft opinions in terms of legal argument and doctrine rather than to explicate the underlying perspective they bring to decision making. In *Breaking the Deadlock*, Posner, who is a prolific and widely influential judge, presents a marvelously clear picture of how he sees the Court's task in deciding constitutional decisions such as *Bush v. Gore*, and he suggests quite plausibly that in practice the Court's members approach their constitutional role along similar lines.\(^5\) If Posner is right, *Breaking the Deadlock* provides a uniquely valuable window into the Supreme Court's own, if officially unacknowledged, self-understanding.

If this is so, then American democracy is in deep disrepair, damaged at its core by a judiciary dominated by lawyers with a principled disdain for democratic politics and in particular for the Congress of the United States. What is striking about Judge Posner's book is not so much his approval of the Supreme Court's displacement of congressional decision making—that is hardly news to anyone familiar with the names Earl Warren, Warren Burger, or William Rehnquist—as his clear, unabashed


\(^3\) 531 U.S. 98 (Dec. 12, 2000). *See also* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (Dec. 4, 2000) (vacating Florida Supreme Court's initial decision and remanding for clarification); Bush v. Gore, 531 U.S. 1046 (Dec. 9, 2000) (staying the recount ordered by the Florida court and granting certiorari).

\(^4\) *See* David A. Kaplan, *The Accidental President* 284-85 (2001) (describing Justice Souter's attempts to persuade Justice Kennedy); *see also* id. at 291-95 (recounting seven Justices' interactions with a delegation of Russian judges in January of 2001).

\(^5\) As will become clear, my focus in this essay is very much on the understanding of constitutional democracy that Judge Posner expresses in *Breaking the Deadlock* rather than on the question that was his focus, the legitimacy of *Bush v. Gore*. 
defense of the Court doing so not on the ground that the law of the Constitution requires it but because five justices (and Posner) thought it politically best for the country that the election controversy be kept away from Congress. Even in the high days of the Court's interference with congressional authority (the reader is invited to think of whichever era of "judicial activism" she prefers), the custom has invariably been for the justices to assert and indeed insist that their actions are demanded by constitutional principle, that their decisions reflect the supremacy of the Constitution as law over the expediencies of political judgment. Posner discards such assertions as window-dressing. *Bush v. Gore* was correctly decided, he tells us, because the majority justices wisely concluded that it would be better for the United States if they decided the election controversy rather than leaving the outcome in the hands of congressional politicians. The role of the legal questions the justices purported to consider was, at most, a secondary check on judicial error: having reached the prudent conclusion that the Court ought to end the controversy, the justices were then well-advised to see if that conclusion could be put in more or less law-sounding terms. Given the elasticity Posner sees in constitutional-law argument, this is not much of a check on judicial discretion ... and a good thing, too, if the justices are to carry out their task of protecting the Republic from political turmoil.

Judge Posner is an extraordinarily able judge with keen and wide-ranging interests. As with much of his other work, I find a great deal to admire in *Breaking the Deadlock*, including some acute observations on election-law reform⁶ and (ironically) a sympathetic presentation of the anti-romantic strain in American democratic thought.⁷ But despite claims to the contrary, Posner is no democrat, or at least not one when the stakes are high enough. That he could write this book with no apparent sense of its fundamentally anti-democratic character tells us a great deal about the state of constitutional law, or rather of constitutional politics, since law for Judge Posner is merely the garb in which judges must (or at least do) cloak their prudential decisions about the good of the Republic.

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⁶ See *Breaking the Deadlock*, supra note 2, at 221-51 (discussing possible reforms).
⁷ See id. at 12-29 (discussing democratic theory).
I. Judge Posner's Analysis of Bush v. Gore

Bush v. Gore produced a somewhat complicated set of outcomes. Seven justices (Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, Thomas, Souter and Breyer) agreed that the Florida Supreme Court's decision under review was faulty under the equal protection clause of the fourteenth amendment.\textsuperscript{8} The Florida high court had ordered the trial court to conduct a manual recount of the so-called undervotes (ballots which the original machine count had recorded as casting no vote for president), and instructed the court that "[i]n tabulating the ballots and in making a determination of what is a 'legal' vote, the standard to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'"\textsuperscript{9} In a per curiam opinion not joined by Justices Souter and Breyer, the United States Supreme Court concluded that

\begin{quote}
[ti]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.\textsuperscript{10}
\end{quote}

The per curiam opinion further concluded that insufficient time remained to conduct a recount under constitutionally adequate uniform

\begin{footnotes}
\textsuperscript{8} See Bush v. Gore, 531 U.S. 98, 111 (Dec. 12, 2000).
\textsuperscript{10} 531 U.S. 98, 105-06 (citations omitted). See also id. at 134 (Souter, J., dissenting) (concluding that the record showed "differences" in the various localities' treatment of undervotes that "appear wholly arbitrary"); id. at 146 (Breyer, J., dissenting) ("in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem" of counting the undervotes).
\end{footnotes}
rules, and therefore reversed the Florida court's recount order.\footnote{See id. at 110. The per curiam reasoned that "[b]ecause the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 5 U.S.C. § 5, Justice Breyer's proposed remedy - remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18 - contemplates action in violation of the Florida Election Code, and hence could not be part of an 'appropriate' order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001)." Id. at 111. As Posner explains, 5 U.S.C. § 5 "sets a deadline (which for the 2000 election fell on December 12) for the appointment of a state's Presidential electors that, if complied with, precludes any challenge to the appointment when Congress meets in January to count the electoral votes." BREAKING THE DEADLOCK, supra note 2, at 114.}

Justice Souter and Breyer joined Justices Stevens and Ginsburg (who found no equal protection violation) in rejecting the Court's remedial order. Finally, Chief Justice Rehnquist filed a concurring opinion, joined by Justices Scalia and Thomas, concluding that the Florida court's order violated Article II, § 1, cl. 2, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors.\footnote{The Chief Justice's argument was that the Florida court's order "departed from the legislative scheme," 531 U.S. at 120 (Rehnquist, C.J., concurring), so substantially that it was an unconstitutional encroachment on Article II's delegation of power to the Florida legislature to direct the manner in which presidential electors are to be appointed. See id. at 112-22.}

Justices O'Connor and Kennedy declined to join the Chief Justice's opinion without explanation, and the dissenting justices explicitly rejected his argument.\footnote{In his recent book on the election controversy, David A. Kaplan reports that Justice Kennedy, at least, did not find the Article II argument persuasive. See KAPLAN, supra note 4, at 258, 274-76.}

In Judge Posner's opinion, the equal protection ground on which the Court based its decision "is not . . . persuasive."\footnote{BREAKING THE DEADLOCK, supra note 2, at 128.} There are, he notes, a variety of technical difficulties with fitting either the holding (that the recount ordered by the Florida Supreme Court was unconstitutional because of a lack of standards) or the remedy (that no recount should be held at all) within ordinary equal protection doctrine; a due process approach, which he briefly considers, is slightly less empty but in the end he thinks it also unsatisfactory.\footnote{See id. at 128-47.}

In addition, if the federal judiciary were to take the Court's reasoning seriously this would "portend[] an ambitious program of federal judicial intervention in the electoral process"\footnote{Id. at 128.} that would be unprecedented and possibly misguided. The Court's holding, thus, is not in Posner's view legally defensible on the only grounds that a majority of the justices accepted. Furthermore, the relief the Court afforded Bush - a stop to the recount altogether - was
illogical if the holding rested on the equal protection clause: "If the vice of the Florida supreme court's decision . . . was the standardless character of the recount that it ordered, the logical remedy was to direct that court to adopt standards . . . [or] dismiss the suit."17

None of this means, however, that Posner thinks *Bush v. Gore* wrongly decided or that it was an act of lawless political will as many of the decision's critics maintain. "A decision is not lawless merely because the majority opinion is weak, especially when pressure of time made it impossible for merely human judges to do a good job."18 Posner cites *Roe v. Wade* as an example of a decision that "[a]lmost every competent professional" believes was announced by a weak majority opinion; he continues that "if a decent rationale could be found for the central holding . . . then the decision would be fine" – presumably in the opinion of almost every competent professional – "would be rehabilitated, and certainly would not be lawless."19 Posner's choice of *Roe* to make this point seems odd – surely there are a substantial number of competent lawyers who think *Roe* flatly wrong on any rationale – but as a general matter his point seems correct. A great many competent professionals think Justice Black's opinion for the Court in the Steel Seizure Case based the decision there on a rigidly formalistic view of separation of powers that is not defensible but think the decision itself thoroughly sound, usually on the basis of the argument Justice Jackson made in his celebrated concurrence.20 Even if *Bush v. Gore* makes no sense as an equal protection case, Posner is right that the decision can lay claim to legitimacy if there is a "decent rationale" for its holding.

Fortunately, in Posner's opinion, such a rationale lies ready at hand in the Article II argument which the Chief Justice's concurrence invoked, although Posner clearly thinks that under the press of time the concurrence did not present the argument in its strongest form.21 "The best rationale for *Bush v. Gore* . . . is found in the word 'Legislature' in section 1, clause 2 . . . the 'Manner directed' clause"22: *Bush v. Gore*

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17 *Id.* at 152.
18 *Id.* at 152-53.
19 *Id.* at 153.
20 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
21 "[T]he concurring Justices who did embrace the [Article II] ground did not defend it very cogently . . . [possibly because of] the sheer pressure of time." *Breaking the Deadlock*, supra note 2, at 161. Posner responds to critics of the Court that they "are fixated on what the Justices said, rather than what they could have said, and might have said had they had more time." *Id.* at 160.
22 *Id.* at 153.
should be understood as interpreting that clause to “forbid[]
gubernatorial and state judicial involvement in the selection of electors,
except insofar as the legislature expressly delegates a role in that
selection to the governor or the courts.”23 Because the Florida high
court’s recount decision rested on an indefensible “interpretation” of
the election laws enacted by the state’s legislature,24 its recount order
 amounted to a usurpation of the legislature’s authority under the
federal Constitution and thus transgressed Article II. And under an
Article II rationale the federal Supreme Court’s decision to permit no
recount at all was, rather than illogical, “the appropriate judicial
remedy” for the Florida court’s invasion of the Florida legislature’s
Article II prerogative.25 Bush v. Gore works as an Article II decision, and
thus the decision can be defended and the Supreme Court absolved of
the charge of having acted unlawfully.

Judge Posner is not the only defender of Bush v. Gore to suggest that
an Article II rationale for the decision would be satisfactory. Michael W.
McConnell, for example, has argued that the Florida court’s actions
provided “the basis for a persuasive finding of an Article II violation.”26
Richard A. Epstein also supports this rationale.27 It is the point at which
Posner parts company with other supporters of Bush v. Gore that I find
most interesting. Epstein and McConnell approve of an Article II
understanding of the decision because they find the Article II argument,
in McConnell’s word, “persuasive” – persuasive as a legal matter.
Posner, on the other hand, endorses the argument for a reason that,
although he asserts that it is a legal one, in fact erases any distinction
between legal and non-legal justifications. To explain how this is so, it is
important to grasp why Posner believes an Article II conclusion “is the
best answer”28 to the controversy before the Supreme Court in Bush v.
Gore.

23 Id. at 156.
24 Posner is quite emphatic on that point. See, e.g., id. at 127.
25 Id. at 152.
the Supreme Court 113 (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter The
Vote].
27 See Richard A. Epstein, “In Such Manner as the Legislature Thereof May Direct”: The Outcome in
28 Breaking the Deadlock, supra note 2, at 254.
Posner’s conclusion does not rest on any belief that the Article II rationale is “the One Right Answer” to the controversy. Indeed, he admits with admirable candor that ordinary legal arguments do not require one to adopt that reading of the Constitution, or its applicability to the case before the Court. “The interpretation [of Article II] . . . is not compelled by case law, legislative history, or constitutional language.” In fact, this interpretation gives the “Manner directed” clause “a meaning very likely unintended by the Constitution’s framers.” Nor is “the application of that interpretation to the opinions of the Florida supreme court . . . inevitable.” What justified the Supreme Court majority in reversing the Florida court and forbidding any further recount was the Court’s “pragmatic” concern (perhaps held more at an intuitive level than consciously) that doing so was necessary to avoid the most serious risks. If the Court had not taken the action it did in Bush v. Gore, Posner tells us repeatedly that we would have faced the possibility of “a genuine constitutional crisis”; the potential for “what . . . is fairly described as chaos” with “bizarre potential,” “a miserable dénouement”; “a potential political and constitutional crisis.” “[T]hat there was a real and disturbing potential for disorder and temporary paralysis . . . seems undeniable,” Posner warns, and although he expresses at one point the desire not “to exaggerate” the danger to the Republic, Posner tells us time and again that it “seems likely [that] without the Court’s intervention the deadlock would have mushroomed into a genuine crisis.” Like the Emancipation Proclamation and the Court’s decision in Korematsu, Bush v. Gore “is a

29 Id.
30 Id. at 156.
31 Id. at 217-18.
32 Id. at 255.
33 See id. at 219.
34 Id. at 161.
35 Id. at 134.
36 Id. at 139.
37 Id. at 155.
38 Id. at 168.
39 Id. at 143.
40 Id.
41 Id. at 161.
42 See Korematsu v. United States, 323 U.S. 214 (1944) (upholding the validity of the decision to intern Japanese-Americans during the Second World War against a claim of unconstitutional racial
case in which the constitutional text (Article II, section 1, clause 2) could be stretched — indeed, rather easily, it seems to me — to enable a national crisis to be averted by constitutional means, albeit a much less ominous crisis than in the earlier examples." The reader should recall that the earlier crises compared to which the 2000 election deadlock was "much less ominous" were the two largest and bloodiest wars in United States history.

*Bush v. Gore* is correct, therefore, because the majority justices — heroically, at the risk of their own prestige — acted with an appropriate regard for the practical consequences of their decision, more particularly of a decision that would not terminate the recounting of the presidential vote in Florida and bring the election controversy to a close. The decision, then, is by Judge Posner's account an excellent and laudable example of "the pragmatic approach to law" of which he has been an advocate for some time. As he explains it,

>[P]ragmatic adjudication . . . is adjudication guided by a comparison of the consequences of alternative resolutions of the case rather than by an algorithm intended to lead the judges by a logical or otherwise formal process to the One Correct Decision, utilizing only the canonical materials of judicial decision making, such as statutory or constitutional text and previous judicial opinions. The pragmatist does not believe that there is or should be any such algorithm. He regards adjudication, especially constitutional adjudication, as a practical tool of social ordering and believes therefore that the decision that has the better consequences for society is the one to be preferred.  

43 See BREAKING THE DEADLOCK, supra note 2, at 170-72.

44 See BREAKING THE DEADLOCK, supra note 2, at 188.

45 Id. at 162.

46 See, e.g., RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); OVERCOMING LAW (1995); THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999); Richard A. Posner, Pragmatic Adjudication, 18 CARDOZO L. REV. 1 (1996). Posner acknowledges that the Supreme Court seldom admits that it has made a decision on pragmatic grounds, a rule to which *Bush v. Gore* is no exception, and thus that we cannot be sure that pragmatism was "the hidden ground of decision." BREAKING THE DEADLOCK, supra note 2, at 175.

47 BREAKING THE DEADLOCK, supra note 2, at 186 (emphasis added).
"[P]ragmatic considerations should play a larger role in the decision of constitutional cases than history and precedent."\textsuperscript{48} Whatever defects or weaknesses \textit{Bush v. Gore} may suffer from as a reading of the Constitution's text, its original meaning, historical developments, or caselaw are (or should be) outweighed from a pragmatist's perspective by its salutary practical consequences: the resolution in mid-December of the disputed election and the resulting ability of Mr. Bush to get on with the transition process and ultimately the work of the presidency.

Judge Posner considers at one point a question raised by the fact that only the three justices who joined the concurring opinion endorsed the only tenable rationale for the decision. The per curiam opinion's adoption of the unpersuasive equal protection argument rather than the superior Article II argument made sense, Posner thinks, because of its "public relations advantage": by "attract[ing] two of the liberal Justices, [it] creat[ed] a solid bipartisan majority for the bedrock proposition that the Florida supreme court had acted unconstitutionally."\textsuperscript{49} On the assumption – which Posner correctly notes is no more than that – that the concurring justices in particular are unlikely to have found the equal protection argument very powerful, they were nonetheless right to join the per curiam opinion.

[T]hey had no real choice. Had they not joined the equal protection ground, the outcome of the case would have been no different – a reversal terminating the recount – but there would have been a majority to reject both possible grounds for that reversal, the equal protection ground (which by hypothesis the three concurring Justices plus Stevens and Ginsburg would have voted against) and the Article II ground (which all but the three concurring Justices would have refused – in fact did refuse – to join). . . . The puzzle is why Justices O'Connor and Kennedy did not join the concurrence.\textsuperscript{50}

\textsuperscript{48} \textit{Id}. at 255.

\textsuperscript{49} \textit{Id}. at 167. \textit{See also id}. at 161 (the failure to adopt the Article II rationale "may be attributed . . . to the strategic objective of getting some of the liberal Justices on board"). Throughout \textit{Breaking the Deadlock}, Posner makes use of the standard evening-news classification of the justices who joined the per curiam as "conservative," and the justices who did not as "liberal."

\textsuperscript{50} \textit{Id}. at 168.
"In a case so politically fraught," Posner concludes a couple of paragraphs later, "a bit of Realpolitik affecting only the ground of decision and not the decision itself should be tolerable to anyone who takes a pragmatic approach to adjudication . . . . 'Fiat iustitia ruat caelum' is not a workable motto for the Supreme Court."\textsuperscript{51}

II. DEMOCRACY AS CRISIS

So, a pragmatically justified decision, one that was (or rather could have been) legally justified as well by "a professionally respectable opinion"\textsuperscript{52}; that, according to Judge Posner, is the best way to think about \textit{Bush v. Gore} and, indeed, the best way for the Supreme Court to do constitutional law in general. What does this analysis tell us about Posner's understanding of our constitutional system, and the role of courts (and particularly the Supreme Court) within that system?

Let us begin by recalling what Posner identifies as the proper impetus for the Supreme Court's decision, the need to avert a potential national crisis, with both political and constitutional dimensions, a crisis that (although of a much lesser order of magnitude) can be spoken of in the same breadth with the Civil War and World War Two. What exactly was this possible crisis? Posner is by no means the only scholarly commentator who advances this explanation of \textit{Bush v. Gore}, not all of them admirers of the decision.\textsuperscript{53} Although Posner sometimes seems to

\textsuperscript{51} \textit{Id.} at 168-69. In their immediate context, these last remarks are addressed to Justices Souter and Breyer, who agreed that the Florida court's recount order raised equal protection concerns but dissented from the federal Supreme Court's remedy. (Judge Posner identifies Breyer as particularly known for his pragmatic approach to judicial decision making: \textit{Id.} at 168.) Posner's point here clearly applies as well in his view to the concurring justices' decision to join an opinion stating an argument which they, ex hypothesi, did not find convincing.

\textsuperscript{52} \textit{Id.} at 180.

\textsuperscript{53} \textit{See}, e.g., Cass R. Sunstein, \textit{Order without Law}, in \textit{THE VOTE, supra} note 27, at 218 ("the Court [may] have done the nation a big favor"). Perhaps the most elaborate argument to this effect has been made by a defender of \textit{Bush v. Gore}, Professor Gary C. Leedes, who believes that except on the unlikely possibility that a recount could have been completed by December 12 (the so-called safe harbor deadline set by 5 U.S.C. § 5) the Supreme Court's decision saved the nation from "the furies of civil commotion, chaos, and grave dangers that were no longer imminent but real." Gary C. Leedes, \textit{The Presidential Election Case: Remembering Safe Harbor Day}, 35 U. Rich. L. Rev. 237, 251 (2001). Professor Leedes's own summary of the dangers turns out to be essentially indistinguishable from, if more detailed than, Judge Posner's views:

[T]he majority's decision to stop the counting is defensible because it avoided (1) the risk, however slight, of throwing the election to the House, (2) the likely risk that the outcome of the presidential election would have been
imply the contrary, few if any responsible constitutional lawyers think that the Court should interpret the Constitution as demanding that justice be done though the heavens fall. If it was indeed “likely [that] without the Court’s intervention the deadlock would have mushroomed into a genuine crisis,”54 that fact was, on most and perhaps all sensible views of constitutional interpretation, a good and sufficient reason for the Court to examine carefully the claim that the deadlock and state recount were unconstitutional. But again, what was the dire outcome from which the Court delivered us? The answer, for Judge Posner, is politics, the danger that the presidential election would end up being decided in a political forum. More specifically, the danger was that the presidential election would be decided by the Congress of the United States.

Judge Posner is not shy or coy about his views on this matter, and I need make no contestable inferences in reaching this conclusion. At the outset of his consideration of the Court’s remedy, Posner makes the obvious concession that “we do not know what would have ensued had the Court allowed [the recount] to resume. We know only what could have ensued – and what could have ensued is fairly described as chaos.”55 He then lists the possibilities: (1) Congress might have been faced with “rival slates of electors in January” (one the result of the Florida court’s recount and the other appointed by the state legislature) and “[t]he choice between them would [have] be[en] up to Congress”;56 (2) Congress might have decided to count no electoral votes from Florida, thereby creating a question as to whether Mr. Gore was elected or the election was to be decided by the House of Representatives (in which case Mr. Bush would have won) and “Congress would have to decide th[is] interpretive issue”;57 (3) Congress might have failed to determine who was elected president by inauguration day, in which case federal law would have designated an acting president and “[e]ventually . . . either Bush or Gore – probably Bush – would have been elected by

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54 BREAKING THE DEADLOCK, supra note 2, at 161.
55 Id. at 133-34.
56 Id. at 134.
57 Id.
the House"\textsuperscript{58}, and (4) Any attempt to get the Supreme Court to resolve the interpretive question mentioned above (or any other constitutional issue arising from Congress's actions in January) would have encountered "a strong argument for invoking the political questions doctrine," thus leaving Congress with the final word on the Constitution's meaning and application.\textsuperscript{59}

The connecting thread in this list is, of course, the involvement of Congress. As Judge Posner is well aware, Congress's participation in the selection of the president would not have been gratuitous but rather the fulfilling of the role expressly ordained for it by the Constitution's text: in none of these scenarios would Congress have involved itself in a process from which the Constitution excludes it, although of course that would not ensure that Congress correctly answered the constitutional issues before it. Furthermore, while he does suggest on occasion that this constitutional method for resolving the election would have had unfortunate collateral consequences,\textsuperscript{60} the central problem Posner sees is definitional: Congress is a political body which acts politically, and allowing it (or the House of Representatives) to decide who would become president would make that into a political event. It is the political nature of congressional resolution of the election that made its possibility a potential crisis.

In articulating this conclusion, Judge Posner's references to Congress border on the contemptuous. Congressional resolution of which competing slate of electors to recognize would have involved "a rancorous struggle in Congress," "a wrangle in Congress,"\textsuperscript{61} an "unruly congressional process,"\textsuperscript{62} "a January crisis,"\textsuperscript{63} "tumultuous proceedings in Congress,"\textsuperscript{64} "a congressional free-for-all."\textsuperscript{65} "Whatever Congress did would have been regarded as the product of pure politics, with no tincture of justice."\textsuperscript{66} As the last quotation illustrates, some of Posner's formulations attribute distaste for a congressional outcome to public

\textsuperscript{58} Id. at 138.
\textsuperscript{59} See id. at 184.
\textsuperscript{60} See id. at 138 ("The new President would have started behind the eight ball"); see also id. at 143 ("[t]he new President would have been deprived of a transition period").
\textsuperscript{61} Id. at 137.
\textsuperscript{62} Id. at 144.
\textsuperscript{63} Id. at 158.
\textsuperscript{64} Id. at 163.
\textsuperscript{65} Id. at 256.
\textsuperscript{66} Id. at 143.
opinion rather than to himself, but he is quite candid about his own opinion. "[T]he structure of Congress with its two houses and hundreds of members and poor reputation for statesmanship – all these things taken together make a credible, expeditious resolution of a dispute over electors unlikely."\textsuperscript{67} "We should endeavor to keep Congress out of the picture, so far as that is possible to do."\textsuperscript{68}

At first glance, one might think a political resolution of the question of who should be the next president unsurprising or even desirable in a representative democracy – and Judge Posner is a supporter, on pragmatic grounds, of representative democracy.\textsuperscript{69} In the case of the 2000 election controversy, however, a political resolution would have been a bad idea according to Posner, indeed a crisis (at least potentially) because the issue in controversy was how to interpret the political act of voting by the Florida electorate, and that is a legal question, not a political one.

Congress is not a competent forum for resolving such disputes. Legislatures resolve conflicts and clashes all the time, of course; that is what the legislative process is mainly about. But disputes over the lawfulness of competing slates of Presidential electors call for legal-type judgments rather than for raw exercises of political power. . . . [C]ongressional resolution of a dispute over electors would be a process of statutory (and constitutional) interpretation and application, the sort of thing that courts are equipped to do but Congress most emphatically not.\textsuperscript{70}

Congress "is a large, unwieldy, undisciplined body (actually two bodies), unsuited in its structure, personnel, and procedures to legal dispute resolution."\textsuperscript{71} Congress is not competent, in short, to carry out the professional task of interpretation that allowing it to address the

\textsuperscript{67} Id. at 238.
\textsuperscript{68} Id. at 250.
\textsuperscript{69} See id. at 20.
\textsuperscript{70} Id. at 145.
\textsuperscript{71} Id. at 250.
controversy would have asked of it. That task was best left to the expertise of the justices of the Supreme Court.\textsuperscript{72}

One problem with this argument is that Judge Posner, with his views on adjudication, cannot make it coherently. The pragmatic approach to adjudication, the reader will recall, asks principally which outcome will have the best consequences for society, not which comports most closely with traditional legal arguments. This is "especially" true of constitutional adjudication,\textsuperscript{73} where "pragmatic considerations should play a larger role ... than history and precedent."\textsuperscript{74} Posner puts great stress on "the intensely political character" of constitutional law\textsuperscript{75}:

The age and brevity of the Constitution, the momentous character of many of the issues that are litigated under it, and the practical finality of most Supreme Court decisions ... invite, enable, and even compel the Justices to base many of their constitutional decisions on contestable personal values and ideological preferences.\textsuperscript{76}

Quoting himself, Posner purports to wonder if "[m]aybe, indeed, courts are not lawless when they 'treat the Constitution and the common law, and to a lesser extent bodies of statute law, as a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society' (such as, perhaps, the embarrassing hole dug by the constitutional and statutory provisions relating to Presidential elections)."\textsuperscript{77} As both his earlier book and the entirety of Breaking the Deadlock make clear, there is no doubt: Judge Posner in fact thoroughly approves of courts treating constitutional law as a means of achieving

\textsuperscript{72} At one point, Judge Posner denies that the Court's decision actually "prevent[ed] Congress from stepping in to resolve" the controversy: "Had Congress felt strongly enough, it could have refused to count Florida's electoral votes." \textit{id.} at 185 (emphasis removed). In the same paragraph, however, he notes that "[i]f course, as \textit{a practical matter}, with the recount stopped and so the popular vote totals in Florida up in the air, there was very little basis for challenging the Bush electors in Congress when the electoral votes were counted in January." \textit{id.} (emphasis added).

Given the latter observation, the argument that the Court did not interfere with Congress's role seems an odd one for a pragmatist to make.

\textsuperscript{73} See \textit{id.} at 186.

\textsuperscript{74} \textit{id.} at 255.

\textsuperscript{75} \textit{id.} at 207.

\textsuperscript{76} \textit{id.} at 207-08.

\textsuperscript{77} \textit{id.} at 169 (quoting \textit{PROBLEMATICS OF MORAL AND LEGAL THEORY}, \textit{supra} note 47, at 258).
the laudable goal of correcting the bad choices – whether found in the Constitution or elsewhere – of majoritarian political processes.78

On Judge Posner’s own account, therefore, a constitutional law decision such as Bush v. Gore is at a far remove from the sort of technical interpretation and application of legal norms that could or should be resolved by the application of the professional expertise that is the Supreme Court’s stated superiority to Congress in the matter. Political choice, as Posner emphatically (and correctly) notes, is no matter of algorithmic reasoning. “Political conflicts are not intellectual disagreements, resolvable by deliberation or debate. They are clashes of interests and values.”79 In a thoroughly political area of law (as Posner perceives constitutional law to be), “what is perceived as ‘sound’ or ‘lawful’ or ‘competent’ or ‘professional’ . . . may often be a matter more of one’s personal political values – the product of upbringing and temperament and life experience and all sorts of nonlegal knowledge and opinion – than of a rigorous and impartial professional judgment.”80 He handsomely concedes that the dissenting justices in Bush v. Gore cannot be said to have been wrong to disagree with the majority’s choice: “there were value judgments in play that . . . could not be evaluated objectively, that were matters of intuition and temperament rather than of logic or measurement.”81

Precisely put. Whether the nation faced a serious crisis or a political disagreement, whether the constitutional and statutory provisions empowering Congress to determine the winner of the election are an embarrassing hole or a sensible solution to electoral-college mishaps, whether the (relative) secrecy of the Court’s procedures was less likely to embitter the losers than the open partisanship of congressional debate, whether it was more damaging to President Bush’s (initial) legitimacy for his victory to flow from a decision by the judicial branch rather than by Congress – each of these is a legitimate political question on which reasonable people can differ because politics is not a matter of deductive reasoning. But once one minimizes the distinction between

78 Also in The Problematics of Moral and Legal Theory, Judge Posner writes that “at their best American appellate courts are councils of wise elders meditating on real disputes . . . . Nor do I flinch from another implication of conceiving American appellate courts in the way that I have suggested. It is that these courts will tend to treat the Constitution . . . as a kind of putty.” PROBLEMATICS OF MORAL AND LEGAL THEORY, supra note 47, at 257-58.
79 BREAKING THE DEADLOCK, supra note 2, at 26.
80 Id. at 170.
81 Id. at 256.
constitutional law and political choice in the way that Judge Posner's pragmatism does, the claim that the Court enjoyed some professional, expertise-derived advantage over Congress is empty. Posner's preference for *Bush v. Gore* over what he calls "a congressional free-for-all"\(^{82}\) is, as he ought to recognize, a political preference for decision making by an electorally irresponsible body over decision making by a body controlled by majoritarian politics, nothing more. It is a political preference defensible on various grounds, but not on the basis of representative democracy. Like his view of constitutional law generally, Posner's defense of *Bush v. Gore* is an unabashed endorsement of what Learned Hand long ago called rule "by a bevy of Platonic Guardians."\(^{83}\)

### III. OVERCOMING CONSTITUTIONAL LAW

Judge Posner understands, of course, that his justification of *Bush v. Gore*, and the general account of constitutional law that underlies it, will not be uncontroversial. As I read *Breaking the Deadlock*, it suggests three distinct lines of response to potential critics. First, he repeatedly offers "liberals" a *tu quoque* argument (i.e., "you do it too"). No point would be served in listing the instances; the following will suffice:

Pragmatism is just one possible approach to constitutional interpretation; it would be unpragmatic to call it The Right Approach. There are respectable schools of jurisprudence according to which *Bush v. Gore* could be shown to be unprincipled, even usurpative. But can liberals enroll in any one of those schools without repudiating much of the constitutional law forged by the Supreme Court in the Warren and Burger eras? I don’t think so.\(^{84}\)

Whatever force this argument has against those committed to distinguishing bad Rehnquist Court activism from the good Warren/Burger Court variety, it has no purchase on anyone who believes that to be legitimate judicial review must be an exercise of legal

\(^{82}\) *id.*
\(^{84}\) *Breaking the Deadlock*, *supra* note 2, at 189.
judgment, and that legal judgments cannot simply be collapsed into “pragmatic” judgments about social good.

The second possible line of defense, which is related but distinct, lies in Judge Posner’s assertion that “[t]here has never been a period in U.S. history in which the Supreme Court has not decided a significant fraction of its constitutional cases on grounds that could easily be described as political.”85 Attacks on Bush v. Gore as “a quantum leap beyond the normal practice of political adjudication [therefore] cannot be sustained.”86 By implication, Posner’s pragmatic approach to constitutional law is orthodox. But granting the premise that Bush v. Gore stands in a long line of “notable decisions”87 that can be coherently explained “only by positing pragmatism as the hidden ground of decision”88 does not lead, necessarily or historically, to the conclusion that Posner’s pragmatism is a (or the) traditional understanding of the role of courts in deciding constitutional cases. Posner’s account is, superficially and perhaps substantively, close to the understanding of judicial decision making advanced by some jurists during the era of Legal Realism.89 With perhaps the occasional and quite eccentric exception, however, the members of the federal judiciary have claimed that their exercise of “the mighty weapon of constitutional interpretation”90 has been at the behest of the law of the Constitution, not a discretionary power to overrule majoritarian political decisions when the judges think those decisions unwise, dangerous or likely to produce a crisis, provided that “a professionally respectable opinion justifying its preferred outcome”91 is possible. Whatever their actual practice, justices across the spectrum have claimed that their decisions ultimately rested not on what they preferred or thought wisest but on what they believed the Constitution required them to do.

85 id. at 219.
86 id.
87 id. at 175.
88 id.
90 BREAKING THE DEADLOCK, supra note 2, at 258.
91 id. at 180.
If, as Judge Posner believes, constitutional law is "[a]n incoherent, deeply politicized body of case law" from which both the justices and their academic commentators are "free to pick favorite[...] doctrines and decisions and to pronounce those favorites 'the law,'" there is one sense in which he is clearly to be praised: he is candid. Such candor, however, comes at a price. Justice Holmes, of whom Posner is a great admirer, wrote in his famous opinion in *Lochner v. New York* that some products of majoritarian democratic processes embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Judge Posner's pragmatic approach entails the repudiation of Holmes's conviction that the Constitution "is made for people of fundamentally differing views," for all that "the Constitution" effectively means for Posner is a grab bag of arguments to be selected and arranged as best supports, or provides rhetorical cover for, whatever "has the better consequences for society" in the opinion of a majority of the justices. Posner lauds what Holmes abhorred, the translation into "constitutional" judgment of the justices' views on what is natural and right, shocking and wrong. The vision of *Breaking the Deadlock* is one in which law, like democracy, has been overcome.

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92 *Id.* at 208.

93 See, e.g., *id.* at 175 (praising Holmes's great rhetorical skills); *see also THE ESSENTIAL HOLMES* XXX (Richard A. Posner ed., 1992) (Holmes "wasn't perfect; he was only great").

94 See *198 U.S. 45, 75-76 (1905)* (Holmes, J., dissenting).
IV. CONCLUSION

If Judge Posner is right in implying that his views of constitutional adjudication are shared by the justices of the Supreme Court, American constitutional democracy does face a crisis, although one that is largely of the judiciary's own making. Posner rightly observes that "American democracy is an institutionally complex and historically determined set of laws and practices rather than a simple mapping of preferences onto votes." Among those practices is the institution of judicial review, understood — however imperfectly it has been exercised — as the application of law rather than the imposition of political preference, within a system in which the norm is the selection of officials and policies through the processes of majoritarian politics. As traditionally understood, constitutional adjudication does not require judges simply to ignore the practical consequences of their decisions in a search for some single, determinate "right answer." But neither does it license them to act as a council of wise elders, displacing political processes whenever they believe it is in society's interests do so.

\footnote{BREAKING THE DEADLOCK, supra note 2, at 253.}