

2001

# To Do a Great Right, Do a Little Wrong: A User's Guide to Judicial Lawlessness

Ward Farnsworth

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Farnsworth, Ward, "To Do a Great Right, Do a Little Wrong: A User's Guide to Judicial Lawlessness" (2001). *Minnesota Law Review*. 2488.

<https://scholarship.law.umn.edu/mlr/2488>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## "To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness

Ward Farnsworth<sup>†</sup>

"A [baseball] manager's job is to select the best players for what he wants done. A manager wins games in December. He tries not to lose them in July. You win pennants in the off-season when you build your team with trades or free agents. They're not all great players; but they can all do something."

When was the last time you encountered such lucidity from an American in high office? What [Earl] Weaver is talking about, and what he exemplifies better than the Supreme Court does, is a quality hard to define, but everywhere indispensable and always recognizable. It is not intelligence, which is plentiful, but judgment, which is scarce.<sup>1</sup>

An unusually important battle over the shape of the Supreme Court's jurisprudence was fought in December of 2000, when the Court decided a case—*Bush v. Gore*<sup>2</sup>—that, among other things, settled the question of who would select its personnel for the subsequent four years. This Essay starts where many commentaries on *Bush v. Gore* will end: with the conclusion that the Court's remedial decision—its ruling forbidding the Florida Supreme Court to order recounts even under standards that comported with the Fourteenth Amendment—lacked an adequate legal foundation by traditional standards. That is not the only possible conclusion one can draw about the deci-

---

<sup>†</sup> Associate Professor, Boston University School of Law. Thanks to Randy Barnett, Jack Beermann, Brian Brooks, Clark Byse, Ronald Cass, Tamar Frankel, Oona Hathaway, Kelly Klaus, Gary Lawson, Adam Long, Tracey Maclin, Stephen Marks, Richard Posner, Nicole Saharsky, Kenneth Simons, David Snyder, and Larry Yackle for helpful comments and discussion.

1. George F. Will, *The Earl*, in BUNTS: CURT FLOOD, CAMDEN YARDS, PETE ROSE AND OTHER REFLECTIONS ON BASEBALL 51, 53 (1998).

2. 121 S. Ct. 525 (2000) (per curiam).

sion, but as we shall see it is a reasonable interpretation. The purpose of this Essay is to assume the truth of that assessment but not the truth of the condemnation that generally follows from it, and to ask instead whether the decision can be defended on extralegal grounds. If the Court stopped the recounting in Florida without a good justification in conventional legal materials because it thought such an intervention would serve the public interest, by what criteria should such a decision be judged? What light does the Court's decision shed on the question of when a decision without a legal basis—a "lawless" decision, strictly speaking—nevertheless may be a good one? The question is raised in part by Judge Posner's recent defense of the decision from a pragmatic standpoint not confined to considerations of its lawfulness by traditional standards.<sup>3</sup> *Bush v. Gore* and Posner's analysis of it present a nice opportunity to consider the strengths and weaknesses of pragmatism as a method for making or evaluating judicial decisions. The case also raises important institutional questions about strategies for judicial decisionmaking when time is short and an atmosphere of crisis surrounds a case.

Part I of this Essay summarizes the legal case against the remedial decision in *Bush v. Gore*. Part II explains why the decision might be considered lawless, and, in a sense, distinct from the criticisms made of many of the Court's other activist decisions. The word "lawless" may seem hyperbolically critical, but without more it is not necessarily meant as a criticism at all. It is meant as a descriptive hypothesis about how the decision may have been made—that is, that necessary members of the majority were unable to find a satisfactory legal justification for an outcome that they wanted to reach, but nevertheless decided to order the outcome because they were convinced it would serve the public interest. Part III offers some suggested guidelines for prudent use of extralegal judicial power: Such decisions should be reserved for cases where the harm to be averted is unambiguous, and where other actors and institutions cannot effectively cope with it; they should be implemented in a calibrated fashion that leaves room for other actors

---

3. Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1 [hereinafter Posner, *Florida 2000*]. Judge Posner has expanded on his views in a book, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*, that was published too late to be discussed here; the substance of the arguments made in the article and book are largely the same.

to reply to the decision; they should be avoided where there is a risk of self-dealing; and they should be bipartisan. I conclude that when evaluated in light of these considerations, the Court's remedial decision was ill-taken if understood as an exercise in well-intentioned lawlessness. Such lawless decisions should be made in ways that limit their duration, and should be reserved for situations unlikely to repeat. This Essay thus is not so much a critique of the Court's decision as it is a critique of one possible defense of it.

The analysis here retains most of its force even if, as Judge Posner suggests, it is possible to come up with a doctrinal justification for the remedy that may be weak by itself but that can serve as the hook on which a pragmatic defense of the decision might be placed. The norm that cases should be decided by construing doctrine limits the expression of judges' own preferences to what they can express through coherent interpretations of legal materials. When a court disregards doctrine and acts lawlessly, or subordinates doctrine to a relatively marginal role and acts pragmatically, it abandons to a greater or lesser degree the constraints furnished by a firmer commitment to doctrine. The further courts go in this direction, the more important it is for them to observe substitute constraints to limit the risk that as they draw freehand they will render undemocratic or unwise decisions. The remedial decision in *Bush v. Gore* was an instance of pragmatism at best and lawlessness at worst; either way, it was a case that called for observance of the substitute constraints just mentioned and described herein. They were not observed.

## I. THE LEGAL INFIRMITIES OF THE DECISION

Although the intention of this Essay is to assume rather than establish that the Supreme Court decided to shut down the election litigation on extralegal grounds, it will help to begin with a summary of the legal case against the ruling.

When seven members of the Supreme Court held that the recount ordered by the Florida Supreme Court<sup>4</sup> violated the Equal Protection Clause,<sup>5</sup> the remaining question was what should be done about it. The natural answer was to remand

---

4. For the sake of clarity, I will generally refer to the United States Supreme Court as the "Supreme Court" and to the Florida Supreme Court as the "Florida court."

5. *Bush*, 121 S. Ct. at 532.

the case to the Florida court for consideration of how to proceed: Perhaps it would order a recount using the uniform standards the Court said were constitutionally required, or perhaps it would conclude that there was no time for such a recount given the expiration of the "safe harbor" period created by 3 U.S.C. § 5<sup>6</sup> or given that the electoral college was to be convened in less than a week. The Court's per curiam opinion, however, did not leave that choice to the state court; it made clear that recounting could not continue:

Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 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. § 102.168(8) (2000).<sup>7</sup>

The Court thus took it upon itself to interpret Florida law, and forbade a further recount.<sup>8</sup>

As a strictly legal matter, this ruling was surprising. It has been settled many times over that the meaning of state law, including a state legislature's intent, is ordinarily for the state's supreme court to ascertain,<sup>9</sup> with great deference given to such norm even in cases where matters of federal law depend on the answer.<sup>10</sup> One can imagine—three Justices *did* imagine—an argument that Article II, § 1, cl. 2 of the federal Constitution<sup>11</sup> makes the intent of the Florida Legislature a federal

6. The statute provides,

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (2000).

7. *Bush*, 121 S. Ct. at 533.

8. *Id.*

9. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875).

10. See, e.g., *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992); *Cent. Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 195 (1925). For further discussion and examples, see *Bush*, 121 S. Ct. at 547-48 & n.1 (Ginsburg, J., dissenting).

11. "Each State shall appoint, in such Manner as the Legislature thereof

question,<sup>12</sup> but that is not what the per curiam opinion said. It treated the significance of obtaining the safe harbor as a question of state law and declared the meaning of state law on that question by fastening onto language in a recent opinion of the state's supreme court.<sup>13</sup> Oddly, it then denied that court a chance to consider the specific question in light of the intervening legal developments.

The Supreme Court's reading of the Florida court's opinions may have been a correct prediction of what the Florida court would have said itself upon remand, but it might not have been. The Florida court had made clear in one earlier opinion that finishing all recounting by December 12 was an important goal of the state's legislative scheme, but that was in the context of interpreting the constraints on recounting during the "protest" period immediately after the election.<sup>14</sup> The court had not considered the relative priority the legislature gave to the goal of finishing by the 12<sup>th</sup> of December compared to the goal of concluding a complete "contest" period in the courts that might require recounts or initial counts of votes that had been legally cast but improperly disqualified. It was not clear, either from the language of the state legislative scheme or from the Florida court's earlier opinions, that obtaining the benefit of the safe harbor was a value that trumped all others. So the Supreme Court's declaration of what was allowable under Florida law was not an uncontroversial report of what the state's supreme court had decided. It was a ruling on the implications of an earlier state supreme court decision, a ruling that the state court might not have made itself. To make such a ruling was a noticeable departure from the Court's rules and traditions bearing on cases where the meaning of state law is decisive. The Court offered no authority to support its power to interpret Florida law.

---

may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ." U.S. CONST. art. II, § 1, cl. 2.

12. *Bush*, 121 S. Ct. at 534.

13. The citations to the Florida court's opinions offered by the Supreme Court earlier in its opinion are not very helpful. The citation that would have been most helpful to the Court's reading of the Florida court's view is the Florida court's decision on remand from the Supreme Court, issued on December 11, 2000. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1273, 1282, 1286 n.17, 1290 & n.22 (Fla. 2000) (per curiam), *vacated per curiam sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

14. See *id.* at 1237 & n.55.

Apart from the remedy, the *Bush* decision contained a number of other questionable rulings. Unlike the remedial ruling, however, these novelties did not seem perpendicular to existing law and judicial practice. The differences between the arguable legal merits of the substantive and remedial decisions were evidenced by the early reception *Bush v. Gore* received from scholars of the Court. Ronald Dworkin's reading of the remedial decision caused him to conclude that *Bush v. Gore* was "plainly indefensible"<sup>15</sup> and "one of the least persuasive Supreme Court opinions that I have ever read."<sup>16</sup> Other liberal constitutional law scholars such as Sanford Levinson<sup>17</sup> and Akhil Amar<sup>18</sup> also were prompt in making scathing criticisms of what the Court had done. Cass Sunstein called the remedial decision a "blunder" that was "not easy to explain" and was the part of the Court's opinion "most difficult to defend on conventional legal grounds."<sup>19</sup> But the remedial decision in *Bush* also had few defenders even among conservatives who defended the Court's decision on the merits. Michael McConnell said the decision that forbade more recounts was "troubling," and concluded that

[a]s a matter of federal law, Justices Breyer and Souter have the better argument. The Dec. 12 "deadline" is only a deadline for receiving "safe harbor" protection for the state's electors. A state is free to forego that benefit if it chooses. The majority opinion responded that the Florida court itself had treated Dec. 12 as the operative date for concluding the vote count. That's true. Indeed, in its first decision, the Florida court calculated the time allowable for recounting votes by counting backward from Dec. 12. Nonetheless, the decision is one for the state to make. It would have been the better course, as a federal court, to remand.<sup>20</sup>

Charles Fried, who as counsel to the Florida Legislature

---

15. Charles Fried & Ronald Dworkin, 'A Badly Flawed Election': An Exchange, N.Y. REV. BOOKS, Feb. 22, 2001, at 8, 10.

16. Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BOOKS, Jan. 11, 2001, at 53, 53.

17. Sanford Levinson, *Return of Legal Realism*, NATION, Jan. 8/15, 2001, at 8.

18. Akhil Reed Amar, *Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at M1.

19. Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 767-68 (2001).

20. Michael W. McConnell, *A Muddled Ruling*, WALL ST. J., Dec. 14, 2000, at A26. Professor McConnell, of course, went on to become one of Bush's first nominees to the federal appellate bench. Professor McConnell later reiterated these views in Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 674-77 (2001).

had written an amicus brief making arguments about the Fourteenth Amendment similar to those the Court accepted, said afterwards that the Court's decision on the merits was justified, but he called the remedial ruling "the least convincing portion of the Court's opinion," and did not offer a legal defense of it.<sup>21</sup> The defense Fried did offer was the thought that if the Florida court had allowed recounting to proceed, and the recounts and review of them "miraculously" had been completed before the electoral college was to convene on December 18, another complaint to the United States Supreme Court likely would have been taken.<sup>22</sup> "Would such a continuation of the legal proceedings, inevitably leading to an indeterminate outcome, really have been a more satisfactory course? Surely if that was the alternative, the Court did well to shut the thing down then and there."<sup>23</sup> Ronald Cass reaches a similar conclusion, defending the majority's substantive holding on Fourteenth Amendment grounds, but not its remedial decision:

The dissenters had the better of the argument over remedy. Had the Supreme Court reversed on the grounds stressed by three concurring justices (that the flaws in the Florida court's interpretation of Florida law were so severe as to amount to a usurpation of power constitutionally conferred on the legislature) the remedy adopted would have fit. But that route commanded the votes of only three justices. The majority no doubt did the nation a service by bringing to a close a vote-recount process that had kept the election from a conclusion for more than a month, even after it became clear that, by one route or another, George Bush would in all likelihood emerge as the victor. But the legal basis for the ending is the weakest part of the majority's decision.<sup>24</sup>

It is rare for a decision by the Court to provoke such a consensus of disapproval.<sup>25</sup> When the friends of a decision—all able lawyers—do not offer a legal defense of an important part

---

21. Fried & Dworkin, *supra* note 15, at 8.

22. *Id.*

23. *Id.*

24. RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 94 (2001).

25. Professor Lund defends the remedial decision on the ground that the that the Supreme Court's remand of the case for proceedings "not inconsistent" with its opinion left it open to the Florida court to overrule its earlier decision and proceed with recounting if it wished. See Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 *CARDOZO L. REV.* (forthcoming 2001), available at <http://www.law.gmu.edu/faculty/papers/docs/01-17.pdf>. This suggestion seems at odds with the Court's language; one of the things the Court's opinion said, with which further acts by the state court were to be "not inconsistent," was that more recounting would not be appropriate under state law. See *Bush*, 121 S. Ct. at 533.

of it, one suspects that no good defense of it is possible. But the criticism then is just that the remedial decision lacked a legal foundation; Fried and Cass still suggest that the Court did the country a service as a practical matter by bringing an end to the controversy. This was a non-legal consideration, but one that may have had a legitimate role to play in the decision of the case.

This brings us to Judge Posner, who is perhaps more ready than most to defend a decision that lacks firm support in traditional legal materials but that creates more beneficial consequences than costs. Posner concedes that "the remedy decreed by the five-Justice majority has a 'gotcha!' flavor, as if the U.S. Supreme Court had outsmarted the Florida supreme court by nailing that court with its perhaps unconsidered suggestion that December 12 was the deadline under Florida law for designation of the state's electors."<sup>26</sup> Posner believes the Supreme Court's decision could have been supported by a different ground; it could have said that Article II of the Constitution barred the recount altogether, regardless of the standards employed, because there was no statutory basis for it.<sup>27</sup> This is a similar theory to the one offered in the concurring opinion of Justice Rehnquist and mentioned above by Ronald Cass;<sup>28</sup> it is not at all the theory of the per curiam opinion.<sup>29</sup>

In any event, Posner also defends the majority's decision, as distinct from its opinion, on cost-benefit grounds:

*Bush v. Gore* may have done less harm to the nation by reducing the Supreme Court's prestige than it did good for the nation by averting a significant probability of a presidential selection process that would have undermined the presidency and embittered American politics more than the decision itself did or is likely to do. Judges unwilling to sacrifice some of their prestige for the greater good of the nation might be thought selfish. The trade-offs become particularly favorable to intervention if one believes that, had the Court abstained in December, it might well have been dragged back into the presidential selection process in January, facing multiple appeals from rulings in the Title III proceedings that might have followed a completed recount. If it had ducked *then*, it might have invited comparison to Nero fiddling while Rome burned.<sup>30</sup>

Now it is possible that the critics of the Court's remedial

---

26. Posner, *Florida 2000*, *supra* note 3, at 48.

27. *Id.* at 48, 50.

28. *Bush v. Gore*, 121 S. Ct. 525, 534-35 (2000) (Rehnquist, C.J., concurring).

29. Posner, *Florida 2000*, *supra* note 3, at 41-42.

30. *Id.* at 54.

decision underestimate its legal merit, and that the decision someday will come to be understood as stronger than it seemed when it was made. Maybe the authors of the per curiam opinion, despite declining to join the concurring opinion that used Article II of the Constitution to justify ending the litigation, did have in mind a similar but inchoate legal justification for their decision; they just lacked the time needed to explore and explain it. One can speculate. But another plausible interpretation is that at least some members of the majority thought about the remedy in the same general way that Fried, Cass, and perhaps Posner view it: as a decision that did the country a favor, even if it lacked a firm legal justification. Convinced of the wisdom of what they wanted to do, but struggling to find a basis in law to support it, the Justices simply *said* it. They believed that the country needed the Court to bring finality to the controversy, so finality is what they supplied.<sup>31</sup>

## II. LAWLESSNESS, PLAUSIBILITY, AND PRAGMATISM

If this hypothesis about the reason for the remedial decision is correct, it might be considered “lawless” in a simple descriptive sense: It was a deliberate departure from what seemed required by the rules and understandings the Court stated before that day and likely would continue to state afterwards, done in the name of a good greater than lawfulness. In part, this is a subjective hypothesis about the basis for the decision—a claim about what the Justices may have thought they were doing and about the considerations that caused them to decide the case as they did. Very likely it will never be possible to confirm or refute this hypothesis. It is a theory derived from the remedial decision’s form (more on the model of an executive order than a judicial discussion), by the difficulty of defending it on conventional legal grounds, and by the exclusively practical justifications most of its defenders have offered for it. The decision paid no tribute to the past, and in offering so little by way of explanation it seemed meant to have as little future force as the Court can give to one of its rulings—a decision “good for this day and train only.”<sup>32</sup> It lacked the grounding in

---

31. This hypothesis has received some journalistic support as well. See DAVID A. KAPLAN, *THE ACCIDENTAL PRESIDENT* 284-85 (2001) (describing Justice Souter’s apparent belief that Justice Kennedy voted as he did because he “thought the trauma of more recounts, more fighting—more *politics*, as it were—was too much for the country to endure.”).

32. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

conventional authority, the generality, and the prospectivity normally expected of a court's decisions. As the defenders of the decision suggest, however, perhaps there is a time and place for the Court to consider stepping outside the bounds of what it can justify by reference to legal materials in order to resolve a public crisis—moments where it falls to the judge or Justice to ask whether he had best stay within the rules or heed Bassanio's plea to Portia: "To do a great right, do a little wrong."<sup>33</sup>

This view of lawlessness as a worrisome but not disqualifying trait of a judicial decision is congenial to pragmatic<sup>34</sup> and perhaps some "prudentialist"<sup>35</sup> accounts of judging. On a pragmatic account, a decision to act outside the law is best understood not as a moral issue that can be resolved by saying that by definition the Court did the wrong thing, but as a question requiring an inquiry into costs and benefits—with the understanding, of course, that the costs are presumed to be very high. A natural analogy is to ask whether there are appropriate occasions for using torture to extract information from criminal suspects. Some might think not, on moral grounds, but many would acknowledge that at least in principle there might be an extreme case—the ticking bomb—where a judicious use of the truncheon is the lesser evil after all.<sup>36</sup> This family of behaviors is difficult to regulate. It consists of acts we want committed so rarely, if ever, that we dare not endorse them explicitly under any circumstances; yet, we may quietly

---

Justice Roberts was using the expression to describe his fear that the Court's practice of overruling its own precedents would come to make its decisions seem only temporary; the train ticket metaphor, however, has since become a general way to refer to decisions that, *when they are made*, are not meant to have precedential significance. See, e.g., *Wash. County v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting). For further examples of arguments by dissenting Justices that the majority was engaged in one-shot lawmaking without intended prospective effect, see *United States v. Virginia*, 518 U.S. 515, 600 (1996) (Scalia, J., dissenting) and *Plyler v. Doe*, 457 U.S. 202, 243 (1982) (Burger, C.J., dissenting).

33. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, l.213 (Jay Halio ed., Clarendon Press 1993).

34. See RICHARD A. POSNER, *OVERCOMING LAW* 247-53 (1995). See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240-65 (1999) (expanding upon pragmatic adjudication with illustrations).

35. See PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (1991). See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 69-70, 111-98 (1962) (regarding the "Passive Virtues" as related to prudentialism).

36. See generally the essays collected in 23 *ISR. L. REV.* 192, 192-406 (1989).

hope that a breach of the norms against them will occur if the benefits are extraordinary and the costs containable. While the law never can explicitly condone such acts, it still must be possible to talk frankly in some forum about when such a defection from the usual rules is best. In *Bush v. Gore*, it may be that the Court in essence beat the suspect—the Florida court—into submission; the question is whether there was a ticking bomb that justified this.

From the related prudentialist standpoint of analysis, a judicial decision is judged primarily on its suitability to the public needs of the times. The pragmatic and prudential perspectives have much in common, both sharing a commitment to practical reason. But the prudentialist is more conservative—more likely to be ruled by caution and tradition, and less free-wheeling in making his own tally of pros and cons the basis for a decision. As examples of instances where such prudential considerations have been decisive, Professor Bobbitt<sup>37</sup> offers *Home Building & Loan Ass'n v. Blaisdell*<sup>38</sup> and *Bowles v. Wilingham*<sup>39</sup>—cases where the Court acquiesced in seemingly unconstitutional lawmaking because of emergency circumstances. True, the question raised here about *Bush v. Gore* is not whether the Court rightly acquiesced in the unlawful conduct of other legal actors, but whether it was justified in taking action itself that it was not able to justify on legal grounds—a distinction that may have some significance, as we shall see. The caution characteristic of the prudentialist tradition has made it better at justifying judicial passivity than judicial activism.<sup>40</sup> But it may nevertheless be possible to interpret the Court's decision as sufficiently public-spirited to amount to a commendable exercise in prudential statesmanship.

The greatest general difficulty in speaking of lawlessness is the danger of taking a continuous variable and dichotomizing it. In fact, of course, the Court routinely makes decisions with varying degrees of support from existing authority and with varying degrees of commitment to applying them prospectively. On a pragmatic view of the Court's decisionmaking, the Court is always making trade-offs between the benefits of a decision it contemplates and the costs of getting there by straining, break-

---

37. BOBBITT, *supra* note 35, at 16-17.

38. 290 U.S. 398 (1934) (upholding a state law granting a moratorium on foreclosure for debtors unable to make mortgage payments).

39. 321 U.S. 503 (1944) (upholding the Emergency Price Control Act).

40. See BICKEL, *supra* note 35, at 111-83.

ing, or changing the relevant legal rules. *Bush v. Gore* thus might be a case where the Court saw great value in the decision it wanted to make to end the very consequential dispute before it—value sufficient to offset the costs of going forward with an unusually weak legal basis and without creating a principle it planned to apply in the future. If cost-benefit analysis is the key to the judicial enterprise, fidelity to text, case law, or other sources of guidance are just some of the goods a decision should maximize, and they may have to take a back seat if a decision lacking those virtues would otherwise serve the public interest. Of course even the pragmatist has a healthy regard for the benefits of decisions that can be justified with arguments from legal materials, rather than just by a cost-benefit analysis in the individual case.<sup>41</sup> According to Posner,

The pragmatic judge may not ignore the good of compliance with settled rules of law. If a federal judge is free to issue an injunction that has no basis in federal law, merely because he thinks the injunction will have good results, then we do not have pragmatic adjudication; we have judicial tyranny . . . .<sup>42</sup>

Equivalently, the legal justifications we require of courts reflect an understanding that decisions straying outside those norms have large fixed costs and potentially large variable costs. But those costs are assessed on a sliding scale, and from a pragmatic standpoint, perhaps the good consequences of a decision may compensate for its weak doctrinal basis.

Judge Posner's defense of *Bush v. Gore* provides an example of the pragmatic point. Like the concurring Justices in that case, Posner relies on the fact that Article II speaks of the appointment of electors by a state "in such Manner as the Legislature thereof may direct."<sup>43</sup> He emphasizes the word "Legislature," and finds this a sufficient basis for the Court's decision: It can be read as making the meaning of a state's legislatively created statutory scheme a question for federal review, and here that review supported the conclusion that the recounts the

---

41. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, *supra* note 34, at 263; *see also id.* at 242-43 (discussing the value of precedent and text from a pragmatic standpoint); POSNER, *OVERCOMING LAW*, *supra* note 34, at 400-01 ("The relevant consequences to the pragmatist are long run as well as short run, systemic as well as individual, the importance of stability and predictability as well as of justice to the individual parties . . .").

42. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, *supra* note 34, at 263.

43. U.S. CONST. art. II, § 1, cl. 2.

Florida court ordered were not permitted.<sup>44</sup> Of course, the use of the word "Legislature" does not *require* any such reading, and Posner does not suggest that it does; rather, his claim is that this reading is best because it facilitates the orderly resolution of election disputes.<sup>45</sup> The word "Legislature" is treated as providing an adequate hook on which to hang a type of cost-benefit analysis. The existence of that hook may be enough to insulate the remedial decision in *Bush v. Gore* from claims of lawlessness in the sense of that word synonymous with "indefensible"; it depends on one's view of the argument's plausibility. But even if on this ground it is considered not quite lawless, the decision must be regarded as relatively law-free (or perhaps "low in law"), in the sense that its roots in traditional sources of guidance remain weak. The language of Article II is brief and general. It can be read as Posner suggests if one wants to, or not, if one prefers otherwise. This does not make Posner's reading a bad one, but it means that if the Justices were using his approach they were reasoning in a rather free-hand fashion about what sort of system would work best to handle statistical ties of the sort that occurred there. The recommendations in this Essay can be understood as applying to decisions of this type, for when a judge uses a thin doctrinal reed to support a decision that reflects a cost-benefit judgment about consequences, doctrinal constraints usually thought to be furnished by doctrine mostly are absent, and it then becomes useful to have surrogate constraints of other kinds. Those constraints, and the observance or disregard of them by the majority in *Bush v. Gore*, will be the subject here.

Meanwhile, necessary members of the majority in *Bush v. Gore* apparently were unprepared to accept the Article II rationale. Regardless of whatever strength that rationale later may seem to possess, the remedial decision remains amenable to the "lawlessness" hypothesis in its subjective sense: A weighty decision was made on grounds that, so far as those who made it were concerned, were extralegal. If so, that way of deciding the case may be examined and criticized regardless of whether it later becomes possible for commentators to think of better ways the same result could have been reached, just as it would be possible to label the decision lawless if the Justices had flipped a coin to reach their result even if commentators

---

44. See Posner, *Florida 2000*, *supra* note 3, at 49-51.

45. See *id.* at 50.

later concluded that the result could have been derived in a more traditional way.

### III. GUIDELINES FOR EXTRALEGAL DECISIONMAKING

#### A. *RESERVE LAWLESSNESS FOR CASES WHERE THE EXPECTED HARM FROM LAWFULNESS IS GREAT AND UNAMBIGUOUS.*

Those who praised the Court's remedial decision often referred in general ways to the harms it avoided: acrimonious proceedings in Congress that might have prevented the ultimate winner from governing effectively, for example, or a possible constitutional crisis—all said to be dangers if Florida sent dueling slates of electors to Washington.<sup>46</sup> But if we are to move from conventional legal considerations to an unconstrained cost-benefit analysis, we must consider carefully what to count as costs and as benefits. It is important that a court take into account costs and benefits it is competent to measure—in the ordinal sense, at least, if not in the cardinal sense. It is also important that the costs and benefits represent values sufficiently uncontroversial to serve as impartial bases for decision. The benefits maximized by the Court's remedial decision in *Bush v. Gore* were dubious on both grounds.

The primary danger in a remand was that the Florida court might have ordered more recounts, which in turn might have caused the state to send two competing sets of electors to the electoral college, triggering further controversies that might have required additional intervention by the Supreme Court. The challenge lies in identifying a politically neutral reason to view these possibilities as problems. A court need not be indifferent to instability that threatens to unravel the rule of law and institutions of government; self-preservation is a cardinal justification for extraordinary measures that depart from the rule of law.<sup>47</sup> Here there was no apparent danger of a junta, of riots, or of a collapse of civil order; however, there was no threat of instability, except in the sense of prolonged uncertainty and controversy. If Florida had sent two slates of electors to the electoral college, some protests in the streets no

---

46. See *id.* at 53-54; see also Sunstein, *supra* note 19, at 772-73.

47. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1999) (discussing how necessity may demand that certain civil liberties be curtailed during wartime).

doubt would have occurred regardless of the final outcome.<sup>48</sup> But protests and instability are not at all the same thing. Protests can represent a healthy public interest in the outcome of the election. They may be annoying, but unless they turn lawless, they cannot be considered a judicially cognizable cost of recounting. There is no standpoint from which to condemn, regret, or wish to avoid them without taking sides on a question to which courts should be indifferent—the optimal extent of short-term public satisfaction with the outcome of a political process.

Uncertainty and controversy can of course produce other costs of their own. One such cost here was the threat to the ultimate winner's sense of legitimacy. The measurement and accounting of this cost, however, were fraught with empirical and conceptual difficulties. Empirically, we do not know what the result of any subsequent political wrangling would have been if the Supreme Court had allowed the Florida court to consider ordering more recounts. It may be that whichever candidate emerged from a brawl in the electoral college would have been surrounded by doubts about his legitimacy, or it may be that he would have been regarded as the legitimate winner in a messy but fair democratic process.

The disagreement over the likelihood of these outcomes among distinguished scholars of the Court provides reason for skepticism that judges are equipped to make such judgments. We saw earlier that Professor Fried thought the Court probably "did well to shut the thing down then and there,"<sup>49</sup> and that Ronald Cass thought the Court "did the nation a service by bringing to a close"<sup>50</sup> the election controversy. Judge Posner takes a similar position:

Had the responsibility for determining who would be President fallen to Congress in January, there would have been a competition in indignation between the parties' supporters, with each side accusing the other of having stolen the election. Whatever Congress did would have been regarded as the product of raw politics, with no tincture of justice. The new President would have been deprived of a transition

---

48. Supporters of both candidates were already protesting in the streets of Florida and outside the Supreme Court before the Court's decision. Ellen Gamerman, *Outside, Protesters Crank Up the Volume; Hundreds Swarm Court to Support Candidates and Be a Part of History*, BALT. SUN, Dec. 2, 2000, at 6A; Lynda Gorov, *Election 2000: GOP Winning Protester Battle*, BOSTON GLOBE, Dec. 4, 2000, at A1.

49. Fried & Dworkin, *supra* note 15, at 8.

50. CASS, *supra* note 24, at 94.

period in which to organize his administration and would have taken office against a background of unprecedented bitterness. His "victory" would have been an empty one; he could not have governed effectively. The scenario that produces this dismal result is conjectural. But that there was a real and disturbing potential for disorder and temporary paralysis (I don't want to exaggerate) seems undeniable.<sup>51</sup>

Professor Dworkin, however, takes a different view. He argues that the decision "ensured both a Bush victory and a continuing cloud of suspicion over that victory."<sup>52</sup> Professor McConnell apparently agrees:

The [C]ourt did not have the resolution to declare that no recount was necessary, or the patience to declare that a proper recount should proceed. That means, unfortunately, that Mr. Bush will take office under conditions of continued uncertainty. I do not think that part of the decision did him, or the nation, a favor.<sup>53</sup>

The fact that eminent students of the Court disagree about a consideration bearing on a decision does not mean the consideration should be given no weight. But when we examine the nature of these disagreements, we find that they are indeed, as Posner concedes, conjectural. They are just hunches about the political effects of the Court's decision—a seat of the pants enterprise. There is no reason to consider such predictions by academics and judges more reliable than the equally divided views of the politicians and professional pundits whose predictions filled the op-ed pages following the decision. They may be less accurate, for the legal academics making these predictions do not hold their positions by virtue of demonstrated skill at predicting the political consequences of decisions. Nor do the Justices hold their positions based on such skill, and the prospect of them forecasting the political consequences of their decisions, and using them as a basis for decision, is a grim one.

We can think of further recounting as having expected costs that the Court hoped to avoid. These costs were a function of two variables: the probability that they would be incurred ("P") and their size ("L," to borrow from Judge Hand's formula<sup>54</sup>). The skepticisms that are considered here are empirical, and involve "P"—the likelihood of various political consequences, and the ability of the Justices to accurately forecast them. Courts are not famously good at measuring the worldly

---

51. Posner, *Florida 2000*, *supra* note 3, at 46.

52. Dworkin, *supra* note 16, at 53.

53. McConnell, *A Muddled Ruling*, *supra* note 20, at A26.

54. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

consequences that arguably *are* their business to evaluate; judges are not social scientists. One type of cost that we might agree is relevant to a court's decision to act on the basis of power rather than law is a danger that the Republic may find its survival jeopardized; hence the willingness of the Court, when the country seems threatened by its enemies, to allow infringements of civil liberties that would not be permitted in normal circumstances.<sup>55</sup> But its decisions in those cases commonly are looked back on with some embarrassment. They tend to be instances where the Court appears to have been swept along by exaggerated perceptions of the threat that liberty posed to order. The potential costs of liberty are easy to imagine in such cases, while the cost of reducing liberty tends to be more diffuse, less visible, less salient, and the Justices turn out to be not much better than their counterparts in the other branches of government at resisting these perceptions. As Chief Justice Rehnquist has said, it may not be realistic to expect anything else when comparable circumstances arise in the future.<sup>56</sup> And even in retrospect, we must be careful to avoid the temporal parochialism of imagining that those decisions easily could have been made differently in their times. The limited character of the Court's ability to assess the worldly dangers of deciding one way or the other, however, should counsel the greatest reluctance when the Justices are contemplating a departure from what the law seems to permit in order to head off some imagined potential calamity.

Meanwhile the reckoning of "L"—the harm to be avoided, however conjectural it may be—is conceptually circular. Most of the costs and benefits of prolonged litigation over the election were impossible to define without making initial decisions that had ideological content and that were the subject of the election itself. Was it good for the country to have a "stronger" president—one who took office without too much political strife? If we assume that Bush would have gone on to win one way or another, so that the Court's decision merely accelerated the inevitable, the values of those who opposed him still would have been better represented in a more drawn-out process in the

---

55. Cf. A.W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIUS* (1992). See generally REHNQUIST, *supra* note 47 (positing that in times of war, necessity may demand curtailment of civil liberties).

56. See REHNQUIST, *supra* note 47, at 224 (discussing the infringement of civil liberties during wartime, with particular reference to World War II internment).

electoral college. That process might have been ugly and acrimonious and might have left the winner in a weakened position to govern. But perhaps that would have been the appropriate result of an election that ended in a statistical tie. All else being equal, many people no doubt would prefer a president who can govern vigorously, but all else is not equal, and from a pragmatic standpoint there is little *a priori* reason to wish for a strong executive. With respect to some presidential duties, everyone would agree that a strong occupant of the office is better than a weak one; the national interest would not be well-served by a weakened Commander-in-Chief during wartime. Indeed, the terrorist attacks on the country in the later part of 2001 might be thought to have called for a strong executive regardless of party. But then that call appeared to be self-executing, as the country rallied around the President in response to the crisis; and it is difficult to believe that the nation would have been less supportive of President Bush after the terrorism if he had been required to endure a more bruising political battle on his way into office nine months earlier. Once the country was attacked, even those who had remained convinced that Bush came to office illegitimately and fiercely opposed his policies seemed to set aside those reservations for the sake of supporting the Commander-in-Chief. Even setting this point to one side, it remains entirely possible that Bush's "strength"—i.e., his popularity after the attacks, and his ability to make decisions about retaliation and defense that were politically difficult to oppose—will end up leaving the country worse off than it would have been if Bush had been "weaker" and his decisions more vigorously contested.<sup>57</sup>

As for the other important duties and powers of the office, millions of people might well have preferred a weak president to a strong one who was not a member of their political party. Many of the decisive issues were zero-sum games; the more trouble a Republican president would have advancing his goals, the happier many Democrats would be, and vice versa. The power of a strong president to make ideologically robust judicial appointments is an important example. Bush's ability to make such appointments may have been strengthened by the Court's decision to bring a relatively early end to what could

---

57. Whether Bush's handling of these challenges will prove more successful than Gore's would have been will remain impossible to say, and a prediction on that score obviously is not a legitimate consideration for a court deciding an election dispute.

have been weeks more of debilitating struggle. This sort of possibility is the reason why supporters of each candidate often were thought to have an interest in weakening their opponent during the election controversies—if not to prevent him from winning, then to ensure that he would be weak if he did win.<sup>58</sup> Whether a weak President Bush is better than a strong one, or better or worse than a weak or strong President Gore, is not possible to say from an apolitical standpoint. Ensuring that the winner of the election entered office in a position of strength thus was not an appropriate “good” for the Court to maximize. From a pragmatic standpoint, the outcome the Court ordered did not work especially well for those who opposed George Bush, and there is no reason to weight their interests less than those of his supporters.

There remains the possibility that the uncertainty caused by more recounts and litigation would have been bad for the economy. During the controversy that followed election day, media commentators frequently speculated about the effect that the resulting uncertainty would have on the stock market. Although the market declined in the weeks and months after the Court’s decision, maybe it would have declined more if the election had been decided through wrangling in the electoral college. It does not take much work, however, to show that attempts to bolster the stock market are no business of the Supreme Court. A committee of nine lawyers, most of whom have no experience in the financial markets (would it matter if it were otherwise?), are unlikely to be skilled at predicting the impact their decisions will have on the market. Even if the Justices were able to do so, they would be able to gauge at most the short-term impact. They would not be able to forecast the long-run consequences for the economy of the election, of ending the controversies surrounding it, or of earning the Court a reputation for occasional lawlessness.

Another consequence the decision was said to avert was a “constitutional crisis.”<sup>59</sup> It is unclear what the term means. The usual definition of a constitutional crisis is a dispute between coequal branches of government about the Constitution’s

---

58. Hence Judge Posner said, “One suspects that by December 12, even before the Supreme Court’s decision, most of Gore’s supporters had lost hope that he would be President and their objective had become to cast enough doubt on the legitimacy of Bush’s election to undermine him and the Republicans generally.” Posner, *Florida 2000*, *supra* note 3, at 47.

59. *Id.* at 46.

meaning that calls into question the authority of either one to trump the other.<sup>60</sup> Nothing quite like that appeared to be in the offing here. What was possible was a scenario in which one of the candidates, Vice President Gore, cast the deciding vote in his own favor in the Senate, which might have been tied along party lines as it considered which slate of electors it preferred from the State of Florida. This would have been awkward. If the House and Senate had voted differently in choosing which electors to recognize, as might well have happened, federal law would have made authoritative the slate of electors that the state's chief executive provided,<sup>61</sup> and in this case the relevant state's chief executive was George Bush's brother. This, too, would have been awkward. But there were statutory rules providing for all this; at least at the time of the Court's decision, the country did not appear headed into a controversy where the rules gave out and left different branches of government at loggerheads.

Posner suggests that perhaps the Florida court might have gone on to order the Governor not to certify his preferred slate,<sup>62</sup> triggering an intramural constitutional crisis within the state that would require the Court's intervention after all, and at an even more sensitive moment than the Court confronted in December. This justification for the Court's decision—that it spared itself a tougher, more costly decision later—illustrates the unusual structure of the cost-benefit calculation that came with the case. When the Court made its decision, it was not necessarily clear that it was deciding who the next president would be. It might merely have been accelerating an inevitable victory for George Bush; we cannot know. But if the Supreme Court had allowed the Florida court to proceed with recounting, the Court could have been called upon again to intervene in January—and then it might have been clearer that the Court was picking the president. So if the spectacle of the Court selecting the president is institutionally costly, then a later decision would have been costlier than an earlier one. But of course the later decision might never have been needed. And if it had been needed, it might have been less costly than the earlier one in other respects. The legal questions involved might have involved relatively straightforward interpretations of 3

---

60. See Michael B. Brennan, *All the Laws But One: Civil Liberties in Wartime*, 83 MARQ. L. REV. 221, 223 (1999) (book review).

61. See 3 U.S.C. § 15 (1994).

62. Posner, *Florida 2000*, *supra* note 3, at 45.

U.S.C. § 15, rather than interpretations of the vaguer Equal Protection Clause and the inconclusive use of the word "Legislature" in Article II. The answers to them might have commanded a stronger consensus on the Court than it was able to achieve in *Bush v. Gore*. A unanimous decision by the Court later might have been preferable to a decision along ideological lines earlier—more capable of commanding respect, and less open to complaints of partisanship. Of course we do not know whether the controversy would have been alive in January, what questions it would have raised, or what the voting lineup on the Court would have been. But that too is part of the point. It would be foolish to try to guess at these questions, or to use such guesses as a basis for deciding an earlier case.

The general point of this discussion is not that allowing recounting to proceed would have been costless. It is that most of the costs of recounting were not the types of costs that are a court's business, because whether to consider them costs or benefits was the subject of too much political controversy on which the Court was supposed to be neutral. The Court also is unlikely to be able to estimate either the probability or the size of such costs accurately. Lacking expertise at figuring out what will happen in the world if they do this or that, the Justices almost always serve the Court and country better by sticking to what they know: how to interpret and apply the law, rather than how to keep the country safe from trouble by making well-intentioned exceptions to the usual rules. Posner advocates greater attention to these latter considerations, criticizing judges for being too inattentive to empirical facts and likely consequences of their decisions in the world.<sup>63</sup> Alas, there are some things Judge Posner can do that not everyone can do; a number of things he can do that nobody else can do, and perhaps a few things he tries to do that nobody at all can do successfully. A pragmatism that calls for courts to divine what is best for the country in a moment of political crisis needs to be implemented by judges who have extraordinary foresight, moral and ethical depth, impartiality, and learning. Theories that depend for their success on these types of qualities in public servants are off to a bad start. Our methods of selecting judges and Justices do not make it especially likely that they will have those qualities; the genius of the institutional design

---

63. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 24-33 (1990).

of our government is that it assumes the operators of the institutions will not have such traits. Our theories about what courts properly take into account likewise should be keyed to the abilities and powers of the ordinary judge or Justice with ordinary training and aptitudes.<sup>64</sup>

The imponderability of the relevant costs and benefits not only makes *Bush v. Gore* a poor candidate for cost-benefit analysis by judges; it also makes it difficult after the fact to assess the efficacy of the remedy the Court imposed. Judging the Court's decision by scrutinizing what actually happened, comparing it to what would or might have happened, and then attempting to find some neutral way to select the best set of consequences, is futile in circumstances dominated by controversial and conflicting preferences about the desirability of various outcomes. Perhaps it is more feasible to judge whether the Court's position, *ex ante*, made it likely to render a pragmatic judgment about the case that did justice to the considerations and interests at stake in it—the quality of the Court's inputs. The positional question is especially important with respect to the side of pragmatism that celebrates “practical reason”—“a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction.”<sup>65</sup> Judge Posner speaks in particular of the role of intuition in *Bush v. Gore*. He writes that “[t]here is such a thing as judgment in advance of doctrine. Experienced judges may have a strong intuition about how a case should be decided yet have difficulty matching the intuition to existing doctrine . . .”<sup>66</sup>—and he suggests that *Bush* may be such a case. In some ways, *Bush* might indeed seem a classic instance where intuition had a constructive role to play: the pros and cons bearing on the Court's possible courses of action were complicated, and intuition can be a powerful way of assimilating the complex considerations bearing on a problem into a resolution that balances them in an inarticulate but satisfying manner. But intuition, and the related form

---

64. Posner acknowledges the danger that judges are not sufficiently trained in the social sciences to be practitioners of pragmatism. See POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, *supra* note 34, at 255. Posner also argues that with changes in education this might be remediable. *Id.* at 247.

65. Posner, *Florida 2000*, *supra* note 3, at 73.

66. *Id.* at 23.

of knowledge known as common sense, are reservoirs of wisdom and bias, foresight and wishful thinking. If one is going to commit a decision to the intuition or common sense of a legal actor, a great deal thus depends on how well the actor's position permits him to internalize the considerations bearing on the question, so that the intuitive resolution does justice to the competing interests involved. It is also important to ask how the Court's position compared to that of other institutions and actors who had their own ability to internalize the relevant considerations and ask whether those considerations already may have been impounded in existing legal materials—statutes and cases—that offered a messy and humble-looking, but nevertheless just, solution to the conflict. It is to these considerations that we now turn.

*B. CALIBRATE LAWLESSNESS TO LEAVE ROOM FOR REPLY BY OTHERS. RESERVE LAWLESSNESS FOR CASES WHERE OTHERS CANNOT RESOLVE THE PROBLEMS IT IS INTENDED TO ADDRESS.*

One way to pose the question raised by the remedial decision in *Bush v. Gore*, on the assumptions about it I have proposed, is to ask when threats to the national welfare justify the Court in giving orders that exceed its jurisdiction. This question may seem curious, because an order that exceeds the Court's jurisdiction might be expected to have no force. But custom has force of its own, and this country enjoys a remarkable custom of obedience to what the Supreme Court says. The Court likely can get away with *ultra vires* orders, at least occasionally—and this is one way to understand the decision ending the election litigation. The Florida court could have rejected the Supreme Court's admonition and gone ahead with a recount, explaining that other goals in the state's legislative scheme governing elections were more important than the benefits of the "safe harbor" and denying the Supreme Court's claim to be able to settle the meaning of Florida law. (It was reported later that Vice President Gore's lawyers considered asking the Florida court to do just that.<sup>67</sup>) Presumably the Supreme Court would then have entered another stay; the only reason for doubt is that the Court's instruction not to continue recounting was notable for its obliquity. The Supreme Court did not quite tell the state court that it must not recount; it

---

67. See David Von Drehle et al., *Anxious Moments in the Final Stretch*, WASH. POST, Feb. 3, 2001, at A13.

said that more recounting could not be part of an “appropriate” order.<sup>68</sup> The Supreme Court’s indirectness probably reflected its own uncertainty about its authority to tell the Florida court what its own opinions meant, and it is possible—though unlikely—that this same uncertainty might have caused the Supreme Court to stand down if the state court had reasserted its own power as authoritative interpreter of the Florida Legislature’s intent. Instead it was the state supreme court—or perhaps more precisely, the losing litigant—that “stood down,” as other legal actors generally do when confronted with an order of the Supreme Court. It was a game of chicken, and the Supreme Court won. An order from the Supreme Court that exceeds its jurisdiction but nevertheless is effective thus is not a contradiction in terms.

These facts about the Court’s ability to issue orders that are *ultra vires* yet effective suggests a partial answer to the question of its prudence in doing so. The Court is the actor in our system least able to be restrained by others. The checks on the Court’s power are either long run (i.e., retirement, death, and appointment) or extreme and unlikely to be exercised (i.e., the threat that its orders will be ignored). This strong expectation of judicial supremacy serves a valuable purpose. It is useful in times of crisis for everyone to know who has the last word; the norm of obedience to that last word generally is more important than the merits of whatever is being disputed. But having the last word is a power that entails responsibility. It is a ground for great pause before deciding that *ultra vires* orders from the Court are *ever* a good idea, for nobody is in a good position to object to them without making very costly threats against the entire chain of command. On this view, the Court is best suited to keeping others within their jurisdiction *so long as it can do so without exceeding its own jurisdiction* and without itself going outside the plausible bounds of law. Experiments with jurisdiction bending are less costly when carried out by other actors because they can be roped in by others—including, but not limited to, the Court. Since by custom that is not true of the Court’s own experiments, those experiments should be devised in ways that leave room for a check of a more temporal variety: the possibility that other actors will be able to respond to the Court’s move with subsequent moves of their own that reflect interests or wisdom not represented in the

---

68. *Bush v. Gore*, 121 S. Ct. 525, 533 (2000).

Court's nine offices.

Here, several types of legal actors were in a position to contribute to a resolution of the election controversy: the Florida courts, the Florida Legislature, the Governor of Florida, the United States House and Senate, and the two candidates. None of them had the power to end the matter unilaterally; all of them had to worry about cooperation and correction from at least one of the other actors or from the Supreme Court. Those types of worries are generally salutary. If the Supreme Court had contented itself with correction of the Florida court, rather than wiping out that court's ability to continue on whatever terms it saw fit, the resulting process might have been protracted, but also might have ended in some sort of compromise. Perhaps Florida would have sent dueling slates of electors to Washington, one from its legislature and the other from its supreme court; perhaps the election would have been thrown into the Houses of the United States Congress; perhaps, under statute, the final determination of Florida's electoral votes would have fallen to the state's governor. At each of these junctures there would be opportunities for correction, statesmanship, foolishness, or misbehavior, with the latter possibilities checked by the threats of others in the process and by the prospect of possible review by the Supreme Court. Incremental adjustments would be possible; people could propose things, test the boundaries of their jurisdiction, be chastised if necessary, and back down by degrees as circumstances warranted. All this is a civilized way to work out a ferocious dispute over a deadlocked national election, and seems as likely as any other method to generate a decent resolution to an unfortunate set of circumstances—a resolution that would give fair expression to the interests of those who lost but might as easily have won.

The same logic holds even if the reason for the Court's intervention was precisely that one of those other actors—the Florida court—was itself “out of control.” This was a common reply of conservatives to claims that the United States Supreme Court was acting lawlessly in *Bush v. Gore*: maybe so, but then so was the Florida Supreme Court. Some types of decisions are indeed valuable only if they lack an exit option for those subject to them; *Bush* may be partially understood as such a case if the point of the decision was to put down a feared partisan insurrection of sorts by the Florida judiciary. Here, however, it is important to appreciate the value of calibration. If the Florida court violates the Constitution, then of course its

transgressions ought to be pointed out and reversed; the per curiam decision did that before reaching a decision on remedy. A preemptive strike against possible further transgressions by the state court, however, is an extraordinary measure. If the Florida court continued to "act out"—ordering a recount, say, without adequate judicial review of the results—then the Court always could enter another stay. If the fear was that the Florida court would manipulate the outcome of the recounts in ways that would be hard for the Supreme Court to review, then there were other political actors positioned to constrain such excesses and to evaluate whether they really were occurring in the first place—particularly the Florida Legislature and both houses of Congress. The point is not that the Supreme Court should have bent over backwards to avoid second-guessing the Florida court's impartiality; rather, it is that the Supreme Court should not have bent over backwards to eliminate the Florida court's role in the dispute. The Supreme Court would have done better to act as the referee of referees.

Apart from the other legal actors in the picture, there were mechanisms in the statute books—principally 3 U.S.C. § 15, passed in response to the last somewhat comparable election controversy—designed to handle disputes over slates of electors and the propriety of their selection. Judge Posner suggests that "the Court's refusal to intervene might have prompted the question: what exactly is the Supreme Court good for if it refuses to examine a likely constitutional error that if uncorrected will engender a national crisis?"<sup>69</sup> The intervention the Court actually performed, however, raises a parallel but nearly opposite question: What exactly is 3 U.S.C. § 15 good for if occasions for its use are regarded as "crises" calling for a decisive preemptive strike by the Court? Embedded in the statutory scheme may have been considerable wisdom about the best way to handle a political crisis of the sort presented by the election<sup>70</sup>—wisdom on which a small committee of lawyers may be

---

69. Posner, *Florida 2000*, *supra* note 3, at 58.

70. When the statute was enacted in 1886, Senator Sherman, one of its primary supporters, had this to say about the relative ability of the Supreme Court and the Congress to sort out competing slates of electors:

Another plan which has been proposed in the debates at different times, and I think also in the constitutional convention, was to allow questions of this kind to be certified at once to the Supreme Court for its decisions in case of a division between the two Houses. If the House should be one way and the Senate the other, then it was proposed to let the case be referred directly to the prompt and summary

unlikely to improve on short notice. Above all, the statutory process would have provided better than a judicial decision for the airing and assimilation of the incommensurable preferences bearing on the controversy. If the Supreme Court decides that it is time "to shut the thing down,"<sup>71</sup> there is little room for any of the experimentation and adjustments described above. It is true that the Court did not remove *all* power from other actors to respond. Congress *could* have declined to count Florida's electoral votes and declared Gore the winner; as noted earlier, the Florida court *could* have declined to obey the Court's instructions. But these would have been drastic responses. Leaving room for others to respond means leaving them room to respond in incremental ways, rather than massively raising the stakes for all of the other players if they do not wish to fold. Here, predictably, they all folded.

C. *RESERVE LAWLESSNESS FOR OCCASIONS WHERE THERE IS NO DANGER OF THE APPEARANCE OR REALITY OF SELF-DEALING.*  
*RESERVE LAWLESSNESS FOR OCCASIONS WHERE THE SUPPORT FOR IT IS BIPARTISAN.*

One might have thought the Supreme Court unusually well-positioned to settle the election controversy because its members were insulated from the direct political pressures bearing on the other players in the controversy—the Florida judges, the Florida legislators, the Florida Governor, the United States Senators and Representatives, and the candidates themselves—most of whom had to worry about reelection. This brings us to two other features of the election controversy and how they bear on the Court's decision. The first is the role of the election in determining the Court's own composition.

---

decision of the Supreme Court. But there is a feeling in this country that we ought not to mingle our great judicial tribunal with political questions, and therefore this proposition has not met with much favor. It would be a very grave fault indeed and a very serious objection to refer a political question in which the people of the country were aroused, about which their feelings were excited, to this great tribunal, which after all has to sit upon the life and property of all the people of the United States. It would tend to bring that [C]ourt into public odium of one or the other of the two great parties. Therefore that plan may probably be rejected as an unwise provision. I believe, however, it is the provision made in other countries.

*Counting of Electoral Votes*, 49th Cong., 1st Sess., 17 CONG. REC. 815, 817-18; see also Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 699 n.13 (2001) (discussing the context of this passage).

71. Fried & Dworkin, *supra* note 15, at 8.

The second, which may be related, is the remarkable division of the Court's members on the question of remedy.

It is unusual for a situation possibly calling for an important decision by the Court to bear any relation to the Court's membership. In the classic case of wartime exigencies there normally will be no occasion to worry about the Court tampering with its own composition; likewise, there is no need for such worry in most domestic emergencies. The election was a peculiar circumstance because the Court's decision may have had enormous consequences for its own personnel. It is worth recording for future reference the large number of politically sensitive issues on which the Supreme Court in recent years was divided by often identical 5-4 margins. They included abortion rights,<sup>72</sup> affirmative action,<sup>73</sup> the interpretation of the Voting Rights Act,<sup>74</sup> the scope of congressional power under the Commerce Clause,<sup>75</sup> the ability of Congress to subject the states to lawsuits for damages under its Article I powers,<sup>76</sup> the extent of permissible public aid to religious organizations under the Establishment Clause,<sup>77</sup> and countless issues of criminal procedure and habeas corpus.<sup>78</sup> Unsurprisingly, the question of the Supreme Court appointments that the candidates were likely to make was an important issue in the presidential election.

Against this backdrop the case for restraint by the Court is obvious enough. As noted earlier, the Court's primary check on its judgments is furnished by the slow process of retirement and appointment by the president and confirmation by the Senate; ergo, a crisis that involves the selection of a president is the very last occasion on which the Court should regard itself as at liberty to reach outside its usual rules to settle the matter. *Bush v. Gore* may have effectively determined the outcomes of dozens of close cases destined to arise during the coming decades. For conservatives it may be the gift that keeps on

---

72. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000).

73. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

74. See, e.g., *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996).

75. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

76. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

77. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997).

78. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998); *Calderon v. Thompson*, 523 U.S. 538 (1998); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *O'Dell v. Netherland*, 521 U.S. 151 (1997).

giving, while for liberals it may prove a remarkably devastating loss, resulting in the ratification and consolidation of several lines of controversial recent decisions moving the Court to the right. The loss was the loss of a chance, of course. Whether the Court's decision in fact caused such a result will never be known because of uncertainties about what the outcome of any recounts would have been, about whether George Bush would have won in any event with the help of the Florida Legislature, and about whether any vacancies on the Court that may occur during Bush's time as President would have occurred if he had lost. But there can be no question that, viewed *ex ante*, the case involved potentially enormous stakes for the Court and its jurisprudence. Outright institutional abstention, akin to recusal, would have been understandable and probably would have been the best course in these circumstances, on the ground that the Court just cannot involve itself in the process of selecting the selector of its own members if there is some plausible way to avoid doing so.<sup>79</sup> The Court had a significant conflict of interest, and the controversy was better worked out by members of the other branches of government, state and federal. The Florida court may have been laboring under biases of various sorts, but it did not have *this* bias to worry about.

While the soundest strategy for dealing with a conflict of interest is to prevent it from coming into existence, sometimes it is necessary to make a decision despite a conflict of interest, as when the Court decides cases under the "rule of necessity."<sup>80</sup> One can imagine a parallel argument that the Court has some supervisory responsibility over a national election, and that the value of preventing a true crisis of succession could justify taking a case like *Bush v. Gore*. Regardless of the details of one's theory of the Court's appropriate role in resolving such crises, however, there is bound to be a tension between the theory and the fact that such elections determine the Court's own composition; the fear is inevitable that the Court prematurely will assume the role of election stabilizer. The practical management of that margin is our concern here. The question of when the

---

79. For further discussion of the case for abstention, and some other reasons supporting it, see Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 686-89 (2001).

80. See *United States v. Will*, 449 U.S. 200, 213-17 (1980) (holding that disqualification of Article III judges was modified by the long-standing rule of necessity).

time has come for intervention, and for how much, has to be resolved with tools not of law, but of political sense. The Court's inability to reach anything resembling a consensus on the need to take the case suggests that it may indeed have acted prematurely. But let us assume there was a good argument for the Court's involvement based on the need to satisfy a national audience that the Florida litigation had been concluded fairly, or on the need, mentioned earlier, to supervise the well-intentioned lawlessness of other legal actors; for our concern now is with the disposition the Court reached once it took the case and was in the unhappy position of needing to make a decision despite the conflict of interest.

The existence of that conflict made *Bush v. Gore* a bad time for adventurousness. Consider more closely the nature of the threat created by conflicts of interest. The worry most commonly voiced, to state matters bluntly, was that various untoward thoughts were dancing across the minds of the Justices in the majority: Some of them may have hoped to retire but would not have wanted to be replaced by Justices who would undo all that they had spent their careers trying to accomplish. Alternatively, some of them may simply have loathed Al Gore. Perhaps these thoughts never occurred to any of the Justices; more likely such thoughts did occur to them and quite properly were suppressed. I have great confidence that none knowingly would have succumbed to temptations of these sorts. To do so would have been an affront to the rule of law of the first magnitude, and the Justices are a profoundly idealistic group of public servants. Nevertheless, the conflict of interest was there, dangling in the background; the greatest threat was not that the Justices would act on it directly, but that it might inescapably color their perceptions of whether the decision they were contemplating was sensible or not so sensible. When a decision has the potential to create large costs and benefits, some of which are appropriate to consider and some of which are highly inappropriate to consider, it is very difficult to prevent the inappropriate from contaminating the assessment of the appropriate; both will inescapably affect the decision-maker's gut sense of satisfaction or horror at the outcome. And what source of temptation and forbidden satisfaction is greater than the wish to propagate the species?

The insidious potential of partisanship to color perceptions is the reason why promises to oneself and others that such a conflict of interest will play no part in a decision are little com-

fort. They reflect an exaggerated faith in the power of good intentions to prevent self-interest or wishful thinking from infecting a decision subtly, even unconsciously. It is awkward to speak of unconscious influences on the behavior of public servants because of the annoying overtones of armchair psychoanalysis that accompany the word, but it is perfectly familiar learning—to ethicists, lawyers, and judges alike—that conflicts of interest are a threat to impartiality not only because they create chances for conscious misbehavior by dishonest people, but because they can skew the judgment of honest people whose intentions are impeccable.<sup>81</sup> “Biases and prejudices are dangerous for the very reason that they are disguised and subtle.”<sup>82</sup> A sophisticated statesmanship thus responds to conflicts of interest not just with an extra measure of earnestness but with an extra measure of self-skepticism. The important challenge once the case had been taken was to give effect to that skepticism; it was to find strategies to prevent any of these conflicts of interest from affecting the decision.

One way to effect such self-skepticism is to make a decision “by the book”—to limit one’s own discretion by adhering to customs or conventions in conservative fashion, using them to keep oneself honest and to signal that the decision would have been made the same way regardless of the conflict of interest. There are perils in bending over backwards to avoid giving effect to a bias,<sup>83</sup> and sometimes in the law there is no “book”—no clearly established jurisprudence—to follow on a question. But with respect to the remedy in *Bush v. Gore*, there was a “book.” It was possible, and would have been a decision easy to defend, to adhere to the most familiar available principles of decision, starting with the custom of letting state courts decide matters of state law. The majority did not at all go by the book, however; it tried something novel. To take such jurisprudential risks with a conflict of interest in the background was imprudent.

Another strategy for decisionmaking where conflicts of interest are a threat is to place great value on bipartisanship. Indeed, most of the worries about the majority’s conflict of interest would have been dispelled by a decision that transcended

---

81. See Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 173 n.147 (1999).

82. Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1071 (1996).

83. See ROBERT COVER, *JUSTICE ACCUSED* 226-38 (1975).

the ideological divisions that were the subject of the election—a decision where those subject to the conflict and those not subject to it were able to agree.<sup>84</sup> Alas, the opposite occurred. Only the five Justices likely to see their views advanced by Bush's appointments to the Court voted to help Bush. The benefits of seeking consensus go beyond the protection of the Court's reputation from charges of partisanship; they bear on the decision to commit extraordinary judicial acts in the first instance. The temptation to take such measures will tend to arise in times of crisis and public controversy. The danger is that the Court will be swept up in the temper of the times rather than being detached from it; it is that the Court will substitute the will of five upset people for the will of tens of millions of upset people (or for smaller sets of upset people—legislators, state court judges—who at least are politically accountable). Unfortunately it is difficult for judges, as for anyone else, to determine whether they have been infected by the same virus of opinion that has overtaken their fellows. One of the remarkable features of the election controversy was the tendency of academics to subscribe to arguments—including arguments about obscure points of Florida law—that favored the politicians they were rooting for on other grounds. Declarations against political interest were rare,<sup>85</sup> suggesting that most people who were thinking hard about the issues found it difficult to avoid letting their wishes about the outcome affect their judgment about the legal questions involved. How is a judge to know whether his thinking is being influenced in the same way? He really cannot know; he has introspection and not much else to help him. One thing he can do, however, is ask whether the arguments that to him seem persuasive are strong enough to make believers out of those who do not already share his priors about the outcome. That is the reason the 5-4 split in *Bush* was alarming. It was horribly consistent with the hypothesis that the Justices were in the grip of the same partisan-influenced riptide that was dominating public opinion everywhere else. Those who accuse the majority of having

---

84. See Sunstein, *supra* note 19, at 772 ("If the Supreme Court is asked to intervene in an electoral controversy, especially a presidential election, it should try to avoid even the slightest appearance that the justices are speaking for something other than the law. Unanimity, or near-unanimity, can go a long way toward providing the necessary assurance.").

85. See Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13, 53-54 (2001).

partisan *motives* underestimate the good faith of the Justices; however, those who acquit the Court of partisan *behavior* may overestimate the utility of good faith as a constraint on wishful thinking.

Valuing bipartisanship is part of a broader view of how to understand the Supreme Court as an institution, especially in times of crisis and regardless of a conflict of interest. If the Court is trying to maximize the national welfare by making a general assessment of what is best rather than by interpreting legal materials, then it is better regarded as a committee of nine unaccountable lawyers in a political role than as a court in the normal and distinctive sense of the term. There are situations where one might want important decisions made by a body fitting that description, and situations where one does not want it. When time is short, the dangers of big decisions by small committees tend to be magnified; there is no cooling period in which the judgments of the members can stabilize and become more likely to reflect the benefits than the costs of their unaccountability. The shortness of time for decision in *Bush v. Gore* thus made any errors more pardonable, but also brought with it obligations to try to ameliorate its effects. A natural step for that purpose is to insist on a measure of consensus, which can function as a surrogate for time: If A has an idea that to him seems terrific but none of his colleagues think it is any good, that is some indication that A might think better of the idea with more time to reflect on it. (This is not the same as saying that A will regret the decision later; the discomfort of second-guessing a decision so significant may be intolerable.)

Now it is true that even when partisanship is running strong, circumstances may require a judge or Justice to make a decision anyway. Why should any of the five in the majority assume that they are the ones affected by the partisanship in the air? Perhaps it is the four Justices in the minority who are befogged. But deciding which side is more likely to be addled by partisanship is not the issue. The issue is whether the currents of partisanship were running strongly enough to discourage a prudent Court from straying beyond established legal authority and trying to wing it with a decision for which no solid doctrinal footing could be found. Put differently, a controversy as significant as the election of 2000 may require judges to take large-scale political considerations into account as well as their legal training when rendering a decision; however, the inability to achieve a consensus, and indeed a division down ideological

lines, suggests that perceptions of those political considerations had not yet ripened into a reliable basis for decision. A partisan split over non-traditional considerations suggests that this is a favorable time for finding refuge in whatever grounds for decision can be found in traditional materials, for the danger is great that an adventure in writing law freehand inadvertently will express preferences that have no place in the decision.

Judge Posner suggests that there are alternative explanations for the 5-4 split on the Court. Maybe instead of partisanship the split represented ideology: The conservatives, being hardy believers in personal responsibility, were unsympathetic to the complaints of voters who had been unable to follow instructions in using their ballots; the more liberal members, being more open than conservatives to appeals to justice at the expense of rules, were more favorably disposed toward the claims of voters who meant to do one thing to their ballots but mistakenly did another.<sup>86</sup> Perhaps those threads did run through the Court's split, but the important question is one of causation. If those ideological rifts just described account for the 5-4 split, it follows that the Court's decision, and the lineup supporting it, would have been identical if the roles of the candidates and the political identities of the other players in the Florida controversies had been reversed—that is, if Gore had been seeking to stop a recount ordered by a conservative state court. Would the thought of effectively ordering a Gore victory have made the decision seem a little less appealing to even one member of the majority? All one can do is wonder, but I regret to say that I know of few students of the Court who think its lineup would have been the same under those circumstances, and none who think so with any confidence. Those who doubt this do not generally imagine that the change in the lineup would have consisted only or primarily of defections of the *Bush v. Gore* dissenters into the majority. The source of the nearly universal skepticism is not necessarily a suspicion of bad faith on anyone's part, nor is it a belief that any particular Justice necessarily would have voted differently. It is an actuarial sense that if the legal materials were so weak and the temptations of wishful thinking so strong as to produce a 5-4 judgment here along the usual lines, then an equally strong wind in the other direction probably would have caused at least some of the trees to bend the other way. It is painful to wonder aloud about

---

86. Posner, *Florida 2000*, *supra* note 3, at 56-59.

these questions because even to ask them is damaging to the Court's prestige. But they are inevitable under the circumstances, and they are a predictable cost of the Court's decision.

There is an analogy between the value of consensus here and to the argument against President Clinton's impeachment that Professor McConnell offered in December 1998. He argued that impeachment would be constitutional, but that "the best test of whether presidential misconduct rises to the level of impeachment is whether members of his own Party are willing to join in the motion."<sup>87</sup> McConnell said,

Does that mean that the President is effectively immune from impeachment as long as his Party stands behind him? Yes, but that is not a bad thing. I have enough confidence in the patriotism of the men and women elected to Congress—even those of the other Party—to believe that, over the centuries, a tradition of required bipartisanship with regard to presidential impeachment will protect our essential interests as a nation. In the meantime, we can limp along for the coming two years with this President, and hope that his successors will be both wiser and more honorable.<sup>88</sup>

Impeachment is a question not just of law but of statesmanship. Also largely a question of statesmanship is a court's decision to act outside its normal rules to end a perceived crisis. Insisting on bipartisanship before taking those types of measures provides a useful constraint on the judicial temptation to grasp. Here, it would have meant a longer election controversy with a messier result, but perhaps we could trust, in the same spirit as McConnell, that the country might "limp along" in the coming years with whatever result obtained, and hope for measures that reduce the likelihood of such debacles in the future.

*D. FASHION LAWLESS DECISIONS TO LIMIT THEIR DURATION.  
RESERVE LAWLESS DECISIONS FOR SITUATIONS UNLIKELY TO  
REPEAT.*

Against the complaints just registered about the Court's decision can be set two points in its favor. The first is that this was a one-shot judicial intervention; the Court did not set itself up against the will of the public in the long run. This greatly reduces the institutional cost of a well-intentioned lawless ges-

---

87. Letter from Michael W. McConnell, Presidential Professor, The University of Utah College of Law, to Henry J. Hyde, Jr., Chairman, Committee on the Judiciary of the House of Representatives 1-2 (Dec. 12, 1998) (on file with the author).

88. *Id.*

ture, and it is why dire predictions of fallout from the Court's decision made shortly after it was announced probably were exaggerations. Whether or not it is regarded as lawless, a decision like *Roe v. Wade*<sup>89</sup> strains the Court's standing with a portion of the public by giving the Court ongoing responsibility for frustrating tens of millions of people who continue to disagree with the decision and resent its ongoing consequences over a period of generations. *Bush v. Gore* likewise frustrated tens of millions of people, but few of them probably will feel frustrated much beyond the time President Bush's first term ends; only intellectuals are likely to dwell on the fact that his Supreme Court appointments will last longer.<sup>90</sup> Whether to overrule *Bush v. Gore* is unlikely to be a burning question in future confirmation hearings, for there is not much there to overrule. It was the decision of the *case*, rather than the decision of the legal issues in it, that riled some of the public; the Court was acting in its capacity as national dispute resolution agency of last resort, rather than as a lawmaker. This is why *Bush v. Gore* is not *Lochner v. New York*,<sup>91</sup> or, if you prefer, *Roe*: If it was the peculiarity of the facts that inspired a majority of the Justices to venture outside what the law seemed to authorize where such a venture may not have been warranted, that same peculiarity also will tend to cabin the harm done by it. The decision thus complied with an important tenet of salutary lawlessness: It should be implemented with strikes that do not require the Court to reassert its lawlessness and make a long-term issue out of it. When the Court does something with which the country cannot live and it is something that will not go away, the result is confrontation. As far as the Court is concerned, however, *Bush* probably has come and gone for the last time.

There is an analogy to the decisions courts make to grant affirmative or negative injunctive relief. Injunctions not to do things are granted more readily than injunctions requiring ongoing judicial supervision and administration. *Bush v. Gore* presents the same general point writ large: The Court intervened dramatically, but in a fashion that created no ongoing duties for itself and that created no holding against which public resistance to its authority might be expected to accumulate. It no doubt will be galling to the decision's more enraged critics

---

89. 410 U.S. 113 (1973).

90. For further discussion, see John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 791 (2001).

91. 198 U.S. 45 (1905).

to suppose that the Court “got away with it,” but it probably did; by making its intervention a limited strike, the Court made its immediate role enormous but did nothing to increase its friction with the political branches in the long run.

A second strength of the majority’s ruling is related to the previous one: It arose in an area of law where the Court rarely ventures. This makes it unlikely that the vices of the decision will be carried over into other areas of the Court’s jurisprudence, either by the authors of the per curiam opinion or by its opponents in retaliation. This is important; one of the great risks of experimenting with lawlessness is that it will become habitual, or that those who opposed the decision will feel emboldened to retaliate in kind, causing a general weakening of the norms that constrain judicial decisions. This seems unlikely to occur. It will be easy for the Justices on both sides to regard *Bush v. Gore* as a sport that was limited, if not to its facts, then to a type of case that the Court rarely sees. It may indeed be that some members of the Court considered a national election a special circumstance, bringing with it a special role for the Court with its own rules, obligations, and liberties to do the helpful thing for the country.

The upshot of these two considerations is that the Court’s decision to shut down the recounting in the presidential election of 2000 is not likely to be *institutionally* as costly to the Court as sometimes was supposed when the decision was released.<sup>92</sup> They do not make the Court’s ruling a good one, but they make it a less serious delict than it otherwise would be. These “strengths” are somewhat paradoxical, because they arguably make the decision both more lawless (by denying it any likely prospective application) but less harmful. Still, one may reasonably prefer the one-time unfortunate decision to the decision that seems likely to set a bad example.

---

92. See, e.g., Neal Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35 (arguing that lower court judges “may begin to dismiss what the Supreme Court says in its decisions” because of *Bush v. Gore*); Jeffrey Rosen, *Disgrace: The Supreme Court Commits Suicide*, NEW REPUBLIC, Dec. 25, 2000, at 18 (arguing that the majority’s decision “made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O’Connor”).

## CONCLUSION: SOME PRAGMATISM ABOUT PRAGMATISM

This inquiry began with an attempt to identify features of the Court's remedial decision in *Bush v. Gore* that may have marked it as "lawless" in some distinctive sense; we then considered some guidelines useful in making such decisions. The guidelines can in turn be used to throw some light back on the difficult question of when a decision might usefully be considered lawless. I have argued, for example, that in *Bush v. Gore* the Justices would have done better to seek a decision that commanded greater consensus among themselves. That might seem a strange claim about any normal case. We expect the Justices to disagree often; why should they agree to agree? Also, how can one say which side should yield for the sake of agreement? We can turn those questions into a pragmatic way of thinking about the meaning of lawlessness: when do we want judges to worry about achieving a measure of consensus before acting? One answer, as we saw, may be that when decisions have to be made quickly, consensus can serve as a substitute for the long reflection that the circumstances make impossible. Another answer, also applicable to *Bush v. Gore*, involves the type of decision being contemplated. Ordinarily we expect judges to show obeisance to the past and to speak generally in ways that bind themselves in the future; we expect them to decide cases by interpreting instructions given to them by others, whether in the form of statutory or constitutional text, past opinions, or customs and practices in their court. The satisfaction of these expectations is supposed to constrain judicial decisions not tightly but usefully, providing some protection against two types of dangers: the threat to democracy posed by unaccountable judges giving effect to their own policy preferences, and the danger that the decisions themselves will be poor because they are made by judges who do not have the time, information, and training to make reliable judgments about what outcome of a case is "best" in an extradoctrinal sense. The forms of law and doctrine help turn complicated disputes over social policy into legal questions that judges do have the time, training, and information to answer, and that leave the hard questions of policy for others to resolve wherever possible.

In any given case judges use a mixture of this legalistic model and a more pragmatic approach. It is a question of proportion and emphasis. Traditional models of judging are pri-

marily legalistic, relegating pragmatic judgments to the margin. To the extent we move toward a more open embrace of pragmatism in adjudication, the problems of democracy and competence become more severe; pragmatism offers criteria for decision that may have other benefits but that reduce the natural hedges against those problems furnished by legalism. In an extreme case such as *Bush v. Gore*—perhaps the *ne plus ultra* of pragmatic adjudication—the hedges may be virtually nonexistent. Substitute constraints then become valuable: other norms and customs to help control the risk of decisions that may be undemocratic or poorly taken when the guards provided by a commitment to traditional judicial methods are pushed to the background or are out of the picture altogether.

This Essay has suggested a series of such constraints that would have been prudent for the Court to observe in deciding *Bush v. Gore*. The discussion has proceeded from the hypothesis that some of the Justices who contributed to the 5-4 majority could not find a traditional legal justification for what they thought was best and were not ready to make new law to explain themselves, but were convinced the remedial decision they made nevertheless would best serve the country by bringing the controversy over the 2000 presidential election to an end. I have argued that decisions made in this way may in some situations be defensible, but that the election litigation was not such an occasion; the constraints that can substitute for doctrine were not observed. It was both empirically and conceptually difficult to determine whether the benefits of the Court's remedial decision outweighed the costs. There was no check on the Court's judgment, as the decision left little room for any other actors to reply. Meanwhile, there were processes in place for resolving the controversy without judicial intervention. The Court itself had too large a stake in the outcome of the controversy to be a good arbiter of it, and the Court was too split by its usual ideological division to be able to offer a credible resolution that reflected judgment detached from the underlying stakes. It is true that the decision had the virtue of being a one-shot extralegal intervention, rather than one that set the Court up against the will of the public in the long run. And it was cabined to an area that made it unlikely to work a change for the worse in the norms that govern the Court's decision-making. In these senses the decision "worked," and cannot be considered a disaster for the Court from a practical standpoint. Those are mitigating circumstances, however, rather than jus-

tifications. If regarded as an exercise in stepping outside the conventional bounds of the law to do the country a favor, *Bush v. Gore* remains a study in temptation best resisted.