

Assume a can opener: Richard Posner's perspective on election 2000

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Breaking the Deadlock by Judge Richard Posner is a provocative book about the controversy surrounding the 2000 Presidential election. Posner's tone is characteristically confident and his assaults on those he disagrees with (e.g. the Florida Supreme Court and the legal academy) are pointed and unyielding. The book is always clear, frequently informative, and occasionally persuasive. Why only occasionally persuasive? Because certain key positions that Posner stakes out follow from assumptions that the reader may not want to grant. This review focuses on three major areas of *Breaking the Deadlock*: the election statistics, the meaning of 'vote tabulation error', and the performance of the key players.

Election statistics

An unbreakable statistical tie

Posner uses statistical arguments and methods to support his conclusion that the vote in Florida was 'an unbreakable statistical tie'. At first blush, this may seem like an odd statement. A 'tie' would seem to indicate that the two candidates got exactly the same number of votes. Yet nobody claims this is what occurred. In calling the Florida vote a 'statistical tie', Posner means that the number of errors and ambiguities associated with counting 6 000 000 votes is at least as large as the apparent difference in vote totals between the two candidates.

When the Supreme Court effectively stopped the recount, George W. Bush held a 537 vote lead over Al Gore. Yet it is almost certainly *not* the case that exactly 537 more voters preferred Bush to Gore. As Posner notes, there is not a one-to-one correspondence between voter preference and recorded vote. Voters must mark a ballot, and that ballot must then be processed. Errors may arise either during the ballot marking or the ballot processing stages. Voter mismarkings could take many forms. Some voters may prefer a particular candidate but accidentally vote for someone else. For example, it is clear that thousands of voters in Palm Beach County who tried to vote for Gore marked their ballots in a way that registered votes for Pat Buchanan.¹ About 2000 other voters, in an apparent and ironic

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¹ FOX, C. (November 17, 2000). A vote for Buchanan is a vote for Gore? *An analysis of the 2000 presidential elections results in Palm Beach, Florida*. <http://faculty.fuqua.duke.edu/~cfox/Bio/election2000note.pdf>

attempt to make their preferences clear, spoiled their ballots by marking the name of their preferred candidate twice—once with the punch key stylus, and then again as a ‘write-in’ candidate.² These double markings—62% of which favoured Gore³—were coded as ‘no votes’ by the vote tabulation equipment. Another 2000 voters spoiled their ballots by circling, underlining, or otherwise improperly marking the candidate of their choice.⁴ And, of course, many thousands of voters left pieces of chad dangling from their ballots. Many of those ballots were scored as ‘no votes’ as well.

Even if ballot translation problems did not exist, there would still be reason to doubt the accuracy of the final count. Some ballots that were legally and correctly cast were not counted because they were never fed into tabulation machines. Some ballots may have stuck to nearby ballots as they went through the machines and thereby remained uncounted. Some ballots that were correctly marked but illegally cast after the voting deadline were counted.⁵ And sometimes—sometimes—there were errors in the machine tabulation.

For all of these reasons, Posner is correct to say that Election 2000 in Florida was an ‘unbreakable statistical tie’.⁶ Our mechanisms for translating intentions into tabulated votes are so indirect and so loaded with opportunity for error and strategic tabulation that a vote difference between candidates as small as 537 is unreliable as proof of who ‘really’ received more votes.

Reality versus the Law

Posner draws no distinction between the legal winner of the election and what others have called the ‘real’ winner. As Posner explains, the winner of an election can only be determined through reference to legal rules. There is no other ‘real’ winner. He writes, ‘[D]etermining the ‘real’ winner of an election is a legal rather than a factual matter. One of the most persistent fallacies in the public, especially political commentary on the deadlock has been the notion that the winner of an election can be determined without reference to election rules’.⁷

If one adopts a narrow perspective, Posner is correct: the winner of an election is, simply, the one who comes out ahead once the rules of the contest (as interpreted by authorities) have been implemented. The problem with this view is that it ignores all of the interesting stuff. If there were only three voters in Florida and two of them wrote the words ‘I vote for Gore!’ in large letters across the front of the ballot, while the third voter filled in the Bush oval, there is an obvious—though not necessarily legal—sense in which Gore received more votes. In this impoverished scenario,⁸ Bush might be declared the legal winner by a 1–0 tally and the two Gore voters might be treated as though they

² BRIDGES, T. (May 11, 2001). Ballots offer clues on intent. *The Miami Herald*. <http://www.miami.com/herald/special/news/flacount/docs/072433.htm>

³ *Id.*

⁴ MERZER, M. (April 4, 2001). Floridians zany, creative in spoiling their ballots. *The Miami Herald*.

⁵ BARSTOW, D. and VAN NATTA Jr., D. (July 15, 2001). How Bush took Florida: mining the overseas absentee vote. *New York Times*, p. 1; ZELENY, J., BERENS, M. J. and DOUGHERTY, G. (November 12, 2001). Still too close to call: An extensive review of rejected Florida ballots shows George W. Bush and Al Gore were correct to battle for every vote, p. 1.

⁶ Posner at p. 2.

⁷ Posner at p. 2.

⁸ The scenario may be numerically impoverished, but such creative ballot markings do occur. In Bay County,

did not vote for anyone. Here common sense and the interpretation that Posner favours part company. Even among those who would argue that Bush should be declared the legal winner, there is likely to be a strong sense that Gore was the 'real' winner. There is more to reality than that which is dictated by a particular interpretation of the rules. When an instant replay shows that a baseball outfielder dropped the fly ball, we do not say that he caught it because the umpire ruled it to be a catch. The rules of baseball may dictate that the game proceed in accordance with the umpire's flawed judgment. But, postmodernist interpretations notwithstanding, the outfielder *really* did drop the ball. Granted, it is sometimes difficult to determine whether an outfielder really caught a ball or whether a voter really intended to vote for Gore. But when such determinations can be made, it makes little sense to suggest that reality resides in a rulebook or an interpretation thereof.

Probability and a Gore victory in the recount

Though he is impatient with attempts to distinguish between real and legal winners, Posner concedes that the legal winner in Florida may not have received the most votes: 'a razor-thin margin of victory such as Bush received establishes merely a probability . . . that the victor actually received more votes than the vanquished'.⁹ The 'central question', says Posner, is whether a fair recount would have given Gore the victory. He concludes that the possibility is remote. In Chapter 2, Posner provides a wealth of statistical analyses to bolster this conclusion.

Posner begins by noting that there were 'fewer than 2000' undervotes out of more than 500 000 votes cast in Broward county.¹⁰ Extrapolating this rate to the general voting population in Florida, Posner arrives at a figure of 30 000 likely undervotes.¹¹ The key question, then, is how many of these uncounted votes did each candidate receive. To answer this question, Posner assumes the role of an economist who, when stranded on a desert island with a sealed can of food, assumes a can opener. He assumes that the missed votes are 'representative of the entire Florida vote assumed to be a tie'.¹² In other words, he assumes that each of 30 000 undervotes has a 50% chance to be a Gore vote and a 50% chance to be a Bush vote. Having made this assumption, he concludes that 'there would be only a five percent probability that the statewide vote for Bush or Gore would change by more than 174 votes'.¹³ Posner concludes that a recount almost certainly would not have provided a victory for Gore.

Gore might not have won the election following an undervote recount, but why assume

Florida, one voter wrote this in large letters at the bottom of his ballot: 'I forgot my glasses and can not see this please put Bush down for my vote' (*sic* Merzer, 2001).

⁹ Posner at p. 49.

¹⁰ Posner at p. 50. An undervote is a ballot that recorded no presidential vote when run through a vote counting machine.

¹¹ The 30 000 figure mistakenly assumes 7.5 million Florida voters rather than 6 million. This error is not particularly crucial as the actual number of recordable undervotes for both optical scan and punch card ballots turned out to be 26 437 using a liberal counting standard (dimples count), or 15 515 using the Palm Beach standard in which dimples on presidential votes only counted if other races also contained dimples. Explaining the numbers (May 11, 2001), *Miami Herald*. <http://www.miami.com/herald/special/news/flacount/photoart/explain0511.gif>

¹² Posner at p. 50.

¹³ Posner at p. 50.

that the undervotes were evenly distributed between the candidates? Certainly there was ample evidence that the proportion of undervotes varied by county and voting method. For example, the percentage of nonvotes in counties that used the punch card system was 3.92%, but only 1.43% in the optical-scan counties.¹⁴ Because counties that used the punch card technology tended to be poorer, democratic strongholds, it is likely that *more* than 50% of the uncounted votes favoured Gore.

I checked the validity of Posner's 50–50 assumption using figures provided from the systematic examination of undervotes by the national accounting firm BDO Seidman in April, 2001.¹⁵ Contrary to Posner's assumption, the distribution of the 26 437 undervotes probably was not equal, and the precise distribution depended on which of several counting standards was used. For example, using a 'liberal' counting standard for punch card ballots in which dimpled ballots count as votes, Gore picked up 13 610 additional votes (51.5%) and Bush picked up 12 827 (48.5%). Although the proportions are close, the 783 vote difference is significantly larger than the expected vote difference that Posner's 50–50 model predicts. In short, Posner's 50–50 model is rejected by these data. For the sake of completeness, I note that Posner's model would also be rejected under the so-called Palm Beach County standard,¹⁶ but not under the clean-punch or two-corner chad standards. Interestingly, across all four undervote recount standards, Gore would have picked up votes—and won the election outright under one of them.

It is worth bearing in mind that the election outcome becomes even more complicated when overvotes¹⁷ are included. A comprehensive study of 175 010 undervotes and overvotes conducted by eight news organizations found that Gore would have won Florida under two of the four counting standards.¹⁸ The practical significance of this is that the overvote issue was to have been considered by the Circuit Court judge who was supervising the recount on the very day that the U.S. Supreme Court effectively stopped the recount. This judge later said that he 'would not have ignored the overvote ballots'.¹⁹

Of course, a finding that Gore would have picked up votes and possibly won the election in various types of recount does not mean that undervotes or overvotes *should* be counted, or that they should be counted using a standard that is most favourable to Gore. But it does mean that we should look closely at the assumptions that go into the statistical analyses in *Breaking the Deadlock* that purport to tell us what a recount would have revealed.

The other conclusions Posner reaches about the recount are more defensible and sometimes quite original. Using statistical regression, Posner finds that (a) the punch card

¹⁴ *Bush v Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388, 412 (2000), dissent by Justice Stevens, fn 4 citing *Siegel v LePore* 234 F. 3d 1163, Dec. 6, 2000.

¹⁵ Explaining the numbers (May 11, 2001), *Miami Herald*. <http://www.miami.com/herald/special/news/flacount/photoart/explain0511.gif>

¹⁶ Under the Palm Beach standard, dimpled Presidential votes count only if dimples are found in other races on the same ballot.

¹⁷ An overvote is a ballot that was disqualified because the vote counting machine detected more than one presidential vote.

¹⁸ Not all overvotes could have been interpreted as legal votes. Using one of the counting standards, 24 619 votes (about 14%) should have counted. FESSENDEN, F. and BRODER, J. M. (November 12, 2001). Study of disputed Florida ballots finds justices did not cast the deciding vote. *The New York Times*, p. 1.

¹⁹ KAUS, M. (November 13, 2001). Everything the New York Times thinks about the Florida recount is wrong! *Slate*. <http://slate.msn.com/?id=2058603>

ballot increased the frequency of undervotes relative to the optical scan ballot, (b) the level at which the recount occurs (precinct vs county) affected the number of undervotes, (c) blacks and illiterates were much more likely to cast overvotes (though not necessarily undervotes) than others, and (d) the elderly were *not* more likely to make voting errors.

Overall, the statistical portions are clear and the author generally provides simple explanations for the techniques he uses. For example, before presenting his regressions, Posner briefly explains such concepts as r^2 , statistical significance, and t -tests. Still, he sometimes makes elementary mathematical errors that detract from his argument. When explaining confidence intervals, Posner asks readers to imagine two states that prefer Bush to Gore by 51%. One state has 100 voters and the other has 10 000 voters. However, due to possible last-minute changes of heart, Bush may not win both states at 51%. Posner then tells us that there is a 95% chance that the Bush vote will be 46–56% in the small state and 50.5–51.5% in the large state. These ranges are not correct. The 95% confidence intervals for the small and large states are 41–61% and 50–52% respectively. Although the general point that small states have larger variability than large states remains intact, this error does not inspire confidence in the author's statistical conclusions.

What counts as vote tabulation error?

The results of Election 2000 in Florida were so close that they triggered an automatic recount under Florida law. The results narrowed further following the recount, and Democrats next requested *manual* recounts in several counties. Florida law requires that such a manual recount proceed in stages. First, a manual recount must 'include at least three precincts and at least one percent of the total votes cast'.²⁰ If such a sample reveals an 'error in the vote tabulation which could affect the outcome of the election',²¹ then the county canvassing boards may proceed with a full manual recount of all legally cast votes. But what constitutes an 'error in the vote tabulation?' This issue played a central role in both the Election 2000 controversy and in *Breaking the Deadlock*.

The office of Florida Secretary of State, Katharine Harris, issued a statement declaring that vote tabulation errors refer exclusively to failures of the vote tabulating machinery to count properly marked ballots. In short, Harris's office equated 'error in the vote tabulation' with 'error in the vote tabulation *machinery*'. According to the conventional wisdom, this narrow interpretation favoured Bush because it restricted the number of ballots that would be reconsidered in a manual recount. Posner accepts this interpretation, repeatedly describing it as 'natural'.²²

The Florida Supreme Court thought otherwise. It felt that the natural interpretation of 'error in the vote tabulation' is one that includes failure of the voting machinery to record a legal vote. Relying on Florida law, the court determined that legal votes include those in which 'there is a clear indication of the intent of the voter as determined by a canvassing board'.²³ Legal votes, then, may include those that are marked in ways that cannot be read by vote tabulation machinery. A man who scrawls 'I vote for Gore' across the centre of

²⁰ Fla. Stat. Section 102.166(4)(d).

²¹ Fla. Stat. Section 102.1663.

²² Posner at pp. 96, 97, 100.

²³ Fla. Stat. Section 101.544(5).

the ballot gets his vote counted under the Florida Supreme Court manual recount standard because his intent is clear. This man's vote is ignored under the Harris–Posner standard.

As further justification for its interpretation of the phrase 'error in the vote tabulation', the Florida Supreme Court noted that the Legislature used the phrases 'vote tabulation system' and 'automatic tabulating equipment' in nearby parts of the election code when referring to the voting *equipment* rather than to the vote count. Presumably, then, the Legislature was concerned with something broader than error in the vote tabulation *equipment* when it referred to 'error in the vote tabulation' in this context.

Posner counters by noting that the word 'tabulation' appears throughout the Florida election code, 'always referring to enumeration or to the counting equipment'.²⁴ Furthermore, Posner does not concede the legal status of all votes in which the intention of the voter can be discerned. He argues that the voter's intent provision comes into play only 'for cases in which the ballot is damaged or defective, which is different from its being spoiled by the voter'.²⁵ Thus, for Posner, a ballot that contains the words 'I vote for Gore' that was not counted because the tabulating machine damaged the ballot should count as a vote for Gore in a manual recount. But the same ballot that is not damaged should be ignored in a recount because the voter marked it improperly. Although reasonable people may disagree, the Harris–Posner approach to vote tabulation seems quite unnatural to me.

A Partisan perspective on the players

Nearly one-third of *Breaking the Deadlock* is spent critiquing the participants. The critiqued include Katharine Harris, the Florida Supreme Court, Gore supporters, the U.S. Supreme Court, and legal commentators. Predictably, Posner praises Katharine Harris while lambasting the Florida Supreme Court, Gore supporters, and legal commentators. Less predictable is Posner's treatment of the U.S. Supreme Court.

Katharine Harris and the Florida Supreme Court

Though he stops well short of calling Katharine Harris a heroine, Posner repeatedly refers to her judgements as 'reasonable', and argues that they were based on her 'specialized knowledge of election administration'.²⁶ Although the latter claim fails the straight face test, the 'reasonable' argument is, well, more reasonable.

Maybe it was not unreasonable for Katharine Harris to limit the manual recount effort to ballots on which the machines could register a vote. Although such a decision was not 'required' by state law as Harris misleadingly argued, perhaps her actions did not fall outside the bounds of reason. This, according to Posner, means that she did not abuse her discretion and that her views 'should therefore have been conclusive on the Florida Supreme Court'.²⁷

But, as noted previously, the Florida Supreme Court had a different view of what constitutes a legal vote. The court had no obligation to defer to Katharine Harris's views

²⁴ Posner at p. 97.

²⁵ Posner at p. 97.

²⁶ Posner at p. 104.

²⁷ Posner at p. 100.

on this legal matter. To do so would be to give Katharine Harris the power to nullify laws passed by legislatures and interpreted by high courts. The question, then, is not whether *Katharine Harris*' judgements were unreasonable, but whether the judgements made by the *Florida Supreme Court* were unreasonable. But how could it be unreasonable for a high court to conclude that all legal votes must be counted in a presidential election where a failure to count all legal votes could very well change the outcome of the election? Nevertheless, Posner concludes that the Florida Supreme Court 'acted unreasonably', 'butchered the state's election statute', 'made a hash of it', and 'erred grievously in interpreting the state's election code'.²⁸

U.S. Supreme Court

Posner approves of the actions taken by the U.S. Supreme Court in Election 2000 but disapproves of the Court's justification. A majority on the U.S. Supreme Court stopped the manual recount ordered by the Florida Supreme Court on grounds that a standardless recount violates the 14th Amendment's equal protection clause: '[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise'.²⁹ Posner is unpersuaded. He points out that different counties in the same state routinely use different equipment, ballots, instructions, and counting methods. A better justification for stopping the recount, he says, is found in Article II of the Constitution, which assigns the power to appoint state Presidential electors to state legislatures rather than to state courts.

I leave the constitutional analyses to those who have more legal expertise than I. However, I note that the justification for Supreme Court intervention that Posner appears to favour above all others is consequentialist in nature. Specifically, he argues that a recount would have risked the stability of the American system of government. He repeatedly refers to the 'chaos'³⁰ and 'political and constitutional crisis'³¹ that would have ensued if closure on the election were not provided before a manual recount could be completed.

It is an interesting perspective but, ultimately, it is more provocative than persuasive. Posner does not provide much in the way of evidence that the actions of the Supreme Court saved us from a constitutional crisis. Of course, it is hard to know what would have happened had the recount continued. But what little evidence exists suggests that the delay was not plunging our nation into crisis. Bill Clinton was still the President, the stock market yawned (it declined by 2% during the period of Presidential uncertainty), and there were no reports of people fleeing their homes to avoid being trampled by the constitutional anarchy that lurked ahead. But give Posner points for creativity. Although

²⁸ Posner at pp. 147–148. Posner is so sure that a biased Florida Supreme Court ran amuck with Florida law that he resorts to sarcasm: 'The code could have provided that electors are to be picked by the state's supreme court after it knows and maybe does not like the outcome of the election, using a standard of the voter's unclear intent and the principles of natural law even when there is no reason to suppose that an infallible hand recount would reverse the result of the election. The code says nothing like that' (p. 127).

²⁹ *Bush v Gore* at HR8B.

³⁰ Posner at p. 134.

³¹ Posner at p. 147.

he categorically rejects the well-publicized claim that the Miami–Dade canvassing board was intimidated into abandoning its recount effort by a Republican mob, he offers that ‘the “mob” characterization . . . supports the view that the Supreme Court really did head off an ugly crisis’.³²

Legal commentators

Posner broadly dismisses the arguments and views of most other Election 2000 legal commentators. He refers to left-leaning legal commentators as one-sided, reflexive, shallow, inexperienced, hyperbolic, and emotional. If only the liberal critics had more expert knowledge, says Posner, they would not render such politically predictable evaluations of Election 2000.

However, the role of expert knowledge as a predictor of conclusions about Election 2000 is dubious. Personal politics is a far better predictor. Nearly all Republican commentators think the U.S. Supreme Court was right to stop the recount, and nearly all Democratic ones think otherwise. Although it is possible that the Republican party hosts all of the wise, balanced experts while the Democratic party caters to emotional nitwits, one has to wonder whether the party of balanced experts would be singing the same tune if the tables were reversed. What if Al Gore clung to a small lead in a crucial state in which a Democratic Secretary of State exercised her discretion to restrict the recount effort? Would the balanced Republicans maintain a position consistent with their Election 2000 one, while the one-sided Democrats flipped? Anything is possible, I suppose.

Conclusion

Breaking the Deadlock provides fairly thorough coverage of the Election 2000 drama from a unique perspective. If we assume a voting model in which a randomly selected uncounted ballot has the same chance of being for Gore and Bush, then perhaps Posner is right to suggest that Gore was unlikely to gain much ground on Bush in a recount. If we assume that the legislature employed the phrase ‘error in the vote tabulation’ to mean ‘error in the vote tabulation *machinery*—and not any other type of error’, then perhaps Posner is right to suggest that the Florida Supreme Court should have stepped aside when Katharine Harris ‘exercised her discretion’ about which votes count and what the deadlines for those counts should be. If we assume that anarchy would reign if the election uncertainty continued for several more weeks, then perhaps Posner is right to suggest that the Supreme Court did the nation a favour. And if we assume a can opener, then the stranded economist will not starve while waiting to be rescued.

Acknowledgements

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³² Posner at p. 213.