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## *Bush v. Gore* and a Proper Separation of Powers

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## *Bush v. Gore* and a Proper Separation of Powers<sup>\*</sup>

George Anastaplo<sup>\*\*</sup>

You can learn things carrying a cat home by  
the tail that cannot be learned any other way.

~ Mark Twain<sup>1</sup>

### PROLOGUE

Our point of departure, for this exploration of the first principles of American constitutionalism, is the Year 2000 Presidential election. We have heard this weekend, as well as during the past year, from many who are much better qualified than I am to comment on the use and abuse of elections.<sup>2</sup>

My initial public comment on the November 7th election—an election in which I felt a sort of proprietary interest because it happened to fall precisely on my seventy-fifth birthday—came in the form of this

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1. This apt observation, attributed to Mark Twain, was quoted by a speaker in a University of Chicago Physics Department Colloquium during the 2000–2001 Academic Year. See, on Mark Twain, GEORGE ANASTAPLO, *THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE* 179 (Ohio Univ. Press 1983); George Anastaplo, *Law, Education, and Legal Education: Explorations*, 37 *BRANDEIS L.J.* 585, 684 (Summer 1998–99).

2. See, e.g., SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (Foundation Press, rev. ed. 2001); see also *infra* notes 60 and 65. See, on Presidential elections generally, GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 89 (Johns Hopkins Univ. Press 1989). More extensive commentary by me on many of the issues referred to in these notes (but not on the intricacies of the law of elections) may be found in GEORGE ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* (S. Methodist Univ. Press 1971).

Letter to the Editor (of November 10) which has been published by several newspapers:

It is possible that our Presidential contest will remain “undecided” for weeks to come, partly because of uncertainties in Florida.

If (a big “if”)—if a prolongation of this standoff threatens to damage the country and to subvert the authority of the next Administration, would it not be prudent for the two major candidates to announce an immediate recourse by them to the drawing of lots to settle this matter? The Electoral College votes could thereafter be easily adjusted by their supporters accordingly.

Would not this be a statesmanlike resolution to this “crisis” by both candidates, dramatizing their character and fitness and making more likely an era of national good will thereafter?

This approach would best be taken before the official recount, including of the absentee ballots, is announced in Florida, thereby making less likely the risk of having it appear that the “real loser” won. It is fortunate that the major candidates have roughly the same amount of popular support nationwide, making it much easier for the country to accept this kind of self-denying compromise.

These candidates have long been extolled as pious patriots. Would not a voluntary recourse by them to the drawing of lots in these extraordinary circumstances, for which there are American legal as well as Biblical precedents, testify both to their faith in Providence and to their dedication to the common good? Certainly, this kind of resolution would be salutary as a reminder that what always unites us is much greater than what may chance to divide us from time to time.<sup>3</sup>

It can be argued that a drawing of lots was, in effect, resorted to during the ensuing month in November–December 2000, but not in that straightforward way which would have been generally recognized as fair. On the other hand, I have the impression that no strategy or argument used by the contending parties made any difference in the outcome, which is to say that the process was inevitably more “political” than “judicial.”<sup>4</sup>

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3. See CHI. DAILY L. BULL., Nov. 13, 2000, at 2; CHI. TRIB., Nov. 15, 2000, §1, at 20; HICKORY DAILY REC. (Hickory, N.C.), Nov. 15, 2000, at A10; UNIV. OF CHI. MAROON, Nov. 17, 2000, at 7; CHI. SUN-TIMES, Nov. 20, 2000, at 32 (in an enigmatic form). The leading Biblical precedent for a recourse to the drawing of lots may be found in *Acts* 1:15-26. My November 10, 2000, Letter to the Editor was sent out on the fiftieth anniversary of my first encounter with the Character and Fitness Committee in Chicago. See *In re* George Anastaplo, 366 U.S. 82 (1961); see also GEORGE ANASTAPLO, ON TRIAL: FROM ADAM & EVE TO O.J. SIMPSON, apps. A, B, C (Lexington Books, Rowman & Littlefield forthcoming 2003). Readers are reminded that Letters to the Editor are often subject to considerable editing about which letter-writers cannot be readily consulted.

4. Judicial actions and opinions in the *Bush v. Gore* controversy may be found at 531 U.S. 98 (2000) (per curiam).

Plato's Socrates has taught us that a just regime depends upon each citizen doing the job appropriate for him.<sup>5</sup> It should be instructive, therefore, to consider on this occasion what we should expect, and permit, each branch of our National Government to do. One heartening feature of this election was the relatively small role played in November and December 2000 by the outgoing President in determining who his successor would be.<sup>6</sup> But then I have long believed (or I have believed it salutary to insist) that who the President may be is, and was intended to be, far less important than it is usually taken to be.

## I

It can be useful for our exploration on this occasion to look, however briefly, at three of the most important (or, at least, three of the most instructive) cases decided by the United States Supreme Court since the Second World War. These are the 1952 Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*;<sup>7</sup> the 1954 School Desegregation Case, *Brown v. Board of Education*;<sup>8</sup> and the 1962 Reapportionment Case, *Baker v. Carr*.<sup>9</sup> That is, I venture to offer here a very short course in American constitutional law, drawing in my notes here on my published commentaries on the Constitution.

I propose, in what follows, to make more of the primacy of the legislative power than others usually do. Congress, if it is helped to recognize its intended prerogatives in our constitutional system, may use the considerable powers it still has to serve the common good by defending itself from invasions of those prerogatives.<sup>10</sup>

Any critic of our current practices must, in order to be truly helpful here, recognize not only the powers of Congress but also its shortcomings. For instance, it is particularly troublesome that a "supermajority" now seems to be needed for passing any controversial bill in the Senate of the United States. This necessity is simply improper, very much against the spirit of the Constitution where the few

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5. See, e.g., PLATO, *REPUBLIC*. See, on the *Republic*, GEORGE ANASTAPLO, *THE THINKER AS ARTIST: FROM HOMER TO PLATO & ARISTOTLE* 303 (Ohio Univ. Press 1997).

6. Indeed, some have argued, Mr. Gore would probably have clearly won if he had permitted Mr. Clinton to help him more during the campaign. See *infra* note 19.

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

8. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

9. *Baker v. Carr*, 369 U.S. 186 (1962).

10. See the Dedication in WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (Univ. of Chi. Press 1953); see also George Anastaplo, *Mr. Crosskey, the American Constitution, and the Natures of Things*, 15 *LOY. U. CHI. L.J.* 181 (1984); Malcolm P. Sharp, *Crosskey, Anastaplo and Meiklejohn on the United States Constitution*, 20 *LAW SCH. REC. U. CHI. L. SCH.* 3 (Spring 1973).

provisions for what we call a “supermajority” are carefully set forth.<sup>11</sup> The practice that the Senate has fallen into means, in effect, that a numerical minority can rule.<sup>12</sup>

## II

Now, to our three cases, beginning with the 1952 Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>13</sup> We can see in the opinion of that Court a salutary reminder of the limits to the exercise of the “war power” by the President.<sup>14</sup>

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11. I question the systematic abuse in the United States Senate of the filibuster in this November 1998 Letter to the Editor (“Why Should Not the Majority Rule?”):

A perverse use of party discipline in this country in recent years has been the repeated recourse to threats of filibustering in the United States Senate, thereby subverting the duty of the majority to rule. The November 3rd election returns mean, among other things, that there is still no filibuster-proof margin enjoyed by the dominant party in the Senate.

The many proposals for constitutional amendments submitted to the First Congress in 1789 included suggestions that a “supermajority” (as we call it) be required on one issue after another. The First Congress refused to change what the Framers had done in limiting severely—that is, to a half-dozen instances—the occasions on which more than a majority is needed to resolve questions in either House of Congress.

The current Senate rule that keeps a bare majority from ending debate, even after a reasonable time, is probably unconstitutional. A self-respecting Senate majority, with the cooperation of the presiding officer, someday should be able, by the use of well-reasoned points of order, to correct both the Senate filibuster rule requiring a three-fifths vote to end debate and the Senate rule requiring a two-thirds vote to change the rules of that body.

The restoration of responsible majority rule in the Senate probably depends upon an informed public opinion. A truly self-governing people would demand that their legislatures should always be free to act efficiently, making due allowance for adequate discussion, for fair procedures, and for traditional privileges.

In short, We the People have to revive, and to insist upon, a reliable standard of constitutionalism in this country.

See CHI. SUN-TIMES, Nov. 11, 1998, at 18; HICKORY DAILY REC. (Hickory, N.C.), Nov. 15, 1998, at A4. See, on “supermajorities” and the Constitution, GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 105, 127, 133, 193–94, 206, 228–29, 296, 303, 310, 447 n.255, 453 n.260 (Johns Hopkins Univ. Press 1995).

12. Proportional representation in legislatures, which we hear advocated among us today, also tends to make responsible government difficult. The most successful legislatures for large countries in modern times have been found among the English-speaking peoples. None of these legislatures, so far as I know, have memberships based on proportional representation.

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see also THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 415 n.110, 433 n.176; THE CONSTITUTION OF 1787, *supra* note 2, at 114, 315 n.77.

14. Particularly salutary is Justice Black’s forthright opinion for the Court in the *Youngstown Sheet & Tube Co.* case. *Youngstown Sheet & Tube Co.*, 343 U.S. at 582–88. See, on the War Powers Resolution, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 233, 448 n.258; THE CONSTITUTION OF 1787, *supra* note 2, at 113, 114, 115, 315 n.72, 316 n.78.

The Commander-in-Chief can become very confident and assertive, if not even overbearing, in the exercise of his powers. Sometimes, of course, the President does “know best”—and the Congress may refuse to do what should be done. But, except in the most extreme circumstances, the risk of Congressional inadequacy is a risk that we want to run.<sup>15</sup>

Furthermore, it has been pointed out, the President may “know” things the rest of us do not, but what he “knows” may simply be wrong. Besides, the Declaration of Independence should be authority enough for the proposition that the Executive has to continually be curbed.<sup>16</sup>

A recent instance of high-minded Executive usurpation that threatened the principles of our regime was the presumptuous Iran-Contra conspiracy.<sup>17</sup> This conspiracy was far more serious in its constitutional implications than the Watergate Scandal,<sup>18</sup> which was merely dirty politics; it was also far more serious than the Clinton Scandals, which merely exposed personal shortcomings.<sup>19</sup>

### III

The *Youngstown* case was decided less than a decade after the end of the Second World War. Perhaps it would have been better if the Congress, rather than the Court, had reined in a President who had seized the steel industry on his own authority. Even so, it was generally agreed that the President should be kept in check here, especially when the President may be far more moved by political than by military considerations.

The Second World War was our last declared war. Since then, the prerogatives of Congress with respect to the declaration of war have

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15. It is rare, that is, for this country to be faced with a crisis as severe as that which confronted Abraham Lincoln in 1861. Chief Justice Fred Vinson, in his dissenting opinion in the *Youngstown Sheet & Tube Co.* case, sometimes seems to suggest otherwise. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 685 (Vinson, C.J., dissenting). See, on Lincoln's constitutionalism, GEORGE ANASTAPLO, *ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY* (Rowman & Littlefield 1999).

16. See, on the Declaration of Independence, *ABRAHAM LINCOLN*, *supra* note 15, at 11, 31.

17. See, on the Iran-arms and Contra-aid controversy, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 11, at 79, 215, 445 n.250; *THE CONSTITUTION OF 1787*, *supra* note 2, at 32–33, 312 n.41, 317 n.85; see also *infra* note 23; and the text accompanying *infra* notes 43 and 47.

18. See, on the Watergate controversy, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 11, at 215, 445 n.250; *THE CONSTITUTION OF 1787*, *supra* note 2, at 33.

19. I did come to believe, however, that the time came for Mr. Clinton to resign. See George Anastaplo, *Letter to the Editor*, *CHI. DAILY L. BULL.*, Sept. 10, 1998, at 2; *N.Y. TIMES*, Sept. 11, 1998, at A26 (National Edition) (abridged); *HICKORY DAILY REC.* (Hickory, N.C.), Sept. 11, 1998, at A4; *CHI. SUN-TIMES*, Sept. 13, 1998, at 38; see also *supra* note 6.

been routinely ignored. That is not to deny that the Constitution recognizes, in effect, the propriety both of immediate self-defense and of what we sometimes call police actions.<sup>20</sup>

But we are now accustomed to major military undertakings which do look like wars but which are initiated and prosecuted for years without the benefit of declarations of war.<sup>21</sup>

Substitutes for declarations of war are sometimes relied upon by the Executive. Perhaps the most plausible was the United Nations Security Council authorization in response to the June 1950 invasion of South Korea. Far more dubious, as substitutes for declarations of war, have been the legislative proceedings connected with the onset of our campaigns in Vietnam, in the Persian Gulf, and in Afghanistan.<sup>22</sup>

Is it not simply healthier, politically as well as constitutionally, when Congress faces up directly, and debates fully, the prospect of war? Among the harms sustained because of the way we now go to war is a depreciation of the sense of constitutional propriety, so much so that Congress may not even recognize (let alone, care) that its powers have

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20. Consider, for example, what even the States are permitted by the Constitution to do in immediate self-defense. See U.S. CONST. art. I, § 10. On the other hand, the Presidential duty to execute the laws may require "police actions," the authority (as well as the means) for which may often be enhanced if not even prescribed by Congress.

21. Consider, in my Letter to the Editor of October 8, 2001, the call for a restored respect for Congressional prerogatives with respect to the initiation of wars:

The national administration, as part of its response to the monstrous crimes of September 11, has spoken often of going to war in or against one or more countries harboring terrorists. Attacks have been launched against Afghan targets. Now we hear talk about Iraqi targets. There still seems to be time, in the present circumstances, to have Congress consider a declaration of war against any country to be attacked by us. Such a declaration, preceded by a proper debate in Congress, would help clarify the current situation and focus everyone's attention upon what is to be done, why, and how. It would be healthy to see, through such salutary self-discipline, a reaffirmation in this country of the constitutional proprieties and the rule of law.

See CHI. DAILY L. BULL., Oct. 9, 2001, at 2; N.Y. TIMES, Oct. 13, 2001, at A22 (National Edition); CHI. SUN-TIMES, Oct. 16, 2001, at 34. This argument has been reinforced by my unpublished Letter to the Editor of August 18, 2002:

The President has recognized the considerable discussion generated by the Administration's signals that it is considering an invasion of Iraq. But this salutary recognition of the public discourse has been undermined by Mr. Bush's insistence that he reserves the sole right to decide the course the United States will take. Is there no one in the Administration who can advise him that it is a constitutional affront, as well as bad politics, to ignore in so blatant a way the exclusive power of the Congress to declare war?

22. These campaigns were far more massive than the expedition against the Barbary pirates. See, for a survey of such expeditions, Chief Justice Vinson's dissenting opinion in *Youngstown Sheet & Tube Co.* See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 683 (1952) (Vinson, C.J., dissenting).

been usurped. Also depreciated is the importance of serious national debate about vital political matters.

Congress, if properly led, could curtail the kind of Executive usurpation that we lament by simply turning off the funds that sustain it.<sup>23</sup> This *is* hard to do, however, as Congressman Abraham Lincoln discovered upon attempting to identify and to curb Presidential misconduct preceding and during the somewhat questionable Mexican War (which *was* a declared war).<sup>24</sup>

The most recent, serious incursion upon the prerogatives of Congress by the Executive has been our current President's undertaking to establish, on his own authority, military tribunals to deal with non-citizen "terrorists."<sup>25</sup> This kind of innovation, which happens in this case to be so poorly conceived as to be almost unworkable, is an incursion also upon the prerogatives of the Judiciary.<sup>26</sup>

#### IV

We can be reminded of Judicial usurpation, rather than of Executive usurpation, when we look at *Brown v. Board of Education*.<sup>27</sup> *Brown* itself was important, even noble, addressing as it did a longstanding

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23. This is, in part, what the Iran-Contra conspiracy was "all about." See *supra* note 17.

24. See, e.g., ABRAHAM LINCOLN, *supra* note 15, at 62, 308–09.

25. See 66 Fed. Reg. 57,833 (Nov. 16, 2001) (publication of the Executive Order signed by the President on November 13, 2001).

26. Consider my Letter to the Editor of November 17, 2001, on this subject:

Concerns have been voiced about the November 13th Executive Order providing for trials by military tribunals, even in the United States, of foreigners accused of acts of "terrorism" anywhere in the world. Critics of the Justice Department's current campaign against "terrorism" should be heartened as it becomes generally apparent how ill-conceived even this vigorously-defended Executive Order really is.

Although it has been objected that the concurrence of only two-thirds of any tribunal established by the Order suffices for convicting and sentencing, it has not been noticed that the judges thus empowered need to be only two-thirds of the tribunal members present, so long as a majority of the military officers designated for a tribunal is indeed present. If, for example, there should be eleven officers chosen for a tribunal, only six need to be present to permit a final decision, which decision can then be made if two-thirds of those six (that is, four) agree. This can mean that little more than one-third of all the officers who have heard the evidence during a trial can suffice for convicting and sentencing, whatever the other two-thirds (who happen not to be present for the decision) may believe or prefer.

Such curious anomalies suggest that this and related, potentially shameful, experiments in the administration of American justice are not likely to endure—and for this we all, not just suspected terrorists, can be thankful.

See CHI. SUN-TIMES, Nov. 20, 2001, at 30 (with an instructive cartoon); see also *infra* note 64.

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 168, 439 n.209.



problem which threatened the integrity of the regime. And the legislatures curbed were, for the most part, *State* legislatures, over which the National Government does have considerable constitutional authority.<sup>28</sup>

It should also be recognized that *Brown* has had a salutary effect, helping to redefine as it did the national position on race relations. This position had been markedly advanced because of the Second World War, and it was given "political teeth" by the Voting Rights Act of 1965.<sup>29</sup>

But it should be recognized as well that the Supreme Court might not have had to do what it did in *Brown*, in the middle of the Twentieth Century, if that same Court had not done what it did in the last quarter of the Nineteenth Century. That is, the United States Supreme Court had (in the *Civil Rights Cases*<sup>30</sup> and in *Plessy v. Ferguson*<sup>31</sup>) stymied what Congress had tried to do not only in its post-Civil War Civil Rights Acts but also through its development of the Fourteenth Amendment.<sup>32</sup>

One serious consequence of the Court's misreading of the post-Civil War Amendments was to unleash the worst elements in the State Governments for the next half-century and more.

## V

The Reapportionment Cases of 1962 and thereafter have also had a salutary effect.<sup>33</sup> Chief Justice Warren identified this litigation as the most important during his tenure.<sup>34</sup>

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28. See, on the Supremacy Clause in Article VI of the Constitution, THE CONSTITUTION OF 1787, *supra* note 2, at 196, 198–203, 277, 320 n.94, 325 n.140.

29. Voting Rights Act of 1965, 42 U.S.C. § 1973 (1993).

30. *Civil Rights Cases*, 109 U.S. 3 (1883); see THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 183–85.

31. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 183–85.

32. The discovery of the deeper meanings implicit in the Fourteenth Amendment is comparable to what has happened in the development of interpretations for Magna Carta, for the Declaration of Independence, and for the Preamble to the Constitution of 1787. See THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 228–38; THE CONSTITUTION OF 1787, *supra* note 2, at 1–12.

33. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); see also THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 438 n.205; THE CONSTITUTION OF 1787, *supra* note 2, at 173–74, 184–85.

34. Earl Warren had served as Attorney General and as Governor of California. See, e.g., G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 84 (Oxford Univ. Press, Inc. 1982); see also THE CONSTITUTIONALIST, *supra* note 2, at 364 (Laurence Berns on Chief Justice Warren as "a kind of living argument for democracy").

But there *have* been problems with the way that the Court proceeded and on what it based its actions, leading to a more or less mechanical one-man/one-vote formula, which did not take sufficient account of special circumstances in various states.<sup>35</sup>

It probably would have been better if, well before 1962, Congress had done what it should have done in addressing the severe malapportionment that had been allowed to distort the elections of both State and National legislators all over the country. Congress should be able not only to protect the soundness of its own membership but also to guarantee (as is its duty) a “Republican Form of Government” in every State in the Union.<sup>36</sup>

One may see here how inept the Court can be in dealing with political questions, even when not driven and divided by partisan passions.

## VI

This brings us explicitly to the *Bush v. Gore*<sup>37</sup> situation, which some still celebrate as the heading off by the Justices of a constitutional crisis.<sup>38</sup>

Did not the Court’s intervention preempt and otherwise interfere with what the Congress might have had to do in January 2001? Is there any reason to believe that Congress could not have addressed and disposed of any contending claims of electoral slates and challenges coming out of Florida (and anywhere else) when the new Congress met?<sup>39</sup>

The Congressional response might, at times, have been “messy”—that is, “political.” But that is to be expected, if not even wanted, from a political body. Besides, elections themselves are *political* undertakings, not adjudications.

## VII

At the heart of my reservations about what happened in, and because of, *Bush v. Gore* is, as I have already indicated, a respect for the intended supremacy of the Legislature in our constitutional system.<sup>40</sup>

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35. See, e.g., *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

36. See, on republican government and the Republican Form of Government Guarantee in Article IV of the Constitution, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 463 (index); THE CONSTITUTION OF 1787, *supra* note 2, at 337 (index).

37. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

38. See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURT* (Princeton Univ. Press 2001).

39. See, e.g., *infra* note 60 and accompanying text.

40. See, e.g., my unpublished Letter of March 11, 2002, to the *Chicago Tribune*:

This supremacy is a fundamental fact of our system, as is evident throughout the Constitution. We were dramatically reminded of this as recently as the Clinton Administration with the subjection of the President to an Impeachment proceeding.<sup>41</sup>

What the Supreme Court did, and was permitted to do, in November and December 2000, was encouraged by the undue apprehensiveness among some of the public about what would happen if the Court did not settle that controversy quickly. A similar apprehensiveness, with some unfortunate consequences for the country, followed upon the monstrous attacks of September 11, 2001. Symptomatic of this apprehensiveness is the unseemly way in which the security of the Vice Presidency has been both protected and publicized the last five months.<sup>42</sup>

The Constitution does provide for extensive Congressional control over the makeup and operations of both the Executive and the Judiciary. A series of questions can illuminate the concern I have about what did and did not happen because of *Bush v. Gore*: Does legislative supremacy still make sense, or do modern conditions require something quite different? That is, is legislative supremacy still the best way to assure the humane implementation of that ultimate legislative supremacy reflected in the sovereignty of the People? Should not Congress, partly by its use of the Powers of the Purse, make sure that the Judiciary and the Executive respect (for everyone's good) the limitations relied upon by the Constitution?<sup>43</sup>

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One of your readers, understandably troubled by radical measures resorted to unilaterally these days by the Bush Administration, argues that "the U.S. Constitution stipulates in no uncertain terms that the executive, legislative, and judicial branches are equal branches." (Chicago Tribune, Letters to the Editor, March 10, 2002, sec. 2, p. 6)

Sometimes the judiciary, as we saw in December 2000, acts as if it is supposed to be the dominant branch. At other times, as we now see, the executive acts that way.

But what the Constitution actually provides is that Congress, with such powers as those of the Purse and of Impeachment, is to be the dominant branch of the National Government, always subject of course to the sovereign Will of the People.

See also George Anastaplo, *Willmoore Kendall and Leo Strauss*, in WILLMOORE KENDALL: MAVERICK OF AMERICAN CONSERVATIVES ch. 6, pt. B (John A. Murley & John Alvis eds., Lexington Books, Rowman & Littlefield 2002).

41. See, e.g., ABRAHAM LINCOLN, *supra* note 15, at 324 n.455.

42. All this can be said to have begun with the way the safety of the President himself was handled on September 11, 2001.

43. Is this not already done routinely by Congress, especially after the excitement of "emergencies" wears off? See, e.g., *supra* note 17.

## VIII

Precedents for legislative supremacy in our constitutional system are both plentiful and substantial. I have already referred to what is taken for granted in our fundamental constitutional document, the Declaration of Independence.

The Framers of the Constitution were themselves organized in, and worked through, an assembly, the Constitutional Convention, which was very much like a legislature. The prototype for American legislatures has been the British Parliament, which had (well before 1776) curbed the power of the Executive and which had never had to contend with anything like judicial review in the form we know it.<sup>44</sup> Even Magna Carta can be understood as an insistence upon the subordination of the Executive to the collectively-expressed will of the community.<sup>45</sup>

Critical to the development of legislative supremacy in Britain was the Power of the Purse effectively claimed by the House of Commons. That power was vital to what happened, for both good and ill, to the prerogatives of the House of Lords in the Twentieth Century.<sup>46</sup> And it

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44. See, on judicial review, ABRAHAM LINCOLN, *supra* note 15, at 365 (index); THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 460 (index); THE CONSTITUTION OF 1787, *supra* note 2, at 335 (index); see also *infra* note 61.

45. Magna Carta even provides for the institutionalizing of the uprising which had led to the coercion of the King at Runymede. See *Law, Education, and Legal Education*, *supra* note 1, at 661–62. Thus, the right of revolution is recognized.

46. Those prerogatives have been severely restricted, with the ultimate fate of the House of Lords still uncertain. I prepared, in 1999, the following memorandum on the House of Lords:

My wife and I received recently from a member of the British nobility the following invitation, “Do let us know if you’d like to come over to witness the death throes of hereditary peerage.” This note came as something of a shock, originating as it did with a couple who had been our gracious hosts on their baronial estate a few years ago and with whom we had visited the House of Lords a decade earlier in the course of my study of that venerable part of the Constitution of the United Kingdom.

I had heard, of course, of the plans of the current Labour Government to abolish the role of at least the hereditary elements of the House of Lords in the legislative process of the country. But, somehow, I had not really grasped this prospect with my soul. The casualness of the note from which I have quoted makes the proposed abolition seem virtually inevitable, matching the casualness (for me, at any rate) of the discussions heretofore in Great Britain of this vital matter.

The proposal of the Abolitionists draws upon longstanding opposition to the House of Lords as undemocratic, if not even as anti-democratic, and as such very much out of touch with the political principles and tendencies of our age. The Abolitionists draw upon deep class animosities in Britain of a kind known in the United States only in racial conflicts. It has not helped the cause of the House of Lords that its Members have all too often been mindlessly conservative in their sentiments and votes.

is the importance of the Power of the Purse that made the Iran-Contra attempt as dubious as it was.<sup>47</sup>

The supremacy of the legislature may be seen also in the State legislatures at the time that the Constitution was drafted. It may be seen as well in the preceding national constitution, the Articles of Confederation, which left the legislature so much in the ascendancy that

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Even so, I seriously began studying the House of Lords, a generation ago, when that House blocked (albeit temporarily, as has to be the case) a local government reorganization bill pushed by the Conservative Government of Margaret Thatcher. "PEERS—THANK YOU FOR SAVING LONDON'S DEMOCRACY" was the banner I saw displayed shortly thereafter, just across the Thames from Parliament, on an office building run by a "left-wing" local government threatened by "reform."

Temporarily blocking, and thereby promoting reconsideration of, dubious legislation proposed by the House of Commons has been a small part of what the House of Lords has done in this century. The House of Lords has been even more useful in improving legislation, often filling in the considerable gaps left in bills passed by the House of Commons. Indeed, the House of Lords has frequently been depended upon to do the detailed work on a bill that the much more political, and hence much busier, House of Commons may not have time for. (For one thing, the Members of the House of Commons, except for those who are Ministers, do not have adequate staffs. The Members of the House of Lords do not have proper staffs either, but they do have leisure. In the United States, the courts do some of the filling in of gaps that the House of Lords does in Britain.)

Related to this workmanlike function of the House of Lords is the recognition that it can discuss controversial or sensitive matters somewhat more frankly, and yet in a less partisan manner, than the House of Commons is usually inclined to do. It helps not only that members of the House of Lords do not have to stand for the next election, but also that the Lords are apt to have among them an expert or two on virtually any subject that legislation touches. These experts have as well the time to study their subjects in some depth. Because of their family experiences and class interests they can approach issues from a much longer view than active politicians ("creatures of a day") can afford or are inclined to do.

No doubt, efforts will be made, if abolition does go through as planned, to supply in another way what the House of Lords has routinely done heretofore in Parliament. Still, the outsider who appreciates British institutions cannot help but wonder whether there are not grave risks run when a centuries-old institution is dismantled, especially when there has been no showing that the chronic problems facing the British have anything to do with the traditions, the Membership, or the practices of the House of Lords. The invitation we received, from which I here quoted, concludes with the observation, "Lots of room for you both here." That can be appreciated as gracious indeed, even as one wonders whether there is ever truly "room" for the outsider who presumes to study and pass judgment upon the workings of a political system that he can know only from afar, no matter how often he visits the country. Critical here, perhaps, are not the lessons one might teach others about the prudence one discovers to be inherent in their institutions, but rather what one learns thereby about prudence which one can thereafter bring to bear upon assessing the time-tested institutions of one's own country.

See HICKORY DAILY REC. (Hickory, N.C.), Apr. 14, 1999, at A4 (for an abridgement of this memorandum).

47. See *supra* note 17.

it provided for neither a separate national executive nor a permanent national judiciary.<sup>48</sup>

Furthermore, it is taken for granted throughout the Articles of Confederation, as it later was in the Constitution of 1787, that the principal branch of the typical State Government is the legislative branch. At times, it can even seem to be assumed in the Articles of Confederation that the legislative was the only branch of such governments.<sup>49</sup>

No doubt, the Articles went too far in relying upon legislative supremacy. But the provisions in the Constitution of 1787 for an executive and a judiciary still leave Congress *able to be* very much in control, subject of course to the Will of the People. This legislative preeminence was evidently considered essential in a republican regime.

## IX

One of the consequences of the approach I have taken on this occasion is a questioning of the now long-accepted institution of judicial review of Acts of Congress for their constitutionality.<sup>50</sup>

Most scholars recognize that there is little indication prior to and during 1787 that such judicial review was either generally desired or explicitly provided for. This is not the place to explain, still another time, how dubious the readings were in *Marbury v. Madison*<sup>51</sup>—the readings by the Court both of the jurisdictional provision in Article III of the Constitution and of the status of any acts of Congress that might indeed be unconstitutional.<sup>52</sup> The immediately perceived limitations of *Marbury* are reflected in the fact that half a century could pass thereafter without invalidation by the Supreme Court of any Acts of Congress.<sup>53</sup> But the principal arguments against judicial review are not “historical” but rather “philosophical,” thus taking account of what a republican regime properly calls for.

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48. See, on the Articles of Confederation, ABRAHAM LINCOLN, *supra* note 15, at 361 (index); THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 455 (index); THE CONSTITUTION OF 1787, *supra* note 2, at 455 (index).

49. Thus, there was no permanent national judiciary established, and the Congress exercised the executive powers of the National Government. See *supra* note 48.

50. See *supra* note 44.

51. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

52. See, e.g., Leonard W. Levy, *Marbury v. Madison*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1199 (MacMillan Publ'g Co. 1986); see also *supra* note 44.

53. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); see also ABRAHAM LINCOLN, *supra* note 15, at 363 (index); THE AMENDMENTS TO THE CONSTITUTION, *supra* note 11, at 457 (index); THE CONSTITUTION OF 1787, *supra* note 2, at 333 (index).

I hasten to add that we do *not* have in *Bush v. Gore* an instance of judicial review, for State Governments are properly subject to supervision in various respects by the National Government (not just by the National Judiciary, however). But what the Supreme Court did in *Bush v. Gore* was somewhat in the spirit of *Marbury v. Madison*, and, as such, likewise open to serious question.

I mention in passing, before leaving the subject of judicial review, that current efforts by the Supreme Court to restrain exercises by the Congress of its Commerce Power are largely illusory. One consequence of the steady “globalization” that we are seeing is that Congress will be required to regulate, as best it can, the economy of the United States, sometimes in exasperating detail.<sup>54</sup>

## X

I do not mean to pass judgment on what various Florida officers, both judicial and executive (or quasi-executive officers), did from time to time during the course of the election and recount in that State.<sup>55</sup>

The Florida officials involved in these proceedings ranged from the Governor and Secretary of State to local election officers and judges. State courts are routinely relied upon, all over this country, to supervise and guide, in inevitably varying circumstances, the interpretation and application of State statutes and regulations. Much of what they do has to be ad hoc, with a sense of fair play depended upon, as diverse arrangements are relied upon in diverse circumstances.

Such variety may seem to some to arouse Equal Protection concerns. But those concerns, as expressed by the United States Supreme Court in November and December 2000, seem rather contrived, considering how diverse the electoral arrangements and practices evidently were throughout Florida (as well as nationwide) in November 2000.<sup>56</sup>

This is not to suggest that everything the Florida Government did, through one or another of its functionaries, was either above reproach or

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54. See, for my comment on Justice Clarence Thomas’s arguments in *United States v. Lopez*, 514 U.S. 549 (1995), and in related cases, George Anastaplo, “*McCarthyism, the Cold War, and Their Aftermath*,” 43 S.D. L. REV. 103, 151 (1998). See, for the “philosophical” arguments referred to, Herman Belz, *The Amendments to the Constitution: A Commentary*, 40 AM. J. LEGAL HIST. 395 (1996) (book review); and Eva T.H. Brann, *Abraham Lincoln: A Constitutional Biography*, 46 S.D. L. REV. 666 (2000) (book review).

55. The Florida Legislature had earlier enacted relevant statutes and threatened to enact still more at once if things did not go as it wanted in the Florida Courts.

56. The United States Supreme Court, evidently aware that such diversity would continue, took the curious precaution of indicating that its rulings with respect to Equal Protection in *Bush v. Gore* were of limited precedential value. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

immune from any official scrutiny. But I *have* been suggesting that the authoritative assessment on this occasion should have been done primarily by the Congress of the United States, once the Florida authorities had done their best.

## XI

The Florida authorities, if the United States Supreme Court had not intervened as it did in this matter, would (before Congress met in January 2001) have almost certainly settled upon at least one plausible slate of Presidential Electors. Political and other maneuvering may have been such that two plausible slates of electors, or at least substantial challenges to the “official” slate, would have been submitted to Congress.

The State legislature and the more influential State officials would probably have come out decisively for Mr. Bush. But it was obvious that the other side was moved, in its insistence upon recounts, by its evidently firm conviction that more voters went to the polls intending to vote for Mr. Gore than had intended to vote for Mr. Bush.<sup>57</sup>

The challenges posed and the evidence available and used in January 2001 would have taken into account what would be likely to happen in the Congress, which would have had to deal with the slates submitted.

## XII

What, then, did the United States Supreme Court insist upon saving us from?

Congress, upon being confronted by contending claims, would have had to decide which slate of Florida Electors to accept and thereafter to declare the winners of the national election accordingly.<sup>58</sup> If one of the Florida slates had been clearly superior in its credentials, especially if thus perceived by the public at large, then that probably would have been the one accepted by Congress.

Public opinion, in this situation, would have taken into account whatever recounts had been made and how they were made, recounts that could have continued through much of December. It would have been difficult for the politicians in Congress to seem simply partisan in

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57. Is it a conservative principle to insist upon keeping and protecting whatever one happens to “acquire” first? Even so, it remains to be sorted out how the current Bush administration has been hampered, in what it could do and in what it could resist doing, because of lingering questions about its legitimacy. *See, e.g., infra* note 64.

58. *See, on the selection of Presidents, THE CONSTITUTION OF 1787, supra* note 2, at 337 (index).



responding to the claims submitted and the evidence relied upon. Besides, they do have their oaths of office to guide them somewhat, as well as their own concern for the national interest.<sup>59</sup>

If, however, the matter remained so inconclusive that Members of Congress did not feel either “justified” or “safe” in deciding one way or another, then another stage in the proceedings would have been reached. That is, the House of Representatives, voting by States, would have had to choose a President—and that probably would have meant, if party discipline could be maintained, the choice of Mr. Bush.<sup>60</sup>

Thus, it seems to me, Mr. Gore could not have been chosen as President unless he came out of Florida with a slate that appeared clearly superior in its claims to that of his opponent. That probably would have been hard (not impossible) to do in the face of the certifications issued by the principal Florida authorities.

### XIII

We expect, and should usually want, “political” concerns to move political men and women in much of what they do. And that can even include what they may have to do in choosing a President. Thus, in some circumstances, the Congress, or the House of Representatives, can properly be as “political” as the People had been in casting the ballots they did on Election Day.

The legitimacy of Congress is not properly called into question when it acts “politically,” however much it may be faulted from time to time for its judgment. But Courts are different, or at least they are supposed to be different, partly because they cannot be held accountable in the way that Congress (like the President) may be.<sup>61</sup>

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59. Of course, a concern for the national interest can take curious forms, as may be seen in the statement issued by Justice Scalia when the Supreme Court ordered that the recount in Florida be stopped pending the Court’s review of the case. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring). See, on the Justice, George Anastaplo, *In re Antonin Scalia*, in 28 PERSPECTIVES IN POLITICAL SCIENCE 22 (1999). Compare Justice Stevens’s dissent on that occasion. *Bush v. Gore*, 531 U.S. at 1047 (Stevens, J., dissenting).

60. For how the State delegations in the House of Representatives were allocated between the principal political parties after the 2000 Election, see FEC, FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES, 141–89 (June 2001), available at <http://www.fec.gov/pubrec/fe2000/cover.htm> (last visited Nov. 29, 2002). I will leave to others to puzzle out whether all this might have meant that Joseph Lieberman would have been named Vice President by the Senate, since the Republicans controlled only fifty seats after the 2000 elections. *Id.* See, for how others have assessed the Florida situation, Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections*, 43 WM. & MARY L. REV. 851, 909 n.295 (2002).

61. In addition, the Justices of the Supreme Court are apt, as usually significantly older than Members of Congress, to be somewhat “out of touch” with the political currents of the times.

Judges rely, for their standing in the community, upon the expectation that they can usually be depended upon for the exercise of sound judgment. Should it not have been obvious to the United States Supreme Court that it would be virtually impossible for it not to appear partisan and political in its intervention, especially if it should be believed that it in effect *selected* Mr. Bush as President? That is, should it not have been obvious to the Supreme Court that it would not be its learning or its good will that would likely be called into question, but rather that upon which it most depends for its authority, its judgment?<sup>62</sup>

#### EPILOGUE

I have suggested that both the Executive and the Judiciary routinely infringe upon the prerogatives and the duties of the Legislature, that there are here constitutional improprieties and hence risks for our regime which should be stoutly questioned both by Congress and by the People.

I should not close, however, without again recognizing, even if only in passing, that the prerogatives of the Judiciary are also infringed upon from time to time by the other branches. Executive infringement may be seen in the recourse to military tribunals already referred to, the creation and operation of which by the Executive may trespass upon both Congressional and Judicial premises.<sup>63</sup>

Congressional infringement upon the prerogatives of the Judiciary may be seen in what Congressional committees all too often do. This is illustrated in another of my Letters to the Editor:

The appearance before a Senate committee of a former chairman of Enron on February 12 was hardly edifying. Senators, like the rest of us, are entitled to that freedom of speech which they vigorously exploited on that occasion to condemn predatory business practices and remarkably self-serving corporate "leadership."

But is it not improper to subpoena a citizen to appear before a Congressional committee, knowing that he will almost certainly invoke his Fifth Amendment right to remain silent—and then have twenty-one Senators subject him to bipartisan abuse? Should we not

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And, it should be emphasized, it *is* quite difficult to distinguish the "constitutional" from the "political" in "constitutional law" determinations. *See infra* note 62.

62. The Supreme Court, in not appreciating what the response was likely to be among thoughtful citizens, displayed that political ineptness which can be expected from older men who *are* out of touch. *See supra* note 61. It remains to be seen how adept the Senate will be hereafter in assessing United States Supreme Court nominees with respect to their sensitivity to Congressional prerogatives.

63. *See supra* note 26.

still prefer to have both an indictment and a trial before prominent public servants mercilessly condemn a potential defendant?

In some instances, one suspects, the attackers were trying to purge themselves of their former associations with the target of their abuse. What a way to celebrate the birthday of that great champion of constitutional propriety, Abraham Lincoln!<sup>64</sup>

It is with respect to such matters as this that the Judiciary has truly something useful to say about constitutional proprieties in the “trials” of persons, something which the Judiciary can probably do better (at least at this time) than any other branch of government.<sup>65</sup>

64. This Letter to the Editor of February 15, 2002, has been published in abridged forms. *See, e.g.*, CHI. TRIB., Feb. 22, 2002, § 1, at 20. The following Letter to the Editor, by me, of June 13, 2002, supplements my February 2002 Letter:

We were treated last February to the unseemly spectacle of twenty-one Senators publicly condemning a former chairman of Enron before he was officially indicted for anything. Now, the President and his Attorney General imitate those Senators by condemning as “a bad guy” a former Chicago gang member, suspected of thinking “dirty bombs,” who has been jailed without either an indictment or the prospect of a trial. In this fashion the traditional guarantees of citizens are depreciated and a salutary respect for our leadership is undermined.

Does not an enduring security depend, at least for us, upon taking seriously the spirit as well as the letter of the Constitution?

One could suspect, in February, that some of the Senatorial attackers of predatory businessmen were trying to purge themselves of their former associations with the target of their abuse. Is the current attack on bad guys who have been thwarted intended to help us forget that the truly bad guys were not noticed in time last September by those who had the duty to protect us from monstrous deeds?

CHI. DAILY L. BULL., June 13, 2002, at 2; CHI. SUN-TIMES, June 20, 2002, at 30; *see also supra* note 26. Related to these concerns about the proper rule of law are those expressed in my Letter to the Editor of July 17, 2002, on the John Walker Lindh case:

Much, perhaps most, of our effort on behalf of Homeland Security has been, for some time now, woefully misdirected, thereby wasting tremendous resources (both spiritual and material) that could be put to much better use for the common good.

It will be a sign that we as a people have begun to recover our balance, morally as well as politically, when it comes to be generally recognized how unduly, if not even cynically, dramatized the conduct is which has evidently gotten a silly young man a twenty-year sentence for “providing service to the Taliban.”

Much more dubious “service” is routinely provided to evil-doing by the fearful and uninformed among us who invest would-be terrorists with far more power and enduring influence than they are ever likely to have.

CHI. DAILY L. BULL., July 22, 2002, at 2; *see also* CHI. TRIB., July 24, 2002, § 1, at 18 (publishing an abridged version); *see also supra* note 26.

65. For citations to further discussions by me of the matters touched upon on this occasion, *see* George Anastaplo, *An Autobiographical Bibliography (1947–2001)*, 20 N. ILL. U. L. REV. 581–710 (2000); George Anastaplo, *Tables of Contents for His Books and Published Collections (1950–2001)*, 39 BRANDEIS L.J. 219–87 (Fall 2000–2001); *see also* George Anastaplo, *Prudence and the Constitution: On the Year 2000 Presidential Election Controversy*, in TEMPERED STRENGTH: STUDIES IN THE NATURE AND SCOPE OF PRUDENTIAL LEADERSHIP (Ethan Fishman ed., 2002).