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A Spotlight on Structure

Allison H. Eid

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INTRODUCTION

Long before George W. Bush and Al Gore traded in the campaign *trail* for the campaign *trial*,[1] the University of Colorado Law Review decided to devote its 2001 symposium issue to *New Structures for Democracy*. One might be tempted to ask how the Law Review had the foresight to plan a symposium focusing on the legal structures governing our democracy at a time when the topic had garnered little national attention. Certainly there was a bit of luck involved in the choice, and no one involved in the symposium would claim powers of prescience. In many ways, however, the *Bush v. Gore* litigation was, in fact, predictable. Of course, the precise contours of the controversy were unpredictable; no one could have foreseen a presidential race coming down to literally a handful of votes in a single state. But controversies arising from the political process have been with us for a very long time—as has the law's struggle to deal with those controversies. Viewed in this light, *Bush v. Gore* simply redirects our attention—and the attention of the contributors to this symposium—to familiar themes of law and politics.

I. THE IMPORTANCE OF DEMOCRATIC STRUCTURE

First, *Bush v. Gore* reminds us that the rough-and-tumble world of politics is not as rough-and-tumble as it may some-

* Associate Professor, University of Colorado School of Law. I would like to thank Troy Eid and Phil Weiser for their helpful comments, and Lisa Klein for her invaluable research assistance. I would also like to thank Susan Fisher, Aaron Hyatt, and the entire staff of the University of Colorado Law Review for their vision and hard work in putting this symposium together.

1. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (Bush I); Bush v. Gore, 531 U.S. 1046 (2000) (granting stay); Bush v. Palm Beach County Canvassing Bd., 531 U.S. 98 (2000) (Bush II).

times seem. Indeed, the game of politics is not one that is played without rules. On the contrary, the rules of the game are set forth before the contest begins, and those rules have a tremendous impact on the outcome. As Sam Issacharoff and Rick Pildes have observed, "The democratic politics we experience is not an autonomous realm of parties, public opinion, and elections, but a product of specific institutional structures and legal rules."[2] The *Bush v. Gore* litigation simply shines a spotlight—albeit an enormous one—on the fact that politics is a "regulated industry."[3]

To illustrate this point, it is necessary to consider briefly the now-familiar rules governing the presidential election controversy.[4] Under the Florida Election Code, the counties were[5] required to submit their final election results to the Florida Secretary of State by 5 P.M. on the seventh day following the election, after which the results of the election were to be certified.[6] Yet the election code also permitted counties to perform manual recounts of the ballots if there was evidence of "an error in the vote tabulation which could affect the outcome of the election"[7]—a process that might take longer than seven days. The Florida Supreme Court decided to extend the certification deadline to fourteen days to permit the recounts to be completed.[8]

Enter *federal* regulation, which the Florida Supreme Court considered only in passing.[9] Under Article II of the United States Constitution, "Each State shall appoint, in such Manner *as the Legislature thereof may direct*, a Number of Electors,

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2. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998).

3. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 207 (2d ed. 1995).

4. For a more extended discussion of the facts and circumstances surrounding the litigation, see George L. Priest, *Reanalyzing* Bush v. Gore*: Democratic Accountability and Judicial Overreaching*, 72 U. COLO. L. REV. 953 (2001).

5. I say "were" instead of "are" because Florida has significantly reworked its election code since the presidential controversy. *See infra* notes 30–34 and accompanying text.

6. FLA. STAT. ANN. §§ 102.111–.112 (West 2001).

7. FLA. STAT. ANN. § 102.166(4)–(5) (West 2001).

8. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000).

9. *See id.* at 1237 & n.55 (suggesting that Secretary of State could ignore manual recount returns if the delay would "preclud[e] Florida voters from participating fully in the federal electoral process," (citing 3 U.S.C. §§ 1–10 (1994))).

equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."[10] In addition, 3 U.S.C. § 5 provides a "safe harbor" provision under which a state's determination of its electors is "conclusive" if the state

> shall have provided, *by law 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, 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 . . . .[11]

In *Bush I*, the United States Supreme Court raised the possibility that, by extending the deadline for certification of the election, the Florida Supreme Court could have: (1) run afoul of Article II's command that the *state legislature* is the repository of lawmaking authority with regard to presidential electors, *or* (2) put at risk the ability of Florida to take advantage of the "safe harbor" provision by changing the rules of the game *after* election day.[12]

The Court, of course, raised these questions only obliquely, suggesting that there was "considerable uncertainty as to the precise grounds for the decision" and remanding the case for further consideration.[13] But the Court was essentially putting the Florida Supreme Court on notice: do not forget the fact that federal law, not just state law, regulates politics.[14]

Four days after the United States Supreme Court issued *Bush I*, the Florida Supreme Court considered another aspect of the election controversy—this time involving the post-certification, or "contest," rules (the Florida Elections Canvassing Commission had certified the election in Bush's favor on the fourteenth day).[15] Under Florida election law, after election

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10. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).
11. 3 U.S.C. § 5 (1994) (emphasis added).
12. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76–77.
13. *Id.* at 78 (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 555 (1940)).
14. Or, as Michael McConnell put it, "[The Court] reminded the Florida Supreme Court that its decisions were subject to review on federal grounds and—in effect—warned the court that its handiwork in the first round of litigation was not sufficiently attentive to the law." Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 659 (2001).
15. Gore v. Harris, 772 So. 2d 1243, 1247 (Fla. 2000).

results had been certified, the losing candidate could contest the outcome on the ground, *inter alia*, that there was a "rejection of a number of *legal votes* sufficient to change or place in doubt the result of the election."[16] The Florida Supreme Court focused on the so-called "undervotes"—ballots in which the machine counters failed to register a vote for president—and ordered a manual recount of all "undervotes" on a statewide basis.[17] In determining whether an "undervote" actually constituted a "legal vote," the court stated that the "standard to be employed" was the one provided by Florida statute—that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter."[18]

The United States Supreme Court stayed the statewide manual recount a day after the Florida Supreme Court issued its opinion,[19] and three days later reversed its judgment in *Bush II*.[20] The *per curiam* opinion found that the "clear intent of the voter" standard invoked by the Florida Supreme Court ran afoul of the Equal Protection Clause[21] because, *inter alia*, "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[22] In other words, should manual counters count dimpled chads, pregnant chads, hanging chads, or no chads at all? The Florida Supreme Court had failed to give any guidance on this issue, and it would not be given a chance to do so. The *per curiam* opinion held that there was no time to fashion a remedy for the equal protection violation because the deadline for taking advantage of 3 U.S.C. § 5's "safe harbor" provision—six days before the

16. *Id.* at 1247 (citing FLA. STAT. ANN. § 102.168(3)(c)) (emphasis added).

17. *Id.* at 1253. As Michael McConnell has pointed out, the Gore campaign's strategy of focusing on the undervotes appears to have been in error. Indeed, it appears that Gore's "only chance of victory in a recount" would have been to focus on the so-called "overvotes," in which voters appeared to have cast more than one vote for president. McConnell, *supra* note 14, at 657–58.

18. Gore v. Harris, 772 So. 2d at 1262 (citing FLA. STAT. ANN. § 101.5614(5)).

19. Bush v. Gore, 531 U.S. 1046 (2000).

20. Bush v. Gore, 531 U.S. 98 (2000).

21. Michael Dorf has pointed out how curious it was that the Court denied certiorari on the equal protection question in *Bush I* but based its decision on that ground in *Bush II*. *See* Michael C. Dorf, Editorial, *Supreme Court Pulled a Bait and Switch*, L.A. TIMES, Dec. 14, 2000, at B11.

22. Bush v. Gore, 531 U.S. at 106.

meeting of electors—was the very day the United States Supreme Court was handing down its opinion.[23]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, wrote a concurring opinion. The concurring justices would have found "additional grounds" to invalidate the Florida Supreme Court's decision, including the Article II and 3 U.S.C. § 5 grounds discussed in the Court's first *Bush* opinion.[24]

Both Justices Souter and Breyer[25] would have found an equal protection violation, but dissented in separate opinions on the ground that they would have permitted the recount to go forward under a standard consistent with the Equal Protection Clause.[26] Justices Stevens and Ginsburg dissented in separate opinions on the ground that they would have found no equal protection violation (nor an Article II or 3 U.S.C. § 5 violation, for that matter).[27]

One cannot help but conclude from this cursory review of the *Bush v. Gore* litigation that the structural rules governing the presidential election *mattered*. Of course, so did the courts' interpretation of that structure, a theme to which I will return in a moment. And it is certainly possible to overestimate the importance of structure. As Michael Fitts has observed, political actors, like economic actors, can find ways to get around structural constructs.[28] But imagine a world in which the election structure had been different. What would have happened, for example, had the Florida election code contained a more specific standard of counting ballots than examining "the in-

23. *See id.* at 110.

24. *See id.* at 111–22 (Rehnquist, C.J., concurring); *see also* Richard A. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613 (2001) (defending the outcome in *Bush v. Gore* on Article II, section 1, clause 1 grounds).

25. For an expanded consideration of the Breyer position, see Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001).

26. *See* Bush v. Gore, 531 U.S. 98, 134–35 (Souter, J., dissenting) ("I would . . . remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order."); *id.* at 158 (Breyer, J., dissenting) ("I would . . . permi[t] the Florida recount to continue under uniform standards.").

27. *See id.* at 123–29 (Stevens, J., dissenting); *id.* at 135–44 (Ginsburg, J., dissenting).

28. Michael A. Fitts, *The Hazards of Legal Fine Tuning: Confronting the Free Will Problem in Election Law Scholarship*, 32 LOY. L.A. L. REV. 1121, 1128–29 (1999).

tent of the voter?"[29] Or, to consider another example, had the "safe harbor" deadline been a week later? Or, to consider still another example, had there been no electoral college? The answers are obvious: the outcome might have been different.

This message has not been lost on legislators and other election observers across the country. After the *Bush v. Gore* litigation came to an end, the state of Florida significantly reformed its election code. Among other things, it eliminated the punch card ballot system that produced the chads in the first place.[30] In addition, "provisional ballots" will now be provided to voters who show up at the polling place but who do not appear on the voter registry.[31] The state has also adopted mandates with regard to voter education programs.[32] Finally, Florida law now expressly requires manual recounts in all close elections,[33] and extends the election certification period from seven to eleven days.[34]

The United States Congress has gotten into the reform act as well. Election reform has become a top priority in Congress,[35] with several reform bills pending.[36]

In the end, all of this reform activity simply reaffirms the fact that the political process—including, as we now know, the presidential election—is a regulated market. It also confirms the corollary to this statement, namely, that the regulations in place have an important impact on success or failure in the marketplace.

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29. *See* FLA. STAT. ANN. § 101.5614(5).

30. *See* 2001 Fla. Sess. Law Serv. 2001-40, § 17 (West) (providing that "a voting system that uses an apparatus or device for the piercing of ballots by the voter may not be used in this state.").

31. *See id.* at § 35, (creating FLA. STAT. ch. 101.048(1), providing that "a voter claiming to be properly registered . . . but whose eligibility cannot be determined . . . shall be entitled to vote a provisional ballot."); *id.* (creating FLA. STAT. ch. 101.048(2)(b)1, providing that the provisional ballot shall be counted if "it is determined that the person was registered and entitled to vote . . . .").

32. *See id.* at § 59 (amending FLA. STAT. ch. 98.255).

33. *See id.* at § 42 (amending FLA. STAT. ch. 102.166).

34. *See id.* at § 40 (amending FLA. STAT. ch. 102.112(1)).

35. *See Election Reform: Dodd Says Addressing Election Problems Will Be His Priority as Rules Panel Chairman*, 109 DAILY REP. FOR EXECUTIVES, June 6, 2001, at A12.

36. *See, e.g.*, The Bipartisan Federal Election Reform Act of 2001, S. 953, 107th Cong. (2001) (calling for the creation of the Election Administration Commission to administer a $2.5 billion grant program to assist states in improving election procedures); The Equal Protection of Voting Rights Act of 2001, S. 565, 107th Cong. (2001) (proposing a new grant program and mandating state election reforms).

This Symposium examines the creation, maintenance, and reform of democratic structures in many different contexts. Sam Issacharoff and Michael Dorf,[37] George Priest,[38] and Paul Campos[39] focus on the 2000 presidential race. Gene Nichol looks at the legal regime governing the redistricting process—a regime that will receive close scrutiny in the redistricting efforts coming in the wake of the 2000 census.[40] Rick Collins examines the legal rules governing the initiative process (otherwise known as direct democracy), suggesting, among other things, that states should consider making it more difficult to amend their constitutions by initiative.[41] And John Gastil, Mark Smith, and Cindy Simmons suggest that the initiative process is not democratic enough, and advocate the use of citizen panels to inform the public debate.[42] The premise of each contribution—either expressly or implicitly—is that structure contributes to our democracy in important and significant ways.

II. THE ROLE OF THE COURTS

The *Bush v. Gore* litigation was the product of another familiar phenomenon of the political process—judicial intervention.[43] Where there are rules, there are disputes over rules, and where there are disputes over rules, there are courts. Thus it should not be surprising that the courts had a tremen-

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37. *See* Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001).

38. *See* Priest, *supra* note 4.

39. *See* Paul F. Campos, *The Search for Incontrovertible Visual Evidence*, 72 U. COLO. L. REV. 1039 (2001).

40. *See* Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029 (2001).

41. *See* Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983 (2001).

42. *See* John Gastil et al., *There's More than One Way to Legislate: An Integration of Representative, Direct, and Deliberative Approaches to Democratic Governance*, 72 U. COLO. L. REV. 1005 (2001).

43. Indeed, Rick Pildes has argued that the Court's opinions in the *Bush v. Gore* litigation reflect a fear within the Court of a free-wheeling democracy—a fear reflected within many pre-*Bush v. Gore* opinions as well. *See* Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001). Similarly, Pam Karlan has argued that *Bush v. Gore*—although wrongly decided, she says—fits within the Court's recent equal protection jurisprudence. *See* Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 77 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

dous impact on the 2000 presidential election; indeed, it was their *interpretation* of the structure, not simply the structure itself, that determined the outcome of the controversy. The *Bush v. Gore* litigation therefore shines a spotlight on a second theme explored in this symposium, namely, what is the proper role of courts in determining the contours of our democratic structure?

Interestingly enough, until the early 1960s, the answer was "almost none." The United States Supreme Court, in a long series of opinions,[44] had declared that such political disputes were nonjusticiable political questions. The preferred method of dispute resolution was believed to be the political process itself.

That all changed with cases such as *Baker v. Carr*[45] and *Reynolds v. Sims*.[46] Both cases involved challenges to states' failure to reapportion legislative districts after significant population shifts had occurred. In both cases, the Court said that the judiciary did indeed have a role—a prominent one, in fact—in resolving disputes arising out of the political process. Indeed, those cases gave rise to the "vote dilution" theory that has become the backbone of the Voting Rights Act.[47] The Court brushed aside concerns that it would be embroiled in the quagmire of politics, suggesting that the Equal Protection Clause contained "judicially manageable standards" to govern its involvement in political disputes.[48]

The dissenters to the Court's reorientation were Justices Frankfurter and Harlan, who both wrote lengthy dissents predicting dire consequences of the Court's foray into the political realm. In his dissent in *Baker*, Justice Frankfurter warned:

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by

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44. For a description of the early contours of the political question doctrine, see Issacharoff, *supra* note 25, at 639, and Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 643–45 (1989).

45. 369 U.S. 186 (1962).

46. 377 U.S. 533 (1964).

47. For an extensive consideration of the theoretical underpinnings of vote dilution litigation, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

48. *See Reynolds*, 377 U.S. at 557 (citing *Baker*); *Baker*, 369 U.S. at 226.

> the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[49]

According to Frankfurter, such interference had implications not just for the Court, but for federalism as well. Federal judicial intervention in state political matters, he wrote, "will add a virulent source of friction and tension in federal-state relations . . . ."[50]

Justice Harlan joined Frankfurter's dissent, and wrote one of his own, joined by Frankfurter. In it, he lamented the Court's lack of "self-restraint and discipline."[51] Justice Frankfurter retired from the Court soon after *Baker* was decided,[52] leaving Justice Harlan as the lone dissenter in *Reynolds*.[53]

In *Bush II,* the *per curiam* opinion cites *Reynolds* for the proposition that "[i]t must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'"[54] In other words, a vote can be diluted not only by rules that govern whether it can be cast in the first instance, but by the method in which it is counted as well. Justice Stevens distinguished *Reynolds* in his dissent on the ground that "we have never before called into question the substantive standard by which a State determines that a vote has been legally cast."[55] In other words, the Court had told states how to apportion legislative districts, but had never told them how to count votes. No one cited *Baker.* But the impact of *Baker* and *Reynolds* runs much deeper than holdings and distinctions. The broader question posed by those decisions—that is, when is it proper for courts, and particularly the United States Supreme Court, to intervene in political disputes—was the clear undercurrent throughout the *Bush v. Gore* litigation.

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49. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

50. *Id.* at 324 (Frankfurter, J., dissenting).

51. *Id.* at 340 (Harlan, J., dissenting).

52. *Baker* was decided on March 26, 1962. Frankfurter retired from the Court on August 28 of that year. *See* COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS AND ITS JUSTICES 1790–1991, at 190 (1991).

53. *See Reynolds*, 377 U.S. at 589 (Harlan, J. dissenting).

54. Bush v. Gore, 531 U.S. 98, 105 (2001) (citing *Reynolds,* 377 U.S. at 555).

55. *Id.* at 125 (Stevens, J., dissenting).

The *per curiam* opinion, for example, closes with a self-conscious justification for its intervention:

> None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.[56]

Somewhat ironically, the Court was echoing sentiments expressed by the Florida Supreme Court in *Bush II*: "Although courts are, and should be, reluctant to interject themselves in essentially political controversies," the Florida high court wrote, "the Legislature has directed . . . that an election contest shall be resolved in a judicial forum."[57]

Conversely, the dissenters in *Bush II* struck a decidedly Frankfurterian tone. Justice Stevens, for example, described the Court's decision as reflecting "an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed."[58] In their separate dissents, Justices Souter and Ginsburg voiced similar federalism concerns.[59] And Justice Breyer directly addressed the political question doctrine:

> Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness . . . which tends to unbalance judicial judgment," and "the inner vulnerability,

56. *Id.* at 111.

57. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1249 (Fla. 2000).

58. Bush v. Gore, 531 U.S. at 128 (Stevens, J., dissenting)

59. *See id.* at 133–35 (Souter, J., dissenting); *id.* at 141–43 (Ginsburg, J., dissenting).

> the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from."[60]

"Those characteristics," he concluded, "mark this case."[61]

Michael McConnell has observed that the Frankfurter position represents "old arguments, long rejected by the Court,"[62] and perhaps the dissenters in *Bush II* had no intention of resurrecting them. But certainly an important task remains—that is, to define which political controversies require judicial intervention, and which should be left to the political process.

In this symposium, Professors Dorf and Issacharoff confront this task in the context of the *Bush v. Gore* litigation, suggesting that there was no failure of the political process to justify the Court's intervention.[63] Professor Priest disagrees, arguing that it was necessary for the Court to intervene to restore the political process bypassed by the Florida Supreme Court.[64] Professor Campos explores the cultural dimension of the Court's involvement.[65] Dean Nichol takes a look at judicial intervention in the redistricting process some 40 years after *Baker* and *Reynolds* started down the path.[66] Professor Collins asks the question of how to adjust initiative procedures to respond to judicial intervention.[67] Finally, Professors Gastil, Smith, and Simmons—all non-law professors—do not expressly tackle the subject of court intervention in the initiative process,[68] which perhaps reminds us that there are forces at work in the political arena other than the courts.

III. NEW CHALLENGES TO THE LEGAL ACADEMY

In the end, the *Bush v. Gore* litigation raises two familiar themes—the importance of legal structure and the courts' role within that structure—in a dramatic and unprecedented setting. But the familiarity of the themes does not diminish the

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60. *Id.* at 157 (Breyer, J., dissenting) (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962)).
61. *Id.*
62. McConnell, *supra* note 14, at 663.
63. *See* Dorf & Issacharoff, *supra* note 37.
64. *See* Priest, *supra* note 4.
65. *See* Campos, *supra* note 39.
66. *See* Nichol, *supra* note 40.
67. *See* Collins, *supra* note 41.
68. *See* Gastil et al., *supra* note 42.

litigation's importance to legal scholars. Indeed, the *Bush v. Gore* litigation presents substantial new challenges to the legal academy.

The controversy came at a time when the field of law and the political process was, as one scholar has noted, in "puberty."[69] Once the United States Supreme Court started down the path of involvement in political disputes in opinions such as *Baker* and *Reynolds*, the cases kept coming, and so did the legal academy and the casebooks. But prior to *Bush v. Gore*, the case for studying those opinions in a course separate and apart from constitutional law still had to be made. In fact, two years ago, in a symposium devoted to the field, one of the main points of contention was what to call it—law and democracy, election law, law and political regulation, or something else?[70] *Bush v. Gore* confirms what pioneers[71] in the field (whatever it is called) have been saying for some time: that the field exists, and should stand on its own.[72]

Certainly, there are many challenges that lie ahead of this field, and for the legal academy as a whole.[73] One of the most important, however, is to consider what type of legal reform of the political process, if any, is desirable. We hope that this symposium will start that conversation.

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69. *See* Richard L. Hasen, *Introduction: Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1096–97 (1999).

70. *See id.* (discussing various contributors' views on what the field should be called). The diversity in names is also reflected in the casebook titles covering the field, including, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d ed. 2001); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY (1998); and DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS (1995). These casebooks differ in their emphasis, but all address common themes arising from law and politics.

71. The author and the University of Colorado Law Review would like to thank four of those pioneers, Sam Issacharoff, Rick Pildes, Pam Karlan, and Bill Eskridge, for participating in the conference held in conjunction with this symposium issue.

72. For a thoughtful symposium focusing on the development of the field of law and politics, see Symposium, *Election Law as its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999).

73. *See, e.g.*, Dorf & Issacharoff, *supra* note 37, at 940–951 (discussing the reaction of the academy to *Bush v. Gore*).