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INTRODUCTION

Politics is the most difficult domain for constitutional law. As practiced in the United States, the aim of constitutionalism is both to provide a foundation for democratic governance and a limitation on the scope of such politics. The Constitution is supposed to enable democratic politics and establish its outer bounds. Yet the original Constitution performed this task only inferentially, leaving most of the details to either subsequent amendments or, more centrally, to judicial interpretation.[1] This in turn leads to a fundamental question: what are the bounds of judicial intervention into the political arena? Although this is an old question, it has clearly been revived and sharpened by the Supreme Court's unprecedented emergence

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1. The sources of the Constitution's limitations may be traced to its eighteenth century pedigree and the curious division of labor by which the implementation of democratic participation and politics was left to the states. *See* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668–69 (1998) [hereinafter Issacharoff, *Politics*] (contrasting the initial American Constitution with later constitutions, particularly those of the twentieth century). For a discussion of the relation between constitutional principles and democratic politics, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY ch. 1 (1998) [hereinafter ISSACHAROFF, LAW OF DEMOCRACY]. We will not revisit these baseline considerations in this article. Rather, we take here as our point of departure that democratic politics is impossible without external constraints on what majorities might do, and that, at least in the United States, these constraints must be imposed from outside the political process.

as the dispositive actor in a drama which began as Bush versus Gore, but ended as *Bush v. Gore*.[2]

Our aim here, however, is not to define the proper boundaries of judicial review of politics. On that issue, we have both set out our views in various writings which we confess up front do not converge.[3] Rather we wish to take up a variant of this issue: what strategy can best constrain judicial overreaching? It is perfectly proper to posit the necessity for judicial oversight of politics and to acknowledge as well that courts—and the Court—may succumb to temptation and cheat for partisan or other improper aims. Life abounds with metaphors about who will guard the guardians, or not allowing the fox to guard the chicken coop, or more simply, keeping one's eye on the ball.

To a certain extent, this is a familiar problem across a broad swath of human conduct, including that which the law seeks to regulate. Because legal sanctions cannot reach all manner of human relations, the law seeks both to create mechanisms of deterrence in cases where wrongdoing is discovered and to establish norms of behavior that will guide conduct elsewhere. Sometimes, this guidance is induced by fear of reputational harm. If a business were to gain a reputation for cheating customers, then others might stay away. But such mechanisms are clumsy and do not account for much of our conduct. Why do people tip at restaurants they know they will never again visit? Clearly, there will be no legal or reputational sanctions. Rather, certain forms of conduct are important to perceptions of individual self-worth in ways that are difficult to quantify or prove—but that seem to function nonetheless.

There is no reason to think that judicial behavior is exempt from these familiar dynamics. Conduct clearly out of bounds,

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2. 531 U.S. 98 (2000).

3. For those who would presume, per Tolstoy, that there are indeed no happy families, we offer as an example of our divergent approaches, Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (looking toward co-ordinated decentralized deliberation); Issacharoff, *Politics*, *supra* note 1 (seeking to create competition reinforcing mechanisms of judicial oversight); Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. (forthcoming 2001) (reviewing SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD (2001)) [hereinafter Dorf, *2000 Presidential Election*] (arguing that principled judicial intervention on doctrinal grounds is possible); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001) (looking to political question doctrine to dictate judicial caution).

such as taking bribes from litigants, will lead to formal sanctions such as impeachment and criminal prosecution. But these instruments are too blunt to be used against merely bad or wrong-headed judicial decisions. Deterrence of such conduct depends on more subtle mechanisms.

We focus here on one such mechanism: informed and balanced criticism of judicial overreaching. Because politics is not self-policing, judicial review of politics seems a necessity. But behind the first-order question of why a counter-majoritarian check on politics is necessary stands a second problem of defining the bounds of such oversight. Unlike that in most other democratic countries, American administrative regulation of politics ranges between the ineffectual and the non-existent. Instead, the role of oversight falls heavily to the courts. What we propose is that gaining greater theoretical clarity on the role of judges in the political arena may yield an additional benefit: it may provide an appropriate template for criticism of wrongful judicial conduct. If we are correct, defining a clear measure for judging judges who judge politics may provide an effective strategy for policing judicial misconduct in the courts' necessary though problematic oversight of the political process.

The question of appropriate restraints on judicial intervention into the political arena has taken on increasing urgency since the constitutionalization of large domains of politics. Who would have believed forty years ago, when the Court was wrestling with the deadweight of the political question doctrine, that we would so quickly become accustomed to judicial regulation of redistricting, campaign finance, participation in political party candidate selection, the permissible bounds of racial representation, and finally, the proper interpretation of state law for the selection of presidential electors?

In what follows, we wish to advance a two-pronged argument. First, we defend a seemingly old-fashioned notion that the best constraint on judicial overreaching may still be the political process theory introduced by the famous *Carolene Products* footnote[4] and developed through subsequent scholarship. This part of the argument may seem familiar and perhaps even unobjectionable—although there are limits to our self-delusion. But the second part of the argument takes issue with hundreds of our colleagues in the legal academy. This is the argument

4. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

that resisting the temptation to jump to political conclusions serves the instrumental role of curbing the judicial temptation to cheat and capitalizes on the institutional role that law professors may play in holding the judiciary to a circumspect, if important, role as guardian of the vitality of the political process.

I. POLITICAL PROCESS THEORY AND ITS LIMITS

The inescapable question of American constitutional law in the twenty-first century is, as it has always been, how to reconcile democracy and judicial review. In 1937, the United States Supreme Court abandoned both its expansive view of property and contract rights[5] and its limited view of the powers of Congress.[6] For a brief moment, it appeared that across-the-board deference to political actors was to be the prevailing approach to constitutional adjudication.[7] Yet even as the Court was announcing its *general* willingness to defer to political bodies, it staked its claim to important *specific* exceptions.

In the most famous footnote in all of law, the Court suggested that no presumption of constitutionality should apply to three categories of legislation: (1) laws that infringe textually enumerated constitutional rights; (2) "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; and (3) laws that discriminate on the basis of race, religion, or national origin.[8]

Justice Stone's footnote bore fruit under Chief Justice Warren. The Warren Court's lasting legacy was a rights revolution on three fronts that directly correlate with the *Carolene Products* footnote: (1) the Court incorporated most of the Bill of Rights against the States;[9] (2) it found authority for judicial review and invalidation of state legislative districts apportioned on other than a one-person, one-vote basis;[10] and (3) it began

5. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

6. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

7. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

8. *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

9. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Duncan v. Louisiana, 391 U.S. 145 (1968).

10. *See* Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

the process of dismantling the *de jure* system of racial subordination.[11]

In retrospect, we can see that the Warren Court was driving by the *Carolene Products* roadmap, but at the time, the Court's direction was less than perfectly clear. Incorporation, for example, was justified by a somewhat tendentious account of the intentions of those who framed the Fourteenth Amendment.[12] More directly relevant to our present subject, in *Baker v. Carr,*[13] only a concurrence by Justice Clark justified judicial intervention in the legislative apportionment process on the ground that there were structural impediments to corrective action by any political actor.[14] By contrast, Justice Brennan's opinion for the Court in *Baker* proceeded more in the manner of botany than of ordinary constitutional law: it listed the cases that had been deemed to raise nonjusticiable political questions, found no entry on the list for apportionment challenges, and thus concluded that such challenges must be justiciable.[15]

The firm association of the Warren Court with *Carolene Products* is due almost entirely to John Hart Ely's extraordinarily influential book, *Democracy and Distrust.*[16] Ely sought to reconcile counter-majoritarian judicial review with democracy by limiting the former to those circumstances in which the legislative process was unlikely to be self-correcting, either because of structural mechanisms that enabled the "ins" to use the levers of government to unfair advantage (as in the appor-

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11. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

12. *Compare* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949), *with Duncan*, 391 U.S. at 162–71 (Black, J., concurring), Adamson v. California, 332 U.S. 48, 68–123 (1947) (Black, J., dissenting), Betts v. Brady, 316 U.S. 455, 474–75 & n.1 (1942) (Black, J., dissenting), *and* HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 34–42 (1968). Recent scholarship suggests that Black may have been closer to the truth, *see* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Earl M. Maltz, *Commentary on Akhil Reed Amar's The Bill of Rights: Creation and Reconstruction of the Concept of Incorporation*, 33 U. RICH. L. REV. 525 (1999), although it is difficult to believe that a strict accounting of the original meaning of the Fourteenth Amendment—rather than an attraction to the discretion-limiting quality of rules —was what in fact drove Justice Black.

13. 369 U.S. 186 (1962).

14. *Id.* at 258–59 (Clark, J., concurring).

15. *Id.* at 208–37 (opinion of the Court).

16. JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980) [hereinafter ELY, DEMOCRACY & DISTRUST].

tionment cases), or because of deep-seated prejudice (as against African Americans) that continually prevented members of some groups from playing the coalition-building game described in Federalist 10.[17] Ely's core argument was directed primarily to the problem of preserving civil liberties and expanding the rights of subjugated minorities. His theory of the political process focused on the inability of majoritarian processes to guarantee through the normal operation of politics a robust protection of the disliked and the disadvantaged.[18] Ely's work remained relatively undeveloped regarding the application of process theory to the core functioning of the political process, an inquiry that has advanced significantly since the emergence of the study of political governance as a distinct inquiry in constitutional law.[19]

As to the express guarantees of the Constitution, Ely acknowledged a positivist justification for their enforcement, but concentrated his energy on showing how most of these provisions could be construed in just the way that his representation-reinforcing theory of judicial review required: the religion clauses of the First Amendment protect outsiders; the speech, press, and assembly clauses make possible the sort of open debate necessary for an informed citizenry to participate in politics; the criminal procedure provisions protect another outsider group, suspected and convicted criminals; and so on.

Ely's principal aim was to justify most of the work of the Warren Court, but he also meant to distinguish that work from what he believed to be its illegitimate extensions beyond the realm of process, most notably in *Roe v. Wade*,[20] and more gen-

17. James Madison famously argued that in a large republic, no single faction or coalition of factions could long oppress the rest of society, because the heterogeneity of interests would lead to constantly shifting coalitions. *See* THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). However, prejudice may prevent otherwise mutually advantageous coalitions from forming. So too, when those in power (the "ins") control the mechanisms by which they are selected, there is a heightened risk of oppression.

18. *See id.* at 135–79.

19. To a significant extent, our work in this area has been an attempt either to provide another structural level of protection to political vitality (Dorf) or to expand the notion of process failure to turn not on the regulated class, but on the threat to the competitive viability of the system (Issacharoff).

20. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

erally in the area of substantive due process.[21] Unless there is some reason to think that an asserted substantive right cannot get a fair hearing in the political sphere, absent very clear textual support, Ely saw no justification for judicial action.

Ely's attack on substantive due process has been quite influential in the Supreme Court. Although the Justices continue to invoke the doctrine, they appear to have declared a moratorium on its extension. Thus, an asserted right to physician-assisted suicide was unanimously rejected,[22] and cases finding violations of substantive due process—such as the Court's recent decision in the grandparent visitation case[23]—are couched as mere applications of long-recognized unenumerated rights. Even the Court's abortion jurisprudence now tracks Ely's theory. Its continued vitality rests on a combination of respect for precedent and, in substantial measure, a shift from a pure liberty justification to one that relies on equality principles as well.[24]

This is not to say that modern constitutional doctrine perfectly tracks Ely's theory. The Rehnquist Court has eagerly fashioned doctrines to promote state sovereignty,[25] notwithstanding the "political safeguards of federalism"[26] that argua-

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21. *See* ELY, DEMOCRACY & DISTRUST, *supra* note 16, at 18 ("'[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness'").

22. *See* Washington v. Glucksberg, 521 U.S. 702 (1997). It is nonetheless interesting to note that Chief Justice Rehnquist utilized the concept of substantive due process with surprising comfort in assessing the right-to-die claim. *See id.*

23. Troxel v. Granville, 530 U.S. 57 (2000).

24. *See* Planned Parenthood v. Casey, 505 U.S. 833, 896–97 (1992) (striking down Pennsylvania's husband-notification laws largely on equality grounds); *see also id.* at 912 (opinion of Stevens, J.) ("*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."); *id.* at 928–29 (opinion of Blackmun, J.) ("A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."). Ely himself, at least circa 1980, did not find the equality rationale for an abortion right convincing because, at least compared to fetuses, women are not a discrete and insular minority. *See* Ely, *supra* note 20, at 934-35. But the very fact that *Roe*'s supporters have felt the need to seek an equality justification, *see* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992), shows the pull of Ely's theory.

25. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997).

26. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

bly make such intervention unnecessary.[27] The Justices have also applied exacting judicial scrutiny to race-based governmental decisionmaking not only when it burdens, but also when it benefits discrete and insular minorities,[28] a position that Ely himself rejected.[29] Indeed, in the election area, the Court has invalidated race-based governmental decisionmaking that systematically disadvantages no identifiable group,[30] and has even expanded equal protection to reach individuals subject to animus for purely idiosyncratic reasons.[31]

Nor has Ely's process theory been uncritically received by academics. Liberal scholars questioned both the possibility and propriety of protecting procedural but not substantive rights. Laurence Tribe noted that procedural protections invariably serve underlying substantive values.[32] Peter Westen argued that equality norms are empty absent a substantive normative framework.[33] And Ronald Dworkin challenged the distinction between enumerated and unenumerated rights as resting on

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27. *See* Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 171–259 (1980).

28. *See* Adarand Constructors v. Peña, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

29. *See* ELY, DEMOCRACY & DISTRUST, *supra* note 16, at 170–72; John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

30. We refer, of course, to the line of cases originating with *Shaw v. Reno*, 509 U.S. 630 (1993). Ely himself believes that race-based districting should be understood to do constitutionally cognizable harm to the non-minority voters placed in majority-minority districts. *See* John Hart Ely, *Commentary: Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997). We might agree with Ely that there is in some sense an injury to persons "[i]ntentionally assigned to a particular district because it's known [that their] vote won't count there," what prior to Ely were termed the "filler people." *Id.* at 585. Nonetheless, before *Shaw*, that sort of harm was not considered a constitutional violation absent a showing of vote dilution or some actual denial of the vote. *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1977). *See* Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 68 (1996); Samuel Issacharoff & Pamela S. Karlan, *Standing And Misunderstanding In Voting Rights Law*, 111 HARV. L. REV. 2276 (1998).

31. *See* Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

32. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

33. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

an incoherent view of meaning.[34] Broadly speaking, Ely's liberal critics accepted his argument for judicial review to reinforce democracy, but they contended that any plausible account of democracy includes substantive rights and values that the courts must enforce alongside of, and intertwined with, procedural guarantees.[35]

Notwithstanding the judicial departures from and academic criticism of Ely's process theory, a premise of that theory has generally been accepted. Even though there has been debate over whether and how much activist judicial review can be justified outside the area of non-self-correcting defects in the political process, most have assumed that correcting such defects is a legitimate judicial function.[36] To put the point in historical terms, there are virtually no surviving heirs to Justice Frankfurter and the second Justice Harlan. Although they went along with the Court's desegregation decisions,[37] these Justices would not have incorporated most of the Bill of Rights against the states,[38] and, crucially, they believed that even non-

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34. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 72–83 (1996).

35. *See id.* at 34 (describing the "question of what the democratic conditions actually are" as "essentially moral"); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 2–3 (1995) (arguing that constitutional interpretation should aim not only to secure "the basic liberties that are preconditions for deliberative democracy," but also to secure "the basic liberties that are preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives").

36. Most but not all. Hard-core originalists have attacked Ely's process theory as ahistorical. So what if process theory can account for the Constitution? If the Framers did not believe in or enact process theory, the originalist says, then it leads only to erroneous interpretations. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 196–99 (1990). Oddly, however, Judge Bork has now endorsed aggressive judicial oversight of the political process in *Bush v. Gore*. *See* Robert Bork, *Sanctimony Serving Politics: The Florida Fiasco*, NEW CRITERION, Mar. 2001, at 4.

37. Justice Frankfurter joined the Court's unanimous decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which pre-dated Justice Harlan's tenure on the Court. Both Justices Frankfurter and Harlan signed the Court's unanimous judgment in *Cooper v. Aaron*, 358 U.S. 1 (1958).

38. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 174 (1968) (Harlan, J., dissenting) ("[T]he first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments."); Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., joined by Frankfurter and Whittaker, JJ., dissenting).

self-correcting defects in the political process did not justify judicial intervention.[39]

The Warren Court eventually came up with a good answer to the Frankfurter/Harlan objection that the apportionment decisions were not, in the phrasing of the political question doctrine, susceptible of judicially discoverable and manageable standards. The Court rigidly applied a rule invalidating any substantial deviations from the principle of one-person, one-vote.[40] As Ely later explained, by giving voice to identifiable communities, many systems that give some limited disproportionate representation to geographic or political units are consistent with democracy, but rigid application of one-person, one-vote provides both a mechanical fix to the problem and imposes a strict limit on judicial creativity. By in essence overenforcing the equality norm, the Court did not have to draw inherently problematic lines distinguishing permissible from impermissible departures from equal-population districts. Although the Court's decisions were difficult to square in principle with the fact of wildly disproportionate representation in the United States Senate or the structural inequalities of the Electoral College, they had the virtue of avoiding judicial entanglement in a "political thicket."[41]

What then of *Bush v. Gore*? Where *Baker v. Carr* and *Reynolds v. Sims* spawned a judicially-enforceable rule that is, if anything, unduly mechanical, the *per curiam* opinion in *Bush v. Gore* was perfectly opaque as to what impact, if any, its decision would have on future challenges to election procedures. Despite rhetorical tributes to an expansive equal protection claim, the Court recoiled: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[42] Thus the Justices paid unwitting homage to Justice Frankfurter. The pointillism of their decision aimed to avoid entanglement in future political thickets, even as they emerged badly

39. *See* Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., joined by Harlan, J., dissenting); *id.* at 331 (Harlan, J., joined by Frankfurter, J., dissenting).

40. *See, e.g.*, Karcher v. Daggett, 466 U.S. 923 (1984) (applying a highly mechanical, exacting interpretation of one-person, one-vote, even where the margin of deviation was less than the Census margin of error).

41. Colegrove v. Green, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.).

42. 531 U.S. at 98.

bloodied from the thorns of *Bush v. Gore* itself. Somewhere, Justice Frankfurter is chuckling.

Should *Bush v. Gore* prompt a reconsideration of *Baker v. Carr*?[43] We think not. As we have noted, it is possible to develop judicially manageable standards for assessing apportionment schemes. More generally, we would not say that most aspects of election law should be off limits to judicial scrutiny. Practices like literacy tests and poll taxes that systematically suppress voter participation could be categorically proscribed by courts, even if they were not already illegal under enacted law.[44] So too, we agree with the foundational assumption of all the Justices in *Bush v. Gore* that some systems for tabulating and counting votes would be so arbitrary as to violate equal protection or, perhaps more obviously, due process.

Indeed, we think that under certain circumstances, even very small differences in weighting should be subject to exacting judicial scrutiny, even if the discriminatory criterion does not independently trigger heightened scrutiny. Suppose, for example, that in an extremely close statewide election, the Florida courts ordered a recount using a liberal standard for discerning voter's intent in those precincts in which more than fifty percent of registered voters were over the age of sixty-five but ordered a more stringent standard elsewhere. Age discrimination ordinarily triggers no heightened scrutiny,[45] and the distinction drawn is at least rational. Perhaps it compensates for poor eyesight among older voters or serves to honor Ponce de Leon: in place of a literal fountain of youth, Florida affords some of its older voters (and their neighbors) a second chance at having their votes counted. Nevertheless, we think such a scheme raises serious equal protection and due process issues for two reasons: the fundamentality of the franchise and an almost intuitive sense that the rules of elections should be in place prior to any particular election and should be fairly immutable after the votes have been cast.

However one resolves this hypothetical and other real-world cases, the fact that particular judges or scholars can say

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43. We note that some were pushing in that direction even prior to *Bush v. Gore*. *See* Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105 (1999).

44. *See* U.S. CONST. amend. XXIV (prohibiting poll taxes in federal elections); 42 U.S.C. § 1971 (Supp. IV 1998) (prohibiting literacy tests).

45. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

where they would find judicially remediable illegalities would seem only to underscore Justice Frankfurter's more basic point. So long as these questions turn on nuanced judgment, he would say, judges become involved at their peril. Especially when—as in *Bush v. Gore* but also in less momentous cases—the intervention occurs after votes have been cast so that the substantive political payoff of any procedural regime can be clearly predicted, any attempt to ground judicial intervention in legal principle will be read as a political smokescreen. But should the troubling legacy of *Bush v. Gore* condemn all judicial oversight of politics?

We think this Frankfurterian objection probably goes too far, but only slightly. The objection goes too far because the Court has indeed managed to intervene successfully in the political arena on numerous occasions, most notably when it has created clear rules of engagement that appear to cabin the discretionary role of courts. Here, of course, the best example is the one-person, one-vote rule of apportionment, even if it too is capable of interpretive disagreement among judges.[46] Whether this applies to *Bush v. Gore* remains to be seen, since the claim can clearly be made that the equal protection arguments, and especially the grounds for the immediate cessation of further examination of ballots in Florida, were so thoroughly unconvincing as to make the case arguably *sui generis*.[47] Yet we grant the basic thrust of the objection. Once one acknowledges a role for courts in correcting failures of the political process, there is a temptation to find such failures everywhere. Our point here is not, as Ely's liberal critics have argued, that a line between substance and process cannot be sustained. Even if such a line can be plausibly drawn, the problem is that adherence to it depends entirely on the self-restraint of judges.

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46. For example, in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), the court split on whether the denominator for equal population should include all persons, all voters, or all citizens—each of which would have yielded a different calculation in determining whether there was an abridgment of minority voting rights. *See also* ISSACHAROFF, LAW OF DEMOCRACY, *supra* note 1, at 145–46.

47. For those keeping score at home, this is another area of mild disagreement. One of us attempts to place *Bush v. Gore* within an uncomfortable continuum of uncertain federal oversight of state political regulation. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD (2001), [hereinafter ISSACHAROFF, ELECTIONS]. The other thinks the case stands alone. *See* Dorf, *2000 Presidential Election*, *supra* note 3.

This brings us back to Ely. Ely saw in the Constitution—including, especially, most of the amendments enacted after the Bill of Rights—a rather strong commitment to democracy. Ely used that commitment as the guiding interpretive principle in constructing his account of constitutional rights. The Constitution does indeed contain a commitment to democracy, but that is not its only commitment. At the level of procedure—how odd that Ely would have overlooked the Constitution's procedural commitments!—the Constitution manifests a fundamental distrust of self-restraint.

The Constitution's well-known strategy is to divide power through a system of checks and balances. Legislation can only be enacted by a majority of each house of Congress and the President, or should the President veto a bill, by a two-thirds supermajority of each house. The President is Commander-in-Chief, but Congress declares war and appropriates funds to the military. The appointment of ambassadors, ministers, and judges requires Presidential nomination and Senate confirmation. And of course, no change in the fundamental rules can be accomplished without securing the consent of a three-fourths supermajority of the states.

The system of inter-branch checks nominally applies to the judiciary as well, but in practice, none of the principal means available to the political branches to check the courts is both effective and fully legitimate. The direct responses are largely ineffectual. In response to Supreme Court decisions invalidating acts of Congress, there is always the possibility of constitutional amendment, but the stringent supermajority rules make this strategy extraordinarily unlikely to succeed in any given instance. Moreover, the Court's recent decisions narrowly construing Congress's power to enforce the Fourteenth Amendment mean that Congress often cannot respond even to Supreme Court decisions *upholding* state action.[48]

Most of the other legislative responses to the courts suffer legitimacy defects. The most dramatic of these responses is the Senate's impeachment power. In Federalist 81, Alexander

48. *See* Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating Congressional effort to make states answerable in damages for discriminating against or failing to accommodate persons with disabilities); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (same, with respect to age discrimination); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act).

Hamilton wrote: "There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations."[49] Recall that Hamilton was one of the strongest Founding Era defenders of a powerful federal judiciary. His argument for judicial review in Federalists 78 and 80 was essentially lifted by John Marshall in *Marbury v. Madison*.[50] Yet Hamilton saw nothing wrong with the Senate impeaching judges whose substantive decisions encroached on the powers of the legislature. Indeed, he was arguing that the Senate's impeachment power would keep judicial overreaching in check.

In modern times, however, such a view is quite properly seen as a threat to the rule of law. The desegregation-era southern billboards calling for the impeachment of Earl Warren were, and are understood as, fundamentally inconsistent with judicial independence. Similarly, when President Clinton and Presidential Candidate Dole suggested that a federal district judge should resign because of a criminal procedure decision with which they disagreed, they were roundly condemned by the legal establishment.[51] Impeachment is now generally

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49. *See* THE FEDERALIST NO. 22 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

50. 5 U.S. (1 Cranch) 137 (1803).

51. The case in question was *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996), in which Federal District Court Judge Harold Baer excluded, on Fourth Amendment grounds, evidence of 80 pounds of cocaine and heroin found in the trunk of a car in Washington Heights. Soon after the ruling, 150 members of the House of Representatives signed a letter to President Clinton, urging him to call for the judge's resignation. Under fire from both the White House and Congressional Republicans, Judge Baer eventually reversed his ruling. *See, e.g.*, Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1 (quoting White House Press Secretary Mike McCurry intimating that the White House might seek Judge Baer's resignation; also quoting Senator Dole characterizing the President as "a candidate who appoints liberal judges who bend the laws to let drug dealers free"). In an extraordinary public statement, four members of the United States Court of Appeals for the Second Circuit, including the Chief Judge, issued a statement roundly criticizing the efforts to remove Judge Baer from the bench. Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1 (quoting Chief Judge Jon O. Newman and Senior Judges J. Edward Lumbard, Wilfred Feinberg, and James L. Oakes arguing that "[t]hese attacks do a grave disservice to the principle of an independent judiciary and, more significantly, mislead the public as to the role of judges in a constitutional democracy."). Even after the conclusion of the presidential campaign, Congressional Republicans continued the call for the impeachment of Baer and

understood to be available only for ethical improprieties or incompetence.[52]

Congress can also check the judiciary by adjusting various ground rules. Although Article III provides federal judges with life tenure and salary protection, Congress can control the existence and jurisdiction of the lower federal courts, can make exceptions to the Supreme Court's appellate jurisdiction, and can even adjust the number of Supreme Court Justices. In response to judicial decisions it regards as illegitimate, Congress could cut the courts' budgets for such "extras" as travel, computers, law clerks, or building maintenance. It could punish the Supreme Court by increasing its mandatory appellate jurisdiction. Perhaps Congress could even remove whole areas of law from the Court's supervision.[53]

The Constitution does not expressly foreclose these and other retaliatory devices. But even if one thought that such inter-branch warfare were an appropriate reaction to extreme judicial overreaching,[54] there will rarely be a consensus that such overreaching has occurred. *Bush v. Gore* is no exception. Would any Republicans in Congress vote to limit the courts' powers in response to that decision? Once punitive measures

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other liberal federal judges. Katharine Q. Seelye, *House G.O.P. Begins Listing a Few Judges to Impeach*, N.Y. TIMES, Mar. 14, 1997, at A24 (quoting House Majority Whip Tom Delay suggesting that Congress begin impeaching "activist" judges, including Harold Baer: "Congress has given up its responsibility to be a check on the court system, and we ought to start exercising it.").

52. *See generally* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2d ed. 2000).

53. The extent of Congress's power to gerrymander the Supreme Court's appellate jurisdiction has long been a deep puzzle, however. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 45 (2d ed. 1988) (describing as "troublesome" Congress's occasional efforts to withdraw Supreme Court jurisdiction over matters in which the Court was likely to invalidate Congressional action, such as the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–62). Although he took a generally broad view of Congress's power to control the courts' jurisdiction, even Henry Hart thought it would be unconstitutional for Congress to use its power over the Supreme Court's appellate jurisdiction to direct an outcome in a particular direction. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1402 (1953). For a rather narrow view of Congress's ability to alter the Supreme Court's appellate jurisdiction absent a compensating vesting of jurisdiction in the lower federal courts, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

54. For an ambivalent suggestion/warning that these tools can be used, see Larry D. Kramer, *The Supreme Court v. Balance of Power*, N.Y. TIMES, Mar. 3, 2001, at A13.

against the judiciary are deployed in response to extreme overreaching, we suspect that they would soon be used in response to simple disagreement, and judicial independence would be jeopardized. We regard the failure of President Roosevelt's Court-packing plan, despite widespread and deep dissatisfaction with the Court's rulings at the time, as an important victory for judicial independence that should not lightly be cast aside, even if one thinks, as we do, that the Supreme Court has lately granted inadequate deference to other constitutional actors.

The judicial appointments process does enable the President and the Senate to change the direction of Supreme Court decisions, but it has three limitations. First, although we agree with our colleague Henry Monaghan that the Senate is in principle entitled to reject a President's judicial nominee because of ideological differences as opposed to professional qualifications, Monaghan himself observed that the Senators themselves can rarely muster the will to do so.[55] Consequently, the appointments process gives the President a greater ability than the Senate to check the courts. Second, the appointments process operates only over the long run, and even then, Justices can time their retirements to the election cycle, thereby increasing the odds that they will be replaced by like-minded jurists. And third, the appointments process only works prospectively. Once confirmed, a Justice can gravely disappoint the hopes of his or her initial sponsors, as the examples of Justices Brennan, Blackmun, and Souter illustrate.

Finally, we come to an inherent limit most famously stressed by Hamilton in Federalist 78. Because the judiciary

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55. *See* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988). In this respect, Bruce Ackerman's proposal that "the Senate should refuse to confirm any [Supreme Court] nominations offered up by President Bush," Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48, is misguided. The Senate always has the power to refuse to confirm nominees to the high court. If, as Ackerman believes, the Justices really decided *Bush v. Gore* for self-consciously partisan reasons, refusal to confirm appointees is a woefully insufficient gesture. For such a blatant violation of the obligation to afford equal justice, the remedy should be impeachment and removal. Of course impeachment by the Republican-controlled House of Representatives is a practical impossibility, whereas only forty-one filibustering Senators are needed to block confirmation. Ackerman's suggestion is hardly illegitimate, but only because the Senate can always block a President's nominees if it takes the political heat for doing so. And, to return to our main point, it usually will be unable or unwilling to do so.

"has no influence over either the sword or the purse," Hamilton wrote, and "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments," it is "the least dangerous" branch. Yet ever since Alexander Bickel appropriated Hamilton's language for his own ironic purposes,[56] it is impossible to see these limitations as functioning as serious inter-branch checks. True, no Court would attempt to make war[57]—but courts have ordered the imposition of taxes to remedy constitutional violations.[58]

More broadly, even accepting that, in general, the courts have neither sword nor purse, their dependence on the other branches is at best an extremely modest external check. In response to *Worcester v. Georgia*,[59] Andrew Jackson reportedly quipped, "[w]ell, John Marshall has made his decision now let him enforce it,"[60] but to our ears, this statement sounds frighteningly similar to Joseph Stalin's response to a papal condemnation of his actions: "How many divisions has the Pope?"[61]

In modern times, the obligation of Presidents to carry out judicial orders would seem to follow *a fortiori* from their obligation to comply with such orders, an obligation that was settled by President Nixon's compliance with the Supreme Court's order to produce the Watergate tapes.[62] To suggest that executive officers could or should refuse to enforce judicial orders because they disagree with the reasoning underlying those orders is, given modern understandings, practically to propose anarchy if not treason.

Thus, at the end of the day, unless we are willing to forego modern notions of judicial independence, inter-branch checks can do relatively little to constrain courts determined to aggrandize their own powers. The key point is that process theory cannot offer an institutional arrangement that would serve

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56. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

57. *But cf.* Holmes v. United States, 391 U.S. 936 (1968) (Douglas, J., dissenting from the denial of certiorari) (proposing to decide the constitutionality of the military draft in the absence of a declaration of war).

58. *See, e.g.*, Jenkins v. Missouri, 672 F. Supp. 400, 411–12 (W.D. Mo. 1987) (citing Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 233 (1964)).

59. 31 U.S. (6 Pet.) 515 (1832).

60. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 518 (1996) (doubting the authenticity of the story).

61. George Weigel, *The Pope's Divisions*, WASH. POST, Sept. 22, 1996, Book World, at 1.

62. *See* United States v. Nixon, 418 U.S. 683 (1974).

as a check on judicial overreaching. Unlike the customary Madisonian design, which sets one institutional actor against another, a process theory which leaves courts as the final repository of power to determine when other institutional actors have exceeded *their* authority, would seem to provide for no meaningful restraint based on inter-institutional discourse and a corresponding institutional settlement of disputes.[63] The political process theory therefore provides a theory of why courts must be prepared to act as the final check against sclerosis or capture in the political arena, but it does little to illuminate what can be done if courts violate the trust involved in allowing them to intercede in what were once deemed political questions. Thus, it would seem that we must place principal reliance on self-restraint after all.

Or must we? We next suggest one way in which judicial self-restraint can be linked to an external, if not exactly an inter-branch, check.

II. THE CHECKING FUNCTION OF THE ACADEMY

Even if it is only an intra-branch check, political process theory, in our view, provides an important guiding principle for judicial intervention into the political process. It shows, fairly conclusively, why the political process cannot be thought to be always self-correcting and constitutional governance cannot leave all fundamental decisions to majoritarian political processes. But this theory is relatively silent about the need for a principled limitation on what judges themselves may do when called upon to step into the breach. What if the guardians become the malfeasants? What if they betray the independence from political expedience and callous self-serving ends that can condemn democratic politics? To whom are these judges accountable?

To be generous, this is the worry that plagued Justices Frankfurter and Harlan through their resistance to the Court's entry into the political thicket in the 1960s. The fear, as expressed by Justice Harlan, is that such political issues were "matters of local policy, on the wisdom of which the federal ju-

63. This is the critique often directed at the Hart & Sacks legal process model. On this reading, the role of the courts in breaking political logjams under political process theory incorporates the same defects.

diciary is neither permitted nor qualified to sit in judgment."[64] In the absence of constraints, courts would assume with greater and greater ease the authority to decide increasingly politically freighted questions:

> Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever.[65]

We are not so much concerned with the particulars of Harlan's indictment of the Court's apportionment cases—this being an area in which subsequent developments proved him clearly wrong—as with the appropriate response. As discussed above, we believe that process theory has given the best response to date to this concern and has provided an important limiting principle for courts tempted to stray from this limited intervention into politics.

But to assume that process theory provides a principled basis for judicial intervention when majoritarian democracy runs astray does not imply that judges acting under such a theory will never err. This risk is hardly confined to process theory. Under *any* theory of constitutional interpretation addressed exclusively to the courts, one must ask what happens if judges stray from the proper approach. In our view, the majority justices erred in *Bush v. Gore* because they failed even to consider whether their intervention was necessary. They did not apply process theory or anything like it. But even if they had, there would be no guarantee that they would have applied it correctly. As we have noted, once liberated to correct process failures, courts may be tempted to see such failures all around

64. Baker v. Carr, 369 U.S. 186, 337 (1962) (Harlan, J., dissenting).
65. Reynolds v. Sims, 377 U.S. 533, 621 (1964) (Harlan, J., dissenting).

them. When the Court errs in any of these ways, what should be the response?

Our incomplete answer focuses on the role of public exposure as a potential deterrent. We begin with a claim that risks accusations of self-delusion, but which may bear elements of truth nonetheless. The claim is simply that courts and the Supreme Court are accountable to public scrutiny, just as are all other public institutions. The further claim is that because federal courts are not elected, the scrutiny takes on a different form from the customary world of the press, intermediary institutions, and the electorate. The custom in this country is that judicial orders are accompanied by written opinions that set forth the legal propositions that guide the courts. Those opinions not only form the basis of the common law method, but also are the basis for critical commentary by informed communities of interest, including both the bar and the academy. As Justice Holmes reportedly observed, "[t]he Supreme Court is not the Court of Final Consideration . . . following every term, there's always the law reviews."[66]

The question for us is how such critical commentary can be effective. To take the obvious example, if one thinks that *Bush v. Gore* was an unjustified intervention into the ongoing events in Florida, how should one criticize the Court? One approach, adopted by a stunning number of our colleagues in the academy, is simply to denounce the Court for assuming "the job of propagandists, not judges," and to propound that such propaganda can only be explained by the Justices "acting as political proponents for candidate Bush, not as judges."[67]

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66. Curiously, this quotation appears in only one law review available electronically, and attributes the line to our colleague Louis Henkin. *See* Barbara K. Bucholtz, *Sticking To Business: A Review Of Business-Related Cases in the 1997–98 Supreme Court Term*, 34 TULSA L.J. 207, 207 (1999) (quoting Louis Henkin, Remarks at A Roundtable on Constitutionalism, Constitutional Rights and Changing Civil Society, Benjamin N. Cardozo School of Law (Nov. 19, 1998)). In private conversation with the authors, Henkin hesitatingly attributed the line to Holmes.

67. *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7, *available at 673 Law Professors Say*, http://www.the-rule-of-law.com/statement.html. The statement itself can be read as addressing only the Court's December 9 order staying the Florida recount. If so read, we have some sympathy for the view expressed, although not the attribution of illicit motives. Given that time was of the essence, the counting of ballots should not have qualified as irreparable harm warranting immediate relief, unless the Court knew with a high degree of confidence that the counting standard was unlawful. Even then, it is difficult to understand why Justice Scalia (or the other four Justices who voted for the stay)

This is a rather extraordinary statement. Certainly at no time in recent memory has there been such an angry breach between the professoriat and the Court. In conversations with colleagues at many institutions, we have been struck by the sense of dismay and disillusionment, even among those that had previously affected the mildly supercilious swagger of the intellectual class. Clearly, that disillusionment swells the ranks of those willing to sign such a statement of outrage. But beyond the evident anger, is such a statement effective? We suggest three reasons why it might not be.

A. Discerning Motives

The first difficulty with the law professors' letter concerns its confident ascription of motivation. The letter claims that the Court's conduct was not merely wrong, but so decisively outside the bounds of constitutional convention as to confirm that the Justices were acting as "political proponents" rather than judges, and that their motivation was to "act as political partisans."[68] We cannot help but notice the ease with which the signatories of this statement claim to understand the motivation of the multi-member Court and to assert that the partisan desires of the Justices, and only the partisan desires, explain the outcome of *Bush v. Gore*. Much ink has been spilled in the law reviews on the difficulty of intent-based assessments of such collective decisions.[69] But even beyond the intent issue,

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thought the public needed to be shielded from the results of such a recount. In any event, in what follows, we treat the law professors' statement as speaking to the totality of the Supreme Court's involvement in the 2000 Presidential election. The statement ran as an advertisement in the *New York Times* after the full decision on December 12. Moreover, the surrounding materials on the web site address the entirety of the Court's action, including posting the December 12 opinion as part of the offending package. And the statement continues to solicit signatures—some 100-plus having been added since the first publication—without any differentiation of what is being condemned.

68. *Id.*

69. *See, e.g.*, Paul Brest, *The Supreme Court 1975 Term Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; J. Morris Clark, *Legislative Motive and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983);

is it really the case that *Bush v. Gore* can only be explained on partisan grounds?

The argument that the Court's intervention into the Florida events can only be a product of partisan aims rests ultimately on the disjunction between *Bush v. Gore* and prior case law. At one level, this is an easy charge to make because the Court had never previously stepped into an electoral dispute to declare the winner of any election, let alone the presidency. But at another level, it is possible to fit *Bush v. Gore* within recent strands of constitutional jurisprudence which lend themselves to no easy claim of partisanship. In the pages of this (Colorado) forum, we do well to remember that Justice Kennedy, rumored to be the author of the *Bush v. Gore per curiam*,[70] authored *Romer v. Evans*,[71] another case that invokes the Equal Protection Clause, announces a wholly ambiguous and apparently *sui generis* standard of review, and finds a constitutional violation.

To be sure, *Romer* serves as "precedent" only for two of the Justices in the *Bush v. Gore* majority.[72] But other lines of doctrine might arguably account for the full five to four split itself. Thus, for example, Professor Karlan has situated *Bush v. Gore* within a line of equal protection cases beginning with *Shaw v. Reno* in which the Court has relaxed the customary standing and injury-in-fact requirements to regiment the scope of permissible state conduct in the political arena.[73] Alternatively, Professor Pildes has shown how the five key votes in *Bush v.*

Eric Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978); Barry A. Miller, Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, *and* Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725 (1977); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto / De Jure Distinction*, 86 YALE L.J. 317 (1976).

70. *See* Joan Biskupic, *Election Still Splits Court: Friction Over Justices' Ruling on Ballot Count in Florida Continues to Cause Hard Feelings, Draw Angry Letters, Even Spark Talk of At Least One Imminent Retirement at High Court*, USA TODAY, Jan. 22, 2001, at 1A.

71. 517 U.S. 620 (1996).

72. Only Justices O'Connor and Kennedy were in the majority in both *Bush v. Gore* and *Romer v. Evans*. Of course, the former does not cite the latter.

73. Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. (forthcoming 2001).

Gore were the same five who, in furtherance of some concept of order in the political process, joined together (on several occasions with Justice Breyer as an ally) to forge a prohibition on fusion candidacies, write-in ballots, and blanket primaries[74]—all threatened disruptions of the political status quo that did not have any discernible partisan implication.

To be sure, we think that the cases invoked by Karlan and Pildes are jurisprudentially flawed—as indeed do Karlan and Pildes. But more importantly, these cases do not have a clear partisan dimension and appear to correspond to doctrinal impulses distinct from rewarding a particular political party in the electoral arena. The cases raise the question whether the temptation at play in *Bush v. Gore* was not partisan politics but some other, perhaps equally misguided, rendition of what an appropriate political order should be. What if the motive was to preserve some conception of the proper functioning of American society that, while not properly the province of judicial determination, is distinct from a simple political conviction that Bush should be president? Then presumably, the claim that *Bush v. Gore* could only be understood as an example of partisan-inspired intervention into the political arena would fail.

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74. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001) (relying on Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); Burdick v. Takushi, 504 U.S. 428 (1992); Clinton v. Jones, 520 U.S. 681 (1997)). Oddly, this same theme is invoked by Judge Richard Posner in defense of the Court's actions in *Bush v. Gore:*

> [I]f I am right that the Florida Supreme Court may well have been violating the Constitution, and if, as seems likely, without the Court's intervention the deadlock would have mushroomed into a genuine crisis, the Court's refusal to intervene might have prompted the question: what exactly is the Supreme Court good for if it refuses to examine a likely constitutional error that if uncorrected will engender a national crisis? . . . *Bush v. Gore* may have done less harm to the nation by reducing the Supreme Court's prestige than it did good for the nation by averting a significant probability of a Presidential selection process that would have undermined the Presidency and embittered American politics far more than the decision itself did or is likely to do. Judges unwilling to sacrifice some of their prestige for the greater good of the nation might be thought selfish. . . . In a case so politically fraught, a bit of *Realpolitik* affecting only the ground of decision and not the decision itself should be tolerable to anyone who takes a pragmatic approach to adjudication. *Fiat justicia ruat caelum* is not a workable motto for the U.S. Supreme Court.

Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1.

B. Glass Houses

We next turn to a second, more general reason why the claim of partisan inspiration may be more complicated than would first appear and may sweep more broadly than just the Court's conduct. When all is said and done, we are fairly confident that the Court failed in its charge in *Bush v. Gore.* We have each argued our reasons for this view elsewhere,[75] and we proceed from that point of reference. It remains unlikely, however, that the Court perceived itself as acting for partisan reasons, even if it were doing so.

There is an extensive behavioral literature about selective integration of information and the tremendous temptation to integrate information in a self-serving fashion.[76] We can say with a fair degree of confidence that the Court certainly did not believe itself to be acting in a partisan manner. Given the extraordinary breach of judicial propriety that would be involved if a court were ever to decide an election dispute on a partisan basis, it is inconceivable that the Court would believe itself to be acting for such forbidden reasons. Beyond the improbability that the criticism would strike a responsive chord in the Court, we may further inquire about the likely response from the Court to the claim by the professoriat that the Justices had substituted partisan aims for jurisprudential ones. Already there are charges from respected liberal academics such as Professor Michelman,[77] claiming that in all the hours devoted to talking heads during the election imbroglio and in all the commentary afterwards, there was hardly any position taken by an academic commentator that could not have been predicted ex ante by the partisan predilections of that particular individual.

Undoubtedly, no academic saw him or herself as claiming the academic bully pulpit or trading on academic credentials

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75. *See supra* note 3 and sources cited therein. *See also* Michael C. Dorf, *Supreme Court Pulled a Bait and Switch*, L.A. TIMES, Dec. 14, 2000, at B11 (criticizing the Court for initially denying review of the equal protection issue only to rule on it later); Samuel Issacharoff, *The Court's Legacy For Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39 (criticizing the particular decision but finding a silver lining in the legal principles it established).

76. *See, e.g.*, Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); George Loewenstein et. al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1992).

77. *See* Frank I. Michelman, Bush v. Gore: *Suspicion, or* The New Prince, 68 U. CHI. L. REV. 679 (2001).

for purely partisan aims. But as psychological studies going back several decades have shown, partisans of different camps will integrate identical information in clearly divergent ways.[78] All too often, identical information is analyzed in distinctly self-interested ways by parties claiming in good faith to be examining the situation objectively. Anyone too busy to read this literature need only think about the racially polarized views of the O.J. Simpson case or, for that matter, about how throughout the Florida controversy, in viewing the identical events, Republicans and Democrats were each convinced that partisans of the other party were trying to steal the election.

The likelihood that the broadside against the Court will be seen as itself having partisan inspiration is compounded by the political gulf between the bench and the academy. As much as the law professor letter claims to draw signatories from "different political beliefs," there are at least grounds for skepticism. Over the past twenty years, the judiciary has become more conservative and more Republican—unlike the academy.[79] When law professors sign a letter claiming to be of different political beliefs, a simple question comes to mind: how many signatories voted for Bush?

We take on this fight not as a replay of the charge against the "nattering nabobs of negativism"[80] of days gone by. Instead, we believe that the professoriat plays an important role in providing critical and principled commentary on the misdeeds of the judiciary. If the judiciary may be tempted to cheat, and to jump to its partisan ends, so too might the professoriat be tempted to substitute plainly normative views for the cold blade of reason and analysis. Or, at the very least, there is the strong risk of that perception. Some may wish to argue that the Court in *Bush v. Gore* succumbed to the crassest of po-

78. The classic study is Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954). In this study, students from Princeton and Dartmouth were shown a film of a football game between the two schools and asked to assess the quality of the officiating. The assessments diverged along entirely predictable lines of school ties.

79. The best overview of this is provided in James Lindgren, *Measuring Diversity* (unpublished manuscript on file with authors). In Table 2, entitled Law Professors at top 100 schools in 1994–96, Lindgren's conclusions are summarized as "80% Dems & Leaning Dem, 13% Repubs & leaning Repub." Clearly, this is markedly more heavily Democratic than the electorate at-large.

80. We draw on William Safire's somewhat tortured formulation written for Vice President Spiro Agnew. WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 444–45 (3d ed. 1978).

litical aims and sought to advance a partisan agenda. But it is also possible that the Court acted improperly for a variety of reasons, some simply arising out of a misapprehension of the role that the judiciary should play relative to other actors.[81] It is exceedingly unlikely that the professors' broadside will engage the issue of judicial misconduct.

One can criticize an enterprise unsympathetically or sympathetically. The more radical offshoots of legal realism take the former course with respect to the work of the courts.[82] To say that legal doctrine is simply a mask for power politics is to attempt to delegitimize the institution from which the legal doctrine emanates. There is nothing necessarily wrong with this sort of move. Some institutions deserve to be delegitimized, and it is a matter of individual judgment which those institutions are. However, it should not be surprising that such unsympathetic critiques do not find a receptive audience within the institutions they criticize. The aim, presumably, is to expose the illegitimacy to the world at large, which then can do something about it.

Interestingly, the law professors' letter condemning the Court's performance in *Bush v. Gore* makes no sense if understood as coming from within the radical realist tradition. After all, if law is just politics, why is it surprising, much less appalling, that *Bush v. Gore* was political? Moreover, such a move would be radically inconsistent with the signatories' claim to have devoted their professional lives to the "rule of law." One cannot both valorize the rule of law and claim that it is but a smokescreen for crass political judgments. But even if the law professors' denunciation is best understood as falling outside the radical realist tradition, we doubt that it will be understood that way within the Court itself—at least by those Justices most clearly denounced. A judiciary that is more than a standard deviation to the right of the constitutional law professoriat has come to assume, we think, that criticism of the sort seen in the academics' letter is meant to be unsympathetic and delegitimating.

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81. This is the argument advanced in Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993).

82. *See* Mark G. Kelman, *Critical Legal Studies Symposium: Trashing*, 36 STAN. L. REV. 293 (1984).

It is not our place to tell other academics how to define or do their job, but those academics who take upon themselves what we have described here as a checking function would do well to engage in sympathetic criticism. By "sympathetic" we do not mean soft. Instead, sympathetic criticism takes seriously the enterprises in which the Court is engaged. So, for example, a sympathetic critic of the Court's federalism jurisprudence would argue why some doctrines are likely to be more effective than others, why some are more faithful to the structure and history of the Constitution, and so forth, rather than simply rejecting the entire federalism enterprise as serving the wrong values.

Sympathetic criticism is thus closely related to what Ronald Dworkin has called integrity,[83] although we disagree with much of Dworkin's allocation of institutional authority. Obligated to forge compromises and decide cases in a hurry, judges are ill-suited to play the role of Dworkin's omniscient jurist Hercules, but academics may be in a somewhat better position to ask how to rationalize whole areas of the law in ways that put it in a good light. We might even say that Ely's process theory was so successful because it was offered as a sympathetic interpretation of the Court's work.

The difficulty, of course, is that Ely offered a sympathetic interpretation of the work of the Warren Court. If academics want to continue to influence the Court, and thus perhaps to provide some constraint, we need to be willing to offer generally sympathetic interpretations of the Court's ongoing work. To reiterate, sympathetic does not mean uncritical. Ely's own work often criticizes particular decisions or doctrines.[84]

Whether the legal academy wants to play this checking function is an open question, and not only because of a political disjuncture between the academy and the courts. Although Chief Justice Rehnquist and Justice Scalia have occasionally expressed contempt for legal scholarship,[85] it was a liberal

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83. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1987).

84. *See, e.g.*, John Hart Ely, *Gerrymanders: The Good, The Bad, and The Ugly*, 50 STAN. L. REV. 607 (1998).

85. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68 (1996) (Rehnquist, C.J., for the Court) (chastising the dissent for disregarding "case law in favor of a theory cobbled together from law review articles"); Janklow v. Planned Parenthood, 517 U.S. 1174, 1180 (1996) (Scalia, J., dissenting from the denial of certiorari) (sarcastically describing the basis for a view expressed by Justice Stevens as

judge, Harry Edwards, who most famously chastised the legal academy for what he took to be its failure to engage the sorts of questions that courts face.[86] As one of the very targets of Judge Edwards's complaint acknowledged, there is "a well-documented disinclination of an increasing number of legal academics to write about the American legal system from the 'internal' perspective of the judge or practitioner and an inclination instead to write for an audience consisting primarily of other scholars whose lives are lived 'outside' the actual practice of law as conventionally defined."[87] Without casting aspersions on those of our academic colleagues who choose to see themselves as such outsiders, we would hope that enough of our number remain sufficiently engaged with the internal perspective to conduct a dialogue with the bench.

C. The Scope of Effective Criticism

Finally, and to return to *Bush v. Gore* and its critics, there is a longstanding argument that it takes a theory to beat a theory. Is it really possible that no matter what the conduct of the state election officials, there would be no warrant for federal court intervention? As noted above, we think not. Moreover, a blanket rule of non-justiciability would run contrary to a number of significant decisions, most notably the *Roe* line of cases in the Eleventh Circuit.[88] There are indeed situations in which federal courts may properly stop vote counts and in which, in extremis, the consequence of doing so might determine the winner of an election. To argue convincingly that a particular judicial intervention into the political arena is misguided thus requires a theory that distinguishes proper from improper intervention. Absent such a theory, the freighted charge of judicial partisanship rings hollow.

To be clear, we do not contend that there is anything wrong with academics having views or engaging in public debate. Far from it; as our invocation of Judge Edwards's charges

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resting on "no less weighty authority than a law review article by Michael C. Dorf").

86. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

87. Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2010–11 (1993).

88. *See* ISSACHAROFF, ELECTIONS, *supra* note 47, at 7–27.

was meant to show, we think the alternative is an unhealthy detachment from the law and policy worlds. By all means, academics should make arguments in public settings (not just law reviews) explaining why particular decisions (including, especially, *Bush v. Gore*) are wrong.

But are we entitled to any deference *in virtue of our station*? Formal statements of the academy purport to be requests for deference to expertise rather than just arguments. In one important respect, law is unlike physics or biochemistry: given the premises of democracy, legal argumentation must be accessible to the (interested) lay public. Accordingly, we think that our arguments and theories are entitled to just so much weight as they earn in public debate.[89] Their certification as the "official" view of the academy adds nothing—and may actually detract from their force.

CONCLUSION

Thus we return to our opening premise, which also serves as our conclusion. Process theory has to date served as the most complete account of the proper bases for judicial intervention into the political arena. For all the debates about its theoretical weaknesses, the events of *Bush v. Gore* return us to the original critique offered up by Frankfurter and Harlan: who will guard against the temptation for judges to become political actors once they become inured to the hazards of the political thicket? Our incomplete answer is that the academy must do its part to hold the Court accountable through reasoned criticism of judicial malfeasance. That engagement may not prove as immediately satisfying as an open condemnation. We suspect it may prove more effective.

89. Our colleague Jeremy Waldron paraphrases Judge Posner's provocative question as follows: "[I]s the fact that someone is a well-known philosopher a reason by itself for paying particular attention to his opinions on a real-world legal issue"? Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597, 623 (2000) (reviewing RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (2000)). We are suggesting that well-known legal scholars may fare no better than well-known philosophers.