Bush v. Gore *and More*

"The Constitutionalization of Democratic Politics" by Richard H. Pildes, in *Harvard Law Review* (Nov. 2004), Gannett House, 1511 Massachusetts Ave., Cambridge, Mass. 02138.

Marching at the head of a trend seen in judiciaries throughout the democratic world, the U.S. Supreme Court has increasingly intervened in the design and operation of elections, political parties, and other basic democratic institutions. *Bush v. Gore* is only the most famous example of a trend that Pildes, a professor of constitutional law at New York University, sees as terribly misguided.

One reason is that constitutional law isn't up to the complex job of designing a political system, Pildes says. It tends to put issues into intellectual cubbyholes: This is a free-speech case, that's an equal-protection case. As a result, the Court has done too much in some areas and not enough in others.

It's done too much "by inappropriately extending rights doctrines into the design of democratic institutions." Liberals aren't the only ones who seek such extensions. Conservatives have, among other things, pushed the Court to strike down campaign finance laws on First Amendment grounds.

Reshaping the political system according to abstract doctrines can have perverse effects. In *California Democratic Party v. Jones* (2000), for example, the Supreme Court, citing political parties' autonomy, ruled unconstitutional California's "blanket primary," which allowed voters to participate in different party primaries for different offices. Proponents of the blanket primary, adopted by Californians in an initiative four years earlier, had argued that it would produce more centrist candidates. To the Court, this smacked of "impermissible viewpoint discrimination," says Pildes. But making such choices is exactly what democratic politics is about. *Any* kind of primary will promote certain kinds of outcomes. In the end, the *Jones* ruling may prompt California and other states to adopt purely nonpartisan primaries, further weakening political parties, which is contrary to the Court's intent.

Pildes thinks that the Court is falling down on the job in the one area where it ought to be doing more: promoting political competition by aggressively scrutinizing laws that let officeholders and political parties entrench themselves in power. In *Timmons v. Twin Cities Area New Party* (1997), for example, it refused to overturn laws banning fusion candidacies (in which candidates appear on both major- and minor-party lines on the ballot). As a result, the New Party, founded in 1992 to exert leftward pressure on the Democratic Party by offering a second ballot line to candidates it supported, disbanded its national organization.

"Constitutional law must play a role in constraining partisan or incumbent self-entrenchment that inappropriately manipulates the ground rules of democracy," Pildes argues. Otherwise, the Court should stand aside and let competition determine the shape of the American political system.

The People's Conservative

"The Inventor of Modern Conservatism" by David Gelernter, in *The Weekly Standard* (Feb. 7, 2005), 1150 17th St., N.W., Ste. 505, Washington, D.C. 20036.

Historians usually name Edmund Burke, the 18th-century British philosopher and statesman, the founding father of modern conservatism. Gelernter, a professor of computer science at Yale University, casts his vote for Benjamin Disraeli (1804–81), the British prime minister who reinvented conservatism as "a mass movement."

"Dark, handsome, exotic-looking," a quick-witted ladies' man (but a devoted husband) and prolific novelist, born a Jew but baptized a Christian at 13, Disraeli entered politics in 1832 as an independent with radical tendencies. After four defeats, he finally won a seat in Par-