

## 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 initia-

tive 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 con-

servatism 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-

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liament as a Conservative in 1837. At the time, Sir Robert Peel was struggling to reconstitute the Conservative Party from the wreckage created by the Whigs' Reform Act of 1832, which extended the franchise to most middle-class men and thus undercut the power of the landowning elite, represented by the Tories. Peel's solution, according to Gelernter, was "a pale pastel Toryism, a watered-down Whiggism that attracted some Whigs but inspired no one."

Disraeli was a man of many contradictions, and one of them was an ability to harbor deep convictions while simultaneously playing the master political operator. When Peel decided in 1846 to bid for Whig votes by repealing the Corn Laws, the tariffs on imported grain that benefited landowners at the expense of city dwellers, Disraeli led the opposition, split the party, and brought Peel's government down. The very next year, he came out *against* such protectionist laws.

While the Conservatives would later form new governments, it would be 28 years before they again commanded a clear majority in the House of Commons. "That gave [Disraeli] the time he needed to refashion the wreckage into a new kind of party." Rather than continue with Peel's "watered-down Whiggism," he wanted to expand the party's base to include workers and others. He was an important force behind the Reform Act of 1867, which gave the vote to many city workers and small farmers.

In reshaping his party and conservatism, says Gelernter, Disraeli acted out of a belief "that the Conservative Party was the *national* party," that it must "care for the *whole nation*, for all classes," at a time when the Left was appealing to the working class to unite internationally. As Disraeli saw it, conservatives were no less progressive than liberals. But conservatives carried out change, in his words, "in deference to the manners, the customs, the laws and the traditions of a people," while liberals fol-



*Benjamin Disraeli was the "master political operator" of Victorian England.*

lowed "abstract principles, and arbitrary and general doctrines."

Disraeli served briefly as prime minister in 1868. Returned to office in 1874, when he was 70 years old, he pursued a strong foreign policy, bringing India and the Suez Canal under the direct authority of the Crown and restoring British prestige while helping to redraw the map of Europe at the Congress of Berlin in 1878. At home, new legislation dealing with health, housing, the environment, trade unions, and working conditions constituted, according to one biographer, "the biggest installment of social reform passed by any one government in the 19th century." In summarizing Disraeli's life, Lord Randolph Churchill wrote: "Failure, failure, failure, partial success, renewed failure, ultimate and complete triumph."

## *Liberalism's Last Prayer*

"Faith Full" by E. J. Dionne, Jr., "Fact Finders" by Jonathan Chait, "Not Much Left" by Martin Peretz, and "Structural Flaw" by John B. Judis, in *The New Republic* (Feb. 28, 2005), 1331 H St., N.W., Ste. 700, Washington, D.C. 20005.

Liberalism today is bereft of ideas and "dying." So asserts Martin Peretz, editor in chief of *The New Republic*, the magazine

that may well have introduced the term *liberal* in its modern sense into the American political lexicon nearly 90 years ago, and