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## Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany

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# Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany

Russell A. Miller\*

*"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."*<sup>1</sup>

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### I. Introduction

The pitched legal struggle for the United States Presidency that raged for thirty-six days after the November 7, 2000 election, culminating in the United States Supreme Court's five-to-four decision awarding Texas Governor George W. Bush the Presidency on December 12, 2000,<sup>2</sup> left me feeling deeply

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2. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (halting the recount ordered by the

dissatisfied. Completely independent of the result of the Court's intervention, a more generalized concern for a democratic process pursuant to which five judges could pick the President contrary to the will of a narrow but clear popular electoral majority has nagged me. In fact, because I was living in Germany at the time of the election and its legal aftermath, my concern was anything but rhetorical. German colleagues and friends routinely asked me, with motives ranging from sincere curiosity to piety, to explain what the Supreme Court had done and what it meant in the democratic scheme of things. These questions were justified. Indeed, what kind of democracy is that?<sup>3</sup>

This Article is my attempt to answer to that question. Along with Richard Pildes's query,<sup>4</sup> this piece is also conceived as a reply to Frank Michelman's questions: "Princes for judges. Is that what Americans want? Would that be keeping the faith?"<sup>5</sup> It is, as well, a consideration of the claim Mark Tushnet and Ran Hirschl pressed that *Bush v. Gore* manifests a "nascent phenomenon extending judicialization to the electoral arena itself."<sup>6</sup> Importantly, these are questions the relevance of which the recent election cases arising out of the 2002 New Jersey United States Senate race<sup>7</sup> and the 2003 California gubernatorial recall<sup>8</sup> kept alive. Fittingly, my analysis has led me to reflect on Germany's constitutional response to contested elections.<sup>9</sup> I begin by accepting the democratic dualism marked out by the

Florida Supreme Court based on a violation of Equal Protection principles).

3. Richard H. Pildes framed the question more eloquently by referring to the operating "normative ideals of democracy," the prevailing "cultural vision of democratic politics," and the sustaining "images of democracy." Richard H. Pildes, *Democracy and Disorder*, in *THE VOTE: BUSH, GORE AND THE SUPREME COURT* 140, 142 (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter *THE VOTE*].

4. See *supra* note 3 (discussing the Richard Pildes Article).

5. Frank I. Michelman, *Suspicion, or the New Prince*, in *THE VOTE*, *supra* note 3, at 123, 139.

6. Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 *Geo. L.J.* 113, 125 n.68 (2001).

7. *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1028 (N.J. 2002), *stay denied*, *Forrester v. New Jersey Democratic Party, Inc.*, 123 S. Ct. 67 (2002) (mem.). See generally David L. Evans, Jr., *N.J. Democratic Party, Inc. v. Samson*, 32 *STETSON L. REV.* 897 (2003).

8. See generally *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc).

9. As the title of this Article suggests, it will consider the phenomenon of judicialization as an explanation for the Supreme Court's decisive intervention in *Bush v. Gore*. Comparative analysis is a common method for contemplating the parameters and meaning of judicialization. See John Ferejohn, *Judicializing Politics, Politicizing Law*, *LAW & CONTEMP. PROBS.*, Summer 2002, at 41, 56 ("[Hypotheses explaining judicialization] can be evaluated with either domestic or comparative information.").

terms "law" and "politics."<sup>10</sup> I invoke these opposing concepts with the terms "judicialization"<sup>11</sup> and "populism."<sup>12</sup> I clarify these concepts and the dialectic they represent more fully in Part II. Roughly summarized, judicialization occurs when shifts in the balance of power between law and politics favor judicial institutions over representative and accountable institutions.<sup>13</sup> From this basic dualism, this Article argues that the Supreme Court's decision in *Bush v. Gore*<sup>14</sup> constitutes a dramatic and unique judicialization of American democracy. In Part III, this Article introduces the

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10. "Figuring out an acceptable relationship between law and politics has been one of the perennial preoccupations of both politicians and lawyers, and of political scientists and legal scholars as well." Christopher H. Schroeder, *Foreword: The Law of Politics*, LAW & CONTEMP. PROBS., Summer 2002, at 1, 1. Perhaps this relationship is what Frank Michelman meant when speaking of "two clashing commitments: constitutionalism and democracy." Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399, 399 (1998). Michelman defines the fault-line like this:

"Constitutionalism" appears to mean something like this: The containment of politics by a supervening law that stands beyond the reach of the politics it is meant to contain—a "law of lawmaking," we may call it—that controls which further laws can be made and by what procedures. "Democracy" appears to mean something like this: *Popular political self-government*—the people of a country deciding for themselves the contents of the laws that organize and regulate their political association.

*Id.* at 400 (emphasis added).

11. "[T]he infusion of judicial decision-making and of court-like procedures into political arenas where they did not previously reside." Torbjörn Vallinder, *When the Courts Go Marching In*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 13, 13 (C. Neal Tate & Torbjörn Vallinder eds., 1995); see also Ferejohn, *supra* note 9, at 41 (defining judicialization as the shift of power from legislatures to courts). See generally ON LAW, POLITICS, & JUDICIALIZATION (Martin Shapiro & Alec Stone Sweet eds., 2002) (discussing the historical growth and impact of judicialization globally). The term is interchangeable with "juristocracy", which presumes judicialization and the subsequent preeminence of the judiciary in policy-making. See Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment through Constitutionalization in Culturally Divided Politics*, 36 STAN. J. INT'L L. 73, 75 (2000) (noting that the definition of juristocracy assumes policy-making by the judiciary through judicial review); Frank I. Michelman, *Law's Republic*, 97 YALE L. J. 1493, 1500–01 (1988) (representing the concept of judicialization with the phrase "a government of the people by laws") (emphasis added).

12. Again, as per Michelman, a "government of the people by the people." Michelman, *supra* note 11, at 1500–01 (emphasis added).

13. In this sense, perhaps I am pathologically interested in "the normative aspects of the relationship between the courts and the [powers and responsibilities of] elected branches." Cornell W. Clayton, *The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)*, LAW & CONTEMP. PROBS., Summer 2002, at 69, 76 (citing Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001)). Admitting the disease, however, is the first step to being cured.

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

Supreme Court's *Bush v. Gore* decision and the German Federal Constitutional Court's decision in the *Hessen Wahlprüfung Entscheidung* (Hessen Election Review Case).<sup>15</sup> Because these cases involved the review of contested elections and the respective courts decided them only a few months apart, they serve as parallel constitutional moments for examining this constitutional development in a comparative context.<sup>16</sup> In both cases, the courts preferred judicial over alternative, if not constitutionally mandated, political mechanisms for resolving the respective election challenges. The context of these cases, in the sphere of what this article terms "pure politics,"<sup>17</sup> is of unique democratic import and serves as the crux of the Article's thesis. It is here, with respect to this distinct sphere of the democratic process, in which the forces of judicialization and populism come directly and most perilously into conflict: The judiciary acted in both of these cases to seize the very apparatus that led to the selection of a candidate or the success of a political party in a specific election. Here we are concerned with a far more meaningful imposition on populist values than that posed by judicial review of legislation which is widely treated as the *sine qua non* of judicialization,<sup>18</sup> or even other "indirect" forms of judicial engagement of the "law

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15. Entscheidungen Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 103, 111 (F.R.G.). Also published at 14 NEUE JURISTISCHE WOCHENSCHRIFT 1048 (2001) and available online as BVerfG, 2 BvF 1/00 vom 08.02.2001, Para.-Nr. (1 - 123), at [http://www.bverfg.de/antacheidungen/frames/fs20010208\\_2bvff000100](http://www.bverfg.de/antacheidungen/frames/fs20010208_2bvff000100) (last visited Nov. 15, 2003) (on file with the Washington and Lee Law Review). In this Article, the case will be referred to as the *Hessen Election Review Case*.

16. Bruce Ackerman proposes consideration of "constitutional moments" when thinking about constitutional transformation and development. See, e.g., 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 4-8 (1998) (positing that there are specific periods of time in American history that have uniquely defined the scope and role of the Constitution in American politics); Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63, 84-87 (Sanford Levinson ed., 1995) (arguing that true change in constitutional legitimacy and meaning comes not through amendment but through popular constitutional upheaval).

17. See Elizabeth Garrett, *Leaving the Decision to Congress*, in THE VOTE, *supra* note 3, at 38, 39 (explaining that the 2000 election crisis was best suited to resolution in the legislature or public forum because of its uniquely political nature).

18. See generally CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001) (approaching judicial review as the driving force of contemporary judicialization of society); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 9 (1990) (arguing that law has become uniquely political, especially when addressing political acts like legislation). Snowiss states:

Judicial exposition of the law of the Constitution, operating as part of a legal check on unconstitutional legislation, generates a policy-making that, unlike that of ordinary law, conflicts with the requirements of democracy and opens judicial review to the charges of judicial supremacy and invasion of the legislative sphere . . . what Professor Bickel has called constitutional law's "counter-majoritarian" difficulty.

of democracy."<sup>19</sup> Whatever case might be made for the propriety, necessity, or inherence of a judicial role in "the political thicket"<sup>20</sup> in these contexts, it is altogether another thing to have the courts settling elections, and in so doing, picking the people's representatives. In Part IV, this Article argues, based on a consideration of the distinct constitutional traditions out of which these cases arose, that the shift the Supreme Court accomplished signals a radical, ideologically driven convergence with Germany's comprehensively judicialized treatment of pure politics.

## II. *The Judicialization of Pure Politics*

### A. *Judicialization of Society*

Gunther Teubner and others<sup>21</sup> have expertly chronicled and critiqued the most recent "thrust"<sup>22</sup> in the unfolding judicialization of society that is the

*Id.* (footnote omitted).

19. The title of the excellent casebook on the subject of the "complex interaction between democratic politics and the formal institutions of the state." SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY I* (1998). Issacharoff, Karlan, and Pildes consider the expanding engagement of the judiciary with the structural institutions of democracy in their casebook, including, inter alia: "the right to participate," "the reapportionment revolution," "the role of political parties," "redistricting and representation," "money and politics," and "alternative democratic structures." *Id.* at xii–xv; see also Ferejohn, *supra* note 9, at 61 (documenting the increased interaction between counts and the institution of the democratic process). Ferejohn notes:

Recent legal regulation of democratic practices has focused on developing constitutional doctrines that permit courts to reshape political practices. Apportionment, access to the ballot box, campaign finance, and other modes of regulating political life, long shielded from judicial scrutiny by the political question doctrine, came under increasing pressure in the post-World War II period.

*Id.*

20. Justice Frankfurter warned against the Court wandering deeper into the "political thicket" in dealing with legislative redistricting. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

21. See generally ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE I* (2000); John Ferejohn & Pasquale Pasquino, *Rule of Democracy and Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* (Jose Maria Maravall & Adam Przeworski eds., 2002) (documenting the tension between the political and judicial processes and arguing for a distinction between democracy and law).

22. Habermas depicted the history of juridification as four great thrusts: the bourgeois state, the bourgeois constitutional state, the democratic constitutional state, and the social welfare state. See Jürgen Habermas, *Law as Medium and Law as Institution*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 203, 205–209 (Gunther Teubner ed., 1985) (analyzing the growth of judicialization in Europe).

consequence of the modern welfare state.<sup>23</sup> Building upon the work of Habermas, Teubner has traced the legal "colonization of the life world,"<sup>24</sup> the law's capture of social relationships behind the restive expansion of the acutely regulated modern welfare state.<sup>25</sup> Along with the "materialization" aspect of judicialization, which he finds dominant in this most recent thrust and therefore of preeminent consideration,<sup>26</sup> Teubner also admits the significance of various (though lesser) aspects of judicialization, including: the proliferation of law,<sup>27</sup> the judicial expropriation of conflict,<sup>28</sup> and the depoliticization of society.<sup>29</sup>

The ascendancy of legal institutions, particularly the judiciary but also more broadly "the medium of legal discourse,"<sup>30</sup> is an inevitable and obvious consequence of judicialization in each of these forms.<sup>31</sup> For example, in

23. See, e.g., Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions, in JURIDIFICATION OF SOCIAL SPHERES 3* (Gunther Teubner ed., 1987) (outlining the opposition to the growth of judicialization and offering ways to deal with the current expansion).

24. *Id.* at 24 (quoting Jürgen Habermas, *Law as Medium and Law as Institution, in DILEMMAS OF LAW IN THE WELFARE STATE 203, 203* (Gunther Teubner ed., 1986)).

25. See *id.* at 11 ("Firstly, the wider historical context of juridification becomes clear, [sic] [in] the context of the development of the modern welfare state.").

26. See *id.* at 14 ("The trend towards juridification in welfare states, which expresses itself in the materialization of formal law characterizes large numbers of legal control interventions in areas classically regarded as self-regulating in the world of industry and labor." (citation omitted)).

27. See *id.* at 7 ("Juridification processes should in fact be analysed in terms of the specific conditions of the modern social state, 'the interventionist state.' This at the same time excludes the law-centered and lawyer-centered perspective of the 'flood of norms' school, which concentrates exclusively on the legal material as such.").

28. See *id.* at 7–8 ("Sociologists of law describe juridification as a process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes.").

29. See *id.* at 9 ("Yet on the other [hand], the repressive character of juridification tends to depoliticize social conflicts by drastically limiting the labor unions' possibilities of militant action." (citation omitted)).

30. Alec Stone Sweet, *Constitutional Politics in France and Germany, in ON LAW, POLITICS, & JUDICIALIZATION 184, 187* (Martin Shapiro & Alec Stone Sweet eds., 2002).

31. Habermas noted this tendency as central to the *juridification* process: "[Juridification] heightens the problem of the separation of power, i.e. of the relation between the functionally differentiated state institutions of legislature, executive and judiciary. Within the constitutional state this problem was posed only in the relationship between executive and judiciary." Habermas, *supra* note 22, at 207. See generally JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS (2d ed. 1992); Helmuth Schulze-Fielitz, *Rechtsprechende Gewalt (Artikel 92) in GRUNDGESETZ KOMMENTAR, BAND III, [The Courts (Article 92)] 353, 362* (Horst Dreier ed., 2000) ("Der ubiquitäre Prozeß der Verrechtlichung in der modernen Industriegesellschaft hat gleichzeitig zu einer Justizialisierung nicht nur des staatlichen Handelns, sondern aller gesellschaftlichen Beziehungen geführt . . . ." [The ubiquitous process of juridification in the modern industrial society has, at the same time, led to a judicialization, not only in matters of the state, but in all



describing the judicialization of the family and education in the context of the modern welfare state, Habermas pleaded for the dejudicialization of these spheres, in which a dysfunctional (that is, inappropriately situated) judiciary intervenes to formalize family and educational conflicts and interactions.<sup>32</sup> Commentators now broadly accept the overweening role of the judiciary in a judicialized society<sup>33</sup> as our reality,<sup>34</sup> and commentary on judicialization

social relationships . . ."] (author's translation)).

32. See Habermas, *supra* note 22, at 216–20 (arguing that the judiciary should not attempt to resolve family or educational disputes because of their personal nature). Habermas explains:

Nevertheless, the intuition that underlies the paradoxical proposal to de-judicialize juridified family conflict is instructive: the juridification of communicatively structured areas of action ought not to go beyond the enforcement of principles of the rule of law; beyond the legal institutionalization of its *external* construction, be it of the family or of the school.

*Id.* at 217–18. Habermas also notes: "Controlled by the judiciary and the administration, the school changes imperceptibly into a welfare institution that organizes and distributes schooling as a social benefit." *Id.* at 219.

33. Vallinder, *supra* note 11, at 13 ("[T]he infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously reside.").

34. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (accepting as a premise that judges have adopted judicialization of social spheres as a reality); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinder eds., 1995) (discussing the growth of global judicialization through cooperative analysis); SWEET, *supra* note 21 (positing that parliamentary supremacy has died at the hands of constitutional interpretation in the courts); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing that the Constitution is in the province of all and that the courts should no longer be treated as the final arbiter of its meaning). This Article's use of the word "our" in this context is meant to be broadly, even globally inclusive, and neither patronizing nor Western/Northern-centric. The contributors to Tate and Vallinder's text:

[F]ind judicialization present or developing in a wide variety of places. Though not all are treated here, Canada, France, Germany, India, Israel, Italy, Malta, the Philippines, Sweden, the United States, Latin America, the former USSR, and the European Community (at least) all appear to be settings in which the expansion of judicial power/judicialization of politics is relevant, even controversial.

C. Neal Tate, *Why the Expansion of Judicial Power*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 27, 27 (C. Neal Tate & Torbjörn Vallinder eds., 1995). Alec Stone Sweet has at least confirmed the judicialization of European polities as well as the supra-national European Union: "In a word, European policy-making has been judicialized." SWEET, *supra* note 21, at 1; see also Ferejohn, *supra* note 9, at 41 (explaining the evidence indicating a shift of power to the courts). Ferejohn states:

Since World War II, there has been a profound shift in power away from legislatures and toward courts and other legal institutions around the world. This shift, which has been called "judicialization" has become more or less global in its reach, as evidenced by the fact that it is as marked in Europe, and especially recently in Eastern Europe, as it is in the United States.

*Id.* (footnote omitted); see also Hirschl, *supra* note 11, at 73 ("Over the past two decades the constitutionalization of rights, the establishment of judicial review, and the judicialization of

typically focuses on the appropriate division of policy-making authority within the modern welfare state.<sup>35</sup> That is to say, the concern is with the judicialization of politics or the shift of policy-making authority from the political (populist) branches (that is, the legislative and, in some systems, the executive) to the unaccountable, unrepresentative judiciary.<sup>36</sup>

### B. Judicialization and the Decline of Populism

It is here, on the preference given to or the power taken by the judiciary with respect to the distribution of policy-making authority among the competing branches of the modern welfare state that this Article concentrates. It is a perspective Teubner invites;<sup>37</sup> his term "depoliticization" can be read to

politics have achieved a worldwide expansion of judicial power."); Herbert Jacob, *Introduction, in COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 1, 1 (Herbert Jacob et al. eds., 1996) ("In this book we seek to demonstrate that the intersection of law, courts, and politics is not a uniquely American phenomenon. It is ubiquitous.").

35. See generally ON LAW, POLITICS, & JUDICIALIZATION, *supra* note 11 (discussing, through a series of essays, the proper role of judicial review and its impact on social legislation and policy).

36. See Clayton, *supra* note 13, at 76 (reviewing the current state of the scholarship on judicialization and its almost exclusive focus on how power has been given to the judiciary and through what means). Clayton argues that the normative question about the role of the judiciary in a democracy diminishes in importance when one confronts the empirical evidence that the "courts use their power to reinforce, rather than to thwart, the political agenda of the elected branches." *Id.* He joins John Ferejohn in arguing that the more relevant analysis would consider "the structural-institutional features permitting judicial policy-making generally." *Id.* at 74; see also SWEET, *supra* note 21, at 1 ("Parliamentary supremacy, understood by most students of European politics to be a constitutive principle of European politics, has lost its vitality."); Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415, 421 (2000) ("[Critics of judicialization] question the legitimacy of transferring important policy-making prerogatives from elected and accountable politicians, parliaments, and other majoritarian decision-making bodies to the judiciary."). Habermas and Teubner were well aware of this tension above the surface but were compelled to delve deeper, to the roots of the matter. See generally Habermas, *supra* note 22 (discussing judicialization as it pertains to family and education); Teubner, *supra* note 23 (analyzing judicialization within the broader social welfare state and offering ways to deal with its impact).

37. Teubner, *supra* note 23, at 27 (arguing that a consequentialist approach to the problem of juridification is appropriate). Teubner explains:

There is no "solution" of the regulatory trilemma in sight. As already stated, the phenomenon of juridification as such is a partial aspect of societal evolution and cannot therefore be effectively reversed by delegalization strategies. The only approaches which can be taken seriously are those which seek to deal with the dysfunctional consequences resulting from juridification.

*Id.* Perhaps more significantly, neither Habermas nor Teubner portrays *juridification* as

indicate the tension between judicialization and popularism.<sup>38</sup> Stated another way, judicialization describes both the outward-looking colonization of the "lifeworld" by the law and the judiciary's accompanying rise to supremacy among the law's institutions.<sup>39</sup> This characterization necessarily raises the questions of legitimacy and of the vitality of the democratic gains achieved in Habermas's third historic thrust of judicialization (the democratic constitutional state), gains which he specifically associated with popularist mechanisms like "parliamentary will-formation and public discussion."<sup>40</sup>

Judicialization may pose such a threat to democracy's inherently popularist values when it involves the judiciary overstepping the positive and perhaps even necessary, popularist delimitation in order to assert its inherently "counter-majoritarian"<sup>41</sup> power where the majority *should* prevail.<sup>42</sup> Even worse, in terms of antipopularist consequences, is judicial involvement in which the minority should prevail based on justice or rights<sup>43</sup> and the majority would have reached that result of its own accord without judicial involvement.<sup>44</sup> Finally, judicial involvement must also be characterized as

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exclusively unprogressive in spite of their call to reclaim the "lifeworld" for a more deliberative, more democratic social existence. See Habermas, *supra* note 22, at 218 ("The place of law as a medium must be replaced by procedures for settling conflicts that are appropriate to the structures of action oriented towards communication—discursive processes of will-formation and consensus-oriented procedures of negotiation and decision-making."); Teubner, *supra* note 23, at 39 ("The necessary consequence of the social phenomenon of self-reference and self-proclamation is the adjustment of legal theory and legal practice to such concepts."). The claim that juridification has had some progressive impact is based on Habermas's and Teubner's concession that the third of Habermas's historic thrusts of juridification involved the "democratization of the constitutionalized power of the state," significantly in the interest of labor, among others. Teubner, *supra* note 23, at 11; see also Habermas, *supra* note 22, at 207 ("Constitutionalized state power was democratized and the citizens . . . were provided with rights of political participation.").

38. Teubner, *supra* note 23, at 9–10.

39. The model depends on the principle of separation of powers. "Mainstream comparative politics scholarship often portrays the expansion of judicial power through judicial review as analogous to the separation of powers between the executive, legislative, and judicial branches because of its tendency to 'diffuse power and add veto points.'" Hirschl, *supra* note 11, at 76 (footnote omitted) (quoting R. Kent Weaver & Bert A. Rockman, *Assessing the Effects of Institutions, in* DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 1, 32 (R. Kent Weaver & Bert A. Rockman eds., 1993)).

40. Habermas, *supra* note 22, at 207.

41. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

42. Judicialization, in the form of judicial review, often serves the important democratic goal of protecting the rights of minorities against the caprice of the majority.

43. See JOHN RAWLS, *A THEORY OF JUSTICE* 51 (1999) ("[T]here is even greater injustice if these already disadvantaged are also arbitrarily treated in particular cases where the rules would give them some security.").

44. In fact, some argue that the judiciary seldom reaches much beyond the interests of the

antipopularist when it reaches the "wrong" result while the majority would have reached a similarly (or at least not dramatically different) "wrong" result. These points form the antipopularist core of judicialization. Beyond the questions concerned with *which interests* should prevail on any given issue, lies the question of *which institution* should act to reach the result: the people through their elected and accountable representatives or the unaccountable and unrepresentative judiciary?<sup>45</sup> Judicialization favors the latter.

### C. The Judicialization of Pure Politics

What then is at stake when the law of democracy falls prey to judicialization? Accepting the definition Issacharoff and others provided that the law of democracy refers to the "pre-existing laws, rules, and institutions" that govern the process of collective decision-making in a democratic political order,<sup>46</sup> the judicialization of this sphere raises the possibility "that in the name of liberal constitutionalism, active judicial review may destroy the most important political right that citizens in liberal democracies possess: the right to participation and self-government."<sup>47</sup> Issacharoff and others explain:

When courts become central players [in the democratic process itself] that will raise some of the most difficult questions about institutional role in all of constitutional theory. On the other hand, courts will become embroiled in partisan, political struggles, not over specific enactments, but over the very political framework through which the electorate exercises its political will.<sup>48</sup>

Judicialization of the law of democracy, understood as an antipopularist process, is a threat because it inappropriately elevates an unaccountable and unrepresentative institution above accountable and representative institutions in the policy-making process.<sup>49</sup> Judicial appropriation of the "democratic

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prevailing majority, and when it does so, it is considerably less effective than the political branches.

45. The answer to the second question draws upon Tushnet's analysis, which concludes that both systems are flawed. See generally TUSHNET, *supra* note 34.

46. ISSACHAROFF ET AL., *supra* note 19, at 1.

47. *Id.* at 2.

48. *Id.*

49. See *id.* (debating the role of the courts in the political process and the need to prevent the courts from taking too great a role in pure political issues). See generally TUSHNET, *supra* note 34.

institutional design,"<sup>50</sup> which establishes the parameters of the electorate's political role and identity, compounds the dangers inherent in this maneuver.

The judicialization of pure politics raises even more urgent questions. Pure politics refers to actual, outcome specific electoral decision-making as opposed to the outcome-neutral engagement of the structures of democracy. Elizabeth Garrett noted the essence of pure politics and the gravity of the Supreme Court's intrusion thereupon in *Bush v. Gore*:

[A]lthough the Court has entered the political thicket frequently . . . [U]sually, the Court's ruling benefits large groups of candidates or political actors. For example, in the campaign finance area, the Court's jurisprudence arguably benefits incumbents relative to challengers, or the independently wealthy relative to middle- and lower-income Americans. The blanket primary decision favors more extreme candidates over more moderate ones. *Rarely does the Court actually know that its decision will result in the immediate election of one or the other individual who is a party in the case.*<sup>51</sup>

Sanford Levinson also draws out the meaning of pure politics in his reaction to the Court's decision in *Bush v. Gore*, stressing:

[O]ne must realize exactly how far removed from any Rawlsian "veil of ignorance" the Court was in December 2000. They not only knew the identity of the specific presidential candidate who would benefit from their decisions; they also knew the outcome of the elections with regard to the House of Representatives and the Senate of the United States.<sup>52</sup>

This context, not the question of how democratic institutions should be structured but rather what the outcome of the implementation of those structures should be, is a sphere of pure politics in which courts should never tread. The legitimacy of carving such a preserve for the realm of pure politics, perhaps limited to the act of electing representatives in a republic or participating in a device of direct democracy (plebiscite or referendum), is actually bolstered because both constitutional traditions under review here at one time took the principle of parliamentary self-regulation for granted.<sup>53</sup>

The judiciary should defer to pure politics, a concept that borrows from the title of Hans Kelsen's work on a "Pure Theory of the Law,"<sup>54</sup> even at a time

50. ISSACHAROFF ET AL., *supra* note 19, at 20.

51. Garrett, *supra* note 17, at 44 (emphasis added).

52. Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, LAW & CONTEMP. PROBS., Summer 2002, at 7, 22.

53. See *infra* Part IV (arguing that the shift evidenced in *Bush v. Gore* is judicialization taken too far).

54. See generally HANS KELSEN, REINE RECHTSLEHRE (2d ed. 1960) (outlining "pure

when the judicialization of politics has led to ever greater judicial involvement in the democratic process. Pure politics should remain a final preserve of traditional democratic principles, namely, that the policy-making (in the case of direct democracy) or the representative and accountable policy-making institutions (in the case of representative democracy) should retain a close political connection to the people themselves.<sup>55</sup> Whether a mechanism like the American political question doctrine can adequately protect the realm of pure politics seems doubtful in light of the judicializing tendencies revealed in the cases examined in this Article. It was, after all, precisely into the realm of pure politics that the U.S. Supreme Court and the German Federal Constitutional Court so willingly tread.

### *III. Two Election Disputes, Two Victories for Judicialization*

The Supreme Court's decision in *Bush v. Gore* and the Federal Constitutional Court's *Hessen Election Review Case* represent significant victories for judicialization over populist alternatives. In both cases the judicial branch, and especially the politically self-conscious but nonetheless unrepresentative and unaccountable Supreme and Constitutional Courts, emerged as the superior mechanism over and against parliamentary populist methods for resolving election disputes. The Supreme Court's intervention thwarted the constitutional and statutory models for the resolution of the Electoral College conflict that would have favored Congress. The model the Hessen Constitution provided and that the Federal Constitutional Court repudiated also sought to ensure a dominant role for the parliament in the matter of election review.

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theory of law"); Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44 (1941), reprinted in HANS KELSEN, *WHAT IS JUSTICE?* 266 (1957). Kelsen sought to identify the "nature of law itself" by "preclude[ing] from the cognition of positive law all elements foreign thereto." HANS KELSEN, *WHAT IS JUSTICE?* 266 (1957). The concept of pure politics would concede the over-simplicity of claims for a strict separation of powers, while insisting that, even in the face of the intermingling of governance in the modern welfare state, there remain some acts that are purely political. See Ferejohn, *supra* note 9, at 47 (noting the acceptance of the complexity theory of separation of powers) To paraphrase Kelsen: The cognition of a realm of political action purely distinct from all elements of judicial and administrative action. KELSEN, *supra*, at 266. Defining the contours of pure politics is a matter for further consideration.

55. See Ferejohn, *supra* note 9, at 45 (arguing that there are substantive areas of law and legislation that are best left to the branches of government most accountable to the people).

A. *The Supreme Court's Decision in Bush v. Gore*

1. *Background*

The 2000 U.S. presidential election failed to produce an undisputed winner by the end of Election Day, November 7, 2000.<sup>56</sup> The outcome of the election was then, in turns, handed over to and sometimes seized by a variety of institutional actors, leading to its ultimate resolution by the U.S. Supreme Court in a five-to-four decision issued in the late hours of December 12, 2000.<sup>57</sup> In a divisive election in which more than ninety-six million Americans voted,<sup>58</sup> much was actually quite clear in the first days following the election. After a dramatic night of slipshod forecasting from the television networks and a roller coaster exchange of zero-hour concessions and retractions,<sup>59</sup> it was clear that the Democratic candidate, Vice President Al Gore, had won a slight but secure victory over Republican George W. Bush in the nationwide popular vote.<sup>60</sup> The states that Vice President Gore had safely taken, or in which he looked certain to emerge as winner after less intensely contested election review proceedings, provided him with a solid lead in the Electoral College count.<sup>61</sup>

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56. See Richard L. Banke, *Outcome Hangs on Contested Florida Vote, in 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS* 1, 1–3 (Correspondents of THE N.Y. TIMES eds., 2001) [hereinafter *36 Days*] (noting that Florida's popular vote was unresolved the day after the polls closed and that a count of the overseas ballots might be necessary to determine a winner).

57. See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (resolving the Equal Protection challenge to the manual ballot recount ordered by the Florida Supreme Court). The Court issued its opinion at 10:00 p.m. Linda Greenhouse, *A Deeply Divided Court Ends the Struggle, in 36 DAYS, supra* note 56, at 304.

58. Richard L. Berke, *Bush Leads Gore by 1,784 Votes as Recount Begins, in 36 DAYS, supra* note 56, at 8.

59. During their election-night coverage, the national television networks declared the decisive states of Michigan and Florida for Vice President Gore at 8:00 p.m. They retreated from that projection a few hours later, labeling Florida too close to call at 10:00 p.m. At 2:00 a.m. on the morning of November 8, 2001, the networks completed their reversal of the initial projection and declared Florida for Bush. At 4:00 a.m., with the uncertainty in Florida prevailing, the networks finally conceded that the result in Florida would have to wait for the official tally. See HOWARD GILLMAN, *THE VOTES THAT COUNTED 18–20* (2001) (outlining the media's failed attempts to declare a winner of the presidential race of 2000).

60. Ultimately, the margin of Vice President Gore's victory in the nationwide popular vote would be 539,897 votes. See *id.* at 170 (documenting the final 2000 election popular vote differential); *A Popular Vote Edge for Gore, in 36 DAYS, supra* note 56, at 319 (same).

61. The dispute over the outcome of the 2000 election came to focus on Florida in spite of the fact that Electoral College slates of Oregon, Iowa, and New Mexico would be awarded on the basis of extremely narrow popular election margins. See *A Popular Vote Edge for Gore, supra* note 60, at 319; GILLMAN, *supra* note 59, at 19 (observing that it was assumed that Florida would determine the 2000 election even with close votes in other states). New Mexico's

The only thing that was not resolved turned out to be the determinative outcome of the popular election in Florida.<sup>62</sup> The winner of the Florida popular election, awarded Florida's slate of twenty-five Electoral College votes, would have the Electoral College majority and would be the President Elect.<sup>63</sup> Over the first few days following the election, Governor Bush's hair's-breadth lead of 1,784 votes in Florida dwindled to an improbable 229 votes after the conclusion of the statewide, automatic recounts necessitated by the narrowness of the election result.<sup>64</sup>

Vice President Gore was emboldened by the extremely narrow result of the Florida election and, no doubt to some degree, by the wave of concerns

Electoral College slate, for example, was ultimately awarded to Vice President Gore on the basis of a 366-vote victory in the state, nearly 200 votes fewer than the final difference in Governor Bush's favor in Florida. *A Popular Vote for Gore*, *supra* note 60, at 319. The reason the battle centered on Florida was, of course, Florida's bounteous and decisive Electoral College slate of 25 votes, a total of six votes more than Oregon (seven), Iowa (seven) and New Mexico (five) combined. *Id.* With only Florida in dispute, Vice President Gore's 266 Electoral College votes led Governor George W. Bush's 246. *Id.*

62. See Berke, *supra* note 58, at 1–3 (documenting the undetermined Florida popular vote at the close of November 7, 2000).

63. See generally U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."). Two Senators represent Florida like all other states. U.S. CONST., art. I, § 3, cl. 1. Based on the 1990 census, Florida's population of 13,003,362 was represented at the time of the 2000 Presidential Election by twenty-three Representatives to the U.S. Congress. U.S. Census Bureau, *Apportionment and Apportionment Population Based on the 1990 Census* (November 13, 2003), available at <http://www.census.gov/population/censusdata/apportionment/table-a.pdf>. There are a total of 435 Representatives and 100 Senators (538 total Electors including three for the District of Columbia, U.S. CONST. amend. XXIII, § 1) making 270 Electoral College votes the bare majority necessary for an Electoral College victory. See Robin Toner, *The Electoral College Rears its Ugly Head, in 36 DAYS*, *supra* note 56, at 24 ("The Electoral College is, essentially, 538 people who elect the president and vice president, based on each state's popular vote.").

64. See FLA. STAT. § 102.141(6) (2001) (old version at FLA. STAT. ANN. § 102.141(4) (2000)) (necessitating a recount). The old statute read:

If the unofficial returns reflect that a candidate for any office was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure.

*Id.*; see also *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 73–76 (2000) (per curiam) (discussing the automatic recount and the events immediately following it); GILLMAN, *supra* note 59, at 20–21 (recounting the events of the election night and the actions of Bush and Gore in the days following the election).



about alleged improprieties and irregularities in the Florida election.<sup>65</sup> He then "exercised his statutory right to submit written requests for manual recounts to the canvassing board of any county."<sup>66</sup> The Vice President's request for manual recounts in four traditionally Democratic counties (Volusia, Palm Beach, Broward, and Miami-Dade) cast the tangled web of legal proceedings that led to the Supreme Court's decision.

Vice President Gore fired the first legal volley, challenging Florida Secretary of State Katherine Harris's authority over the county canvassing boards, which would conduct a manual recount and submit final, countywide tallies.<sup>67</sup> Secretary Harris had interpreted Florida's election law as imposing a strict seven-day deadline for the completion and submission of the results of the canvassing boards' manual recount efforts.<sup>68</sup> The trial court upheld Harris's discretion to enforce the seven-day deadline and the objectivity she employed in that enforcement, on the most significant points, leading Vice President Gore to appeal to the Florida Supreme Court.<sup>69</sup> Meanwhile, the counties from which

65. See Don Van Natta Jr. & Dana Canedy, *The Case of the "Butterfly" Ballot*, in 36 DAYS, *supra* note 56, at 10 (discussing how the confusing layout of the Palm Beach County "butterfly" ballot may have led a significant number of voters who intended to vote for Vice President Gore to cast their vote for Reform Party Candidate Patrick Buchanan); see also GILLMAN, *supra* note 59, at 21 (describing the "butterfly" votes); David Gonzalez, *African-Americans Seek Inquiry into Florida Vote*, in 36 DAYS, *supra* note 56, at 36–38 (addressing a range of complaints from minority voters including improperly prepared voter registration lists, understaffed polling stations, disproportionate negative impact in voting technology errors, and suspicious police road-blocks near polling stations in minority neighborhoods).

66. *Palm Beach County Canvassing Bd.*, 531 U.S. at 73–74 (citing FLA. STAT. ANN. § 102.166 (2000)).

67. Katherine Harris had also served as the cochair of Governor Bush's Florida campaign committee. GILLMAN, *supra* note 59, at 31.

68. See *Palm Beach County Canvassing Bd.*, 531 U.S. at 74 ("The Florida Circuit Court ruled that the statutory 7-day deadline was mandatory, but that Volusia [county] board could amend its return at a later date. The court further ruled that the Secretary . . . could exercise her discretion in deciding whether to include the late amended returns."). The statute read:

The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following a primary election and by 5 p.m. on the 11th day following the general election. If the returns are not received by the department by the time specified, such returns shall be ignored and the results on file at that time shall be certified by the department.

FLA. STAT. ANN. § 102.118(1)–(3) (2002) (old version at FLA. STAT. § 102.112(1) (2000)); see also GILLMAN, *supra* note 59, at 34 ("[Harris] began to warn those who were becoming hopeful about recounts that state law required counties to submit their returns no later than one week after the election.").

69. See *Palm Beach County Canvassing Bd.*, 531 U.S. at 74 (discussing the procedural posture leading up to the case); see also *McDermott v. Harris*, No. CV 00-2700 (Leon County

Vice President Gore had requested a manual recount had either abandoned the effort (Miami-Dade and Palm Beach), sent the results of a partial manual recount in time to meet the deadline (Broward, though resolved to continue the full manual recount after the deadline had passed), or met the deadline after a full manual recount by a mere five minutes (Volusia).<sup>70</sup> Vindicated by the trial court and in keeping with her announced intention to enforce the seven-day deadline for submitting returns, the Secretary certified the election results as they stood on November 14, 2000, with Governor Bush leading by 300 votes.<sup>71</sup> On Vice President Gore's appeal, the Florida Supreme Court accepted jurisdiction over the case and immediately vacated the Secretary of State's certification of the state's vote.<sup>72</sup> The Florida Supreme Court sought to resolve two distinct issues: (1) whether the manual recounts proposed by the canvassing boards, especially to the degree that they included "undervotes" in the new tally,<sup>73</sup> were consistent with the election law's provision for manual recounts as a result of an "error in vote tabulation;"<sup>74</sup> and (2) how to resolve conflicts in the Florida election law regarding the timing of the conduct and submission of manual recounts as well as the Secretary of State's discretion to

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Cir. Ct. filed November 14, 2000), *overruled by Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), in *BUSH v. GORE: THE COURT CASES AND THE COMMENTARY* 19, 23 (E.J. Dionne Jr. & William Kristol eds., 2001) (upholding the Secretary's discretionary authority to enforce the deadline, with the exception that she not pre-judge the certification of any potentially late-filed returns from county canvassing boards).

70. GILLMAN, *supra* note 59, at 42–43.

71. *Tracking Bush's Lead*, in *36 DAYS*, *supra* note 56, at 174.

72. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 74–75 (2000) (*per curiam*).

73. See GILLMAN, *supra* note 59, at 24–25. Gillman wrote:

Undervotes referred to ballots in which a machine did not register a vote for any candidate for a particular office. One reason for this result would be that the voter chose not to express a preference for a particular office; but it was also possible that a voter attempted to convey a preference but did not have that preference registered because of some feature, limitation, or error associated with the vote-counting machines. When a machine failed to register a vote that someone attempted to cast, then that result might be more properly thought of as "undercounting" rather than undervoting; at least this was the emergent view within the Gore campaign.

*Id.*

74. *Palm Beach County Canvassing Bd.*, 531 U.S. at 75; see *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1229 (Fla. 2000), *vacated sub nom. by Palm Beach County Canvassing Bd.*, 531 U.S. at 78 ("The issue in dispute here is the meaning of the phrase 'error in the vote tabulation' found in section 102.166(5)."); see also *FLA. STAT. ANN. § 102.166(5)* (2000) (current version at *FLA. STAT. § 102.166(5)* (2002)) (describing the procedure for manual recounting).

accept or reject late-filed election returns (presumably delayed by a manual recount).<sup>75</sup>

In a decision issued on November 21, 2000, the court unanimously concluded, with respect to the first issue, that the legislative phrase "error in the vote tabulation" justified the manual recounts the canvassing boards proposed.<sup>76</sup> As to the second issue, the court concluded that, among the potentially conflicting provisions regarding the timing of the certification of amended returns and the Secretary of State's discretion to accept or reject late-filed returns, Florida law neither precluded the late-filing of returns nor empowered the Secretary to reject late-filed returns except when "the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process."<sup>77</sup> In reaching this conclusion about the controlling interpretation to give the relevant Florida statutory provisions, the Florida Supreme Court declared that a resolve to honor and give force to "the will of the voters" guided its decision.<sup>78</sup> The court also considered the preeminence the Florida Constitution gives (of course, in the court's interpretation of the constitution) to the right to vote.<sup>79</sup> The Florida Supreme Court, in light of its ruling, invoked its equitable powers and ordered all amended election returns, following any manual recount, to be submitted to and accepted by the Secretary by November 26, 2000.<sup>80</sup>

75. *Palm Beach County Canvassing Bd.*, 531 U.S. at 75; see *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1230 ("Having concluded that the county canvassing boards have the authority to order countywide manual recounts, we must now determine whether the Commission must accept a return after the seven-day deadline . . ."); see also FLA. STAT. ANN. § 102.166 (2000) (current version at FLA. STAT. § 102.166 (2002)); § 102.111 (2000) (current version at FLA. STAT. ANN. § 102.111 (2002)) (describing the procedure for recounts in Florida); FLA. STAT. ANN. § 102.112 (2000) (current version at FLA. STAT. ANN. § 102.112 (2002)) (detailing the deadlines for submission of county returns to the Secretary of State).

76. See *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1230 (concluding that "the county canvassing boards have the authority to order countywide manual recounts").

77. *Id.* at 1239.

78. *Id.* at 1228.

79. See *id.* at 1239 ("Because the right to vote is the preeminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited."); see, e.g., FLA. CONST. art. I, § 1 ("All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.").

80. *Palm Beach County Canvassing Bd.*, 772 So. 2d 1220, 1240 (Fla. 2000), *vacated sub nom. by Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam). The Court noted that November 26, 2000 was a Sunday and extended the deadline for submission and acceptance to Monday, November 27, 2000, in the event that the Secretary's office was not open on November 26. *Id.*

Governor Bush appealed the Florida Supreme Court's decision to the U.S. Supreme Court<sup>81</sup> while the manual recounts Vice President Gore sought resumed in various manifestations and under a range of standards.<sup>82</sup> The magnitude and complexity of the manual recount, further hampered by orchestrated protests,<sup>83</sup> caused the process to bog down. Nonetheless, the lurching recount effort produced hundreds of new votes for Vice President Gore. Hours after the November 26, 2000 deadline that the Florida Supreme Court had imposed, Secretary of State Harris certified Florida's vote for a second time and for a second time declared Governor Bush the recipient of Florida's Electoral College slate, this time with an enhanced lead of 537 votes.<sup>84</sup>

The U.S. Supreme Court, after an expedited briefing and hearing schedule, issued a unanimous per curiam decision on December 4, 2000.<sup>85</sup> The Court took pains to recognize its usual deference to state courts when confronted with those courts' interpretation of state statutes.<sup>86</sup> The Court

81. The Supreme Court granted Governor Bush's petition for writ of certiorari on November 24, 2000. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004 (2000).

82. A literal carnival of controversies accompanied the recount effort as the campaigns seemed to fight over every single vote. See Rick Bragg, *A Recount Moment: Eating the Chads*, in 36 DAYS, *supra* note 56, at 105 (giving an account of the clash between Republicans and Democrats involving the rough handling of the ballots); Dexter Filkins & Dana Canedy, *Chaotic Protest Influences Miami-Dade's Decision*, in 36 DAYS, *supra* note 56, at 134–35 (discussing the protest orchestrated by Governor Bush's campaign that contributed to Miami-Dade County's decision to give up the recount effort); David Firestone, *Overseas Ballots Boost Bush Lead to 930*, in 36 DAYS, *supra* note 56, at 101 (discussing the dispute over discarding some oversea absentee ballots because of postmark dispute); Richard Pérez-Pena, *Military Ballots Merit a Review*, *Lieberman Says*, in 36 DAYS, *supra* note 56, at 111 (discussing the disqualification of 39% of the absentee ballots from overseas and Lieberman's statement that Florida election officials should reconsider those rejections); Richard Pérez-Pena, *Rancor Prevails in Debate Over Military Votes*, in 36 DAYS, *supra* note 56, at 101 (describing the dispute over letting unpostmarked ballots in that most of the oversea absentee ballots came from military personnel); Don Van Natta Jr., *Republicans Blast New Rules About Dimpled Chads*, in 36 DAYS, *supra* note 56, at 107 (detailing the change in recounting standards and the Republican dissent).

83. See Filkins & Canedy, *supra* note 82, at 134–35 (relating the public pressure that influenced some of the Canvassing Board members to stop the counting).

84. Todd S. Purdum, *Bush Wins Again But Gore Won't Concede*, in 36 DAYS, *supra* note 56, at 165; see GILLMAN, *supra* note 59, at 77 (discussing how Secretary Harris refused to accept Palm Beach County's incomplete and untimely submitted hand recount, which at the time of the deadline had netted Vice President Gore an additional 192 votes); see also Don Van Natta Jr. & Rick Bragg, *How Harris Rejected Palm Beach Recount*, in 36 DAYS, *supra* note 56, at 171 (recounting how the Secretary refused Palm Beach County's recount even after an appeal for an extension with only 800 to 1000 votes left to count).

85. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam).

86. See *id.* at 76 ("As a general rule, this Court defers to a state court's interpretation of a state statute.").

stressed, however, that in the present case the Florida Supreme Court had undertaken an interpretation of a Florida election statute that the Florida legislature had enacted under the authority given it "by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution."<sup>87</sup> Furthermore, the Court noted that the Florida election statute implicated the "safe harbor" provisions of the federal Electoral Count Act of 1887, which guarantees the integrity and acceptance of any state's Electoral College slate that is determined, pursuant to pre-existing laws and procedures, at least six days prior to the meeting of the Electoral College.<sup>88</sup> The Court implied that these federal interests justified its review of the matter. More importantly, the Court suggested that these federal constitutional and statutory links must bear on the interpretation the Florida courts (in this case, the Florida Supreme Court) give the Florida election statute on matters associated with presidential elections.<sup>89</sup> The Court, however, felt itself unable to review the Florida Supreme Court's opinion in light of these federal interests because the basis of its decision regarding these questions lacked the requisite certainty and precision.<sup>90</sup> The Court vacated the Florida Supreme Court's decision and remanded the matter back to that court giving it specific instructions to: (1) clarify the degree to which the Florida Constitution circumscribes the authority the U.S. Constitution extended to the Florida legislature; and (2) to clarify the significance of the federal "safe harbor" provision to the Florida election scheme.<sup>91</sup> As if conscious of the compounding political tension, the

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87. *Id.*

88. 3 U.S.C. § 5 (2000). The statute provides:

If any State shall have provided, by laws 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 of such State, 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, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

*Id.*

89. *See Palm Beach County Canvassing Bd.*, 531 U.S. at 76–77 ("There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl.2, 'circumscribe the Legislative power.'").

90. *See id.* at 78 (citing *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 555 (1940)) ("[C]onsiderable uncertainty" is a "sufficient reason for [the Court] to decline . . . to review the federal questions asserted to be present.").

91. *See id.* (stating that the Court is "unclear as to the extent to which the Florida Supreme

U.S. Supreme Court's decision was remarkable for its restraint and unanimity. Still, its decision to take the case at all was alarming to most observers<sup>92</sup> and hinted at the grave temptation towards the judicialization of this purely political dispute facing the Court.

While the U.S. Supreme Court was fashioning its unanimous, seemingly hands-off decision in *Bush v. Palm Beach County Canvassing Board*,<sup>93</sup> another (and what would prove the final) round of legal proceedings was already underway. The day after Secretary Harris's certification of the Florida vote on November 26, 2000, Vice President Gore sued in a Florida trial court in Leon County to contest the newly (re)certified election results.<sup>94</sup> Vice President Gore asserted in his complaint that, in certifying the election returns, Secretary Harris included illegal votes and wrongly rejected a number of legal votes, both in sufficient numbers to change or place in doubt the result of the election.<sup>95</sup> The trial court, after a frenetic hearing in the case, issued its decision denying the Vice President's claims for relief on the same day the U.S. Supreme Court issued its opinion in *Bush v. Palm Beach County Canvassing Board*.<sup>96</sup> The

Court saw the Florida Constitution as circumscribing the legislature's authority . . . [and] as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5").

92. See GILLMAN, *supra* note 59, at 74 ("And so it was a surprise to most observers when on Friday, November 24, just one day after Thanksgiving and two days before the recount deadline, the justices of the Supreme Court announced that they were stepping into the fray."); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in *THE VOTE*, *supra* note 3, at 184, 193 ("The Court's decision to grant certiorari was very surprising to most observers, and it was a highly significant event."); Cass R. Sunstein, *Order Without Law*, in *THE VOTE*, *supra* note 3, at 205, 209 ("At the time, most observers thought it exceedingly unlikely that the Court would agree to hear the case."). *But see* GILLMAN, *supra* note 59, at 72 ("Some former law clerks to conservative justices indicated that they would not be surprised if the Court took the case. U.C. Berkeley law professor John C. Yoo, a former law clerk for Justice Clarence Thomas, said that it would be best for the country if the Supreme Court got involved, since 'the political process is starting to break down.'").

93. The Court's decision was only *seemingly* hands-off, when one considers that "all actors subsequently behaved as if the Court had actually decided that Article II of the Constitution or the Electoral Count Act would be violated were the state courts to rely on the state constitution or make 'new law.'" Pildes, *supra* note 3, at 163. In this sense, the only possibility for minimizing the Supreme Court's impact in such a highly strung context, would have been total disengagement.

94. Florida election law provided for two phases of review, the *protest* phase (carried out in the period prior to the certification of the returns) and the *contest* phase (carried out in the period after the certification of the returns). See FLA. STAT. ANN. § 102.166 (2000) (current version at FLA. STAT. ANN. § 102.166 (2002)) (describing the protest phase in detailing the procedures for recounts); FLA. STAT. ANN. § 102.168 (2000) (current version at FLA. STAT. § 102.168 (2002)) (detailing the contest phase of the election).

95. FLA. STAT. § 102.168(3)(c) (2000) (current version at FLA. STAT. § 102.168(3)(c) (2002)).

96. *Gore v. Harris*, No. CV-00-2808 (Leon County Cir. Ct. filed Dec. 4, 2000) *overruled*

trial court, relying on a remarkably strict (and to some, an obviously flawed) standard of proof,<sup>97</sup> found that Vice President Gore had failed to present "credible statistical evidence [or any other] competent substantial evidence to establish by a preponderance a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission."<sup>98</sup> The Vice President had filed his appeal even before the trial court had read its ruling to conclusion.<sup>99</sup> Meanwhile, legal maneuvers from Governor Bush's campaign on other fronts shadowed the challenge the Vice President's campaign pursued.<sup>100</sup>

On December 8, 2000, four days after the trial court's ruling on Vice President Gore's contest of the election, the Florida Supreme Court reversed the trial court, although without managing the unanimity that had characterized the decisions of both the Florida and U.S. Supreme Court decisions in the first round of litigation. Entering the fourth week of a wearying and uncharted election process, with the time required for a recount effort on a grand scale quickly running up against the December 12 "safe harbor" deadline and the December 18 vote of the Electoral College, the political tension finally seemed

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by *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), in *BUSH v. GORE: THE COURT CASES AND THE COMMENTARY* 53 (E.J. Dionne Jr. & William Kristol eds., 2001).

97. See GILLMAN *supra* note 59, at 102 ("If there was one saving grace for the Gore team it was that [Judge] Sauls seemed to base his decision on a fundamental legal mistake—and to many commentators, an obvious legal mistake."). The trial court had based its decision, in part, on a decision of the Florida Supreme Court handed down under a now superseded version of Florida's election law.

98. See *Gore v. Harris*, 772 So. 2d 1243, 1255 (Fla. 2000) (discussing trial court's handling of the case).

99. GILLMAN, *supra* note 59, at 102.

100. It is only possible with the benefit of hindsight to relegate these proceedings to a reference in a footnote. Any one of the election cases being heard in a number of federal and state courts could have been the deciding volley and all, but for the limits imposed by space and time, merit analysis. See *generally* Siegel v. Lepore, 234 F.3d 1163 (11th Cir. 2000) (en banc) (rejecting the Republican candidate's request for preliminary injunctive relief because plaintiffs had not shown irreparable injury); Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000) (en banc) (rejecting the Bush campaign's 14th Amendment challenges to the practice of conducting manual recounts in Florida). There were also the formal legal challenges from the Gore campaign to nearly 25,000 absentee ballots from Seminole and Martin Counties, to which a sizeable number (4,000) of improper or irregular ballots had been added. The trial courts rejected the claims. See *Jacobs v. Seminole County Canvassing Bd.*, No. 00-2816, 2000 WL 1793429, at \*4 (Fla. Cir. Ct. Dec. 8, 2000) (finding that the information listed as necessary for a request for an absentee ballot is directory, not mandatory and allowing the absentee ballots to be counted); *Taylor v. Martin County Canvassing Bd.*, No. CV 00-2850, 2000 WL 1793409, at \*5 (Fla. Cir. Ct. Dec. 8, 2000) (concluding that the irregularities in the absentee ballots did not affect the sanctity of the ballot or the integrity of the election).

to crack the objective facade of the judiciary. The four-judge "Democratic"<sup>101</sup> majority issued a per curiam opinion in which it ruled that Vice President Gore was entitled to a manual recount of the undervotes in the counties that he had targeted.<sup>102</sup> But, the majority further reasoned, the ultimate relief required a counting of the legal votes contained in the undervotes in all counties where the undervote had not yet been subjected to manual tabulation.<sup>103</sup> The majority interpreted Florida's election legislation and case law as placing a controlling emphasis on discerning and giving force to the "will" and "intent" of the voters,<sup>104</sup> thereby justifying a low standard for ordering the recount and a broad standard for defining a "legal vote." The majority, however, could not justify limiting the manual count of undervotes to the counties Vice President Gore targeted. At least implying a concern for equality and fairness issues, the court agreed with Governor Bush's argument that "because this is a statewide election, statewide remedies would be called for."<sup>105</sup> The majority ordered the matter back to the trial court and charged it with fashioning, under the broadest possible discretion and jurisdictional reach, "any relief appropriate under the circumstances."<sup>106</sup>

Chief Justice Wells most fiercely represented the dissenters on the Florida Supreme Court, declaring: "I could not more strongly disagree with [the majority's] decision to reverse and prolong this judicial process."<sup>107</sup> Chief Justice Well's dissent contained a disparate litany of concerns and complaints: that the majority based its opinion on newly minted precedent not applicable to this election, that the majority's opinion would withstand the constitutional scrutiny of the U.S. Supreme Court, and that the state lacked the time to pursue the sweeping recount ordered by the majority.<sup>108</sup> Chief Justice Wells also

101. The majority consisted of justices appointed by Florida's previous Democratic governors while the three-judge minority consisted of justices appointed by Florida's Republican Governor Jeb Bush.

102. *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000) (per curiam), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

103. *Id.*

104. *See id.* at 1253 ("This essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving elections disputes."); *see also id.* at 1256 ("This Court has repeatedly held, in accordance with the statutory law of this State, that so long as the voter's intent may be discerned from the ballot, the vote constitutes a 'legal vote' that should be counted.").

105. *Id.* at 1261.

106. *Id.* at 1262 (improperly citing FLA. STAT. § 102.168(5) when § 102.168(8) was the proper legislative provision).

107. *Id.* at 1263 (Wells, C.J., dissenting).

108. *Id.* at 1262-70 (Wells, C.J., dissenting).



expressed regret for the majority's failure to exercise judicial restraint, which he regarded as a controlling principle in political disputes of the kind which the court faced in this case. "At common law," the Chief Justice urged, "[T]here was no right to contest in court any public election, because such a contest is political in nature and therefore outside the judicial power."<sup>109</sup> Recognizing that the legislature had nonetheless provided for judicial intervention in election matters, Chief Justice Wells nonetheless passionately insisted that: "Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters—not judges."<sup>110</sup> It was a warning, though perhaps itself politicized, that shed light on the rarefied sphere of pure politics.

Over the dissenters' objections, the court returned the case to the trial court and a statewide manual recount of Florida's now month-old presidential election results began.<sup>111</sup> It was to be a short-lived effort. In the early afternoon of December 9, 2000, the day following the Florida Supreme Court's ruling, the U.S. Supreme Court granted Governor Bush's application for a stay of the recount and agreed to review the Florida Supreme Court's decision.<sup>112</sup>

## 2. *The Relevant Law*

Through the Florida Supreme Court's second decision in the matter (*Gore v. Harris*), the controlling law had predominantly consisted of Florida's constitution and statutes, reflecting the local nature of the conflict, in spite of its national implications. This consequence resulted from the United States Constitution's clear delegation of the matter (election of the Electoral College) to the legislatures of the states. Article II of the Constitution provides that: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."<sup>113</sup>

Nonetheless, in *Bush v. Palm Beach County Canvassing Board*, the Supreme Court's first decision in the matter, the Supreme Court signaled that the Article II delegation did not remove all federal constitutional (and presumably statutory) meaning from the presidential election process conducted

109. *Id.* (Wells, C.J., dissenting).

110. *Id.* at 1264 (Wells, C.J., dissenting).

111. See GILLMAN, *supra* note 59, at 119 (discussing how Judge Lewis set the deadlines for the recount and limited objections to in-writing only).

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

113. U.S. CONST. art. II, § 1, cl. 2.

by the states.<sup>114</sup> True to this warning, both Article II and especially the Equal Protection Clause of the Fourteenth Amendment<sup>115</sup> were featured in the Supreme Court's decision in Governor Bush's appeal of the Florida Supreme Court's decision in *Gore v. Harris*. Federal statutes, especially the Electoral Count Act of 1887, also played a role, particularly because they established the timeline for the election and Electoral College process. Federal law, for example, sets the date for the election (of the Electors) as well as the date for the casting of the Electoral College votes.<sup>116</sup> More important to the case as it arose to the U.S. Supreme Court after the Florida Supreme Court's *Gore v. Harris* decision was the "safe harbor" deadline of the Electoral Count Act of 1887, which provides for the uncontested receipt of a state's Electoral College slate.<sup>117</sup>

Although these federal constitutional and statutory norms ultimately controlled the resolution of the legal battle between Vice President Gore and Governor Bush, the U.S. Supreme Court, in its consideration of the appeal from the Florida Supreme Court's decision in *Gore v. Harris*, was principally concerned with the application of federal norms to the Florida Supreme Court's interpretation of the state's election laws. For this reason, a summary of the law relevant to the Supreme Court's decision in *Bush v. Gore* also requires consideration of the Florida constitutional and statutory law implicated by the election dispute. In its interpretation of Florida election law, the Florida Supreme Court gave signal importance to Article I, Section 1 of the Florida Constitution, which states that "[a]ll political power is inherent in the people."<sup>118</sup> The Florida Supreme Court also found that Article IV,

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114. *Palm Beach County Canvassing Bd.*, 531 U.S. at 76–77. The Court wrote:

[I]n the case of a law enacted by a state legislature applicable not only to elections of state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2 of the U.S. Constitution.

*Id.*

115. See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

116. See U.S. CONST. art. II, § 1, cl. 3 ("The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

117. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (stating that the December 12 deadline had come and no constitutionally sufficient recount procedure had begun); 3 U.S.C. § 5 (2002) (outlining "Safe Harbor" deadline).

118. FLA. CONST. art I, § 1.

Section 1 of the Florida Constitution should control its interpretation of the state's election laws, stating that:

All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot, shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.<sup>119</sup>

Of the numerous, interlocking rules set forth in the Florida Election Code for the regulation of elections,<sup>120</sup> only Florida's statutory provision for "contesting" the certified election results related to the Supreme Court's decision in *Bush v. Gore*.<sup>121</sup> An aggrieved candidate or elector could challenge a county's certification of the election results in court, alleging among other grounds, the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election."<sup>122</sup> The trial court in which the party filed the contest receives sweeping powers to "fashion such orders as [it] deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances."<sup>123</sup> The issue for the Supreme Court was, in particular, the Florida Supreme Court's interpretation of the statutory terms: (1) "legal votes," which, based on a survey of other Florida election statutes as well as Florida and extra-jurisdictional case law, the Florida Supreme Court defined as any "clear indication of the intent of the voter";<sup>124</sup> and (2) "rejection [of a number of legal votes]," which, again based on a survey of Florida and extra-jurisdictional case law, the Florida Supreme Court defined as "a voting machine fail[ing] to count a ballot, which has been executed in substantial compliance with applicable voting requirements and reflects, the clear intent of the voter to express a definite choice."<sup>125</sup>

119. FLA. CONST. art. VI, § 1.

120. FLA. STAT. ANN. §§ 97-106 (West 2002).

121. See *Gore*, 531 U.S. at 101 (explaining *Gore's* use of the contesting statute).

122. FLA. STAT. ANN. § 102.168(3)(c) (West 2002).

123. FLA. STAT. § 102.168(8) (2000).

124. *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla. 2000), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

125. *Id.*

### 3. *The Supreme Court's Decision in Bush v. Gore*

The decision the U.S. Supreme Court issued on December 12, 2000 is better understood as a set of decisions, with a controlling *per curiam* opinion, a concurring opinion from Chief Justice Rehnquist (joined by Justices Scalia and Thomas), and separate dissenting opinions, in various constellations of agreement, from Justice Stevens, Justice Souter, Justice Ginsburg and Justice Breyer. Because they explicitly invoke the tensions between judicialization and popularism that are central to the Article's analysis, the following section will discuss the dissenting opinions, which consider the implications for judicialization of the *Bush v. Gore* decision.

#### a. *Per Curiam Opinion and Equal Protection*

Governor Bush appealed the Florida Supreme Court's decision in *Gore v. Harris* on two grounds: (1) The Florida Supreme Court's decision violated Article II of the United States Constitution because it constituted the post hoc judicial imposition of standards for resolving an election dispute in a matter clearly designated to the state legislature's authority; and (2) The manual recount ordered by the Florida Supreme Court was so significantly void of standards as to risk a violation of the Equal Protection and Due Process Clauses.<sup>126</sup> Only the latter of these claims found favor with a majority of the Court, and it is the Equal Protection and Due Process implications of the Florida Supreme Court's decision that the Court's majority considered in its *per curiam* opinion.<sup>127</sup>

The *per curiam* majority's decision depends, primarily, on the constitutionally protected status of the right to vote for presidential electors. Recognizing that the Constitution does not secure the right to vote for presidential electors as such,<sup>128</sup> the majority noted that all the state legislatures, to which the Constitution delegated the plenary power to select the presidential electors, have opted for statewide popular elections as the method for selecting presidential electors.<sup>129</sup> Vesting the citizens with the right to vote for the President of the United States in this way creates, the *per curiam* majority explained, a fundamental and protected right.<sup>130</sup> The *per curiam* majority then

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126. See *Gore*, 531 U.S. at 103 (stating the questions presented).

127. See *id.* (finding a violation of the Equal Protection Clause).

128. See *id.* at 104 (citing U.S. CONST. art. II, § 1).

129. *Id.*

130. *Id.*

emphasized that one part of such a fundamental right is that the Constitution requires its *equal* exercise.<sup>131</sup> Having granted the right to vote, the per curiam majority explained, the "State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."<sup>132</sup> This principle, the majority reasoned, has its expression in the Court's "one-person, one-vote" jurisprudence, especially to the degree that this principle prohibits disparate treatment of voters from one county to the next.<sup>133</sup> As will be discussed later,<sup>134</sup> it is precisely this line of decisions through which the Court embarked upon its radical judicialization of the law of democracy, a path that would lead the Court's per curiam majority to this moment: the judicialization of pure politics.

The per curiam majority concluded that the Florida Supreme Court's decision violated the "one-person, one-vote" precedent by ordering a statewide manual recount of undervotes, guided by nothing more than the dictate to give force to the "intent of the voter" and without identifying "the actual process by which the votes were to be counted."<sup>135</sup> The per curiam majority held that the Florida Supreme Court had "ratified uneven treatment" by permitting "unequal evaluation of ballots in various respects" in the counties' conduct of the manual recount.<sup>136</sup> The per curiam majority finally held that the Florida Supreme Court, though possessing the power to "assure uniformity has [instead] ordered a statewide recount with minimal procedural safeguards."<sup>137</sup> For this reason, and in light of the inequalities that would result, the Court found the Florida Supreme Court's decision in *Gore v. Harris* to be a violation of the Equal Protection Clause and reversed.<sup>138</sup>

As the per curiam majority noted, seven justices concurred in the conclusion that the recount the Florida Supreme Court ordered in *Gore v. Harris* presented some constitutional (Equal Protection Clause) concern.<sup>139</sup>

131. *See id.* (finding that "more than the initial allocation of the franchise" receives equal protection).

132. *Id.* at 104–05 (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

133. *Id.* at 107 (citing *Gray v. Sanders*, 372 U.S. 368 (1963)).

134. *See infra* notes 203–06 and accompanying text (discussing Equal Protection's role in the extension of judicialization).

135. *Id.* at 109. The Supreme Court's majority was at pains to affirm this standard as an "abstract proposition and starting principle." *Id.* at 106. The majority wondered who, with what qualifications and pursuant to what system of review, would count the ballots. *Id.* at 109.

136. *Id.* at 106–07 (2000). The majority worried not only about deviance between counties but also within counties. *Id.* at 106.

137. *Id.* at 109.

138. *See generally id.* at 100–11.

139. *Id.* at 111 (Souter, J. & Breyer, J., dissenting).

The more contentious issue, upon which the Court divided 5-4, was the nature of the remedy.<sup>140</sup> The per curiam majority seized upon the Florida Supreme Court's dicta in the first of the 2000 presidential election cases to conclude that Florida's election laws aimed to take advantage of the federal Electoral Count Act's "safe harbor" provision.<sup>141</sup> In pursuit of that aim, in consideration of the "substantial additional work" needed to bring the recount into compliance with the Equal Protection Clause, and confronted with the fact that the "safe harbor" deadline (December 12) would lapse in a few hours, the per curiam majority was satisfied to simply reverse the Florida Supreme Court's order for a statewide recount and thereby remove any obstacles in the way of the Florida vote tabulation the Florida Secretary of State certified on November 26, 2000: Governor Bush won the Florida election and Florida's twenty-five Electoral College slate by a total of 537 popular votes.

*b. Chief Justice Rehnquist's Concurrence and Article II*

Concurring in the per curiam majority opinion, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) wrote separately to articulate the Article II concerns the Florida Supreme Court's decision in *Gore v. Harris* presented.<sup>142</sup> Recognizing his frequent deference to state courts (like the Florida Supreme Court in the case at hand), Chief Justice Rehnquist sought to distinguish his participation in the majority's reversal of the Florida Supreme Court by explaining that in most cases the interaction of the various branches of a state's government neither implicates nor finds clear direction in the federal Constitution.<sup>143</sup> In those cases, the Chief Justice implied, the Supreme Court is wise to be guided by the principles of comity and federalism in deferring to

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140. *Id.* Justices Souter and Breyer, though concurring in the majority's constitutional interpretation, would have reversed and remanded the case back to the Florida Supreme Court with orders to fashion a standard for the conduct of the statewide manual recount that would comply with the demands of the Equal Protection Clause and perhaps permit its resolution prior to the date set for casting the Electoral College votes (December 18, 2000). *Id.* at 134-35 (Souter, J., dissenting); *id.* at 146 (Breyer, J., dissenting).

141. *See id.* at 110 ("The Supreme Court of Florida has said that the legislature intended the State's electors to participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5 (quoting *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1289 (Fla. 2000), vacated *sub nom.* by *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam))).

142. *See id.* at 111 (Rehnquist, C.J., concurring) (asserting that "there are additional grounds" for reversing the Florida Supreme Court).

143. *See id.* at 112 (Rehnquist, C.J., concurring) (stating that the republican form of government typically prevents state courts from addressing federal Constitutional questions).

state courts.<sup>144</sup> For the Chief Justice, the present case posed a much different set of circumstances because the Constitution, in Article II, clearly assigns priority to the state legislatures in the matter of presidential elections.<sup>145</sup> Thus, the choice confronting the Court was between Florida's Supreme Court and Florida's legislature. On this point, the Chief Justice concluded, Article II of the Constitution made the matter clear:

What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II. This inquiry does not imply disrespect for state courts but rather respect for the constitutionally prescribed role of state legislatures.<sup>146</sup>

The remainder of Chief Justice Rehnquist's concurrence consists of a catalogue of the Florida Supreme Court's unreasonable departures from Florida's controlling "legislative scheme,"<sup>147</sup> "legislative wish,"<sup>148</sup> clearly expressed legislative intent and "statutory framework"<sup>149</sup> with respect to Presidential elections and the review of elections. Among the departures the Chief Justice noted were the Florida Supreme Court's extension of the statutory period for bringing an election protest by seven days, with its concomitant effect on the length of time allowed for an election contest.<sup>150</sup> The Chief Justice noted the Florida Supreme Court's disregard for the statutory significance of the Secretary of State's certification of the tabulation of the vote, which should have elevated the standard of review applied by the courts in an election contest proceeding.<sup>151</sup> The Chief Justice also characterized as unreasonable the Florida Supreme Court's interpretation of the statutory terms "legal vote;" he concluded that: "Florida statutory law cannot reasonably be

144. *Id.* (Rehnquist, C.J., concurring).

145. *See id.* at 113 (Rehnquist, C.J., concurring) (explaining that Article II "'conveys the broadest power of determination' and 'leaves it to the legislature exclusively to define the method of appointment.'" (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892))).

146. *Id.* at 115 (Rehnquist, C.J., concurring).

147. *Id.* at 118, 120 (Rehnquist, C.J., concurring).

148. *Id.* at 120 (Rehnquist, C.J., concurring).

149. *Id.* at 122 (Rehnquist, C.J., concurring).

150. *See id.* at 117-18 (Rehnquist, C.J., concurring) (citing *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1220 (Fla. 2000), *vacated sub nom. by Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam) (asserting that lengthening the time to protest an election "necessarily shortened the contest period for Presidential elections").

151. *See id.* at 118 (Rehnquist, C.J., concurring) ("The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle.").

thought to *require* the counting of improperly marked ballots."<sup>152</sup> Finally, the Chief Justice remarked that the Florida Supreme Court's decision in *Gore v. Harris* "jeopardizes the 'legislative wish' to take advantage of the safe harbor provided by 3 U.S.C. § 5."<sup>153</sup> In all of this criticism of the Florida Supreme Court's judicial incursion into this highly sensitive political context, Chief Justice Rehnquist failed to acknowledge the judicializing tendency of the per curiam majority opinion with which he was writing to concur.

*c. The Dissenters: Voices for Judicial Restraint*

The four justices dissenting from the majority's per curiam judgment and Chief Justice Rehnquist's concurring opinion took a variety of (mostly counter) positions on the substance of the claims Governor Bush asserted.<sup>154</sup> For this reason, they aligned themselves in various constellations with each other and, in two cases, in part with the majority.<sup>155</sup> Common to each of the dissenting opinions, however, is a clear call for judicial restraint counseling the Court to refrain from deciding the dispute, or, if it felt itself compelled to engage the case, to issue only the most minimal judgment, thereby permitting the popularist mechanisms of the Constitution and the Electoral Count Act of 1887 to take their course. The dissenters, thereby, at least implicitly recognized the judicializing significance of the moment. It was not the first time, in the twisting course of the proceedings, that Justices had voiced concerns about judicial intervention. In the first of the U.S. Supreme Court opinions, the Court noted the reserve and deference with which it normally reviewed "a state court's interpretation of a state statute."<sup>156</sup> In fact, the Court's judgment in the first of the two cases seems animated by this restraint.<sup>157</sup> Prior to the U.S. Supreme Court's December 9, 2000 stay of the statewide manual recount and the Court's subsequent 5-4 decision bringing the election battle to an end, each of the federal courts that had been called upon by the parties had maintained a

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152. *Id.* at 118-19 (Rehnquist, C.J., concurring).

153. *Id.* at 120-21 (Rehnquist, C.J., concurring) (citing *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000), *vacated sub nom. by Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam)).

154. Justices Souter and Breyer dissented chiefly from the remedy imposed by the majority, not the substantive conclusion regarding the Equal Protection Clause. See *supra* note 140 and accompanying text (explaining the Justices' dissenting positions).

155. *Supra* note 140.

156. *Palm Beach County Canvassing Bd.*, 531 U.S. at 76.

157. See *id.* at 78 ("This is sufficient reason for us to decline at this time to review the federal questions asserted to be present.").



similar if eroding distance from the proceedings.<sup>158</sup> As noted earlier,<sup>159</sup> Florida Supreme Court Chief Justice Wells strongly appealed for judicial restraint in his dissent to the Florida Supreme Court's decision in *Gore v. Harris*. While the federal courts had been concerned with federalism and comity in counseling restraint, however, Chief Justice Wells had more pragmatic concerns. He worried that prolonging the judicial process would "propel this country and this state into an unprecedented and unnecessary constitutional crisis."<sup>160</sup> In addition to this concern, Chief Justice Wells urged that "finality must take precedence over continued judicial process."<sup>161</sup> No voice, up to the decision in *Bush v. Gore*, had explicitly grappled with the populist implications of judicial intervention.

In urging judicial restraint, the dissenters to the Supreme Court's decisive judgment from December 12, 2000 again invoked the principles of federalism and comity. Justice Stevens, in his dissent, strongly appealed to these principles and argued that the issues asserted failed to present substantial federal questions meriting the Supreme Court's involvement in the case.<sup>162</sup> In his now famous closing paragraph, Justice Stevens only hinted at the judicializing implications of the per curiam majority's decision, concluding that the per curiam majority's abandonment of the principles of federalism and comity, in the interest of finality, must have depended upon an "unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decision if the vote count were to proceed."<sup>163</sup> This, Justice Stevens complained, cast "the Nation's confidence in the judge as an impartial guardian of the rule of law,"<sup>164</sup> as the real loser of the presidential election. Justice Ginsburg substantially echoed Justice Stevens' concerns for federalism in arguing that the U.S. Supreme Court should have left the Florida judicial proceedings undisturbed. "Unavoidably," Justice Ginsburg explained, "this Court must sometimes examine state law in order to protect federal rights. But

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158. For an assessment of the district and circuit court rulings, see generally Kevin Sack, *Federal Court Had Just Voted for Recount*, in 36 DAYS, *supra* note 56, at 278; Kevin Sack, *Federal Court Rejects Bush Request to Bar Manual Recounts*, in 36 DAYS, *supra* note 56, at 255; Kevin Sack, *Federal Judge Defers to State Court*, in 36 DAYS, *supra* note 56, at 62.

159. See *supra* notes 107–10 and accompanying text (discussing Florida Supreme Court Chief Justice Wells' opinion in *Gore v. Harris*).

160. *Gore v. Harris*, 772 So. 2d 1243, 1263 (Fla. 2000) (Well, C.J., dissenting) *rev'd sub nom.* *Bush v. Gore* 531 U.S. 98 (2000) (per curiam).

161. *Id.* at 1270 (Wells, C.J., dissenting).

162. See *Gore*, 531 U.S. at 123 (Stevens, J., dissenting) ("The federal questions that ultimately emerged in this case are not substantial.").

163. *Id.* at 128–29 (Stevens, J., dissenting).

164. *Id.* at 129 (Stevens, J., dissenting).

we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court."<sup>165</sup> As an indication of this restraint and deference, Justice Ginsburg noted the Court's frequent certification to state high courts of state law questions underlying federal claims in order to afford those "courts an opportunity to inform us on matters of their own State's law because such restraint 'helps build a cooperative judicial federalism,'"<sup>166</sup> and in recognition of the significance of those courts' "common exposure to local law which comes from sitting in the jurisdiction."<sup>167</sup> Justice Ginsburg concluded: "Federal courts defer to state high court's interpretations of the State's own law. This principle reflects the core of federalism, on which we all agree."<sup>168</sup>

The federalism argument for the Supreme Court's nonintervention or, in the alternative, for restrained intervention, does not challenge the general role of the judiciary in the proceedings but simply prefers the state courts to the federal courts. In this sense, the arguments of Justice Stevens and Ginsburg are not animated by concerns for judicialization in its collision with popularism. In their dissenting opinions, however, Justices Souter and Breyer insinuated the general impropriety of a judicial solution to this purely political dispute.<sup>169</sup> The per curiam majority also briefly acknowledged this theme in the conclusion of its opinion. Recognizing the momentousness of its decision to intervene, the per curiam majority nonetheless felt itself duty-bound, albeit reluctantly, to act:

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.<sup>170</sup>

Justices Souter and Breyer, on the other hand, followed these anxieties to their appropriate conclusion: They would have preferred a political over a judicial solution to the case. Justice Souter noted, in questioning the significance of the federal questions presented for the Court's review, that "it

165. *Id.* at 137 (Ginsburg, J., dissenting).

166. *Id.* at 139 (Ginsburg, J., dissenting) (quoting *Lehman Bro. v. Schein*, 416 U.S. 386, 391 (1974)).

167. *Id.* at 138 (Ginsburg, J., dissenting).

168. *Id.* at 142 (Ginsburg, J., dissenting).

169. *See supra* notes 153–59 and accompanying text (discussing the Justices' concerns).

170. *Gore*, 531 U.S. at 111.

is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15.<sup>171</sup> Justice Souter repeatedly and approvingly invoked the possibility that the dispute could have found its solution in the political branches.<sup>172</sup> What Justice Souter implied, Justice Breyer quite nearly gives full voice, coming closer than any other figure in the proceedings to raising the specter of judicialization against which the political question doctrine provides protection.<sup>173</sup> In questioning the significance of the federal questions the case presented and counseling the Court's restraint in deference to the Florida Supreme Court, Justice Breyer also protested that the issues before the court draw their significance from their political and not their legal nature.<sup>174</sup> "[T]his Court," Justice Breyer argued, "should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election."<sup>175</sup> This, far more than the mere political question doctrine, is a concern for limiting the role of the judiciary in the realm of pure politics. Justice Breyer insisted on the preferred role of the political branches in resolving Electoral College disputes, citing the Constitution as well as the Electoral Count Act of 1887 (and, extensively, its legislative history).<sup>176</sup> Justice Breyer concluded:

Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think the Constitution's Framers would have reached a different conclusion. Madison, at least, believed that allowing the judiciary to choose the presidential electors "was out of the question."<sup>177</sup>

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171. *Id.* at 129 (Souter, J., dissenting).

172. *See generally id.* at 130–33 (Souter, J., dissenting).

173. *See id.* at 153–58 (Breyer, J., dissenting) (analyzing the political, rather than judicial, nature of the dispute). *See generally* Baker v. Carr, 369 U.S. 186 (1962) (refusing to apply the political question doctrine when considering Tennessee's state legislature's malapportionment problem); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political . . . can never be made in this Court."); Fritz W. Scharpf, *Judicial Review and the Political Question: A Fundamental Analysis*, 75 YALE L.J. 517 (1966) (discussing the political question doctrine).

174. *See Gore*, 531 U.S. at 153 (Breyer, J., dissenting) ("But that importance is political, not legal.").

175. *Id.* (Breyer, J., dissenting).

176. *See generally id.* at 153–58 (Breyer, J., dissenting) (citing U.S. CONST. amend. XII; 3 U.S.C. §§ 5, 6 and 13).

177. *Id.* at 155 (Breyer, J., dissenting) (citing James Madison, *25 July 1787*, reprinted in 5 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 363 (2d ed. 1876)).

#### 4. *Implications for Judicialization of Bush v. Gore*

The majority's opinion in *Bush v. Gore* constituted an implicit, though no less resounding, victory for judicialization. This is true because, bearing in mind the definition of judicialization this Article has adopted,<sup>178</sup> the Court's decisive intervention unnecessarily preferred a judicial resolution to an established, albeit elaborate and antiquated, popularist system for the resolution of such Electoral College disputes.

##### a. *The Popularist Alternative*

In order to understand this claim it is necessary to consider, if only briefly, the popularist scheme provided by the U.S. Constitution and federal law. The Court refused to take resort in this popularist scheme in the Electoral College dispute at the heart of *Bush v. Gore*. Instead, the Court preferred to intervene and resolve the dispute itself.

The popularist scheme for resolving disputes over presidential elections has both constitutional and statutory bases. Article II, Section 1, Clause 3 of the Constitution gives the House of Representatives (each state's delegation possessing one vote) the power to elect the President in the event that no candidate achieves an Electoral College majority or two candidates achieve a majority but are tied:

The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote.<sup>179</sup>

Again, in the Twelfth Amendment, the Constitution prefers the preeminently<sup>180</sup> popularist institution of the House of Representatives for the resolution of uncertainties with respect to the outcome of Electoral College, providing that:

178. See *supra* notes 9, 11 (defining judicialization); see also Part II (discussing the judicialization of pure politics).

179. U.S. CONST. art. II, § 1, cl. 3.

180. As compared with any other institution of the federal government, the most popularist body must be the House of Representatives:

As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under

The Electors shall meet in their respective states and vote by ballot for President and Vice President, . . . which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, . . . and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.<sup>181</sup>

Federal law reinforces the Constitution's commitment of the law of democracy to popularist institutions and procedures. Alongside the six-day "safe harbor" provision described above, the Electoral Count Act of 1887 also provides that a state legislature (regardless of the pre-existing rules/laws governing the selection of electors) may direct the appointment of electors in any manner deemed appropriate in the event that the state's electors have not been identified by the day prescribed by law.<sup>182</sup> Furthermore, the Electoral Count Act of 1887 establishes the process by which Congress should resolve "different scenarios in which two slates of electors from the same state vie for recognition as the true or correct slate."<sup>183</sup> In such a case, following a written objection to the final Electoral College tally from at least one member of the House and Senate, the challenge is presented to the two houses of Congress.<sup>184</sup> As a guiding principle to Congressional involvement, Congress should give priority to the Electoral College slate certified by the state's governor, unless both houses of Congress agree that the votes certified by the governor were not "regularly given."<sup>185</sup> If, however, two Electoral College slates present themselves to Congress, Congress should give preference to that slate determined to be valid pursuant to the respective state's election review procedures and submitted by the "safe harbor" deadline.<sup>186</sup> If both slates claim to have met these requirements (rightful product of the state's election review

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consideration [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.

THE FEDERALIST NO. 52, at 361 (James Madison) (Benjamin F. Wright ed., 1966).

181. U.S. CONST. amend. XII.

182. See 3 U.S.C. § 2 (2000) ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

183. ABNER GREENE, UNDERSTANDING THE 2000 ELECTION 169 (2001); see 3 U.S.C. § 15 (outlining the process of choosing between two groups of electors from the same state).

184. 3 U.S.C. § 15 (2000).

185. *Id.*

186. *Id.*

process *and* qualifying for the "safe harbor" protection), then the Electoral Count Act charges the two Houses of Congress, acting separately, with endorsing one or the other of the slates.<sup>187</sup> If the House and the Senate disagree at this point, the Electoral College slate bearing the governor's endorsement claims priority.<sup>188</sup> Again, the Electoral Count Act charges both houses of Congress with recognizing a slate of Electors in the event that the competing slates presenting themselves neither have the benefit of a completed election review process in the state nor the "safe harbor" status.<sup>189</sup> As before, if the two houses of Congress cannot agree, the slate bearing the state governor's endorsement prevails.<sup>190</sup>

This process overwhelmingly favors popularist institutions, Congress and state governors, as the determinative bodies in the event of an Electoral College dispute. The only suggestion that the matter is one for the unaccountable and unrepresentative judiciary is the cryptic reference to a state's election review process, which may lead to an unintended decision-maker if it does not directly anticipate the involvement of the state's judiciary. Significantly, however, nothing about the phrase "election review process" necessarily implicates the judiciary. Considering the legislative history of the 1887 Electoral Count Act, the intention of Congress at that time was clearly to steer the process of settling uncertainties with respect to the Electoral College back into popularist institutions.

#### *b. A Significant Shift Towards Judicialization*

As strong as they were, the dissenting opinions of Justices Souter and Breyer could have been much stronger with respect to the antipopularist consequences of the majority's and Chief Justice Rehnquist's opinions in *Bush v. Gore*. In spite of their grave concerns in the present case, the reasonableness of the dissenters' criticism of the judicialization inherent in the *per curiam* and concurring opinions can be, at some level, attributed to the fact that, as Justices of the Supreme Court, they have an inherent tolerance for, confidence in, and approval of judicial (that is, unaccountable, unrepresentative) mechanisms. Judges who could be radical opponents of judicialization would be rare. It can also be attributed to the fact that the significant judicialization achieved by the *per curiam* opinion is only implicit. The Court did not explicitly rule that the

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

judiciary, or the Supreme Court as the head of that branch of government, is generally the necessary or even the preferred institution for the outcome-specific resolution of electoral disputes.<sup>191</sup> The Court did not strike the populist procedures for resolving Electoral College disputes that the Electoral Count Act of 1887 outlined as unconstitutional.<sup>192</sup> To the contrary, the majority explicitly tried to limit the impact of its decision to the case at hand, noting that its "consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."<sup>193</sup>

The implied nature and attempted delimitation of the judicialization the *Bush v. Gore* decision achieved do nothing, however, to minimize the decision's dramatic antipopulist impact. The Supreme Court had never before intervened to decide the outcome of an election, let alone a Presidential election. For this reason alone it is difficult to dispute the sheer epochal weight and symbolic quality that the judicialization *Bush v. Gore* achieved. This is true in part because of the supreme significance of the particular election at issue. It merits repeating the painfully obvious: This was the presidential election. It is also true because of the clarity of the judicializing impact of the Court's decision: The decision was reached on questionable legal grounds by a Court divided along partisan fronts while rejecting a constitutional and statutory process involving a representative institution. In discrediting each of the possible alternative justifications for the Court's intervention, whether invoked by the Court itself or its defenders, Howard Gillman, in his book-length survey of the election dispute, was unable to get beyond the fact that, all the while, "there was a 211-year-old nonjudicial process in place for dealing with the problem [in Congress]."<sup>194</sup> Gillman adamantly rejected the most common claim among the Court's defenders that resort to this constitutionally and statutorily prescribed course would itself have constituted a constitutional crisis:

It could not be realistically asserted that ending public weariness or prolonged uncertainty was enough to constitute the greater good of the nation; that would have made the very process laid out in the Electoral Count Act inherently inconsistent with the public welfare, which is preposterous. Instead, the centerpiece of the imagined crisis was the

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191. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (noting the general desire to defer electing the president "to the people . . . and to the political sphere").

192. *See id.* at 110 (discussing Florida's adoption of the act's procedural safeguards for federal elections).

193. *Id.* at 109.

194. GILLMAN, *supra* note 59, at 191.

possibility that the procedure laid down in 3 U.S.C. § 15 for resolving disputes would have broken.<sup>195</sup>

For Gillman, the Court's rejection of a Congressional solution was characteristically antipopularist. "If the constitutional crisis rationale is not a simple post hoc rationalization of an otherwise inexcusable decision," he argued, "then it mostly represents simple impatience with democratic processes—a preference for quick, clear, imposed solutions over ones that are forged through debate, compromise, or (as was most likely if election 2000 went to Congress) ugly, hardball politics."<sup>196</sup>

The *Bush v. Gore* decision, in any event, does have significance as legal precedent. Elizabeth Garrett suggested the case struck a revolutionary jurisdictional posture that was in contrast to the Court's previous, not infrequent—though, to her mind, frequently disastrous<sup>197</sup>—involvement in the law of democracy, including voting rights issues, campaign finance regulation, and the regulation of political parties.<sup>198</sup> In spite of the Supreme Court's substantial role in "shaping the electoral process,"<sup>199</sup> Garrett distinguished the Court's previous involvement in the field from the circumstances in *Bush v. Gore*.<sup>200</sup> Garrett explained that, unlike the general and nonpartisan nature of its previous decisions, *Bush v. Gore* presented the Court with a situation in which it actually knew that its decision would lead to the election of one of the parties to the case.<sup>201</sup> The Court undeniably stepped across a new frontier into the realm of pure politics and, in so doing, cleared a way for a dramatically new kind of judicial involvement in elections. This new jurisdictional posture is inherently antipopularist.<sup>202</sup>

195. *Id.* at 194.

196. *Id.* at 195.

197. *See* Garrett, *supra* note 17, at 39, 44 ("Although the Court has a long history of involvement in the electoral process and in political matters, it often makes the situation it finds worse rather than better. In short, although the Court has entered the political thicket frequently, its performance in these cases is disappointing.").

198. *See id.* at 40–48 (discussing prior instances of judicial involvement in elections and arguing that the *Gore* Court should have exercised judicial restraint); *see also* ISSACHAROFF, *supra* note 19, at 1–2 (discussing generally the impact that state institutions and legal structures have on the democratic process).

199. Garrett, *supra* note 17, at 40.

200. *See id.* at 40–45 (noting difficulties presented by the 2000 election that had never before been considered by the Court).

201. *See id.* at 45 (discussing the likely effect of the *Gore* ruling and the Court's awareness of it).

202. *See id.* at 39.

Some who have criticized the Court's reasoning in *Bush v. Gore* or in its decision to stay the recount have nonetheless concluded that its intrusion into the political



The equal protection violation, which justified the Court's reversal of the Florida Supreme Court, also builds, as another patina of precedent, upon an emerging, radically judicialized legal doctrine. Pamela Karlan conceived of *Bush v. Gore* as the most recent and most dramatic expression of the Court's structural equal protection case law, according to which:

The Court deploys the equal protection clause not to protect the rights of an individual or a discrete group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted. Neither *Bush v. Vera* and the other *Shaw* cases nor *Bush v. Gore* fully answers the question of when, and why, courts should intervene in the deeply messy process of partisan politics. And each adopts a distressingly narrow perspective within which to measure equality.<sup>203</sup>

Mark Tushnet also agreed that the case carries precedential weight, even if from an alternative perspective. Tushnet suggested that even progressives would come to view *Bush v. Gore* as correctly decided: "After all, the equal protection doctrine the case articulated can certainly be turned to progressive uses. We can, and should, take the case as another in a long line of decisions by political actors—a category that includes judges—expanding and protecting the expansion of the franchise."<sup>204</sup>

*Bush v. Gore* is, in the end, a dramatic victory for judicialization. Interposing itself in the election dispute as it did, at the expense of an alternative populist process, the Court preferred a clearly judicialized process.<sup>205</sup> The populist solution to the case was preferable, however, even if Congress would have been no less partisan than the Court in deciding the case: "The glaring difference, of course, is that senators and representatives caring to retain their offices would have had to face the judgments of voters on their manner of settling the election."<sup>206</sup> The Supreme Court will not. That, of course, is the nature of judicialization.

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process was justified because it settled the presidential election dispute before the country was plunged into a constitutional or political crisis. This distrust of the political branches to resolve controversies is part of a larger distrust of politics.

*Id.*

203. Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on Changeable Court*, in *THE VOTE*, *supra* note 3, at 77, 78.

204. Tushnet, *supra* note 6, at 125.

205. See Samuel Issacharoff, *Political Judgments*, in *THE VOTE*, *supra* note 3, at 55, 74 (noting that "every time a court strikes down an election statute . . . the unelected judiciary substitutes its judgment" for those officials that are directly accountable to voters).

206. Michelman, *supra* note 5, at 133.

*B. The Federal Constitutional Court's Decision in the Hessen Election Review Case*

*1. Background*

On February 7, 1999, the *Bundesland* (Federal State) Hessen held *Landtag* (State Parliament) elections.<sup>207</sup> The Christian Democratic Union (CDU) won 43.4% of the vote (1,215,783 votes) and was awarded fifty of the 110 seats in the State Parliament.<sup>208</sup> The Social Democratic Party of Germany (SPD) trailed in the poll with 39.4% of the vote (1,102,544 votes) and forty-six seats.<sup>209</sup> The Greens (Bundnis 90 or Die Grünen) won 7.2% of the vote (201,914 votes) and eight seats.<sup>210</sup> The Free Democrats (FDP), the final party to surpass the 5% standard for entering parliament, won 5.1% of the vote (142,845 votes) and six seats.<sup>211</sup> The CDU established a governing coalition with the Free Democrats and Roland Koch, the CDU candidate for *Ministerpräsident* (State Executive), took office.<sup>212</sup> The Hessen *Wahlprüfungsgericht* (Election Review Court) considered a range of initial challenges to the validity of the election, focusing primarily on administrative deficiencies like the untimely delivery of absentee voting materials,<sup>213</sup> but it ultimately affirmed the validity of the election.<sup>214</sup> Nearly a year later, the

207. See *Entscheidungen des Bundesverfassungsgerichts* [BverfGE] [Federal Constitutional Court] 103, 111 (116) (reporting the outcome of the Hessen Election); 14 *NEUE JURISTISCHE WOCHENSCHRIFT* 1048 (2001) (unofficial publication of the decision by a commercial journal); BVerfG, 2 BvF 1/00 vom 08.02.2001, Para.-Nr. (43), at <http://www.bverfg.de> (Court's publication of the decision on its website); see also *Hessen-Wahl zum 15. Landtag am 07. Februar 1999* [Election Return Website 1] (last visited Dec. 4, 2003) at [http://www.election.de/data/ltw\\_he99.html](http://www.election.de/data/ltw_he99.html) (German election returns website, reporting the outcome of the Hessen election); *Hessen [Ergebnisse]* [Election Return Website 2] (last visited Dec. 4, 2003) at <http://www.wahlrecht.de/ergebnisse/hessen.htm> (German election returns website, reporting the outcome of the Hessen election); *Urteil des Wahlprüfungsgerichts beim Landtag zur Gültigkeit der Landtagswahl 1999*, 30 *STAATSANZEIGER FÜR DAS LAND HESSEN* 2350 [Official Public Record] (July 26, 1999) <http://141.90.2.45/cache/Tabellen/stanz1999.htm> (last visited Dec. 4, 2003) (decision of the Hessen Election Review Court, published in the official public record for the federal state Hessen, reporting the outcome of the Hessen election).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. With only a combined 48.5% of the vote, the governing CDU and FDP coalition lacked an absolute electoral majority, but it had a one seat majority (fifty-six seats of 110) in the parliament.

213. An explanation of the make-up and status of the Election Review Court follows, *infra* Part III.B.3.b.

214. See Official Public Record, *supra* note 207, at 2353 (rejecting initial, procedural

Election Review Court, *sua sponte*, reopened the election review proceedings after it was revealed that the CDU used unreported campaign funds in the course of the state election campaign.<sup>215</sup> In a press release, the Presiding Judge of the Election Review Court explained that his Court was concerned particularly with the influence that the questionable funds might have had on the outcome of the election.<sup>216</sup> The reopening of the election review proceedings gave rise to a petition to the Federal Constitutional Court from the CDU-led government in Hessen that sought abstract judicial review of the election review procedures Hessen's constitution and the attending statutes provided.<sup>217</sup>

challenges to the election).

215. It is unlikely that the use of the funds (estimated in the millions of Euros), which were drawn from a secret bank account in Liechtenstein, was actually illegal. See Georg Paul Hefty, FRANKFURTER ALLGEMEINE ZEITUNG translated in *Not for the State to Decide*, at 1 (Feb. 26, 2001) (discussing the difficulty of invalidating an election based on a party's improper use of finances). The Election Review Act provides, however, for the invalidation of an election for lesser improprieties. For a German-language survey of the Hessen campaign funding scandal, see Markus Deggerich, *Die brennenden Fragen der CDU-Spendenaffäre*, SPIEGEL ONLINE (Dec. 19, 2000) at <http://spiegel.de/politik/deutschland/0,1518,108558,00.html> (reported in a popular German weekly news magazine) (on file with the Washington and Lee Law Review); *Die CDU-Spendenaffäre Chronologie des Niedergangs (Stand 28 Jan. 2001)* (*The CDU-Contributions Scandal: Chronology of the Decline* (Status as of Jan. 28, 2001)) (last visited June 8, 2002) at [http://www.landtag.hessen.de/gruene-fraktion.hessen/htm/06\\_material/0602\\_info/chronik.pdf](http://www.landtag.hessen.de/gruene-fraktion.hessen/htm/06_material/0602_info/chronik.pdf) (report drafted by the opposition political party the Greens) (on file with the Washington and Lee Law Review).

216. See *Die Landtagswahl von 1999 wird überprüft*, SPIEGEL ONLINE (Mar. 3, 2000) at <http://www.spiegel.de/politik/deutschland/0,1518,67626,00.html> (detailing the renewed challenge to the Hessen election, based on the CDU contributions scandal) (on file with the Washington and Lee Law Review); Ralf Pasch & Gundula Zeitz, *Eine brisante Aufgabe über viele Monate Höllein ist Berichterstatter beim Wahlprüfungsgericht*, FRANKFURTER RUNDSCHAU [daily German newspaper] (Mar. 11, 2000) at <http://www.wahlrecht.de/news/2000/09.htm> (reporting renewed challenge to the Hessen election based on the CDU contributions scandal) (on file with the Washington and Lee Law Review). As noted in the text accompanying note 208 *supra*, the CDU and FDP coalition did not command an absolute electoral majority (48.5%) and led a potential SPD and Greens coalition by less than 2%. See *supra* notes 208–12 and accompanying text (explaining the composition of the election's results). The difference between the two coalitions was 54,170 votes and two seats in the parliament. *Id.*; see also Election Return Website 1, *supra* note 207 (reporting the outcome of the Hessen election); Election Return Website 2, *supra* note 207 (same).

217. Unlike the U.S. Supreme Court, which requires an actual case in controversy in order to have jurisdiction over a matter, U.S. CONST. art III, § 2, cls. 1 & 2; *Flast v. Cohen*, 392 U.S. 83, 94 (1968) ("[T]he judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'"), the German Federal Constitutional Court may, in the abstract, review a federal or state law for its constitutional compatibility. GRUNDGESETZ [GG] [Basic Law] art. 93.1(2); *Bundesverfassungsgerichtsgesetz* [BverfGG] [Federal Constitutional Court Act] art. 13.6 (outlining the Court's jurisdiction and the controlling procedures before the Court). A state government may initiate such review, as in the *Hessen Election Review Case*. "The

## 2. Relevant Law

Article 78 of the Hessen *Verfassung* (HV–Hessen Constitution) provides the procedures, standards and mechanisms for reviewing and invalidating a state election.<sup>218</sup> The broad terms of the constitutional provision are more specifically outlined in the attending Hessen *Wahlprüfungsgesetz* (HwahlPrüfG–Election Review Act).<sup>219</sup> Article 78 of the Hessen Constitution establishes the following procedures and standards: (1) an election review Court, established by the state parliament, reviews the validity of an election; (2) an election is invalid in the event that the Election Review Court finds that irregularities, criminal actions, or other action that qualify as a violation of *gute Sitten* (good faith or common decency) influenced the election; and (3) the Election Review Court is constituted of the two highest-ranking judges of the state and three members of parliament.<sup>220</sup> The State Government, in its abstract judicial review application, placed the second and third of these provisions before the Federal Constitutional Court.

The application to the Constitutional Court also sought abstract judicial review of Sections 1, 2, and 17 of the Election Review Act. Section 1 of the Election Review Act establishes that the Election Review Court is constituted of, along with three members of parliament, the President of the Hessen *Verwaltungsgerichtshof* (Administrative Court) and the President of the Hessen *Oberlandesgericht* (Higher Regional Court).<sup>221</sup> Section 2 of the Election Review Act outlines the standards for selecting the parliamentarians who will sit on the Election Review Court.<sup>222</sup> Section 17 of the Election Review Act makes the written *Urteile* (judgments) of the Election Review Court immediately enforceable.<sup>223</sup>

In its application to the Constitutional Court, Hessen's CDU-led Government argued<sup>224</sup> that the standard the Election Review Court was to apply in its review of

purpose of such review is not to vindicate the position of any party to the action, rather it is to simply and objectively 'declare what the constitution means.'" DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 13 (2d ed. 1997).

218. Art. 78 HV.

219. Hessisches Wahlprüfungsgesetz [HwahlPrüfG] [Hessen Election Review Act].

220. See Hessische Landesverfassung [HV] [Constitution of the Federal State Hessen] art. 78 (providing the structure and form of the Hessen Election Review Court).

221. See HwahlPrüfG § 1 (providing for the service of two judges on the Hessen Election Review Court).

222. See HwahlPrüfG § 2 (providing for the selection of state parliamentarians on the Hessen Election Review Court).

223. See HwahlPrüfG § 17 (providing for the immediate enforceability of the decisions of the Hessen Election Review Court). Section 17 of the Act is dependent upon § 15, which establishes that the Election Review Court decides by way of an *Urteil* (judgment.).

224. BVerfGE 103, 111 (116–119).

the election for a violation of the *gute Sitten*, as well as the composition of and the determinative role accorded to the Election Review Court, would constitute a violation of, *inter alia*: (1) Article 19.4 of the *Grundgesetz* (GG—Basic Law),<sup>225</sup> which establishes a right to judicial recourse and finds its applicability in the state context by way of Article 28.1 of the Basic Law;<sup>226</sup> (2) Article 20.2 of the Basic Law,<sup>227</sup> which requires the separation of public authority between legislative, executive and judicial bodies; and (3) Articles 92 and 97 of the Basic Law, which are the federal constitutional guarantees of judicial authority over legal disputes and judicial independence.<sup>228</sup> The Hessen Government's application focused especially on the ambiguity and imprecision of the *gute Sitten* standard for invalidating an election and the mixed nature of the Election Review Court, consisting as it does of both judges and members of the state parliament, though nonetheless empowered to act through judgments.<sup>229</sup> The government also objected to the inherent conflict of interest the Hessen election review scheme created, which requires the parliamentarians who are participating as members of the Election Review Court to rule on the validity of the entire state parliamentary election, including the validity of their status as elected parliamentarians.<sup>230</sup>

### 3. *The Constitutional Court's Decision in the Hessen Election Review Case*

#### a. *Defining gute Sitten*

The Constitutional Court first addressed the state government's challenge to the standard for the Election Review Court to apply when judging the validity of an election pursuant to Article 78.2 of the Hessen Constitution.<sup>231</sup>

225. See art. 19.4 GG ("Should any person's rights be violated by public authority, he may have recourse to the courts.")

226. See art. 28.1 GG ("The constitutional order in the Länder must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law.")

227. See art. 20.2 GG ("All authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.")

228. See art. 92 GG ("The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder (Federal States)."); see also art. 97.1 GG ("Judges shall be independent and subject only to the law.")

229. BVerfGE 103, 111 (116–19).

230. *Id.*

231. The Court summarily disposed of the objections to the admissibility of the Hessen state government's abstract judicial review application. *Id.*

According to the state constitutional provision, an election is invalid if a violation of the *gute Sitten*, among other improprieties, influenced it.<sup>232</sup> This was the standard the Election Review Court suggested that it would apply after reopening its review of the 1999 election.<sup>233</sup> The Constitutional Court held that the standard was constitutional, but in doing so, it crafted a narrow definition of the concept that will make its application rare.<sup>234</sup> This part of the Court's

232. See art. 78.2 HV (providing the standard of review to be applied by the Hessen Election Review Court).

233. See *supra* note 215 and accompanying text (discussing reopening of the review of the 1999 election).

234. The Court began its analysis of the constitutionality of the *gute Sitten* standard by refusing to base its interpretation on the jurisprudence associated with the use of that standard in the private-law context. BVerfGE 103, 111 (125–26). The Bürgerliches Gesetzbuch [BGB] [German Civil Code], for example, provides for the invalidation of legal transactions that offend the *gute Sitten*. See § 138.1 BGB ("A legal transaction which offends good morals is void."). This application of the standard has its basis in the predominant legal and social morality, and it has been broadly defined by the courts as the "standard of decency of all fair and just persons." *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] [German Supreme Civil Court] 10, 228 (232); BGHZ 69, 295 (297); BGHZ 141, 357 (361) (author's translation). Through the process of the *mittelbare Drittwirkung der Grundrechte* (direct, "radiating effect" of the fundamental rights), the fundamental rights of the Basic Law also help shape the contours of this provision of private law as they are reflective of the prevailing social values. See, e.g., BVerfGE 7, 198 (206) (holding that the influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public*). The Court stated:

It is equally true, however, that the Basic Law, which is not intended to be a system that is neutral as to values, has also set up an objective value system in its section on fundamental rights . . . . This value system centered around the human personality developing freely in the social community, and its dignity, must be regarded as the basic constitutional decision for all spheres of law; legislation, administration and the judiciary are given guidelines and inspiration by it. Accordingly, it also manifestly influences the civil law: no provision of civil law may be in contradiction with it; each one must be interpreted in its spirit.

*Id.* (citations omitted) (author's translation). Donald Kommers describes the *Drittwirkung* principle as follows:

In the seminal Lüth case (1958; no. 8.1), the Constitutional Court remarked that the Basic Law's objective system of values "expresses and reinforces the validity of the [enumerated] basic rights." Given the importance of this system, declared the court, these objective values "must apply as a constitutional axiom throughout the whole legal system," influencing private as well as public law. The court rules that while basic rights apply directly to state action, they apply indirectly to substantive private law.

KOMMERS, *supra* note 217, at 48–49. Pursuant to this loose definition of the *gute Sitten* standard, the courts have invalidated private transactions in a broad range of circumstances, including the failure to properly heed the ethical foundation of marital or family relationships, the commercialization of personal or emotional decisions, the abuse of a position of trust (e.g. patient or client relationship), and the exploitation of extreme economic advantage.

Instead, the Court drew exclusively upon the practice and application of election review

decision does not, however, constitute the grander shift towards judicialization. This consequence was more significantly a result of the Court's consideration of the constitutionality of the Election Review Court itself.

*b. The Election Review Court as a Mixed Entity*

Addressing the state government's challenge to the mixed nature of the Election Review Court, the Constitutional Court firmly asserted the constitutional requirement that, pursuant to Article 92 of the Basic Law, judicial power be entrusted to independent judges.<sup>235</sup> The Constitutional Court then defined "judicial power" as the power to enter a final, binding decision regarding legal issues.<sup>236</sup> The Court found the roots of the Election Review Court's mixed nature in Germany's Weimar Constitution of 1919, which sought to disperse broadly the merits of representative democracy throughout the institutions of public authority, including the courts, rather than allowing one branch of government to insulate itself from the will of the people.<sup>237</sup>

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law. BVerfGE 103, 111 (127). The Court traced the standards applied to election review in the Constitution of the German Reich of 1871 and the Weimar Constitution of 1919. *Id.* at 127–28. The Court also considered the use of the standard in Hessen's 1946 Constitution as a clear reaction against the National Socialist's manipulation of elections and the democratic machinery. *Id.* at 126. Finally, the Court reviewed the contemporary jurisprudence of state and federal courts, as well as the academic literature, regarding the standards for invalidating elections. *Id.* at 127–31. Based on this survey, the Court settled on an interpretation of the *gute Sitten* standard for the election review context that focused on the state's obligation to remain neutral and ensure equal opportunity in the electoral process. The Court explained that "an impermissible influence on an election, resulting from an election error or mistake, exists only if the influence on the formation of the voter's intent constituted a violation of the fundamental freedom or equality of the election." *Id.* at 127 (author's translation). Institutional and organized attempts at influencing the formation of the voter's electoral intent, especially by the state, troubled the Constitutional Court. *Id.* at 133–34. The Constitutional Court concluded that an action violates the *gute Sitten* if: (1) the state supports a specific party to a more than acceptable degree and thereby affects the formation of the voter's electoral intent; (2) a private third party, an involved political party, or an individual candidate uses force or pressure to affect the formation of the voter's electoral intent; or (3) some other force, which is so strong that it could only be avoided with the help of the courts or police, is brought to bear on the formation of the voter's electoral intent. *Id.* at 132–33. Because the case before the Constitutional Court proceeded in the abstract, the Court was not required to apply its interpretation of the *gute Sitten* standard to the facts of the disputed Hessen state election, though the allegations of the use of unreported campaign funds clearly appeared to fall short of the announced standard. *Id.* at 132–33.

235. BVerfGE 103, 111 (136).

236. *Id.* at 137.

237. *Id.* at 138–39.

Out of respect for the sound democratic reasoning and resoundingly popularist constitutional pedigree upon which the Hessen Constitution relied in creating the Election Review Court, the Constitutional Court did not directly find the Election Review Court unconstitutional.<sup>238</sup> The Constitutional Court concluded, however, that the mixed judicial and political nature, teamed with an attending lack of neutrality and judicial independence, rendered the Election Review Court something less than a "court" in the constitutional sense.<sup>239</sup>

This characterization led the Court to another conclusion that left the Election Review Court significantly weaker, if not incapacitated. The Court credited the Hessen State Government's challenge to Section 17 of the Election Review Act, which provided for the immediate enforcement of the Election Review Court's decision.<sup>240</sup> This ruling effectively stripped the Election Review Court of the central element of the Constitutional Court's definition of judicial power: the final and binding effect of its decisions. The Constitutional Court concluded that, pursuant to Article 92 of the Basic Law, "a decision with such legal consequences in an election review process may not be reached by a mixed institution like the 'Election Review Court.'"<sup>241</sup> The Constitutional Court found that the Election Review Court's authority to enter a nonreviewable decision was unconstitutional, especially when the institution intended to resolve disputed legal claims.<sup>242</sup> Such expressions of state authority, the Constitutional Court emphasized, belong exclusively to the province of the Article 92 judiciary.<sup>243</sup>

In striking Section 17 of the Election Review Act the Constitutional Court required that the Hessen State Court of Justice, with its constitutionally guaranteed (as an Article 92 judicial institution) neutrality and independence, have the opportunity to review the decisions of the Election Review Court.<sup>244</sup> To this end, the Constitutional Court recommended the reformulation of Section 17 of the Election Review Act,<sup>245</sup> making the decisions of the Election

238. *Id.*

239. The Court recalled that former Reichsminister for the Interior Hugo Preuss described a similar entity under the Weimar Constitution as a *mittleres Verfahren* (mixed process). *Id.* at 139.

240. See *supra* note 215 (discussing reopening of *Hessen Election Case*).

241. BVerfGE 103, 111 (139–140).

242. *Id.*

243. See *id.* at 140 (holding that public decisions having legal consequences must be taken by the judiciary).

244. *Id.*

245. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 29 (1994) ("[T]he Constitutional Court commonly embellishes its decision with specific instructions to the legislature as to how to assure future compliance with the Basic Law. This



Review Court enforceable after one month and not immediately, as had been the case.<sup>246</sup>

On February 23, 2001, just two weeks after the Constitutional Court entered its decision in the abstract judicial review proceedings in the *Hessen Election Review Case*, the Hessen Election Review Court entered its judgment in the challenge to the validity of the CDU's 1999 state election victory.<sup>247</sup> Applying the Constitutional Court's new, broad definition of the *guten Sitten* standard, the Election Review Court ruled that the CDU's use of illegal funds, while regrettable, could not be said to have constituted the high degree of coercion or force required to invalidate the election.<sup>248</sup> In its judgment, the Election Review Court complained that the Constitutional Court's decision had severely handicapped the Election Review Court's ability and authority to review the challenge to the 1999 election.<sup>249</sup>

#### 4. Implications of the Hessen Election Review Case for Judicialization

The Constitutional Court's decision in the *Hessen Election Review Case* constituted an explicit, and perhaps conclusive, victory for judicialization. It involved the renunciation of the Hessen Election Review Court, one of the last vestiges of the popularism that characterized the hopes of Germany's short-lived 1849 *Paulskirche* Constitution, which later ascended as the cardinal value of the Weimar Constitution.<sup>250</sup> In both of these constitutional moments, and even the 1871 *Reichsverfassung*, the populist sanctity of the electoral process marked the review of elections as a right of parliamentary self-management.<sup>251</sup>

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practice too will strike a familiar cord for readers conversant with such Supreme Court decisions as *Miranda v. Arizona* and *Roe v. Wade*." (citations omitted)).

246. See BVerfGE 103, 111 (141–42) (reformulating § 17 of the Hessen Election Review Act to make the Election Court's decisions enforceable only after thirty days).

247. See *Beschluss des Wahlprüfungsgerichts beim Hessischen Landtag zur Nachprüfung der Gültigkeit der Landtagswahl 1999* [Hessen Election Review Court], 32 STAATSANZEIGER FÜR DAS LAND HESSEN 1162 (2001) (disposing of the challenges to the election), at <http://141.90.2.45/cache/Tabellen/stanz2001.htm> (last visited Dec. 4, 2003) (on file with the Washington and Lee Law Review). Also published at 14 NEUE JURISTISCHE WOCHENSCHRIFT 1054 (2001) (unofficial publication of the decision by a commercial journal).

248. *Id.*

249. *Id.*

250. See BVerfGE 103, 111 (126) (remarking the fact that the Hessen Election Review Court had its tradition in the Weimar Constitution). See generally H.W. KOCH, A CONSTITUTIONAL HISTORY OF GERMANY (1984); PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW (1997).

251. Martin Morlok, *Wahlprüfung; Mandatsprüfung (Artikel 41)*, [Election Review; Review of Electoral Mandates (Article 41)], in GRUNDGESETZ KOMMENTAR, BAND II, 880, 881

This tradition of popularist respect for pure politics, remarkably similar to the emphasis the U.S. Constitution and federal law places on a Congressional settlement of Electoral College disputes,<sup>252</sup> was expressed in the Weimar Constitution through a *Wahlprüfungsgericht* (Election Review Court). The *Wahlprüfungsgericht* was a hybrid benefiting from the substantive and procedural legal expertise of the judiciary (through the participation of judges) while retaining, unmistakably, its popularist identity (through the majority participation of parliamentarians).<sup>253</sup> This institution is the very same the Federal State Hessen adopted in its 1946 state constitution<sup>254</sup> and the Federal Constitutional Court condemned to irrelevance in the *Hessen Election Review Case*.

But, more than representing a choice for the unaccountable and unrepresentative judiciary over more popularist institutions in the context of the election disputes, popularist alternatives the existing law clearly favored, the Constitutional Court's decision also had the effect of resolving the Hessen state parliamentary election in favor of one candidate and his party, a circumstance of which the judges of the Federal Constitutional Court must have been aware. In this important respect, the Federal Constitutional Court's decision is similar to the Supreme Court's decision in *Bush v. Gore*.

#### IV. Converging on the Judicialization of Pure Politics

In spite of their similarities, the victories for judicialization scored by *Bush v. Gore* and the *Hessen Election Review Case* are set against the backdrop of divergent constitutional traditions. German judicialization is, largely, the constitutionalized reaction to the distinct shock of the National Socialist terror.<sup>255</sup> The present ascendancy of judicialization even in the sphere of pure

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(Horst Dreier ed., 1998) (noting the majoritarian significance of the tradition of parliamentary self-governance).

252. See *infra* Section IV.B (discussing the Supreme Court's intervention in the Florida Electoral College dispute).

253. See Art. 31 Weimarer Reichsverfassung [WVR] [Constitution of the Weimar Republic] (providing for an Election Review Court consisting of judges and a majority of parliamentarians); Morlok, *supra* note 251, at 881 (noting the fact that the Election Review Court created by the Constitution of the Weimar Republic provided that a majority of its members would be parliamentarians).

254. See Art. 78.3 HV (providing for an Election Review Court consisting of three judges and three parliamentarians). Notably, the Hessen Constitution is three years older than the Federal Basic Law.

255. "The aim of the delegates [at the constitutional convention] was to reconstitute the free democratic system envisioned by the Weimar Constitution while correcting the weaknesses

politics, perhaps brought to its fullest fruition by the *Hessen Election Review Case*, is explicitly a response to the populist abuses that characterized the Nazi regime.<sup>256</sup> It is not possible, however, to refer to any similarly distinct (and incontestably justifiable) stimulus in American constitutional history as a trigger for the judicialization the Supreme Court's decision in *Bush v. Gore* achieved.

## A. German Judicialization of Election Review

### 1. German Judicialization Generally

The judiciary enjoys distinct predominance in the German constitutional order, notwithstanding the system's clear alignment with the parliamentary tradition.<sup>257</sup> The size of the German judiciary characterizes, at least symbolically, the judiciary's predominance.<sup>258</sup> In Germany there are as many

thought to have contributed to its demise." CURRIE, *supra* note 245, at 9 (citing Helmut Steinberger, *Bemerkungen zu einer Synthese des Einflusses ausländischer Verfassungsideen auf die Entstehung des Grundgesetzes mit deutscher verfassungsrechtlicher Traditionen*, in 40 JAHRE GRUNDGESETZ: ENTSTEHUNG, BEWÄHRUNG UND INTERNATIONALE AUSSTRAHLUNG 41, 53 (Klaus Stern ed., 1990) ("Weimar and the terrifying example of National Socialism stood clearly in the foreground."); see also GORDON SMITH, *DEMOCRACY IN WESTERN GERMANY: PARTIES AND POLITICS IN THE FEDERAL REPUBLIC* 47 (1979) ("In devising the new constitution the almost overriding pre-occupation of the delegates was to avoid the 'mistakes' of the Weimar Republic; the Basic Law reflects a sustained attempt at rectification rather than a desire to construct a visionary democratic order."); Kim Lane Scheppelle, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1367 (2001) (stating that historical horrors, such as Nazi Germany, have led several countries to embody "rule-of-law" clauses in their constitutions).

256. SMITH, *supra* note 255, at 44. Smith wrote:

The spectre of the Weimar Republic is not easily laid to rest in Germany. Even though the Federal Republic has a reputation for stability, and slight faltering of the political institutions immediately provokes an air of intense crisis: the ever-present fear that a pronounced failure would show, after all, that liberal democracy does not work in Germany. This insecurity may help to account for the marked reliance on the constitution and on legal norms: they provide a measure of reassurance and certainty in the face of the dangerous vagaries of politics [that is, populist institutions].

*Id.*

257. See Schulze-Fielitz, *supra* note 31, at 362 ("Aber die Justiz ist doch zu einem erheblichen Machtfaktor geworden, deren Einfluß sich tendenziell ausdehnt." ["But the judiciary has become a considerable power with the tendency to expand its influence."] (author's translation)); Sweet, *supra* note 30, at 191 (stating that the federal Constitutional Court has "perhaps the most wide-ranging [jurisdiction] of any court anywhere").

258. Schulze-Fielitz, *supra* note 31, at 362-63.

as 20,969 state and federal judges, or one judge for every 4,000 Germans.<sup>259</sup> By comparison, in reputedly over-litigious America, there are 28,172 state and federal judges, one judge for every 10,000 Americans.<sup>260</sup> These statistics admittedly fail to account for the distinct functions the judiciary serve in the two systems, including the fact that German judges, acting alone (that is, not necessarily depending upon the case made by attorneys and often with only a token role played by jurors), are responsible for resolving conflicts in a broad range of social spheres.<sup>261</sup> The distinction between the role of judges in the two systems, however, merely proves the point: The unaccountable and unrepresentative judiciary plays a remarkably pervasive role in German society.<sup>262</sup>

The term *Streitbare Demokratie* (militant democracy), one of the fundamental principles upon which the German Federal Republic stands, dramatically captures the extreme limit to which the German constitutional order is willing to substitute the wisdom of a professional, life-tenured judiciary for that of the politically driven will exercised by popularist institutions.<sup>263</sup> *Streitbare Demokratie* refers to the concept that democracy is entitled to defend itself against its internal enemies,<sup>264</sup> even by essentially undemocratic or authoritarian means.<sup>265</sup> This fundamental limit on deliberative popularism finds its expression in Articles 18 and 21.2 of the Basic Law, which provide for the forfeiture of basic rights and the banning of political parties.<sup>266</sup> True to

259. Russell Miller, *Judicial Selection Controversy at the Federal Court of Justice*, 2 GERMAN L. J. 8, ¶ 19 (2001), available at <http://www.germanlawjournal.com> (on file with the Washington and Lee Law Review); Schulze-Fielitz, *supra* note 31, at 363 (citing statistics from 1997 and numbering 20,999 German judges).

260. Miller, *supra* note 259, at ¶ 19.

261. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 86–88 (2001) (comparing the role of judges in American and German dispositions). For an introduction to the various and numerous German subject matter jurisdictions, see NIGEL FOSTER AND SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 127–28 (3rd ed. 2002).

262. See Miller, *supra* note 259, ¶ 19 ("That explanation, however, should do nothing to minimize the resounding fact that the judiciary plays an extraordinarily important role in the function of German society.").

263. See KOMMERS, *supra* note 217, at 217–37 (providing a general explanation of militant democracy in German Basic Law).

264. Internal enemies include those who (1) seek to abolish the free democratic order or to endanger the existence of the Federal Republic; and (2) abuse the basic freedoms (speech, press, teaching, assembly, association or property) "in order to combat the free democratic basic order." *Id.* at 38.

265. See *id.* at 37–38 (stating that Article 18 authorizes the Federal Constitutional Court to order the forfeiture of rights).

266. Article 18 provides: "Whoever abuses [a list of basic rights follows] in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its

judicialization, in both cases the Federal Constitutional Court, the system's supreme judicial organ, is the sole and unappealable authority empowered to impose these penalties.<sup>267</sup>

The extensive role played by the Federal Constitutional Court in other, more traditional questions, further betrays the depth of German judicialization. As Donald Kommers remarked in defining the overtly political stature of the Federal Constitutional Court:

The deeply ingrained Continental belief that judicial review is a political act, following the assumption that "constitutional law—like international law—is genuine political law, in contrast, for example, to civil and criminal law," prompted Germans to vest the power to declare laws unconstitutional in a special tribunal . . . a separate constitutional tribunal with exclusive jurisdiction over all constitutional disputes, including the authority to review the constitutionality of laws.<sup>268</sup>

In most cases, appeal to the Federal Constitutional Court is by right, not even just for individual citizens asserting a violation of their basic rights,<sup>269</sup> but also for the various political institutions and bodies endowed with standing before the Court.<sup>270</sup> With a clear path to the highest levels of the judiciary open to political actors, and Germany's lack of a political question doctrine,<sup>271</sup> there is open criticism that politics, the very matter of popularist activity, have been subjugated to the judiciary. Such criticism notwithstanding, the sweeping and non-controversial status of constitutional judicial review in postwar German jurisprudence also exemplifies Germany's embrace of judicial involvement in

extent shall be declared by the Federal Constitutional Court." Article 21.2 provides: "Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality."

267. *Id.*

268. KOMMERS, *supra* note 217, at 3, 9 (quoting GERHARD LEIBHOLZ, POLITICS AND LAW 329 (1965)).

269. A constitutional amendment creating an individual's right to file a constitutional complaint with the Federal Constitutional Court was ratified in 1969. *See* art. 93.1(4a) GG; KOMMERS, *supra* note 217, at 14 ("[A]ny person may enter a complaint of unconstitutionality if one of his or her fundamental substantive or procedural rights under the Constitution has been violated by public authority.").

270. *See* art. 93 GG (containing a list of areas besides constitutional complaints within which the Federal Constitutional Court rules, such as disputes between political institutions and bodies).

271. CURRIE, *supra* note 245, at 170 ("In accordance with this point of view, it is commonly said that German law knows no equivalent of our political question doctrine: All constitutional questions presented must be decided by the Constitutional Court.").

popularist spheres. From the initial concern about the subject expressed during the debates of the *Parlamentarischer Rat* (Parliamentary Council or Constitutional Convention) in 1948,<sup>272</sup> German law has come to accommodate and the German public has come to accept (if not expect) a thorough-going power of judicial review from the Federal Constitutional Court, including abstract judicial review.<sup>273</sup> Donald Kommers explained:

[T]he Constitutional Court is at the epicenter of Germany's constitutional democracy. "The Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court," remarked Professor Rudolf Smend on the court's tenth anniversary. Already by the 1990s Smend's view was conventional wisdom among German public lawyers and constitutional scholars.<sup>274</sup>

This encompassing role played by the judiciary is all the more surprising when set in the context of a parliamentary system, which is meant to endow the popularist institution with supremacy while the judiciary is reduced to the mere interpretation of the law.<sup>275</sup> In keeping with the parliamentary model, the Basic Law anticipates the priority of the *Bundestag* (federal parliament), while at the same time undermining it. At Article 20.3, for example, the constitution establishes that: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."<sup>276</sup> David Currie explained that Article 20.3 clearly invokes the traditional sense of parliamentary supremacy,<sup>277</sup>

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272. In the Parliamentary Council:

The controversy centered on the distinction between what some delegates regarded as the "political" role of a constitutional court and the more "objective" law-interpreting role of the regular judiciary. Some delegates preferred two separate courts—one to review the constitutionality of laws (i.e., judicial review), the other to decide essentially political disputes among branches and levels of government (i.e., constitutional review).

KOMMERS, *supra* note 217, at 8.

273. Art. 93.1 GG; §§ 76 & 77 BVerfGG. "One manifestation of this tendency is abstract judicial review." KOMMERS, *supra* note 217, at 39; *see also* CURRIE, *supra* note 245, at 168–69 (discussing the pervasice role of abstract judicial review in the Constitutional Court).

274. KOMMERS, *supra* note 217, at 55.

275. CURRIE, *supra* note 245, at 134–49 (arguing that in the German system, the executive is essentially (though admitting of characteristic exceptions to the rule) an extension of the parliament); SMITH, *supra* note 255, at 62 (discussing parliamentary control over the judiciary); *see also* arts. 62–69 GG (dealing with the Federal Government).

276. Art. 20.3 GG.

277. "Article 20.3 of the Basic Law states the fundamental principle of statutory supremacy ('Gesetzvorrang': While the legislature itself is bound only by the constitutional order ('die verfassungsmäßige Ordnung'), the executive and the courts are bound by law ('Gesetz und Recht')." CURRIE, *supra* note 245, at 116.

but vagueness with respect to the language used in the Basic Law on this point has left the door open for the judiciary to level the playing field if not seize the advantage.<sup>278</sup> A controversial interpretation of the language of Article 20.3, leading to the creation of a kind of common law-making authority for the courts, was not necessary to color the German system as thoroughly judicialized.<sup>279</sup> The Basic Law itself recognizes, in the myriad and broad avenues leading to the jurisdiction of the Federal Constitutional Court, the predominance of that judicial organ, which the Constitution charges with serving as the *Hüter der Verfassung* (guardian of the constitution).<sup>280</sup>

In light of the thorough judicialization of German constitutional/political culture, it was more than just a tribute when, in the keynote address at the state ceremony celebrating the Federal Constitutional Court's Fiftieth Anniversary, Gerhard Casper referred to postwar Germany as the "Karlsruhe Republic," claiming that "if cities are to define German republics, then please allow me—at least for today and on this occasion—to choose the city of Karlsruhe, where the Federal Constitutional Court is located . . ." <sup>281</sup> He might have called it the "Judicialized Republic" instead.<sup>282</sup>

278. *Id.* ("Just what is meant by 'Recht' in this provision is unclear."). The Federal Constitutional Court resolved the question to the advantage of the judiciary in the *Soraya Case*, BVerfGE 34, 269. David Currie explained:

*Recht* . . . under some circumstances . . . could include additional norms derived by judges from "the constitutional legal order as a whole" and functioning "as a corrective to the written law." It followed, said the Constitutional Court, that the judges could fill gaps in the statutes "according to common sense and general community concepts of justice."

*Id.* at 117–18 (quoting BVerfGE 34, 269 (287)).

279. See generally Volker Krey, *Rechtsfindung contra legem als Verfassungsproblem (I)*, [Finding of Justice Contra Legem as a Constitutional Problem (III)] 33 *Juristenzeitung* [JZ] 361, 378 (1978); Hans-Peter Schneider, *Die Gesetzmäßigkeit der Recht-sprechung* [The Legality of Jurisprudence], 28 *Die öffentliche Verwaltung* [DöV] 443, 452 (1975).

280. See Articles 92–94 GG (dealing with the broad jurisdiction and the composition of the Federal Constitutional Court); Article 13 BVerfGG (elaborating on the broad jurisdiction of the Federal Constitutional Court); see also KOMMERS, *supra* note 217, at 3 ("By contrast, Germany's Federal Constitutional Court, as guardian of the constitutional order, is a specialized tribunal empowered to decide only constitutional questions and a limited set of public law controversies." (emphasis added)).

281. Gerhard Casper, *The "Karlsruhe Republic"—Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court*, 2 GERMAN L. J. 18, ¶ 11 (2001), available at <http://www.germanlawjournal.com> (last visited Dec. 4, 2003) (on file with the Washington and Lee Law Review).

282. See FRIEDRICH KLEIN, BUNDESVERFASSUNGSGERICHT UND RICHTERLICHE BEURTEILUNG POLITISCHER FRAGEN 15 (1966) ("In derartigen Fällen wird das Gericht materiell im Bereiche der Gesetzgebung tätig, greift, wie es selbst einmal gesagt hat, die richterliche Gewalt in die gesetzgeberische Sphäre hinüber." ["In those cases in which the Court materially functions in

## 2. German Judicialization of Pure Politics

Germany's comprehensive judicialization has not neglected the process by which election disputes are settled. Article 41 of the Basic Law explicitly provides for the judicialization of election review and therefore thrusts the judiciary into the realm of pure politics, after first making a gesture towards the longstanding German tradition of parliamentary self-regulation:

- (1) The scrutiny of elections shall be the responsibility of the *Bundestag*. It shall also decide whether a deputy has lost his seat in the *Bundestag*.
- (2) Complaints against such decisions of the *Bundestag* may be lodged with the Federal Constitutional Court.<sup>283</sup>

Thus, according to the Article's first sub-part, the *Bundestag* decides in the first instance on any disputed election,<sup>284</sup> but, pursuant to the Article's second sub-part, the Constitutional Court's shadow looms ominously over this populist function. Another example of how complete the process of German judicialization has run is that German commentators casually disregard the view that the Court's review authority in this context represents a radical judicialization of what had long been exclusively a matter of parliamentary autonomy in Germany. The seminal commentary on parliamentary law and practice in Germany, for example, summarily concludes that this judicial intrusion upon parliamentary sovereignty "should not be seen as a restriction of the *Bundestag's* autonomy."<sup>285</sup> The most frequently cited critique of the

the political field of law-making, the judicial power overtakes, as the Court once said itself, the political law-making sphere." ] (author's translation)); Sweet, *supra* note 30, at 191 (charging the wide-ranging review activity of the court).

283. Art. 41 GG (emphasis added). David Currie remarked this feint towards a populist resolution of election disputes: "[The *Bundestag*] . . . resolves disputes respecting the election of its own members—*subject in the last instance to review by the Constitutional Court.*" CURRIE, *supra* note 245, at 112 (emphasis added).

284. Article 41 of the Basic Law only provides for the protection of "objective" electoral rights and not "subjective" electoral rights. See WOLFGANG SCHREIBER, HANDBUCH DES WAHLRECHTS ZUM DEUTSCHEN BUNDESTAG (BAND I—KOMMENTAR ZUM BUNDESWAHLGESETZ) 645 (2002) (comprehensive commentary on the Federal Election Act); Morlok, *supra* note 251, at 883 (noting the limitation of the constitutional protection of electoral rights to "objective" rights). "Objective" electoral rights refer to the general integrity of an election and thus the legitimacy of the democratically elected organ of the state. "Subjective" electoral rights refer to the individual interests of a voter, candidate or elected official in the electoral process. See, e.g., BVerfGE 4, 370 (379) (stating that the consideration of a claim arising out of an electoral dispute is much more concerned with the certification that the *Bundestag* was legitimately constituted.).

285. Jost Pietzcker, *Schichten des Parlamentsrechts: Verfassung, Gesetze und Geschäftsordnung*, in PARLAMENTSRECHT UND PARLAMENTSPRAXIS [*Layers of Parliamentary*



constitutional scheme for reviewing elections flirts with the issue of the propriety or democratic wisdom of the Court's involvement in the process of reviewing election disputes, but easily concedes the judicialization of the matter before moving on to focus on detailed criticism of the provisions of election review set out by Article 41 and its accompanying procedure.<sup>286</sup> Curiously, this disinterest in the democratic implications of the Court's involvement is set against the general recognition of the inherently populist significance of election review. Gerald Kretschmer concluded that the election review process the Basic Law provided "contains a plebiscitary element," albeit a plebiscite in which, ultimately, judges have the final word.<sup>287</sup> Martin Morlock also recognized that "election review, at its foundation, is to be conceived of as a matter of popular sovereignty," though that sovereignty is ultimately assigned to the judges of the Constitutional Court.<sup>288</sup>

The *Bundestag*, to its credit, has constructed a number of procedural barriers that serve to minimally limit the supervisory (and judicializing) influence of the Federal Constitutional Court with respect to the review of elections.<sup>289</sup> And, in its first term, the Federal Constitutional Court demonstrated a commendable measure of self-restraint when defining its role in the election review process. The Court found a constitutional complaint aimed at the *Bundestag*'s rejection of an election review complaint to be inadmissible because two of the procedural rules for invoking the Court's jurisdiction in such cases had not been satisfied.<sup>290</sup> More significantly, the Court decisively

*Law: Constitution, Laws and Handing Orders, in* PARLIAMENT AND PARLIAMENTARISM] 333, 335 (Hans-Peter Schneider & Wolfgang Zeh eds., 1989) (author's translation). In part, the Court's involvement in election reviews is a consequence of the initial characterization of challenges to elections as a *Rechtskontrolle* function (essentially, a "legal matter") giving rise to concerns about the Basic Law's provisions guaranteeing access to legitimately constituted courts. See SCHREIBER, *supra* note 284, at 883 (holding that the Election Review is a special complaint that has to be distinguished from other complaints); Arts. 19.4 and 92 GG. This reasoning is circular: Were one to characterize the review of elections as essentially a political matter, these constitutional requirements for judicial involvement would not come into play.

286. See Karl-Heinz Seifert, *Gedanken zu einer Reform des Wahlprüfungsrechts*, 20 DÖV 231, 232 (1967) ("[T]he complaint procedure before the BVerfG makes the matter worse rather than better.") (author's translation).

287. Gerald Kretschmer, *Wahlprüfung, in* PARLAMENTSRRECHT UND PARLAMENTSPRAXIS, *supra* note 285, at 441, 463 (author's translation).

288. See Morlock, *supra* note 251, at 883 (noting popular control over election review).

289. See SCHREIBER, *supra* note 284, at 451, 462-63 ("Um zu verhindern, daß das BVerfG leichtfertig angerufen wird und sich mit völlig unbegründeten, querulatorische order unsachlichen (. . .) Beschwerden Einzelner befassen muß." ["In order to prevent the easy, barely-justified recourse to the Federal Constitutional Court."]) (author's translation).

290. BVerfGE 1, 430 (1952). At issue in the case were two of the statutorily created procedural rules governing the filing of an election review complaint with the Federal

held that the procedural barriers the *Bundestag* had erected to limit the Court's involvement in election review cases were constitutional.<sup>291</sup> Nonetheless, the Court has had its fair share of opportunities to resolve election disputes pursuant to the authority vested in it by Article 41 of the Basic Law.<sup>292</sup>

The judicialization of election review had also been taking place at the level of state government. The two-stage model established by the Basic Law, with initial parliamentary review followed by conclusive judicial review, had been duplicated in thirteen of the Federal Republic's sixteen *Länder* (Federal States) at the time of the Federal Constitutional Court's decision in the *Hessen Election Review Case*.<sup>293</sup> Hessen, of course, was among the three deviant states and it was a structure, with its veiled but unequivocal concern for popularist authority over this highly sensitive sphere of pure politics, that the Federal Constitutional Court would render impotent with its decision in the *Hessen Election Review Case*.

It was not always so. The parliamentary (that is to say, popularist) body jealously held as its province election review in Germany prior to the birth of the Federal Republic. The Frankfurt Paulskirche Constitution of 1849, in Article 112, established that "[e]ach house shall review the legitimacy of its members and decide on their qualifications to serve."<sup>294</sup> Even with the

Constitutional Court: a statute of limitations of one month and the requirement that such a complaint be supported by 100 voters. See §§ 13, 48 BVerfGG (establishing these procedural requirements).

291. BVerfGE 1, 430 (432) (1952) (holding that the procedural requirements for admissibility of an Election Review complain at the Federal Constitutional Court do not contravene the Basic Law's guarantee of the right to a judicial hearing because they have the impact of focusing the Court's election review competence on violations of objective electoral rights).

292. Accounting only for the fourth through seventh federal election cycles (1961–1987), the Federal Constitutional Court considered 22 election review complaints. SCHREIBER, *supra* note 284, at 463.

293. Franz Josef Jung & Ingo Schon, *Die Hessische Wahlprüfung nach der Entscheidung des BVerfG*, 34 ZEITSCHRIFT FÜR RECHTSPOLITIK 354, 355 n.17 (2001) (citing HEINRICH LANG, SUBJEKTIVER RECHTSSCHUTZ IM WAHLPRÜFUNGSVERFAHREN 47 (1997) (studying the election review systems employed in the various federal states)).

294. Art. 112 Paulskircherverfassung [Paulskirche Constitution] (author's translation); see KURT BALL, DAS MATERIELLE WAHLPRÜFUNGSRECHT 8 (1931) (studying the substantive law on election review). Ball notes that the constitution of Baden, as early as 1818, similarly committed election review to the parliament (Art. 41). *Id.* at 9. The provision is remarkably close to its parallel in the U.S. Constitution, Article I, Section 5: "Each House shall be the Judge of Elections, Returns and Qualifications of its own members . . ." The parliamentary organ under the Paulskirche Constitution, known as the Nationalversammlung (National Assembly) considered the legitimacy of an election as a plenary body in only one case and found the election in one district to be invalid and denied the affected representatives their qualification to serve in the National Assembly. BALL, *supra*, at 51.

restoration of the rule of regional nobles in Germany in 1849, following the collapse of the Paulskirche revolutionary democratic experiment,<sup>295</sup> the rulers made limited provisions for democratic elections.<sup>296</sup> In those cases, the popularist mandate over election review remained the rule.<sup>297</sup> The *Reichsverfassung* (Imperial Constitution) of 1871, under which Germany found itself united as a nation state for the first time, did not change this tradition. Article 27.1 of the 1871 *Reichsverfassung* provided that: "The *Reichstag* [Imperial Parliament] reviews the legitimacy of its members."<sup>298</sup> The insistence of the democrats of the period on the absolute separation of democratic powers from the competences of the monarch was the primary basis for this clear commitment of the subject of election review to the parliament.<sup>299</sup> Another basis was the reference to the issue in the constitutions of other countries.<sup>300</sup> In sum, Germans simply took for granted the popularist nature of the authority to review elections throughout the pre-Weimar constitutional period,<sup>301</sup> reflecting an understanding of the proper separation of powers in a democratic system that did not require scholarly or political justification.<sup>302</sup>

An examination of the Weimar Constitution of 1919, enacted after the revolution transferred all public authority to the people, surprisingly reveals a

295. See MICHAEL STOLLEIS, PUBLIC LAW IN GERMANY 1800–1914, 248–59 (2001) (discussing constitutional law during the Revolution of 1848).

296. *Id.*

297. See Art. 78 Preußische Verfassung from 1850 [Prussia Constitution] ("Each chamber reviews and determines the legitimacy of its members" (author's translation)); Art. 27 Verfassung des Norddeutschen Bundes from 1867 [Northgerman Union Constitution] ("The *Reichstag* [Imperial Parliament] reviews and determines the legitimacy of its members." (author's translation)). BALL, *supra* note 294, at 9. During the pre-Weimar constitutional period in Germany only the Constitution of Alsace-Lorraine of 1911, in Article 9, assigned the responsibility for election review to a judicial organ. *Id.* at 10.

298. Art. 27.1 Reichsverfassung [Imperial Constitution] ("The *Reichstag* [Imperial Parliament] reviews and determines the legitimacy of its members." (author's translation)); BALL, *supra* note 294, at 9.

299. BALL, *supra* note 294, at 95.

300. *Id.* at 96; see Kretschmer, *supra* note 287, at 441, 445. Kretschmer notes that the issue of election review was first made a matter of constitutional law in the U.S. Constitution (1787), which unequivocally makes it a competence of Congress. Kretschmer claims that the treatment of the issue in the U.S. Constitution "was the model for the related terms of the French Constitution of 1789." *Id.* (author's translation). These constitutional developments, Kretschmer notes, were likely influenced by the commitment of the issue to the authority of the English House of Commons from as early as 1571. *Id.*

301. BALL, *supra* note 294, at 50 (noting that the National Assembly, which had its seat in Frankfurt am Main, took for granted that the right to "examine the legitimacy of a member" was a fundamental right of the parliament" (citation omitted)) (author's translation).

302. *Id.* at 241.

significant departure from the exclusively popularist tradition of election review. Article 31 of the Weimar Constitution substituted a mixed form of review in the nature of a *Wahlprüfungsgericht* (Election Review Court), providing that "an Election Review Court will be established at the *Reichstag* [Imperial Parliament]. It will also have jurisdiction over the question whether a parliamentarian has lost his or her seat."<sup>303</sup> The character and nature of the newly created Election Review Court significantly mitigated this apparent, radical judicialization of election review, which resulted from the Weimar Constitution's reliance on a "court" rather than the Parliament for resolution of election disputes. The entity Article 31 created, despite the Constitution's reference to it as a "court," looked nothing like the unrepresentative and unaccountable judicial organs that create the democratic risks associated with judicialization. Instead, the Weimar Election Review Court was predominantly a popularist institution; for example, Article 31 provided that "[t]he Election Review Court consists of members of the *Reichstag*, . . . and members of the *Reichsverwaltungsgericht* [Imperial Administrative Court], . . . . The Election Review Court functions through public, oral proceedings presided over by three members of the *Reichstag* and two members of the judiciary."<sup>304</sup> In this combination (three parliamentarians and two judges) the drafters clearly intended the Weimar Constitution to bring the hoped-for political neutrality and legal expertise of the judiciary to bear on the review of elections while nonetheless preserving parliamentary, popularist superiority over the matter. The heavily divided debate at the Weimar constitutional convention (*Nationalversammlung* [National Assembly]) reflected the widely-held anxiety of *any* transfer of authority over election review away from the parliament,<sup>305</sup> even in the symbolic form of the Election Review Court. The fact that the Weimar constitutional convention itself naturally retained the exclusive authority to adjudge the qualifications of the participants at the convention reflected this reticence.<sup>306</sup> The Convention only approved the proposal for the Election Review Court after Hugo Preuß, the widely-respected public law scholar, Interior Minister, and leading framer of the Weimar Constitution,<sup>307</sup>

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303. Art. 31 WVR (author's translation); BALL, *supra* note 294, at 138.

304. Art. 31 WVR (author's translation); BALL, *supra* note 294, at 138.

305. BALL, *supra* note 294, at 138 ("Many believed that in so doing the parliament relinquished an important right.") (author's translation).

306. *Id.* at 136.

307. Preuß is generally regarded as the leading figure in the constitutionalization of the Weimar Republic: "The Weimar Constitution had no more passionate defender than the person who drafted it." Christoph Schoenberger, *Introduction to Hugo Preuß*, in *WEIMAR: A JURISPRUDENCE OF CRISIS* 110 (Arthur J. Jacobson & Bernhard Schlink eds., 2000) (Belinda Cooper trans., et al. 2000).

delivered an impassioned speech in its defense, in which he assured the convention that the new, mixed form of review did not diminish the rights of the parliament.<sup>308</sup>

It was a vast leap from this popularist tradition, however modestly diminished by the "mixed" review of the Weimar Constitution, to the thoroughly judicialized process of election review that would emerge under Article 41 of the Basic Law. Heugo Preuß, in 1919, recognized the extent of that change during the Weimar constitutional convention at which the delegates introduced the mixed review of an Election Review Court, rather than Preuß's preferred absolute judicialization of the matter. Preuß remarked:

For myself, I would find it appropriate to completely assign the issue of election review to a court. Here, a mixed process is proposed in which parliamentarians and judges constitute the Election Review Court. In any event, I consider that to be considerable progress against the current situation . . . .<sup>309</sup>

The dramatic shift in democratic culture is the product of the desire, both Allied and German, to develop constitutional structures in postwar Germany that are responsive to the systemic and cultural weaknesses that made the National Socialist dictatorship and terror possible. One example of that shift is the Basic Law's abandonment of popularist mechanisms for resolving election disputes in favor of Article 41's highly judicialized process. This dynamic, what Norbert Frei called "postwar [German] democracy's foundational anti-Nazi consensus,"<sup>310</sup> gave impetus to the radical judicialization of German society. Edmund Spevack explained in his survey of the Allied influence on the drafting of the West German constitution that the key experiences for the German framers of the Basic Law "were the failure of the Weimar constitution and the personal experience of the National Socialist dictatorship."<sup>311</sup> The impulse in postwar German constitutional thinking was to react against both historical experiences.<sup>312</sup> This reaction, at least to the degree that the Allies,

308. BALL, *supra* note 294, at 137.

309. *Id.* (author's translation) (citing Drucks d. Nationalversammlung, Verh. Bd. 326, p. 290 D).

310. NORBERT FREI, *ADENAUER'S GERMANY AND THE NAZI PAST* xii (Joel Golb trans., 2002).

311. EDMUND SPEVACK, *ALLIED CONTROL AND GERMAN FREEDOM* 252 (2001).

312. *Id.* at 253–54. Spevack wrote:

It can certainly be said that the Basic Law built on the memory of Weimar liberal democracy, and its framers tried consciously to avoid some of the errors of construction which they recognized in the Weimar Constitution . . . . For the work of the Parliamentary Council, as well as for German constitutional drafts in the period 1940 to 1948 in general, however, there was another historical experience

and particularly the Americans, dictated it is dependent upon imported American constitutional theory—"presidentialism, federalism, and judicialism."<sup>313</sup> Spevack has portrayed the expansive jurisdiction of the Federal Constitutional Court, the primary example of postwar German judicialization as a "reaction to the Nazi period."<sup>314</sup> The German constitutional law expert Ulrich Scheuner justified the sweeping authority of the Federal Constitutional Court, and thus the trend towards judicialization, in these terms: "[The Germans] live in a country which cannot completely trust itself and has therefore made the attempt to construct a supreme court aiming to stabilize its order."<sup>315</sup>

This judicialization undoubtedly has brought the desired stability to Germany, which was evident even as the nation negotiated reunification. But it has also led to the refutation "of the old theory which made a sharp distinction between legal questions and political questions"<sup>316</sup> and consequently that:

[P]olitical issues are often formulated in constitutional law terms, so that the authority and legitimacy of law is invoked to justify and underpin ideological and partisan aims. Policy is discussed not in terms of expediency but in terms of constitutionality.

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which was just as important as the failed experiment of the Weimar Constitution: National Socialism. The Nazi era was clearly in the memory of the Germans, and the majority of those involved in drawing up constitutions has experienced the Nazi dictatorship first-hand.

*Id.*

313. *Id.* at 209 (emphasis added). "[C]ertain central areas of the Basic Law, such as the concept of . . . *judicial review*, were taken over from American constitutional theory and may be considered American constitutional exports into West German constitutional practice." *Id.* at 207 (emphasis added).

314. *Id.* at 234; see WILLIAM E. PATERSON & DAVID SOUTHERN, *GOVERNING GERMANY 67* (1991) (discussing the effect of the Nazi period on the establishment of the VW constitutional court). Paterson and Southern stated:

The experience of the Nazi Enabling Law of 24 March 1933, by which the *Reichstag* had transferred its powers to the government, also influenced the Parliamentary Council in favour of establishing a constitutional court. By the Enabling Law, it was argued, the Weimar system had been legally liquidated. A constitutional court could not have prevented dictatorship by annulling the law. It could, however, have made clear the difference between constitutional amendment and political revolution.

*Id.*

315. HEINZ LAUFER, *VERFASSUNGSGERICHTSBARKEIT UND POLITISCHER Prozeß 21* (1968) (author's translation) (citing Ulrich Scheuner, *Diskussionsbeitrag*, in *VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART* 834, 838 (Herman Miller ed. 1952)).

316. PATERSON & SOUTHERN, *supra* note 314, at 73.

With this presentation of political questions in legal terms goes a widespread reliance on judicial means of resolving disputes rather than on the political means of bargaining, negotiation and compromise.

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The German political system and political culture embody the widespread conviction not only that public actions should be capable of justification by reference to legal norms but also that the courts are an appropriate instrument to achieve this conformity. There is a very extensive reliance on judicial means of resolving contentious issues. The spectrum of judicial conflict resolution extends from high politics through the field of employment and covers all matters of ordinary administration and social provision.<sup>317</sup>

The debates leading to the enactment of Article 41 established that the judiciary was intended to address the suspicions of populism in postwar Germany in direct reaction to the shortcomings of the Weimar Constitution that made the Nazi dictatorship possible. The first proposal for an election review provision in the new constitution emphasized parliamentary authority over the issue, empowered the Parliament to create an election review court (like that which operated under Art. 31 of the Weimar Constitution), and extended jurisdiction to the Constitutional Court only if "the validity of the election remains [after being reviewed by the parliament] disputed."<sup>318</sup> The report to the constitutional convention concluded, with respect to the proposed article on election review, that "*at least* in the most important cases, as with a challenge to the whole election, the Constitutional Court should retain a right of review."<sup>319</sup> Despite the clear preference for a populist form of election review in the draft article and the reference to the limited nature of the Court's jurisdiction in the report, discussion at the convention quickly shifted to focus on a more significant role for the Constitutional Court. A representative of the CDU, Dr. de Chapeaurouge, stressed that "the issue dealt with a political dispute that one could not entrust to the parliament, which would certainly vote in favor of the majority."<sup>320</sup> In the event that the issue must remain with the parliament, Dr. de

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317. *Id.* at 74.

318. Hermann Rechenberg, *Artikel 41*, in *Kommentar zum Bonner Grundgesetz*, Band V, (Art. 38–49), 1, 3 (Rudolph Dolzer, Klaus Vogel, & Karin Graß eds., 2003) (citing Art. 51 of the Herrenschimseentwurfs [Herrenschimsee Draft] (detailing the history of the postwar constitutional convention for West Germany on the subject of election review).

319. *Id.* (author's translation) (citing Bericht über den Verfassungskonvent auf Herrenschimsee vom 10. Bis 23. August 1948 des Verfassungsausschusses der Ministerpräsidenten-Konferenz der westlichen Besatzungszonen [Kommentierender Teil] 86 (1948)) (emphasis added).

320. *See id.* at 4 (citing Organisationsausschuß, A.A. Sitzung vom 7 no. 1948 Stan Prot., p. 67) (detailing the history of the postwar constitutional convention for West Germany on the

Chapeaurouge suggested requiring the political body to act with a qualified majority.<sup>321</sup> Others, usually representatives of the CDU and FDP, expressed this antipopularist anxiety.<sup>322</sup> Only a single representative, Löbke of the SPD, reflecting on the clear popularist orientation of election review in the German constitutional tradition, expressed doubts about the need for any judicial role in election review.<sup>323</sup> But Dr. Mücke, another social democrat, countered that point by referring to the election crisis of 1933 that ultimately led to Hitler's ascension to the Weimar Chancellorship.<sup>324</sup> Mücke's remark moved the debate distinctly in the direction of a judicialized model of election review. The rest of the discussions focused on style and procedure, but the Constitutional Court's review authority over the Parliament's election review decisions was settled.<sup>325</sup>

German judicialization generally, and the judicialization of election review specifically, have their roots in the postwar constitutional reaction to the popularist excesses of the Weimar system that made the Nazi dictatorship possible. These are strong historical justifications for the intrusion of the judiciary into the sphere of pure politics, a sphere that German constitutionalism traditionally delegated to the Parliament. The Federal Constitutional Court's decision in the *Hessen Election Review Case* reaffirmed this shift and closed the door on an era of great faith in popularist institutions.

### *B. America Converging on Germany's Judicialization of Pure Politics*

The Supreme Court's decision in *Bush v. Gore* represents a no less significant act of judicialization. As with the Federal Constitutional Court in the *Hessen Election Review Case*, the Supreme Court chose to intervene in the election review process in spite of the fact that the Constitution and federal law clearly required a popularist process for resolving the Florida Electoral College dispute. There is, however, a significant difference between the two cases:

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subject of election review).

321. *See id.* (detailing the history of the postwar constitutional convention for West Germany on the subject of election review).

322. *See id.* (citing Organisationsausschuß, A.A. Sitzung vom 7 no. 1948 Stan Prot, p. 68) (detailing the history of the postwar constitutional convention for West Germany on the subject of election review).

323. *See id.* (detailing the history of the postwar constitutional convention for West Germany on the subject of election review).

324. *See id.* at 5 (citing ebenda, p. 75) (detailing the history of the postwar constitutional convention for West Germany on the subject of election review).

325. *See id.* (detailing the history of the postwar constitutional convention for West Germany on the subject of election review).



There is no similar, obvious historical justification for the judicialization the Supreme Court's decision in *Bush v. Gore* accomplished.

### 1. American Judicialization Generally

There is a vast literature addressing the evolving, historical role of the judiciary in the American constitutional polity. It is beyond the scope of this Article to recapitulate that long and rich tradition. It should suffice to remark that it is a story that begins with a constitutional provision<sup>326</sup> creating a judiciary so anemic in breadth and jurisdictional scope that it inspired Alexander Hamilton to characterize it in the *Federalist Papers* as "the least dangerous" branch.<sup>327</sup> It was, above all, a *republic* that the founding fathers intended to establish.<sup>328</sup> Suspicion of unaccountable and unrepresentative institutions like the judiciary was rife in Philadelphia<sup>329</sup> and was the prevailing view in the early years of the Republic.<sup>330</sup>

326. U.S. Const. art. III.

327. THE FEDERALIST No. 78, at 490 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

328. CAROL BERKIN, A BRILLIANT SOLUTION 9 (2002) ("Anxious and uncertain, the convention delegates nevertheless persevered. They brought to bear their political experience, their sensitivities to legal loopholes, their commitment to representative government.").

329. See SNOWISS, *supra* note 18, at 38–44 (discussing judicial review at the constitutional convention); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 60–74 (2001) (discussing the making of the Constitution).

330. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 239–40 (2000) ("[E]ven a limited power of judicial review remained controversial in the 1780s. At the time, the most that could be said . . . was that courts might exercise review where the legislature unambiguously violated an established principle of fundamental law."); see Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 251 (2002) (discussing early viewpoints on judicial review). Barkow stated:

In 1976, Justice Chase stated that he would declare an Act of Congress void only "in a very clear case." Similarly, Justice Paterson stated in 1800 that the Court should strike only "a clear and unequivocal breach of the constitution, not a doubtful and argumentative application." Courts at the founding recognized and respected the fact that "it is the duty of legislators as well as judges to consult [the Constitution] and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest.

*Id.* at 251.

Chief Justice Marshall's declaration<sup>331</sup> of the Supreme Court's exclusive authority to interpret the Constitution in *Marbury v. Madison*,<sup>332</sup> thereby imposing judicial review where the Constitution otherwise failed to textually provide for it, served as an epochal shock to this old conceptual order. Alexander Bickel, John Hart Ely, Frank Michelman and Mark Tushnet have convincingly argued that judicialization is counter-majoritarian, especially as it is achieved through the mechanisms of constitutionalism and judicial review.<sup>333</sup> To varying degrees each of the others agrees with Bickel's conclusion that "nothing in [the complexities of democracy] can alter the essential reality that judicial review [a variant of judicialization] is a deviant institution in the American democracy."<sup>334</sup> Without regard to the form of contemporary democracy to which one refers, from among the possible varieties,<sup>335</sup> it is a fundamental expectation that in democratic systems policy-making authority will be vested in popularist institutions, that is to say, popularly elected and accountable representatives.<sup>336</sup> Judicial review necessarily contradicts that

331. Scholars widely debate the origins of judicial review. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999).

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

333. See BICKEL, *supra* note 41, at 16–23 (discussing the counter-majoritarian force in the judiciary); ELY, *supra* note 34, at 1–9 (introducing the tension between majority rule and judicial review); TUSHNET, *supra* note 34, at 70–71 (discussing the judiciary's distrust of the people); Michelman, *supra* note 5, at 407–10 (discussing the paradox of constitutional democracy).

334. BICKEL, *supra* note 41, at 17; see ELY, *supra* note 34, at 66, 103 ("In a representative democracy value determinations are to be made by our elected representatives . . . [W]e may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures."); TUSHNET, *supra* note 34, at 31, 71 ("A populist constitutional law rests on a commitment to democracy, a commitment itself embodied in the Declaration's principles . . . . The skeptical rejection of populist constitutional law, however, is powerfully antidemocratic."); Michelman, *supra* note 10, at 399 ("Do we see some slight to democracy, some 'Counter-Majoritarian Difficulty,' . . . in unelected judges deciding the legal validity of the enactments of popular assemblies and thereby effectively ruling the country? . . . I am one who does see the difficulty, who tries to take democracy seriously.").

335. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 1 (1956) ("One of the difficulties one must face at the outset is that there is no democratic theory—there are only democratic theories.").

336. See, e.g., BICKEL, *supra* note 41, at 19 (explaining democratic theory and the electoral process). Bickel notes:

But nothing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to

expectation by extending an ever greater share of policy-making authority to the unaccountable and unrepresentative judiciary. Judicial review, as a form of judicialization and as opposed to popularism, is the expression of an exaggerated or opportunistic "form of distrust of the legislature"<sup>337</sup> and politics.<sup>338</sup>

Along with the extensive consideration given to the judicializing consequences of judicial review in American constitutional law, there has also been concern about judicialization in administrative law. Judge Loren Smith raised the issue in an article in the *Duke Law Journal* in 1985, explaining that "the 'judicialization of the administrative process' is a phrase descriptive of several related phenomena. It is probably used most often to refer to the active participation of the courts, through extensive judicial review, in the decisions of executive bodies."<sup>339</sup> In discussing this phenomenon, Judge Smith characterized the dialectic between politics and law as the tension between "decisions of will" and "decisions of logic"<sup>340</sup> and complained that American administrative law had succumbed to the fallacy that "we can make social and economic decisions by means of formal [legal/judicial] procedures without the exercise of political [populist] will." Judge Smith argued that the surprising source of much of the judicialization of American administrative law was legislative branch acquiescence rather than judicial branch self-aggrandizement.<sup>341</sup> Legislative vetoes, looking very much like mechanisms to

this characteristic.

*Id.*; DAHL, *supra* note 335, at 125 ("I am inclined to think that the radical democrats who, unlike Madison, insist upon the decisive importance of the election process in the whole grand strategy of democracy are essentially correct."); RAWLS, *supra* note 43, at 195 ("We may begin by recalling certain elements of a constitutional regime. First of all, the authority to determine basic social policies resides in a representative body selected for limited terms by and ultimately accountable to the electorate.").

337. BICKEL, *supra* note 41, at 21.

338. These commentators approach the judicialization phenomenon through a critique of judicial review, but they do not say that constitutionalism and judicial review are undemocratic. Bickel, Ely, Michelman, and Tushnet envisage an altered, more limited or more clearly defined, role for constitutionalism and judicial review. The point is that constitutionalism and judicial review, though inherently antipopulist, may serve an important democratic function, especially in protecting the interests of minorities against the tyranny of the majority. See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994). Wherever the boundary around the democratically permissible antipopulism of constitutionalism and judicial review may lie, it seems that the judicialization of pure politics is unquestionably located outside it.

339. Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 34 *DUKE L. J.* 427, 428 (1985).

340. *Id.* at 430.

341. *Id.* at 450. Smith argues:

What is surprising—and, I would argue, counterproductive—is that the recent

secure the popularist authority of Congress, actually had the opposite effect. The presence of this check on the exercise of executive authority led Congress to grant power to the executive in ever more vague terms, inviting at the same time more judicial scrutiny of these vague mandates.<sup>342</sup> Judge Smith explained: "Judicial review becomes far more important in defining the direction and meaning of a statute when that statute sets out vague and possibly self-contradictory mandates to an agency, rather than clear or simple directive that leave little room for any judicial doubt as to the agency's mission."<sup>343</sup>

Reflecting upon judicialization generally in the United States, Martin Shapiro concluded: "If any nation is the peculiar home of the expansion of judicial power, it is the United States."<sup>344</sup> As an explanation, Shapiro offered, consistent with the preceding paragraphs, the emergence of constitutional judicial review, especially as courts have exercised it in the administrative context.<sup>345</sup> He also argued that American judicialization is a by-product of "the litigation explosion."<sup>346</sup> Admittedly difficult to document and comparatively assess across various societies, Shapiro nonetheless identified a number of factors that attest to a "litigation explosion" as a contribution to judicialization in the United States, including shifts in tort doctrine, demographics, American corporate culture, and the growth in the number and size of large law firms.<sup>347</sup>

## 2. American Judicialization of Pure Politics

For more than 150 years, courts consistently treated questions implicating democratic structures and processes as political matters outside the competence of the judiciary. Chief Justice Marshall set the parameters of this preserve in *Marbury v. Madison*, the decision universally credited with the emergence of

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approach to government decisionmaking adopted by Congress has resulted in the augmenting of the institutional power of the third branch and, therefore, of those special interests with the capacity to use the courts to achieve judicially what they could not obtain politically.

*Id.*

342. *See id.* at 451 (discussing the legislative veto).

343. *Id.* at 452.

344. Martin Shapiro, *The United States*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 43, 43 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

345. *See id.* at 45–54 (discussing the growth of judicial review).

346. *Id.* at 54–56.

347. *See id.* (discussing briefly the various factors responsible for the "litigation explosion"). *See generally* Robert A. Kagan, *Constitutional Litigation in the United States*, in *CONSTITUTIONAL COURTS IN COMPARISON* 25 (Ralf Rogowski & Thomas Gawron eds., 2002).

judicial review and all of its judicializing consequences.<sup>348</sup> As the Court gave form to the political question doctrine, it became a matter of settled precedent that the law of democracy "fall[s] outside the purview of the [unaccountable and unrepresentative] judiciary" and lies instead with more populist institutions.<sup>349</sup> Rachel Barkow discussed a number of the Supreme Court's cases that established this boundary in her excellent survey of the evolution of the political question doctrine.<sup>350</sup> The capstone case in this line is *Colegrove v. Green*,<sup>351</sup> in which Justice Frankfurter, along with the oft-cited warning against judicial involvement in the "political thicket,"<sup>352</sup> convincingly articulated the populist justification for so limiting the Court's competence in respect to questions of democratic structure and process (like Congressional districting and reapportionment):

Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.<sup>353</sup>

All of this changed when the political question doctrine gave way at the beginning of the 1960s.<sup>354</sup> "In the decade between 1959 and 1969, the Supreme Court, which had addressed relatively few voting rights issues not directly connected with black disenfranchisement in the preceding half century, entertained a steady stream of voting rights cases."<sup>355</sup> The Supreme Court's

348. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

349. Barkow, *supra* note 330, at 244.

350. *See generally id.*

351. *Colegrove v. Green*, 328 U.S. 549 (1946).

352. *Id.* at 556.

353. *Id.* at 553–54.

354. Barkow, *supra* note 330, at 263–73 (discussing "the beginning of the end" of the "political question" doctrine).

355. ISSACHAROFF ET AL., *supra* note 19, at 40. The Court's restraint in all democratic process cases but those involving black disenfranchisement cannot be urged as an artificial distinction used to cover the fact that the Court really had frequently intervened in the law of democracy because the racially discriminatory focus of these cases casts them in the light of individual rights concerns for which protection by judicial review has proven an effective democratic mechanism. Barkow, *supra* note 330, at 242 ("At one end of the spectrum are the questions on which the political branches are entitled to no deference. This theory of interpretation makes most sense in cases involving the proper scope of individual rights.").

intervention on the issue of voting rights was not an isolated exception but rather occurred alongside the "reapportionment revolution,"<sup>356</sup> another wave of cases that "thrust the Supreme Court into one of the most difficult areas of policing the electoral system . . . the structural dimension of proper electoral opportunity, [leading to] the emergence and application of the, by now well-known, one-person/one-vote rule."<sup>357</sup> At the eye of this storm was the Supreme Court's decision in *Baker v. Carr*,<sup>358</sup> "perhaps the most profoundly destabilizing opinion in the Supreme Court's history."<sup>359</sup> The Court in *Baker* expanded the scope of the doctrine to include not only the "classical" (separation of powers concerns built into the Constitution's design) but also a "prudential" (pragmatic, judicial self-restraint) basis for excluding the Court's competence over a question.<sup>360</sup> This seeming expansion of the doctrine was not enough, however, to prevent the Court's intervention in that particular reapportionment dispute, and as a result *Baker* "actually signaled the beginning of the end of the prudential political question doctrine. In fact, in the almost forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political questions."<sup>361</sup> The era of the judicialization of the law of democracy was fully underway.

The judicializing revolution *Baker* triggered also exposed the realm of pure politics to judicial intervention. The Court's first significant excursion into the field resulted from its refusal to find that the political question doctrine precluded its review of Representative Adam Clayton Powell's suit seeking various remedies for harms he suffered upon his exclusion from the Ninetieth Congress.<sup>362</sup> Following a House investigation that revealed mismanagement and financial irregularities during Powell's Chairmanship of the House Committee on Education and Labor in the Eighty-Ninth Congress, the House sought to exclude Powell upon his re-election to the Ninetieth Congress pursuant to its constitutional authority to "be the judge of the Elections, Returns, and Qualifications of its own Members . . . ."<sup>363</sup> Unlike the Court's

356. ISSACHAROFF ET AL., *supra* note 19, at 116.

357. *Id.*

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

359. ISSACHAROFF ET AL., *supra* note 19, at 134.

360. Barkow, *supra* note 330, at 253–72 (explaining in detail how the prudential version of the political question doctrine gradually grew out of interpretive questions associated with the classical theory).

361. *Id.* at 267–68.

362. See *Powell v. McCormack*, 395 U.S. 486, 518–19 (1969) (stating that the case did not present a "political question").

363. U.S. CONST. art. I, § 5, cl. 1.

forays into the law of democracy over the preceding decade, Powell's case did not present an abstract question about participation or districting but instead placed the outcome of a specific, albeit disputed, election in the hands of the Court. The Court's decision would determine the fate of a particular candidate for office and, at the same time embrace or reject the constitutional structure giving priority to the competence of the popularist institution over the matter. The Court grappled with a detailed historical examination of the meaning of the term "qualifications" as used in Article I, Section 5 in resolving the first of the *Baker* standards for establishing a nonjusticiable political question, namely, whether there has been a "textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>364</sup> The Court interpreted Congress's authority to be the judge of its members' "qualifications" in the most narrow terms, limiting that power only to the review of the "standing qualifications" outlined in Article I, Section 2 of the Constitution.<sup>365</sup> Excluded from this narrow interpretation of the term "qualification" was the broader authority of Congress to judge the "fitness" of its members and, more generally, its authority to serve as the popularist authority in election review matters.<sup>366</sup> The Court justified its narrow interpretation of Congress's exclusive authority pursuant to Article I, Section 5 by invoking the popularist risk that Congress might use the authority that would arise from a more expansive interpretation to thwart the will of the electorate.<sup>367</sup> Invoking both the commentary of James Madison and the story of John Wilkes,<sup>368</sup> the Court claimed that its narrow interpretation honored the Framers' rejection of the possibility that the legislature would have the competence to "usurp the indisputable right (of the people) to return whom they thought proper to the legislature."<sup>369</sup>

For all the popularist merit of the Court's stated intention of protecting the electorate from a representative assembly that might seek to insulate itself from the electorate by refusing to seat disagreeable representatives, the Court ignored the inherently antipopularist costs of its decision. By exempting Article I, Section 5 powers from the protection against judicialization the political question doctrine provided, the Court asserted itself as the proper institution to

364. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

365. U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

366. *See Powell*, 395 U.S. at 550 ("[I]n judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.").

367. *Id.* at 533–35.

368. *Id.*

369. *Id.* at 535 (internal quotation omitted).

resolve such wrinkles in the democratic structure and process. In so doing, the Court substituted the unaccountable and unrepresentative judiciary for the accountable and representative houses of Congress. The Court also failed to account for the popularist check the electorate could exercise over such a Congress run amok: Voting the renegades out of office if push came to shove.

The Court certainly could not have anticipated that it was paving the way for it to ignore, thirty-one years later, the constitutional and statutory prerogative of Congress (the popularist prerogative) over presidential election disputes, such that the Court could essentially select the President just as it had, in essence, selected Congressman Powell. One must nevertheless read *Powell* as clear invitation to the judicialization of pure politics, and one must see *Bush v. Gore* as the natural bottom of the slippery slope onto which the Court wandered in *Powell*.

The political question doctrine should have precluded the Court's consideration of Governor Bush's suit challenging the statewide manual recount of undervote ballots in Florida. "The text of Article II—as amended by the Twelfth Amendment—makes clear, then, that Congress plays a vital role in the election of the President. The House and Senate, respectively, have the power to cast the deciding ballots in elections."<sup>370</sup> One can even read this clear commitment of the matter to Congress to include Congress's authority to adjudge the role of the state judiciary in the process.<sup>371</sup> This ought to have been enough to fulfill the first of *Baker's* standards<sup>372</sup> and to preclude the Court from taking the case. But working in the shadow of *Powell*, the per curiam majority did not even bother to discuss the political question doctrine, in spite of the highly politicized nature of the case with which it was confronted in *Bush v. Gore*.<sup>373</sup>

370. Barkow, *supra* note 330, at 278.

371. *Id.* at 279 (arguing that "the text of Article II, section 1 itself appears to give Congress the ability to determine whether a state judiciary has overstepped its bounds and improperly interfered with the state legislature's authority under Article II to determine the manner in which electors are chosen").

372. See *supra* note 360 and accompanying text (discussing the first of the *Baker* standards).

373. Barkow, *supra* note 330, at 275. Barkow wrote:

To be sure, neither respondent Gore nor respondent Palm Beach County Canvassing Board relied on the political question doctrine in opposing petitioner Bush's claim, and the Court was under enormous time pressure to reach a decision. But neither the absence of full briefing nor the press of time can absolve the Court of its independent obligation to determine whether it has jurisdiction.

*Id.*

In support of the conclusion that the Court should have found *Bush v. Gore* nonjusticiable, Erwin Chemerinsky noted the Court's invocation, albeit a rare example, of the political question



As persuasive as the political question doctrine argument is, revealing that at least some of the issues confronting the Supreme Court in *Bush v. Gore* clearly fulfilled the criteria for the nonjusticiability and concomitant exclusion of the Court's intervention in *Bush v. Gore*, Barkow raised the point in the context of a broader review of the "fall of the political question doctrine."<sup>374</sup> In this light it may be necessary to envision an altogether distinct or new doctrine, a doctrine of pure politics, which would preclude the Court's meddling in an outcome specific election context. This might be necessary first because the Court's political question doctrine jurisprudence, limited as it now is, may simply be inadequate to the task of checking the spread of judicialization. More importantly, it might be necessary to conceive of a new doctrine because the traditional political question doctrine, with the separation of powers as its chief concern, does not adequately (i.e., directly and explicitly) address the populist values at stake in pure politics. The issue there is not the superiority of one or the other branches, but rather the validation of the rarefied populist, republican principles that underlie our entire constitutional democracy. It just so happens that, as between the unaccountable and unrepresentative judiciary and more populist institutions like Congress or the Florida legislature, the populist institutions are those that can best deliver on those values. Under a new doctrine of pure politics, assigning priority to those institutions is not dependent upon an evaluation of their "proper" roles as between separated powers but upon a practical evaluation of their likelihood to advance a specific set of populist values.

These populist values held sway in the framing of the process by which the President would be selected. "An evaluation of the historical materials indicates that the selection of electors was intended to be placed within the control of the people through their representatives [at the state level]."<sup>375</sup> The courts respected this populist mandate throughout most of the nation's first two-hundred years. This was true of the ratification debates<sup>376</sup> and subsequent presidential election disputes.<sup>377</sup>

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doctrine in another pure politics context. See Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1108–09 (2001) (discussing *O'Brien v. Brown*, 409 U.S. 1 (1972), in which the Court found that an equal protection challenge to the political process was nonjusticiable).

374. See generally Barkow, *supra* note 330.

375. *Id.* at 281.

376. See *id.* at 280–81 ("[A]n analysis of the ratification debates shows the framers intended Congress, not the courts, to play a strong role in resolving disputes over elections.").

377. See *id.* at 286–95 (discussing the Hayes-Tilden election and other similar disputes and arguing that Congress and the Supreme Court remained accountable for their roles in the process).

The American commitment to popularist resolution of conflict in the realm of pure politics mirrors Germany's commitment. If one fixes the American leap to judicialize this sphere of pure politics to the Supreme Court's decisions in *Baker* or *Powell*, it appears that the American shift occurred some twenty years after the postwar German break with the popularist priority of the Weimar period. More important than the question of why the Americans held onto their popularist commitment a few years longer than the Germans is the question of why Americans, too, ultimately abandoned it in the 1960s and then with a vengeance in *Bush v. Gore*. The question is exacerbated by the glaring absence of a historical or political shock, like the Nazi trauma in Germany, to justify the shift. Rather, judicialization of pure politics in the United States seems more likely a part, and perhaps the final step, of a much broader trend by which the Supreme Court is aggressively accumulating power for itself on purely ideological grounds (determined from season to season by the political posture of the Court at any given time) and not the necessity of history. As Barkow noted:

In the past few decades, however, the Supreme Court has become increasingly blind to its limitations as an institution—and, concomitantly, to the strengths of the political branches—and has focused on *Marbury*'s grand proclamation of its power without taking that statement in context. The modern Supreme Court—beginning with the Warren Court, continuing through the Burger Court, and exponentially gaining strength with the Rehnquist Court—acknowledges few limits on its power to say what the law is. While the Warren and Burger Courts used the supremacy rhetoric of *Marbury* to advance the Court's position vis-à-vis the states, the Rehnquist Court has used that language to assert a superior place in the constitutional order vis-à-vis the other federal branches.<sup>378</sup>

Jamin Raskin offered dramatic evidence of this trend towards ideologically driven judicial self-aggrandizement, which is nothing more than judicialization by another name: "In the entire first two centuries of the Constitution's existence, the Court struck down just 127 federal laws, but between 1987, when William Rehnquist took over as Chief Justice, and 2002, the Court has invalidated a remarkable 33 federal enactments."<sup>379</sup> Since the tenure of Chief Justice Earl Warren, there has been good cause to accuse the Supreme Court of "anti-democratic constitutional politics,"<sup>380</sup> a trend that has not abated under Chief Justice Rehnquist. No doubt, the anti-institutional disillusionment

378. *Id.* at 301–02.

379. JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 5 (2003).

380. *Id.* at 10.

resulting from the Watergate scandal and the Vietnam War played a part in weakening the popularist institutions and, considering the heroic role of the Supreme Court in the Watergate scandal, perhaps strengthening the judicial branch. But the initial shifts toward the judicialization of the law of democracy preceded both these historic triggers. Significantly, the Watergate and Vietnam War era also saw the credibility and reputation of the Supreme Court suffer considerably. Decisions like *Miranda v. Arizona*<sup>381</sup> and *Roe v. Wade*<sup>382</sup> just as thoroughly called the Court's credibility into question.

### V. Conclusion

That different constitutional cultures with respect to the role of the judiciary in settling electoral disputes and, therefore, with respect to the tension between judicializing and popularist tendencies in the United States and Germany is nowhere more evident than in the general tone of the scholarly response to these decisions. German scholars, if they responded at all,<sup>383</sup> went about a disciplined and subdued analysis of the constitutional norms at issue in the Constitutional Court's decision. None remarked the plain fact that the Court had inserted itself in the political process to finally settle the Hessen state election and to finally entrench such a role for the judiciary.<sup>384</sup> Meanwhile, after more than five hundred United States law professors published a petition in the press protesting the Supreme Court's intervention in the 2000 Presidential election,<sup>385</sup> the legitimacy and legality of the Court's intervention has come to serve as the eye of a still-swirling scholarly storm.<sup>386</sup>

In spite of the general alarm expressed by the American scholarly community,<sup>387</sup> the Supreme Court's *Bush v. Gore* decision constitutes

381. *Miranda v. Arizona*, 396 U.S. 868 (1969).

382. *Roe v. Wade*, 410 U.S. 959 (1973).

383. As of a search on May 15, 2002 in the German electronic legal database *Juris*, eleven (short) law journal articles have been published regarding to the Federal Constitutional Court's decision in the *Hessen Election Review Case*.

384. *Id.*

385. John C. Yoo, *In Defense of the Court's Legitimacy*, in *THE VOTE*, *supra* note 3, at 223, 224.

386. As of a search on November 11, 2003 in Westlaw (a search of titles containing the phrase "Bush v. Gore"), 104 law journal articles have been published regarding the Supreme Court's decision in *Bush v. Gore*. A search in Amazon.com as of November 11, 2003 reveals a growing book industry (more than 60 titles) concerned with the Supreme Court's decision in *Bush v. Gore*.

387. It is my sense that, even among those who defend the Court's intervention, there are few (if any) who take that move for granted.

America's movement in the direction of the heavily judicialized democratic perspective characteristic of postwar Germany. It is precisely because these cases were intimately concerned with the "complex interaction between democratic politics and the formal institutions of state,"<sup>388</sup> but even more significantly, the actual outcome of an election and therefore the realm of pure politics, that they serve as an appropriate measure of any such trend.

Both the German Federal Constitutional Court and the U.S. Supreme Court strongly emphasized that the desire to discern, promote, and protect the will of the people, especially as it is uniquely (even preeminently) expressed through the act of voting, was central to their consideration of the cases. The Constitutional Court, in defining the *gutte Sitten* standard, expressed concern that nothing less than the free and equal formation of the will and intent of the voters was at stake. Similarly, the U.S. Supreme Court was confronted, in part, with the task of determining the constitutionality of Florida's standard for reviewing an election, that is, to determine the "intent of the voters." What principle of democracy should be clearer: An election should be an expression of the voters' will. Both Courts, however, intervened to decide the disputed elections and, in so doing, thwarted populist proceedings designed to keep the review of elections as close as possible to the voters themselves by placing such reviews in the hands of the people's elected representatives. Both systems anticipated procedures that incorporated elected representatives in the election review process. But, both courts found it necessary, although extolling the virtues and primacy of the will of the people, to take the election review process (and thereby, the election decision as well) out of the hands of the people's directly elected representatives and officials. To its credit, the Constitutional Court addressed this glaring contradiction, at least implicitly, in its explication of the importance of the fundamental safeguards secured by the doctrine of separation of powers, including an independent judiciary. The Constitutional Court explained that the separation of powers requires decisions of law having enforceable weight to be taken by neutral and independent judges. It cannot be said, however, that the Constitutional Court expressed any reservations with respect to asserting itself (and the judiciary generally) into the election review process, demanding instead that Hessen's State Supreme Court have the final say in election review matters and not the state's "Election Review Court" with its directly elected parliamentarians as sitting members. The U.S. Supreme Court's *per curiam* majority opinion in *Bush v. Gore*, on the other hand, avoided the contradiction and brashly pressed ahead with its intervention in the Florida election review process.

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388. ISSACHAROFF ET AL., *supra* note 19, at 1.

At least the German Constitutional Court could, if ever called to account, address the judicializing consequences of its Hessen Election Review decision to the broader commitment to judicialization in German jurisprudence that seems a clear reaction against the populist excesses of the Weimar era, excesses directly responsible for the rise of Nazism in Germany. The Supreme Court, on the other hand, would have to concede that *Bush v. Gore* represents the penultimate judicialization of pure politics with only the shifting ideological perspective of the Court as the justification.

In either case, however, the message is clear: Make way for the lords of democracy.