Free States or Red States: The Supreme Court’s Role in Recent Election Law Disputes

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Professor Gardner’s wide-ranging essay, *Forcing States to be Free: The Emerging Constitutional Guarantee of Radical Democracy*,¹ is in the best tradition of American legal scholarship. Gardner finds a common narrative in recent U.S. Supreme Court decisions involving the seemingly disparate doctrinal areas of free speech law, equal protection constraints on voting district lines, and election law. He then proceeds to criticize the Court’s embarrassing performance in *Bush v. Palm Beach County Canvassing Board*,² and its follow-up *Bush v. Gore*,³ not as a *sui generis* effort to manipulate political outcomes, but instead as part of the mistaken trend he has identified. Finally, applying his analysis to a problem that arose surprisingly often in the 2002 election, Gardner concludes that the Constitution will seldom, if ever, require federal courts to interfere with a state’s decision concerning late substitution of candidates on ballots for federal office.

Gardner’s argument is refreshingly straightforward. Federal courts often find themselves asked to supervise the conditions under which Americans elect public officials. Gardner urges us to distinguish between two purportedly quite different situations in which such judicial intervention is sought. In one class of cases, people prevented from participating in certain state political processes seek redress in federal court. In these cases, Gardner argues, courts act properly in the name of constitutionally guaranteed equal protection when they insist that no American may be improperly shut out of the democratic process. Accordingly, Gardner applauds cases such as *Harper v. Virginia Board of Elections*⁴ (poll taxes

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¹ 35 CONN. L. REV. 1467 (2003).
² 531 U.S. 70 (2000).
violate equal protection clause); *Carrington v. Rash* (state may not bar military personnel from voting merely because state residence is based solely on being stationed at in-state military base), and *Kramer v. Union Free School District* (school board elections cannot be limited to property taxpayers and parents). As Gardner puts it, all these cases involved courts stepping in to make sure that no one is unfairly excluded from politics.

A second set of cases arises when individuals are dissatisfied with the way the state permits them to participate in the political process. These aggrieved individuals are not shut out completely, but for a variety of reasons they challenge the constitutionality of the conditions under which their participation is structured. Gardner urges courts to be much less sympathetic to such claims. It is not the job of the federal courts to insist that every election for state or federal office be an unconstrained aggregation of individual votes. Instead, states should be free to place limits on campaigning or draw district lines in ways that further the state’s conception of appropriate government. His undeniable point here is that no set of conditions governing elections can be fairly equated with the underlying concept of democracy. An election in which the candidate who receives a plurality of votes earns office is democratic. So too is an election in which the top two candidates are paired in a run-off so that only a candidate who earns a majority actually assumes office. Accordingly, it would be wrong for a federal court to invalidate either type of election in the name of the Constitution. Similarly, Gardner generalizes, although courts should do all they can to ensure that everyone gets to participate, they should then get out of the way and let states determine how people participate in politics. This includes letting a state decide for itself what matters regarding elections should be determined by state legislatures and what matters decided perhaps by other branches. A principal vice of *Bush v. Palm Beach County Canvassing Board* then is that the Court failed to adhere to Gardner’s basic precept.

It is hard not to admire Gardner’s effort to credit the *Bush v. Palm Beach* Court for sincerity, even as he argues convincingly that the Court has taken a wrong turn. And, the issues Gardner raises are provocative and should spark reaction beyond the fine commentary contributed by Professors Richard Pildes, Burt Neuborne, and Nathaniel Persily in this issue of the Connecticut Law Review. From my vantage point, however, three points mar Professor Gardner’s otherwise insightful analysis and prevent him from persuading us that he presents the right way to think about recent judicial intervention in political cases. First, I am troubled by complexity and ultimate instability within Gardner’s distinction between exclusions from politics (for which Gardner demands redress in the name of America’s commitment to “radical egalitarianism”) and limits within politics (which Gardner argues the contemporary court has mistakenly invalidated in the name of “radical democracy”). Second, I believe the trend Gardner claims to have identified is somewhat amorphous and more importantly is inconsistent with the Court’s direction in other important areas of law. I thus have grave reason to doubt that the vision of radical democracy is motivating the Court as it confronts the cases Gardner discusses. Finally, Professor Gardner’s discussion of the recent U.S. Supreme Court cases that propelled George W. Bush into the White House leaves me unsure of his precise ground for disagreement with these cases and dissatisfied with his explanation that these cases are part of a trend toward radical democracy or any other replicable principle. I shall consider each of these points in turn, closing with a brief comment on how the cases involving candidate substitutions just prior to election day help us to better understand a small part of the significance of *Bush v. Gore*.

I. **ONE-PERSON, ONE-VOTE**

Following a classic pattern of the legal scholar, Professor Gardner’s article is built upon an analytical distinction. In his case, the divide is between judicial intervention to assure participation in elections (good) and judicial intervention to structure the content and nature of voter participation (bad). As is the case for most analytical distinctions proffered by legal scholars, this one appears well drawn when contrasting extreme cases. Nearly all observers are comfortable watching the courts force states to grant voting status to those otherwise excluded (no one today would defend a poll tax). In contrast, a lively and representative controversy split the U.S. Supreme Court 5–4 in its recent decision insisting that Minnesota permit candidates for judicial office to discuss political issues during the course of a campaign. Gardner criticizes this decision for failing to respect Minnesota’s power to structure its judicial elections in ways befitting the state’s own conception of judicial politics.

As is true of most such analytical distinctions, however, Gardner’s is subject to the classic riposte from the legal critic. Namely, it is not hard at all to imagine borderline cases in which it is difficult to discern whether a particular governmental rule excludes folks from politics or merely regulates the behavior of participants within politics. To take one particularly illustrative example, consider the nation’s experience with civil service

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5 380 U.S. 89 (1965).
7 Gardner, supra note 1, at 1476–78.
9 Gardner, supra note 1, at 1482–83, 1497–1498.
the Court to intervene. And what the Court’s intervention showed is not simply that there are a small number of cases in which it is fair to draw an analogy between exclusion and meaningless participation. Instead, we should now see that any departure from what Gardner calls a no-holds barred competition in which every vote counts can be subject to analysis on whether the state has so rigged things as to disadvantage one group at the expense of another. So what we need to know is whether this disadvantage contradicts some fundamental constitutional norm or whether it is just part of the state’s constitutionally guaranteed flexibility in setting its own politics. What commentators such as Gardner must provide is the set of relevant questions courts should ask in making this determination.

To see why this is so consider how the one-person-one-vote cases illustrate the problem with distinguishing among even the extreme cases Gardner presents. Gardner worries that judicial invalidation of some campaign finance regulation is meant to restore no-holds barred electoral competition. But defenders of Buckley v. Valeo often point to unlimited spending by rich folks as one of the only ways for truly innovative candidates to make headway in our political system. Gardner sees campaign finance regulation as leveling the playing field to ensure that individuals with less money have meaningful access to the system. The Court sees unlimited spending as part of free speech in support of permitting political mavericks to have meaningful access to the system. Only a substantive theory about what kinds of entrenchment block the constitutional scheme can tell one from the other. Gardner’s notion of universal competence to vote, what he calls “radical egalitarianism,” is too slim to do this job. Even the Minnesota judicial elections case that seemed effortlessly to fit within Gardner’s scheme turns out to be problematic. How do we know that the judicial challenger in that case prohibited by Minnesota law from speaking to political issues during the election will not be at a structural disadvantage running against judicial incumbents? If Gardner’s answer is that it is up to the state to decide what form of elections it wants so that first amendment concerns should not apply, then why can’t Tennessee say to urban voters in Baker v. Carr that equal protection concerns should not apply in that case either? In sum, the real trick to determining when courts ought to intervene in state electoral processes is to determine when the state process has structurally and substantially entrenched one group at the expense of another. The line between exclusions from and participation in politics is too slender to solve such a complex problem.

II. WHAT’S THE REAL TREND?

Professor Gardner does significant scholarly service in reminding

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10 For a comprehensive review of this experience, including discussion of the 1993 Amendments to the Hatch Act broadening the rights of federal workers, see Rafael Gely & Timothy D. Chandler, Restricting Public Employees’ Political Activities: Good Government or Partisan Politics, 37 Hous. L. Rev. 775 (2000).
12 Gardner, supra note 1, at 1471.
readers of America's historical commitment to republican government and in contrasting that commitment to a reflexive defense of more simplistic majoritarian processes. Federal courts, for example, have no basis for interfering with states who adopt supra majority requirements to pass certain sorts of legislation.16 And Gardner's analysis does put the decision in Republican Party of Minnesota v. White into valuable historical perspective. Perhaps the Court there was wrong to focus more on the damage to the free speech rights of the losing judicial candidate and less on Minnesota's interest in a more republican conception of the judiciary.

The question on many readers' minds, however, will be whether, as Gardner argues, the Court has been on a mission lately to replace republican measures with democratic ones; or whether, as many will fear after Bush v. Gore, the Court has sought to supplant Democratic approaches with Republican ones. The patchwork of cases Gardner weaves together to define his "shift toward radical democracy" are clearly subject to both readings.

Gardner marks the beginning of the Court's shift with Buckley v. Valeo. He is troubled because the Court apparently embraces the value of free spending (as opposed to free giving) in the name of letting each candidate do as she likes in the struggle for votes. Gardner laments the Court's rejection of the purported republican defense of campaign finance regulation that it helps ensure equal access to the political system. As noted above, however, the Court's decision can also be defended in terms of granting meaningful access to big spenders who cannot get control of an organized political apparatus (think Ross Perot). More important here, however, is the idea that keeping money out of politics (as opposed let's say to requiring property ownership as a condition for participating in politics) is hardly part of the states' traditional interest in republican government. Nor does Buckley v. Valeo involve state regulation at all. Instead, the Court's holding in Buckley, over some impassioned dissents is easily susceptible to more cynical readings. Is it democracy the Court felt it was protecting or the vested interests of those who stood to gain from unlimited spending?

Gardner then turns to Republican Party v. White, the case where the Court by a 5-4 margin held that the First Amendment prevents Minnesota from limiting the speech of a challenger seeking to be elected to the Minnesota Supreme Court. He finds in this case, despite a lengthy opinion more deeply rooted in First Amendment doctrine, that Justice Scalia is concerned with allowing states to structure political participation. The facts, however, involve a clearly conservative challenger seeking to upset the existing justices through reference to controversial issues such as crime and abortion. The judicial line-up is the same 5-4 line-up we saw in Bush v. Gore. Scalia clearly concedes that Minnesota could choose to have its judges appointed, thus preserving the republican approach. So it is not a radical defense of democracy we are seeing. Instead, Scalia stresses the sham aspect of pretending to have an election but then preventing outsiders from making a strong case. Justice Kennedy, whose vote is needed for the outcome, makes clear that he might even have ruled the other way had Minnesota applied its rule only to sitting judges.17 Thus, this case strikes me as more reminiscent of Justice Scalia's dissent in Romer v. Evans.18 It is an impasioned defense of popular majorities when those majorities might be expected to clash with elite portions of society who do not share Justice Scalia's world view (the ABA and AALS come in for heavy targeting).

Gardner turns next to the voting rights cases involving the drawing of state legislative district lines with an eye toward racial balance. He is entirely right that the Court has been very skeptical of such racial gerrymandering and that one important fact lurking in the background of these court cases is the federal voting rights act that limits state discretion. Gardner states that "it is difficult to avoid the impression that what most bothers the Court in these cases is the presence of an externally imposed legal limitation on the otherwise unconstrained legislative politics of redistricting." Perhaps. But what may also bother the Court, as Gardner readily admits, is the role of race in the drawing of district lines. And Gardner points to nothing to suggest that an externally imposed limit on legislatures that was to the Court's liking would receive the same result. Oh well, Gardner almost concludes, even if these cases do not persuade you, wait until you look at Bush v. Palm Beach County Canvassing Board. In that case, the Court made emphatically clear the importance of unconstrained legislative authority in setting the rules for who is chosen for the electoral college. But, of course, this is precisely the case that raises everyone's suspicions. The thrust of Gardner's creative identification of a trend toward radical democracy is to make us see Bush v. Palm Beach as part of an ill-conceived set of judicial principles developed over time. It is unfortunately too easy to conclude, however, that the principle of unconstrained legislative sovereignty was well-conceived on the spot immediately following the election to produce the desired result.

16 See Gordon v. Lance, 403 U.S. 1 (1971) (upholding West Virginia rule that required 60% approval of voters in a referendum election prior to the incurring of bonded indebtedness by political subdivisions). But see Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating city charter amendment that demanded unusual procedural step of taking ordinances concerning housing discrimination directly back to voters prior to passage).


19 Gardner, supra note 1, at 1485.
Moreover, our suspicions concerning *Bush v. Gore* grow stronger when we consider the ways in which Professor Gardner's account of the purported trend toward radical democracy ignores the broader trends within constitutional law that *Bush v. Gore* seems blithely to ignore. Let's start with the tension between America's important commitment to republicanism and our now still deeper belief in racial equality. Many of the problems with our historically republican institutions is that their straightforward operation turns out to have a distinctly discriminatory effect on minority groups in general and African-Americans in particular. The genius of the Great Compromise and the non-majoritarian construction of the U.S. Senate has resulted in a contemporary America in which small disproportionately White states have a greater say than their population would warrant in a majoritarian system. Nowhere has this been more vividly felt lately than in the shape of the electoral college that sealed Bush's 2000 victory. As everyone knows, Bush lost the popular vote but gained office by winning enough red states populated by a disproportionate number of white voters. Accordingly, there is good, valuable, wonderful pressure on all of us to reconsider the wisdom of our republican institutions as they turn out to violate norms of equal protection. It's just this sort of pressure that helped push the Court toward strict insistence on the one-person one-vote system so firmly embraced in *Baker v. Carr, Reynolds v. Sims* and similar cases.

In this respect, *Baker v. Carr* and *Reynolds v. Sims* fall within a large and important part of constitutional history from the second half of the twentieth century. If we group them with other cases such as *Heart of Atlanta Motel v. United States*, *Katzenbach v. McClung*, *Katzenbach v. Morgan*, and *Hunter v. Erickson*, we see the following pattern. During much of this period the United States Supreme Court remained suspicious about the willingness of the states, and in particular the southern states, fully to embrace the constitutional commitment to racial equality. Accordingly, the Court continued to find reasons to interpret the Constitution in ways that would authorize federal and judicial intervention to insist that states adopted the program of racial equality.

In *Heart of Atlanta* and *Katzenbach v. McClung* the Court continued to expand congressional power of the commerce clause so as to permit application of anti-discrimination statutes to economic activity that could arguably be characterized as intra-state. In *Katzenbach v. Morgan*, the Court was sufficiently sympathetic to New York's effort to expand the franchise to certain Spanish speakers that it essentially agreed to share its long-standing role as interpreter of the Constitution. In *Hunter v. Erickson*, the Court overrode its normal deference to state and local procedural mechanisms because the locality there was rigging things to block expansion of the anti-discrimination norm. And, of course, in *Baker v. Carr*, the Court departed from longstanding tradition to conclude that the apportionment of a state legislature was not a political question.

It is important to recall these cases because the hallmark of the Rehnquist Court in our most recent period has been the war it has waged on all of them. The stance of the Court's current majority seems to be informed by a new, and certainly not irrational, perception that formerly recalcitrant states have now more or less embraced the civil rights agenda. This purported political shift has emboldened the Court to rewrite major doctrines within constitutional law in ways that take power back from Congress. Thus, the Court has dramatically curtailed the breadth and reach of federal anti-discrimination efforts through recent Commerce Clause and Eleventh Amendment cases. And, it has shackled Congress from using Section 5 of the Fourteenth Amendment to bind states to a concept of individual rights more expansive than that set down by the Court itself. These holdings fit well with the idea that the current Court sees part of its mission as restoring the rightful place of states within our federal structure.

What we would expect to see then in the context of *Baker v. Carr* is precisely the opposite of the trend Gardner claims to have identified. The state-friendly Rehnquist Court might be expected to cabin equal protection clause jurisprudence to render state governmental structures largely immune from judicial scrutiny. Why would the same Court that has adopted a deferential attitude towards states in so many contexts suddenly have developed a sincere commitment to constitutionally-mandated "radical democracy" as a way of handling state affairs?

There seems one obvious explanation for the Court's recent cases. They have arisen in situations where the outcomes dictated by appeals to what Gardner calls "democratic" instincts have squared with political portions of the Court's agenda. The Court majority was suspicious of elitist judicial interests in Minnesota. It is highly suspicious of drawing legislative districts along racial lines. And, of course, it radically preferred the Florida legislature to the Florida Supreme Court. This is an unfortunate

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24 Of course, this ground had been traveled earlier in the name of promoting national market regulation. See Wickard v. Filburn, 317 U.S. 111 (1942).
26 Consider also Chief Justice Rehnquist's dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 62 (1973) (predicting the day when a majority of the court may once again stand up for the states).
and much to be avoided explanation. But Gardner has provided insufficient evidence or argument to convince us otherwise.

III. WHERE ARE WE NOW?

In the days immediately following the 2000 Presidential election, law professors throughout the U.S. were queried about their expectations concerning the Supreme Court’s chances of getting involved in the case. Most professors I knew were highly doubtful that the Court would express its opinion on the merits of the dispute. There seemed no clear federal interest, and whether or not the doctrine of political question formally applied, the spirit of that doctrine seemed to counsel prudence.

Perhaps we all misunderstood the country’s best interests at the time. It is easy to see how members of the Court felt a strong tug toward providing the nation with a quick resolution. Given the closeness of the Florida vote, it seemed highly unlikely that the supporters of either candidate would ever be persuaded that their candidate had actually received fewer votes. So the only possible resolution was one in which one candidate backed down based on the provenance of a decision-maker who ruled the matter settled. The Bush forces seemed highly unlikely to back off based on a decision of the Florida Supreme Court. Plans were under way in the Florida legislature to seat a separate set of electors should the procedures produced by the Florida courts have shown Gore to be the winner. Thus, it seemed likely that if the vote count shifted to show Gore in the lead, the matter would eventually end up in Congress where partisan politics appeared to suggest Bush would win in the end. Accordingly, commentators such as Richard Posner have defended the Court’s actions, if not its reasoning, as an act of great statesmanship to spare the country from a protracted and divisive struggle. 27

I disagree with Posner because I believe it would have been better for the country to grapple with the hard politics that Supreme Court deferral might have created. 28 But this is not the place to debate the correctness of the Bush v. Gore ruling. 29

For purposes of Professor Gardner’s essay, the important point is that the Court did intervene and thus we must grapple with the consequences of that intervention. Gardner’s essay suggests two distinct lessons, neither of which strikes me as the one we should draw. At the outset, Gardner invokes an ambience of ominous federal meddling in suggesting that recent judicial developments should cause candidates to “watch their backs.” As his story unfolds we learn that the 2002 cases involving the New Jersey switch from Robert Torricelli to Frank Lautenberg, the Minnesota switch from Paul Wellstone to Walter Mondale, and the refusal to permit immediate substitution following the death of Patsy Mink were resolved without any federal judicial opinions on the merits. Gardner does not, however, take us through the reasoning in these cases to permit us to evaluate the courts performance. Mere cheerleading for a simple principle of “non-intervention” cannot be where we want to end up.

Note first that the very phrase “watch your back” can as easily be employed to describe other kinds of nefarious influence upon election returns. The Florida election featured not only disputes about vote counts but allegations concerning improper exclusions of individuals from the voting rolls, divergent standards used for counting absentee ballots, and attempts by police to prevent some folks from even getting to the polls. As a candidate in an upcoming election then one might want to watch your back concerning all sorts of efforts to manipulate the outcome. Fear of judicial intervention would hardly be a candidate’s greatest concern. Consider that House Republican staffers were among those heckling vote counters in Dade County during the aftermath of the 2000 election. Indeed, a candidate will often need judicial intervention to protect her self against other kinds of misconduct. And, if a state court, for example, were to prove unsympathetic to allegations concerning racial harassment of voters by local police, we would want federal courts to step in citing the fourteenth amendment’s guarantee of equal protection.

The deeper point then is that even non-intervention on grounds of political question or on grounds that there’s no real federal interest still requires reasons. If the federal courts have the power to change the outcome and don’t do so, they are equally accountable as if they do. The Supreme Court of New Jersey in the Torricelli case wrote an opinion explaining why it allowed the Democrats to switch candidates even after the 51-day deadline. The U.S. Supreme Court’s refusal to comment on the case constituted a judgment either that the New Jersey Court had the law right or that the challengers raised no federal interest sufficient to intervene. We should celebrate if the U.S. Supreme Court has it right on these points but not simply because the Court “stayed out” of the matter.

The great thing about Professor Gardner’s article is that he understands precisely the need to articulate a theory for determining when and why the Court ought to intervene. Thus, his second lesson from Bush v. Gore is that we ought to put the brakes on federal interventions in election disputes whenever the courts depart from pursuing the radical egalitarianism of the
constitution in favor of some new-fangled notion of radical democracy. I have explained above some of the difficulty I have with his distinction between exclusions form politics and limits on participation in politics. Here I want to quibble with its application to Bush v. Gore and to the problem of late substitution of candidates. I do so because Gardner's essay leaves readers with the impression that the Supreme Court has lost its way in following the wrong political theory. I would need a lot of convincing that this was the problem.

The linchpin of Gardner's argument is that the Court reads Article II Sec. 1 Cl. 2 to demand that the Florida legislature be unconstrained in its control over the process for selecting electors. Gardner believes that the state constitution may legitimately constrain the legislature and that the state courts may enforce the constitutional guarantee. He sees deference to the legislature as indicative of the court's thrall to simple majority rule.

Two things strike me as problematic about using this point to defend the thesis Gardner develops. First, it's not clear to me that the Supreme Court's decision to champion legislative prerogative in the presidential election context is based on deference to democracy. Much more likely is that the Court sees legislative decisions about voting as typically occurring prior to the date of the election. Thus deference to the legislature furthers classic rule of law values as much as it favors democracy. It's true the state courts may be forced to interpret the meaning of statutes that govern elections. But in the mind of conservative judges such statutory interpretation will create less room for mischief than the traditional judicial power to read statutes in light of constitutional norms. That power, a court could easily fear, would be subject to judicial manipulation in light of knowledge developed as a result of the tentative election outcomes.

Second, and more to the point, there may be cases in which a state legislature adopts a method of selecting electors that violates the federal constitution. Suppose, for example, that the legislature adopted a property qualification to serve as a presidential elector. Congress would, of course, be entirely free to refuse to seat such electors. Should this be the sole constitutional remedy? If so, then Gardner's real point is that questions concerning the structure of elections ought to be political questions outside judicial review. In this case, Gardner is no longer relying on the courts to protect us from rules that exclude some folks from politics. Alternatively, if Gardner believes that federal courts ought to invalidate such an obviously unconstitutional qualification, then it's an insufficient answer in other cases to suggest that we needn't worry about troublesome state rules because Congress can always say no. In sum, we need a richer theory about the lessons of Bush v. Gore than we can draw from reference to republican v. democratic principles.

I have similar problems with the using deference to state governmental models as a way of resolving the cases involving late substitutions of candidates on ballots. Professor Gardner argues forcefully that decisions about when to substitute candidates ought to be made by the state. I might agree. But who is the state? The problem in cases such as the one involving Senator Torricelli is that the Republicans contended that the state had already decided not to permit substitutions after fifty-one days. So they argued that the state court was flouting the state system in permitting the last minute change. Does the state system permit the state court to make that judgment? Suppose Torricelli asked to withdraw and the state Democratic Party nominated the New Jersey Supreme Court's Chief Justice to take his place. Suppose the New Jersey Supreme Court permitted a substitution but issued an order forbidding the new candidate from using any of the money raised by Torricelli for the Party. Should the federal courts supervise the state courts at all in such instances? Do we want the federal courts sometimes to decide that the model the state has adopted may violate federal constitutional norms? Perhaps not. But then what we need is a revitalized political question doctrine and not a distinction between republican and democratic aims.

There is, however, one lesson from Bush v. Gore that Professor Gardner's piece helps drive home and that I believe is more important than any single theory about what determined the outcome. Courts cannot engage in political statecraft without understanding that their actions will produce principles whose consequences they can neither anticipate nor control. Perhaps the most outrageous aspect of Bush v. Gore is that the Court could comment in the opinion suggesting that the principles adopted there are good for one case and one case only. Imagine then the Court's and the nation's shock when just one election later we were on pins and needles wondering whether it would happen again. Would the U.S. Supreme Court step in to tell New Jersey that it could not place Senator Lautenberg's name on the 2002 ballot? Would Walter Mondale be allowed to replace Paul Wellstone? Prior to Bush v. Gore, all would have assumed that such matters would be left in the state courts. Scholars everywhere owe the nation our very best efforts at undertaking precisely the challenge taken up by Professor Gardner to say as best we can why after 2002, we may aspire to assume so again.

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31 For ringing criticism of the Court on these grounds, see Guido Calabresi, In Partial (but not Partisan) Praise of Principle, in QUESTION OF LEGITIMACY, supra note 29, at 67.