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## Foreword

# Symposium Foreword: Law & Politics in the 21st Century

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On April 1, 2008, challenger Michael Gableman defeated incumbent Wisconsin Supreme Court Justice Louis Butler, marking the first time in four decades that a sitting Wisconsin Supreme Court justice was defeated in a reelection bid.<sup>1</sup> Butler's defeat sent shockwaves through the Wisconsin legal system; those unhappy with the result, including Butler himself, decried the increasing politicization of the state's judiciary and the influence of interest groups in the judicial selection process.<sup>2</sup>

Wisconsin is not the only state to see its judicial arena become increasingly political; Minnesota, for example, was the central battleground in what ultimately became the Supreme Court's major pronouncement on the extent to which states may prohibit the speech of candidates for judicial office.<sup>3</sup> Nor are judicial elections the only way in which law and politics are

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1. See John Fund, *Wisconsin's Judicial Revolution*, WALL ST. J., Apr. 5, 2008, at A8.

2. See, e.g., David Ziemer, *Loss Attributed to Pro-Business Group*, WIS. L.J., Aug. 5, 2008, <http://www.wislawjournal.com/article.cfm/2008/08/11/Butler-speech-attacks-WMC-Loss-attributed-to-probusiness-group> (noting that Justice Butler blamed the pro-business interest group Wisconsin Manufacturers & Commerce for his defeat).

3. See *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (finding that states may only prohibit judicial candidates' speech if there is a compelling governmental interest in favor of such restrictions, and only if the restrictions are narrowly tailored to serve that interest).

becoming increasingly intermixed. Voters and political parties are more frequently challenging the constitutionality of election administration procedures,<sup>4</sup> and candidates for office are even contesting state-certified election results.<sup>5</sup> In the latter moments of George W. Bush's presidency, moreover, Congress rebuked the President's assertions of executive power in areas ranging from domestic wiretapping and waterboarding to the treatment of detainees at the United States prison in Guantanamo Bay, Cuba.<sup>6</sup> Law and politics are becoming more intertwined than ever before, and to further explore this phenomenon, the *Minnesota Law Review* presented this year's Symposium: Law & Politics in the 21st Century.

The legal and political battles that followed the 2008 presidential election further highlight the relevance of a symposium on law & politics. In the wake of the 2008 election, for example, Vice President-elect Joseph Biden, Jr., promised to shrink the role of the Vice Presidency and called his predecessor's view of the office "overly expansive,"<sup>7</sup> a characterization that prompted the predecessor, Dick Cheney, to belittle Biden.<sup>8</sup> Even more relevant are the events following President Barack Obama's resignation of his Senate seat: U.S. attorney Patrick Fitzgerald filed a criminal complaint against Illinois Governor Rod Blagojevich, the official entrusted with appointing a successor to Obama, when Blagojevich allegedly attempted to sell the seat to the highest bidder.<sup>9</sup> Despite Senate Democrats' entreaties not to appoint a successor because of the "taint" associated with the

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4. See, e.g., *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008) (holding, in the Democratic Party's constitutional challenge to an Indiana voter identification law, that such a requirement was closely related to the state's legitimate interest in preventing voter fraud, and therefore passed constitutional muster).

5. See Kevin Diaz & Bob Von Sternberg, *\$12 Million Later and Still No Senator from Minnesota*, MINNEAPOLIS STAR-TRIB., Apr. 15, 2009 (noting that, over five months after the 2008 senatorial election, the contest between Al Franken and Norm Coleman had not yet been resolved).

6. See, e.g., Brett M. Kavanaugh, *Separation of Powers During the 44th Presidency and Beyond*, 93 MINN. L. REV. 1454, 1457-58 (2009) (listing some of President Bush's battles with Congress in the area of executive powers).

7. Carol E. Lee, *Biden To Shrink VP Role—Big Time*, POLITICO, Dec. 14, 2008, <http://www.politico.com/news/stories/1208/16558.html>.

8. See, e.g., Jonathan Martin, *Cheney and Biden Trade Shots*, POLITICO, Dec. 21, 2008, <http://www.politico.com/news/stories/1208/16782.html>.

9. See, e.g., Carrie Johnson, *Top Aide Resigns As Pressure on Blagojevich Grows: Some Criticize Timing of Case*, WASH. POST, Dec. 13, 2008, at A1, <http://www.washingtonpost.com/wp-dyn/content/story/2008/12/12/ST2008121202724.html>.

governor's arrest, Blagojevich nevertheless appointed former Illinois Comptroller Roland Burris to the seat.<sup>10</sup> A constitutional showdown threatened to ensue when the Senate refused to seat Burris, despite his seemingly valid appointment.<sup>11</sup> It is unclear how these issues (and many others, including the outcome of Minnesota's historically close senatorial election), will be resolved. What is clear is that these battles provide the perfect fodder for a discussion of law and politics in the 21st century.

The goal of this Law & Politics Symposium was to attract some of the most prominent scholars in the country to conduct research and draw conclusions about the degree and extent to which political factors affect the development of the law. The *Law Review* recruited panelists from numerous backgrounds, including judges, law professors, political scientists, and journalists selected specifically for geographical, ideological and methodological diversity. The result was a symposium with two keynote speakers and three panel topics: (1) "Politics and the Judiciary"; (2) "Current Issues in Election Law"; and (3) "Beyond Bush: The Future of Executive Power."

The Symposium's first keynote speaker, The Honorable Brett Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit, provided five proposals for solving separation-of-powers problems that have recurred in recent years. Based on his experience in the executive and judicial branches, Judge Kavanaugh proposes to: (1) temporarily defer civil suits against the President until the end of the President's term (thus overruling *Clinton v. Jones*);<sup>12</sup> (2) simplify the nominations process for sub-cabinet level executive officers and judicial nominees; (3) streamline the organization of executive branch agencies; (4) encourage inter-branch consensus before going to war; and (5) eliminate the "permanent campaign" through a one-term, six-year presidency.

While Judge Kavanaugh provided a jurist's view of the problems that arise when law and politics intermix, Benjamin Wittes, the second keynote speaker, offered a modest proposal from a journalist's perspective. To solve the problem of how judicial nominations currently occur as part of an "umpireless game," Wittes proposes creating one centralized source of in-

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10. See, e.g., Paul Kane, *Senate Rejects Burris in Spectacle at Capitol*, WASH. POST, Jan. 6, 2009, [http://voices.washingtonpost.com/the-trail/2009/01/06/senate\\_rejects\\_burris\\_in\\_spect.html](http://voices.washingtonpost.com/the-trail/2009/01/06/senate_rejects_burris_in_spect.html).

11. *Id.*

12. See *Clinton v. Jones*, 520 U.S. 681, 689–95 (1997).

formation about all judicial nominations and nominees that would help inform actors involved in the nominations process, including legislators, the media, and the public. This clearinghouse of information would include, among other things: (1) a rigorous set of statistical data tracking nominees; (2) basic biographical information about each judicial nominee, including links to relevant opinions, news stories and other public record material; and (3) a forum for ongoing evaluations of controversies that arise over the course of a judicial nomination. Mr. Wittes is in the process of creating such an “institutional umpire” through his work at the Brookings Institution.

The Symposium’s first panel addressed topics under the heading of “Politics and the Judiciary.” Professor Ward Farnsworth of Boston University School of Law, the panel’s preeminent legal realist, offered his statistical research explaining instances of “dissent against type”—when judges or Justices dissent against what is ordinarily thought to be their preferred policy outcome. Professor Farnsworth’s typology identifies several factors that may increase a Justice’s propensity to dissent against type, including the presence of substantive criminal law issues, cases raising the rule of lenity, cases involving white collar defendants, and cases decided in the Justice’s first few Terms. While instances of “dissents against type” might ordinarily raise skepticism about legal realist theories of decision making, Professor Farnsworth concludes instead that these dissents simply increase our understanding of what each Justice’s “type” actually is.

In a similar manner, Professor Tim Johnson of the University of Minnesota’s Department of Political Science discussed what provokes Supreme Court Justices to orally announce their dissents from the bench. Professor Johnson concludes that the decision to dissent from the bench is a function of ideological, case-specific, and strategic considerations. For example, as the ideological distance between a dissenting Justice and the majority opinion author increases, and as the salience of the disputed legal issue increases, so too will a Justice’s propensity to orally announce a dissent from the bench.

Finally, Professors Lee Epstein, Nancy Staudt, and Thomas Brennan of Northwestern University Law School offer an empirical analysis of whether macroeconomic factors influence Supreme Court decision-making. After analyzing a series of Supreme Court decisions involving economic regulation in which the United States was a party, Professors Epstein,

Staudt, and Brennan conclude that none of their three proposed models (legal, political, or economic) adequately explains the Court's level of deference to the United States as the economy contracts. Rather, they surmise that decreased deference to the Solicitor General during contracting economic periods can be explained by the Justices' effective punishment of incompetent government actors during poor economic times.

Professor Heather Gerken of Yale Law School began the day's second panel, entitled "Current Issues in Election Law." Professor Gerken reiterated her proposal for a "Democracy Index," a ranking of state and local election systems based on factors like accuracy, reliability, and predictability. Because the Democracy Index is a so-called "shortcut to reform," Professor Gerken argued that it would be easily understandable for voters, policymakers, and election administrators, and could gain the needed political traction otherwise lacking in reformers' attempts to improve election administration laws.

Professor Ellen Katz of the University of Michigan Law School offered a more doctrinal analysis of recent Supreme Court decisions pertaining to election law. Analyzing the Roberts Court's four recent election law cases, Professor Katz concluded that the Roberts Court is retreating from election law cases, by taking an approach that seeks to avoid active federal engagement with the state-created rules regulating democratic participation. The consequences of this withdrawal are an increasing amount of pressure on the electorate and civic and political organizations; Katz observes that the Roberts Court's approach assumes and demands a legally literate and diligent electorate that doesn't exist in reality. In effect, Katz argues, the Roberts Court has moved away from the Court's historic role in regulating electoral processes, and has transferred the burden of ensuring adequate electoral participation to political and civic organizations.

Professor Nathaniel Persily of Columbia Law School, along with his co-author, Jennifer Rosenberg, discussed a similar analysis of the Roberts Court cases, but with a twist: Persily and Rosenberg explore the Roberts Court's *de facto* presumption against facial challenges to election laws, and explain the consequences of such a presumption. According to these authors, more frequent as-applied challenges to election laws can, among other things, decrease incentives for high impact litigation and permit step-by-step overruling of precedents where numerous exceptions eventually swallow the rule. Persily and

Rosenberg suggest that courts should consider adopting an “election law exception” to the ordinary presumption against facial challenges, at least when to do so would increase clarity of election rules, minimize irreparable harm to individual voting rights, and decrease the cost of vindicating an individual’s right to vote.

Finally, Professor Terry Smith of Fordham University School of Law tackled an issue that often pervades election law—the intersection of race and election administration. Specifically, Professor Smith examines the increasing endangerment of minority vote dilution claims, using the recent North Carolina Supreme Court decision of *Pender County v. Bartlett* as a lens to do so.<sup>13</sup> Professor Smith concludes that the North Carolina Supreme Court’s decision to add a numerosity requirement to Section 2 claims undercuts the purpose of Section 2 by imposing additional and unnecessary hurdles to the formation of multi-racial electoral coalitions.

The day’s last panel was entitled “Beyond Bush: The Future of Executive Power,” and it featured both objective and normative dimensions. First, Professors Charles Cameron of Princeton University and Professor William Howell of the University of Chicago offered empirical assessments of executive power. Professor Cameron examined whether and to what extent the President may exert power over Supreme Court policy through judicial appointments. Professor Cameron provided an innovative empirical assessment of the doctrinal changes resulting from the switch between the Burger 6 and Burger 7 natural courts, and suggested that more recent theories of Supreme Court decision making—especially so-called author-influence theories—more accurately predict the impact a new Justice has on the Supreme Court. Professor Cameron’s conclusions are particularly enlightening to the extent that they undermine theories of Supreme Court decision making focusing on the median Justice.

Professor Howell, on the other hand, examined almost the opposite question: how the Supreme Court purportedly repudiates assertions of executive power. Narrowing his doctrinal study to three of the Supreme Court’s most famous repudiations of executive power in wartime, Professor Howell argued that these cases actually can be read to reaffirm the central principles of so-called crisis jurisprudence, which suggests that

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13. 649 S.E.2d 364 (N.C. 2007), *aff’d sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

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the Supreme Court gives broader levels of deference to the President than it otherwise would in wartime. Professor Howell thus concluded that even when the Supreme Court “strikes down” assertions of presidential power, it doesn’t “strike back” at the executive’s attempts at aggrandizing power.

The executive power panel also provided a unique opportunity for normative debate, as Professors Heidi Kitrosser of the University of Minnesota Law School and Steven Calabresi of Northwestern University Law School contested the merits of unitary executive theory. Professor Calabresi, along with his co-author Nicholas Terrell, critiques a recent article by Professors Christopher Berry and Jacob Gersen that argues for a plural, rather than a unitary, executive. For ten reasons, including the need for accountability, executive branch coordination, and an energetic executive, Professor Calabresi defended the Framers’ vision of a unitary executive.

While Professor Kitrosser did not dispute the Framers’ vision of a unitary executive, she did take issue with the contention that a unitary executive fosters accountability. Instead, Professor Kitrosser contends that a unitary presidency undermines accountability and restricts the free flow of information through the exercise of executive branch secrecy. Kitrosser and Calabresi engage in an illuminating debate that surely will help clarify the bounds of unitary executive theory as applied to 21st century presidents.

In sum, the articles presented herein represent a wide variety of ideological, methodological, and academic approaches to law and politics. The questions that Symposium panelists attempted to answer, and the problems they attempted to solve, remain at the forefront of today’s legal debate. It is the *Minnesota Law Review’s* hope that this Symposium will contribute significantly to the course of legal discussion and shape the development of law and politics scholarship in the years to come.