THE SUPREME COURT AND ELECTION LAW

JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE*

RICHARD L. HASEN

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To Lori
who inspires me every day with her
strength, intelligence, patience, and love

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Preface

The idea for this book arose out of two events. First, Bill Marshall, who was working in the White House but planning a return to academia, called and asked if I would participate in a conference commemorating the fortieth anniversary of *Baker v. Carr,* the Supreme Court case opening the door to a variety of challenges to election laws in the United States. Second, the virtually tied presidential election of 2000 led to a dramatic intervention in the political process by the United States Supreme Court in the case of *Bush v. Gore*.

Thus, at the very time academics were turning their attention back in time to assess the role that courts should play in regulating elections and the political process, real-world events led to a court intervention in the political process beyond even the fanciful hypotheticals that law professors devise to torture students.

Much of the commentary in the immediate aftermath of the Supreme Court's decision in *Bush v. Gore* to halt the recount focused on that decision itself—its potential political motivations, its possible defensibility as a matter of pragmatism if not precedent, its effect on the legitimacy of the Supreme Court. But few who entered the fray in the heat of the moment reflected much on where *Bush v. Gore* fit into the larger picture of Supreme Court intervention in the political process since *Baker v. Carr*.

This book is an initial effort to examine the larger picture. I consider what role the Supreme Court has played and should play in regulating political equality in the United States. My work builds upon the emergence of election law as its own field of study, apart from, yet related to, its parents, constitutional law and political science. Dan Lowenstein of UCLA, one of the pioneers in the election law field, first enticed me to think about election law as its own subject when I was a student in his seminar in 1990. Since that time, Dan and I have worked together—through a casebook, a quarterly journal, and an electronic discussion group—to

help the field grow. At this stage, election law scholars are beginning to confront major questions of how courts should (or should not) regulate politics.

An earlier version of chapter 2, "Judicial Unmanageability," appeared as "The Benefits of 'Judicially *Un*manageable' Standards in Election Cases Under the Equal Protection Clause," 80 North Carolina Law Review 1469 (2002), part of the symposium on *Baker v. Carr* organized by Bill Marshall and Melissa Saunders of the University of North Carolina. The rest of the material in this book is new.

Acknowledgments

This book is much stronger thanks to the insightful and challenging comments of many colleagues. Bruce Cain, Beth Garrett, Heather Gerken, Tom Mann, Chris May, Rick Pildes, Bob Pushaw, Roy Schotland, and Mark Tushnet had the patience to read and comment on the entire manuscript. I also received useful comments and suggestions from Ellen Aprill, Evan Caminker, Del Dickson, Sam Issacharoff, Pam Korland, Hal Krent, Dan Lowenstein, Michael McConnell, Dan Ortiz, Spencer Overton, Josh Rosenkranz, Peter Schuck, David Strauss, Stephen Wermiel, Richard Winker, Adam Winkler, and participants at a Loyola Law School faculty workshop.

I could not have written a book such as this without the support of Loyola Law School, particularly Dean David Burcham and Associate Dean Victor Gold. They made sure that whatever resources I needed to conduct my research were available, and, more importantly, they have created the environment for scholars and teachers to thrive.

Thanks also to Robert Nissenbaum, Paul Howard, and Renee Rastorfer of Loyola's law library for stellar support. Indeed, this book could not have been written without the support of research librarians. Much of the historical research conducted for this book relied upon the case files of Supreme Court justices. I am grateful to Del Dickson for helping me get started tracking down these materials. Jeff Flannery of the Library of Congress Manuscript Reading Room went above and beyond the call of duty in assisting me in examining the papers of Chief Justice Warren and Justices Brennan, Douglas, and Marshall. John Jacob, archivist of Justice Powell's papers at Washington and Lee University, was also generous with his time, as was Mike Widener of the University of Texas Law Library (Justice Clark's papers) and Nancy Shader of Princeton's Seely G. Mudd Manuscript Library (Justice Harlan's papers). Thanks also to the executors of

Justice Brennan's literary estate for permission to access his papers through 1985.

Peter Bartle, Sofya Bendersky, Amber Star Healy, Michael Kim, Trisha Ortiz, and Eugene Rome provided exemplary research assistance, and Betty Kinuthia and Thelma Wong Terre provided superb faculty support. Thanks to the editorial staff of NYU Press, including Alison Waldenberg, Deborah Gershenowitz, Ginny Wiehardt, Despina Gimbel, Jennifer Yoon, and Eric Zinner, for their thoughtful and careful work.

Finally, I thank my family. Thanks to my parents, for their support of my education and pride in my work; to my children, Deborah, Shana, and Jared, for the joy they bring me every day and for reminding me how much more there is to life beyond this book; and, most important, to my wife, Lori. I could not have asked for a better life partner. Lori's strength, intelligence, patience, and love inspire me every day to do my best work and to improve our world.

Introduction

Mighty Platonic Guardians

> We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America.
>
> —*Holder v. Hall*, Justice Thomas, concurring.[1]

Supreme Court intervention in the political process has become a regular feature of the American political landscape. To give a few examples, the Court has required the reapportionment of virtually every legislative body in the country to comply with the principle of "one person, one vote"; ended the practice of political patronage employment; prevented local governments, states, and the federal government from limiting campaign spending in the name of political equality; curtailed the extent to which legislatures may take race into account in drawing district lines; and most recently (and, some would add, notoriously) determined the outcome of the 2000 presidential election.[2]

Though such intervention now seems commonplace, it was not always so common. In the period 1901–1960, the Court decided an average of 10.3 election law cases per decade with a written opinion. During the period 1961–2000, that number jumped to 60 per decade. Figure I-1 shows the trend.[3] The numbers are equally dramatic in Figure I-2, which displays the percentage of election law cases on the Court's docket. In the 1901–1960 period, on average only 0.7 percent of cases the Court decided by written opinion were election law cases. During the 1961–2000 period, that percentage increased seven and one-half times to an average 5.3 percent of cases.

The change in the 1960s is no mystery. In 1962, the Court decided *Baker v. Carr*,[4] determining that courts would now hear cases raising challenges to state apportionment plans (in court parlance, that such cases are "justiciable"). The Court did so despite Justice Frankfurter's strong protests that the courts should not enter into the political thicket for fear of harming the courts' legitimacy.

Perhaps encouraged by the Court's willingness to enter the thicket, and responding to the burgeoning civil rights movement, Congress passed the Voting Rights Act in 1965, beginning a dialogue between Congress and the Court over the contours and extent of voting rights. Congress passed major amendments to the act in 1982, partly in response to evidence of continued discrimination against racial minorities and partly in response to the Court's 1980 *City of Mobile v. Bolden*[5] decision that made it difficult for racial minorities to succeed in claiming that their votes were unconstitutionally "diluted." Congress created a statutory right to bring such a dilution claim under the new section 2 of the act, but it did so with exceedingly murky language—fully expecting the thorny statutory questions to be sorted out by the courts. The Court, in *Thornburg v. Gingles*,[6] did not disappoint, creating a three-factor threshold test, followed by a "totality of the circumstances" test, for judging claims of section 2 vote dilution.

Baker thus opened up the courts to a variety of election law cases, and the Court—with lower courts following its lead—has plunged forward in earnest to decide them. This book assesses how the Court has handled an important subset of these cases, those that regulate political equality, and sets forth some proposed methods and standards that the Court should employ in deciding such cases in the future. Especially given the controversy over *Bush v. Gore*, the Supreme Court case determining George W. Bush as the winner of the 2000 presidential election, the question whether the Court has been involved appropriately in regulating the political process is as timely as ever. Some see a rather straight line from *Baker* to *Bush*,[7] which should lead at least those critical of *Bush* to rethink *Baker*.

The Past and Future of Process Theory

Although *Baker* was controversial at the time, the case now has been canonized as an example of appropriate court intervention in the face of a failure in the political process. Tennessee had not reapportioned its legislative districts for sixty years, leading to a situation where rural voters, no

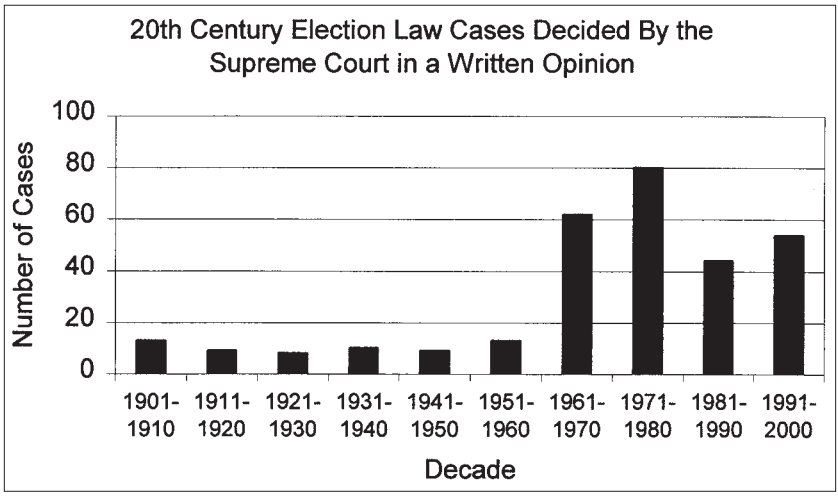

Figure I.1

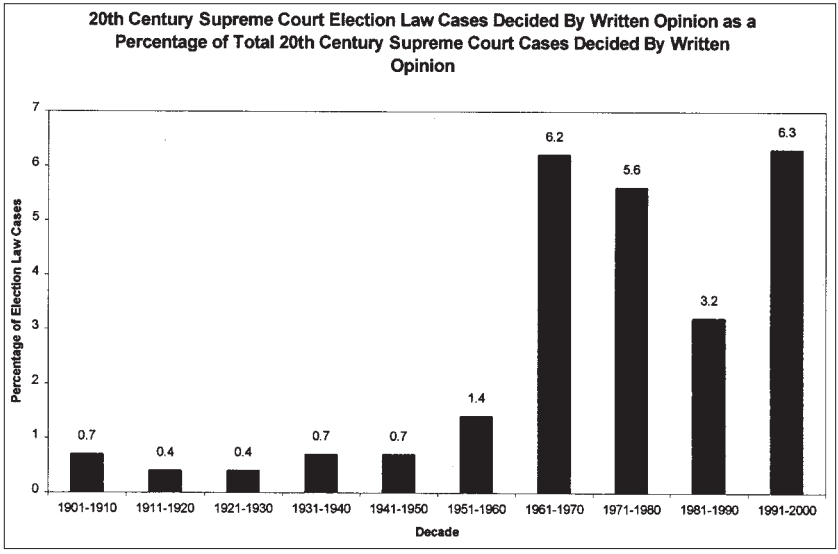

Figure I.2

Sources: Albert P. Blaustein and Roy M. Mersky, *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States*. Table 9 (1978) (data for 1901–1970); U.S. Department of Commerce, *Statistical Abstract of the United States*. (various years) (data for 1971–1999); Supreme Court of the United States, *2001 Year-End Report of the Judiciary* 5 (January 1, 2002) (available at www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html) (data for 2000)

longer a majority in the state, controlled a majority of the seats in the legislature: "37% of the voters of Tennessee elect[ed] 20 of the 33 Senators while 40% of the voters elect[ed] 63 of the 99 members of the House."[8] Other state legislatures were even more malapportioned; California, for example, had a 1,432 percent deviation between its largest and smallest districts before 1966.[9] The political market failed in the case of unequally populated districts because existing legislators could not be expected to reapportion themselves out of a job, nor would voters who benefit from the existing apportionment elect legislators inclined to do so.

John Hart Ely later argued in his important 1980 book, *Democracy and Distrust*, that "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."[10] Although much of Ely's theory of judicial review has been rejected by many constitutional law scholars,[11] the part that appears to have survived the test of time is his idea that courts should intervene in the face of political market failure. *Baker* was his poster child in crafting this argument.

Some observers describe Ely as having provided an after-the-fact justification for many of the activist decisions of the Warren Court, but the idea that courts should intervene to cure political market failure predates both Ely's work and the Warren Court. In the famous footnote 4 of Justice Stone's opinion in the 1938 case *United States v. Carolene Products Company*,[12] the Court endorsed more searching judicial review in three circumstances. In the second circumstance, the Court called for stricter review when the law at issue "restrict[ed] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[13]

Most election law scholars have embraced process theory—at least that part focused on curing political market failures—almost as a matter of religious conviction. Samuel Issacharoff and Richard Pildes recently built upon Ely's work by advocating that the Court act to prevent political "lockups," primarily by the political parties.[14] I return in some detail to what has come to be known as "the political markets approach" in chapter 5, where I see it as a variant of recent (in my view, unwarranted) calls by both legal scholars and the Court to move away from adjudication of political equality cases on individual rights grounds and toward adjudication on "structural" or "functional" grounds.

Process theory has an intuitive appeal as a rule to apply in election law cases because it purports to provide both a reason for and a limit on judicial intervention in political cases, but it has proven to be problematic in three key ways.

First, the theory has not been successful in limiting judicial power: courts have not confined themselves to intervening in election law cases only in the face of political market failure. *Bush v. Gore* is the most recent example of this phenomenon. As Pamela Karlan and Elizabeth Garrett separately have argued, the Court in *Bush* had no need to intervene under process theory; the Florida legislature and the United States Congress were in a position to act if necessary to resolve disputes over Florida electors.[15] It is difficult to believe that even trenchant and well-argued criticism along these lines by prominent members of the legal academy such as Karlan and Garrett can serve to check the Court's desire to intervene in political cases when a Court majority wants to do so.[16] Thus, process theory may provide no meaningful constraint.

The second problem with process theory is that it masquerades as a purely procedural rather than a substantive basis for review of political cases.[17] A close consideration of the theory, however, reveals its implicit normative agenda. Return to the poster child for process theory, *Baker v. Carr*. Accepting the premise that the Tennessee political process was stuck in a position where a minority of rural voters controlled the state legislature, why should the Court intervene to "unblock" this "stoppage" in the political process?[18] The answer must be that there is some normative baseline—perhaps some rudimentary concept of equality that says the legislature should not be so far off from majority rule[19]—that allows us to conclude that unblocking the Tennessee stoppage is the right thing to do. If process theory operates in the world of substance, it must be weighed against other substantive arguments for intervention (or nonintervention) in political cases.

Daniel Lowenstein takes this point about the substantive dimension of process theory further, indeed too far. He believes process theory is a variant of "*Lochner*-era judicial interventionism," referring to the now-discredited approach of *Lochner v. New York*.[20] In *Lochner*, the Supreme Court struck down a state law setting maximum hours for bakers. Lowenstein agrees *Lochner* was decided incorrectly because it depended upon contested empirical and conceptual economic assumptions best resolved by legislatures, not courts. He then compares *Lochner* to process theories: "Tinkering with electoral and legislative procedures is no less subject to empirical imponderables than tinkering with the economy. What constitutes a democratic or impartial political procedure is just as conceptually contestable as what constitutes an externality in the economic realm." He concludes that "[i]f those who are aggrieved by an economic regulation

ordinarily are consigned to the political arena to seek relief, why should not the same be true for those who disagree with some aspect of the political process?"[21]

One answer to Lowenstein is that those who are aggrieved by the political process—such as by being denied the right to vote—may have a more difficult time using the political arena to get relief than those who have the right to vote who are aggrieved by a particular economic regulation. Lowenstein denies that this claim is empirically correct, arguing that most political reforms in this country were carried out by political, rather than judicial, means.[22] He admits, however, that "the Supreme Court played a significant role in the extension of the franchise to blacks in the South."[23] Moreover, Lowenstein implicitly recognizes that his criticism goes too far, for even he believes that *Baker* and *Reynolds* were properly decided, all the while claiming that process theory is "in fact . . . very rarely applicable in our society."[24] So the difference between Lowenstein and most other election law scholars is one of degree as to how much process theory explains when the Court should intervene in the political process.

The third problem with process theory is that, despite its implicit substantive dimension, it is a shallow theory. It says nothing about how the courts should intervene in the face of political market failure.[25] *Baker* was a case of serious malapportionment of districts, and process theory provides a good reason for the Court to remedy the political market failure, if one accepts the weak equality rationale mentioned above. Should malapportionment have been remedied by requiring some "rational" apportionment, strict equality in the size of legislative districts, or something between these standards? Ely defended the one person, one vote standard that the Court adopted two years after *Baker* in *Reynolds v. Sims* as having the advantage of administrative convenience;[26] the standard in no sense flowed from process theory.

The shallowness problem of process theory is compounded by the fact that judges are not experts in political science, and even political scientists admit they sometimes have limited ability to predict how changes in rules governing elections and politics will affect political power. Judges, at least life-tenured federal judges such as those on the Supreme Court, often have every incentive to vote their values and not make self-interested decisions,[27] but impartiality does not cure competence concerns.

*Moving beyond Process Theory: Core and Contested Political Equality Rights in a Post–*Bush v. Gore *World*

Given the above three problems with process theory, this book looks beyond the theory and toward a broader view of how courts should decide election law cases. I concur with the aspect of process theory that says that courts generally should confine judicial intervention to cases of political market failure—in the face of a working political system of rudimentary equality, hands off by the judiciary makes sense—but I am not naive enough to believe that courts will in fact limit themselves. So part of this book is aimed at other devices that courts should use to experiment with various election rules that they might craft.

But procedural or mechanical fixes are not enough of a guide to decide such cases. Process theory's inability to provide substantive rules for curing political market failure proves the point. Thus, the next part of the book advocates a substantive theory of political equality to justify and limit the Court's role in regulating the political process.

The procedural and substantive arguments I make are intertwined, and both depend upon a critical assumption that I defend in this book: that the Supreme Court can (and should) distinguish between certain *core* political equality rights and other political equality rights that are *contested*.

Core political equality rights stem from two sources. The Court simply must accept a few of these core rights, such as nondiscrimination in voting on the basis of race or ethnicity, as minimal requirements of democratic government; they do not change along with public perceptions of the contemporary meaning of "democracy." But most core rights are *socially constructed*. The right to an equally weighted vote is now a core right (but was not when the Court decided *Baker*) because most people see it as a core right. Thus, most core political equality rights are the product of *social consensus*, or at least near-consensus. As my example of weighted voting shows, the Court itself can shape the social consensus with the rulings it makes.

On the other hand, some political equality rights are *contested*. For example, many but certainly not most people in the United States today believe that some groups, particularly members of racial minorities, should have the right to roughly proportional representation in legislative bodies. Contested political equality rights are neither a minimal requirement for democratic government (many democratic governments do not use proportional representation) nor the product of social consensus.