

# 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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup> 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*,<sup>4</sup> 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*<sup>5</sup> 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*,<sup>6</sup> 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*,<sup>7</sup> 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

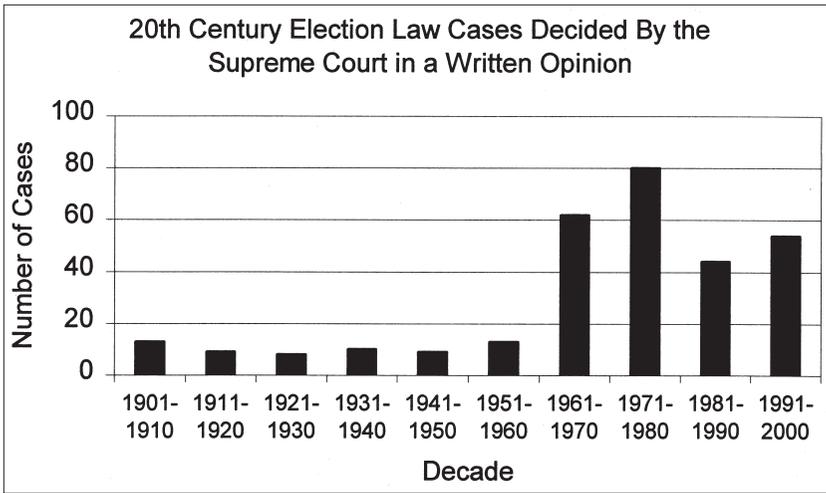


Figure I.1

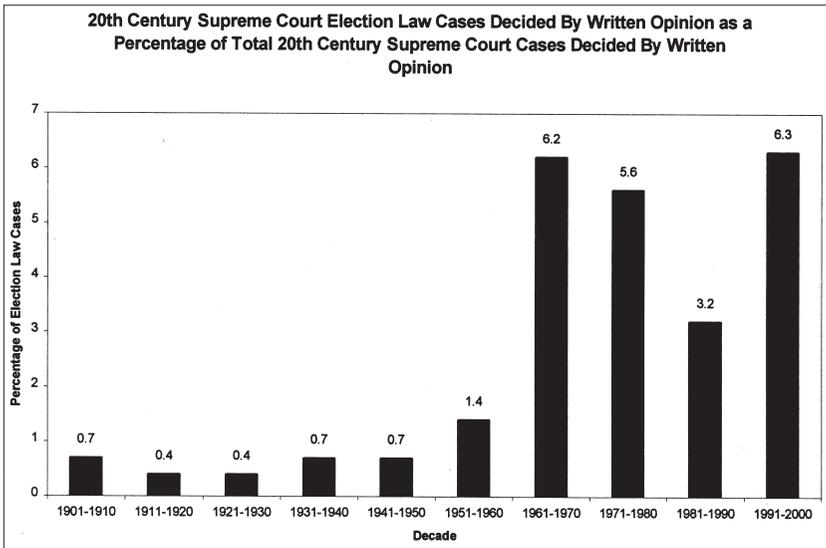


Figure I.2

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](http://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.”<sup>8</sup> Other state legislatures were even more malapportioned; California, for example, had a 1,432 percent deviation between its largest and smallest districts before 1966.<sup>9</sup> 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.”<sup>10</sup> Although much of Ely’s theory of judicial review has been rejected by many constitutional law scholars,<sup>11</sup> 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*,<sup>12</sup> 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.”<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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?<sup>18</sup> 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<sup>19</sup>—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*.<sup>20</sup> 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?”<sup>21</sup>

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.<sup>22</sup> He admits, however, that “the Supreme Court played a significant role in the extension of the franchise to blacks in the South.”<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup> *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;<sup>26</sup> 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,<sup>27</sup> 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.

I use this distinction between core and contested political equality rights first in chapter 2 to make the procedural argument that when the Court chooses to craft a rule in an area of a contested equality right, it should do so with a murky (or vague) political rule. In contrast, when the Court chooses to craft a rule involving a core equality right, it is better suited to the use of a bright-line rule. The rationale is that the Court acting in an area of contested claims both has less reason to act decisively and also is in a greater danger of making poor policy choices.

In chapters 3 and 4, I make a stronger claim about core and contested political equality rights. Chapter 3 identifies three core equality principles and argues that if the government attempts to place a limit on the exercise of one of these three core political equality principles, the Court, with an eye on legislative self-interest and agency problems, must engage in a skeptical balancing of interests. In chapter 4, I argue that Congress or state and local legislative bodies (or the people, in those jurisdictions with an initiative process) should decide whether to expand political equality principles into contested areas. The Court should defer to legislative value judgments in such cases but, again, use searching scrutiny to control legislative self-interest.

A reader may accept my procedural and mechanical fixes described in chapter 2 without accepting the more controversial normative positions I put forward in later chapters. Before describing those normative positions in greater detail, I need to defend the constitutionalization of a substantive agenda of equality.

In making this move toward substance, I cannot avoid the charge that I am asking the Court to take on the role (or, more accurately, to continue in its role) as Platonic guardian of our political system.<sup>28</sup> The term “Platonic guardian” refers to Plato’s allegory of the cave in *The Republic*.<sup>29</sup> In a dialogue between Socrates and Glaucon, Socrates describes a group of men who have been chained in a cave since birth so that they cannot turn their heads toward the light at the cave’s opening. They see only shadows and attempt to discern which real objects cast the shadows. One man is freed, leaves the cave, and sees the real world. He returns to the cave, and before his eyes have adjusted to the dark his skills at discerning which real objects cast the shadows are poor compared to those of the men who stayed down in the cave. But after his eyes have adjusted, he is in a far better position to judge the shadows than are the cave dwellers to discern objects from shadows because he can rely upon the reality he observed on the surface.

Socrates explains that the cave is like the world, most people are like the prisoners in the cave, and philosophers are the ones who have seen the real world. The philosophers must be forced to return to the cave and to act as “guardians” or rulers of society. The philosophers should be told:

“You have had a better and more complete education than any of the others; so down you go into the cave with the rest to get used to seeing in the dark. For then you will see far better than they do what these images are, and what they are of, for you have seen what the beautiful, the just and the good truly are.” So our state will be ruled by minds which are awake, and not as now by men in a dream fighting with one another over shadows and for the power and office which in their eyes are the great good. Truly that state is best and most quietly ruled where the rulers have least desire to be such, and the state with the opposite sort of rulers is the worst. And will you name any other sort of man than a philosopher who looks down on political office?<sup>30</sup>

It is admittedly difficult for a liberal like me in the aftermath of *Bush* to argue in favor of the Court’s role as Platonic guardian. The *per curiam* opinion in *Bush* disingenuously lamented, as Plato’s philosopher might have, having to exercise its “unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.”<sup>31</sup> The lament was disingenuous because the Court could have declined to hear the case not once but twice.

But it is simply too late in the day to argue that *Baker* was wrongly decided and that the Court should promptly march out of the political thicket.<sup>32</sup> That argument carries no weight on the Supreme Court; not a single member of the Court has questioned *Baker* for decades. Even Justice Thomas, quoted at the beginning of this chapter from his concurring opinion in *Holder v. Hall*, has questioned only the scope of the grant of authority given by Congress to the Court in the Voting Rights Act. He has not questioned the general justiciability of election law cases. The last justice to have come close to calling for a return to nonjusticiability was Chief Justice Burger, who briefly quoted Justice Frankfurter’s *Baker* dissent in his concurring opinion in the 1986 case *Davis v. Bandemer*.<sup>33</sup>

Even conservatives who once may have opposed *Baker* rarely question the case now.<sup>34</sup> Indeed, *Bush* may have convinced some conservatives that Court intervention in the political process is sometimes necessary, if only to stop a lawless or dangerous state court.<sup>35</sup>

Turning back the clock also ignores almost four decades of Congress depending upon the Court to fill in important gaps in legislation, such as the Voting Rights Act, regulating the political process. To be sure, the Court could continue to decide statutory cases and avoid constitutional ones. But the main lesson to be learned from the Voting Rights Act cases is that the Court has intervened frequently into the details of the political process with no apparent loss of popular legitimacy. Even the Court's unprecedented interference in the 2000 presidential election does not appear to have hurt its reputation among the public.<sup>36</sup> Justice Frankfurter's primary fear of loss of legitimacy has been neutralized by the facts.

Thus, for both practical and theoretical reasons, *Baker's* justiciability holding is unlikely to be reconsidered. With *Baker* in place, there is nothing else to do but to argue over *how* the Court should decide election law cases.

### *A Road Map*

This book argues in favor of preserving room for Court intervention in the political process, but for intervention that is (1) tentative and malleable, (2) focused on individual (or sometimes group) rights and not on the "structure" or "functioning" of the political system, (3) protective of core political equality principles, and (4) deferential to political branches' attempts to promote contested visions of political equality. The chapters that follow define and defend these new proposed limits on Court intervention. I would like to think I would have made these recommendations had I been writing solely about the Warren Court, but perhaps I would not have;<sup>37</sup> certainly some of the more controversial election law cases of the Rehnquist Court have motivated my passion to write this book.

Other readers, with different visions, no doubt would argue for a different role for the Court in these political cases. But if the Court is going to continue to use the Constitution as a general grant of authority to make policy determinations about the proper workings of political process, it makes sense to steer the Court toward good policies. This book, then, begins a discussion that may be continued by others. It draws on insights from political science, economics, and legal theory in assessing how the Court should regulate the political process. It also considers in depth, for the first time in any published work, the internal papers of Supreme Court justices deciding many of these political equality cases. The papers show

the extent to which the Court majority has consistently applied its own value judgments rather than deferred to precedent, social consensus, or any textual limitation of power in the Constitution.

To understand where the Court should go, I begin with where it has been. In chapter 1, I survey the Supreme Court's regulation of political equality since 1960 in four key areas: formal equality requirements, wealth, race, and political parties. Rather than canvass every case that arguably falls into each of these categories, the survey shows general trends. Not surprisingly, given that we are talking about a multimember body with shifting membership over a forty-year period, the Court's treatment is full of inconsistencies and changing rules over time. Nonetheless, the survey discerns some general patterns about the Court's treatment of political equality in each of these areas. The chapter concludes with a look at *Bush*, and considers how the case fits or fails to fit into the forty-year history of political regulation coming before it. Of all the criticisms that have been made of *Bush* (and I make many in this book), the idea that the case should be criticized as inconsistent with precedent turns out to be overblown.

Chapter 1 is primarily a descriptive chapter; to the extent it is normative, I try to limit myself to questions about whether cases show fidelity to precedent already set by the Court. In chapter 2, I turn more directly to the normative, arguing for the use of judicially *unmanageable* standards in deciding election law cases. My claim is that the Court in cases involving contested political equality issues initially should use murky or unclear standards in articulating new political rights. Unclear standards lead to variations in the lower courts, and the Supreme Court can learn from such variations the best way to ultimately craft new political equality rules.

The substantive normative analysis of political equality begins with chapter 3. There I argue that the Court should play a central role in protecting the *core* of three equality principles: the "essential political rights" principle, the "antiplutocracy" principle, and the "collective action" principle. The three principles are *limits* on the government's power to treat people differently in the political process. The principles are derived primarily from social consensus (or near-consensus) about the contemporary understanding of political equality, and chapter 3 defends this basis for determining the scope of political equality claims.

The essential political rights principle prevents the government from interfering with basic political rights and requires equal treatment of votes and voters. The antiplutocracy principle prevents the government from

conditioning meaningful participation in the political process on wealth or money. The collective action principle prevents the government from impeding through unreasonable restrictions the ability of people to organize into groups for political action.

I explain in chapter 3 that if the government attempts to place a limit on the exercise of one of these three core political equality principles, the Court, with an eye on legislative self-interest and agency problems, must engage in a skeptical balancing of interests. This kind of balancing is very different from the deferential balancing we have seen from the Court, particularly in recent years when it has acted to protect the Democratic and Republican parties from political competition.

Although the Court's role is to protect the core, the Court should not act on its own to take sides in cases involving *contested* equality principles. When a plaintiff raises such a claim, the Court should reject its constitutionalization.

Instead, as I explain in chapter 4, it is up to Congress or state and local legislative bodies (or the people, in jurisdictions with an initiative process) to decide whether to expand political equality principles into contested areas. The Court generally should defer to such decisions, if the Court can be confident that the legislature's intent is to foster equality rather than engage in self-dealing. Chapter 4 examines whether the Court's treatment of campaign finance laws and the Voting Rights Act is consistent with this idea. I argue that the Court was wrong to reject the equality rationale for campaign finance regulation in its initial campaign finance cases, and it appears poised to go down the wrong path in the Voting Rights Act cases as well, perhaps holding major provisions of the act unconstitutional as exceeding Congress's power to enforce the Fourteenth and Fifteenth Amendments.

Chapters 3 and 4 defend strict balancing tests as appropriate in the political equality cases. The balancing I call for differs significantly from the Court's balancing tests by requiring a close connection between legislative means and ends as an indirect way to police legislative self-interest. Nonetheless, balancing represents the typical way that the Court has (at least ostensibly) handled such claims in the past. A reader familiar with the Supreme Court's constitutional jurisprudence might not think balancing needs much defending. To the contrary, however, we are in the midst of a disturbing trend away from a focus on individual rights and toward "structural arguments" about workings of the political system.

In chapter 5, I consider these structural arguments, which have come from the Court in its racial gerrymandering cases such as *Shaw v. Reno*, and from election law scholars such as Issacharoff and Pildes, calling for the Court to promote a certain kind of political competition rather than engage in what they term “sterile” balancing of individual rights and state interests. I argue that far from being a sterile concept, equality claims, both individual and group, remain at the core of how the Court should evaluate election law claims. Structural arguments, whether made by the Court or commentators, are misguided and potentially dangerous. They evince judicial hubris, a belief that judges appropriately should be cast in the role of supreme political regulators.

Finally, the Conclusion chapter considers some remaining issues. First, can we get there from here? I argue that rational judges pursuing their self-interest might agree to the more minimal role for the Court I advocate as part of a tacit mutually beneficial agreement. I also consider how the lessons learned in the political equality cases may translate across other constitutional issues. I conclude by looking at how the Court has fared under my standards from *Baker* to *Bush*.

The Court remains well entrenched in the political thicket and is likely to remain there. This book is not an exit manual. Instead, it provides some possible minimalist strategies for the Court’s forays into the forest to be successful, or at least not dangerous to the health of our democracy. It asks the Court to leave much of the future development of American democracy in the hands of those who are politically accountable.