

## SUING THE GOVERNMENT IN HOPES OF CONTROLLING IT: THE EVOLVING JUSTIFICATIONS FOR JUDICIAL INVOLVEMENT IN POLITICS

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Most of the papers in this symposium conceptualize lawsuits against the government as instruments used to protect individuals and minorities from state policies that violate fundamental rights or discriminate against particular groups. The judiciary, under this view, exists as the countermajoritarian check on political processes naturally skewed toward satisfying the preferences of the numerous or the powerful. Thus, in addition to protecting rights specified in the Constitution, judicial review is often thought to be most necessary when one of the triggers mentioned in *Carolene Products* footnote four<sup>1</sup> is present: namely, restriction of the political processes that could bring about the repeal of undesirable legislation, or discrimination against discrete and insular minorities. Specifically because they are not elected and accountable, the argument goes, federal judges are in the best institutional position to police the political process to prevent majoritarian tyranny and to safeguard the processes that bring about democratic change.

This essay examines a subclass of suits against the government: those where plaintiffs turn to the judiciary in hopes of gaining greater representation, power, or control of government. For most of our nation's history, such suits were seen as involving political questions outside the province and beyond the capabilities of the judiciary. When the Court began to intervene, it did so based on the *Carolene Products* rationales. The most recent cases—of the last twenty-five years or so—reveal what I consider two disturbing trends. The first concerns the co-opting of the *Carolene Products* rationales for the adjudication of “normal” political conflict. Whereas once plaintiffs ran to the courthouse as a last resort when the structures of politics systematically closed them out of the legislature, now plaintiffs who have lost through the “normal” operation of democratic government routinely run to the judiciary for a second bite at the apple. The second trend involves the supplementing of the *Carolene Products* rationales with alternative justifications for judicial intervention into the politi-

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<sup>1</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

cal process. In a series of decisions, the Court has intervened in the political process in the name of what can best be described as "tradition," safeguarding processes and institutions from innovations that are themselves often justified as protecting minorities or providing greater political access. I conclude this essay by evaluating whether these unintended and perhaps inevitable consequences have served to undermine the justifications for even the initial judicial forays into politics that are normally viewed as crowning, progressive achievements of the modern Court.

### I. JUDICIAL INTERVENTION INTO POLITICS—THE SALAD DAYS

Most would time the Court's intervention into politics with the 1962 decision in *Baker v. Carr*<sup>2</sup> and its progeny over the next decade that established the one-person, one-vote rule. Because of the vigorous disagreements the Justices expressed in those cases as to whether they should get involved in the "political thicket"<sup>3</sup> of redistricting, the one-person, one-vote cases appear as a watershed in the judiciary's conceptualization of its role in the political system. This first impression is somewhat misleading, however.

Prior to *Baker* the Court had intervened several times in the electoral process, sporadically protecting African-American voters by enforcing the guarantees of the Equal Protection Clause and the Fifteenth Amendment. As early as (or depending on your perspective, as late as) 1915, the Court struck down certain grandfather clauses as inconsistent with the Fifteenth Amendment.<sup>4</sup> And in the following forty years, it used the Fourteenth and Fifteenth Amendments in the *White Primary Cases* to strike down a series of attempts by the Texas Democratic Party to exclude African-Americans from participating in both formal and informal candidate nominating processes.<sup>5</sup> Just two years prior to *Baker*, the Court (with Justice Frankfurter writing for it, no less) struck down the Tuskegee racial gerrymander on Fifteenth Amendment grounds, finding it to be merely a more sophisticated form of outright disfranchisement.<sup>6</sup>

While prior to *Baker* the Court intervened (if ever) in only the most extreme cases of race-based disfranchisement, immediately after *Baker* the Court extended its reach into cases where the plaintiffs were not discrete or insular minorities. Indeed, the Court created the right to vote out of whole cloth—reading into the Equal Protec-

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<sup>2</sup> 369 U.S. 186 (1962).

<sup>3</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

<sup>4</sup> *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>5</sup> See *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

<sup>6</sup> *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

tion Clause a protection against discrimination in voting that made the Fifteenth, Nineteenth, and Twenty-Fourth Amendments superfluous.<sup>7</sup> The bounds of this newly discovered right were not limited to historically oppressed groups or even discrete or insular minorities; they extended even to thirty-one year old stockbrokers who lived with their parents and wanted to vote in school board elections.<sup>8</sup> And once the Court established the right to vote, the rights to run for office and to appear on the ballot, as a party<sup>9</sup> or a candidate,<sup>10</sup> represented the next logical jurisprudential step. However, these post-*Baker* cases, like the one-person, one-vote cases themselves, could be justified by appealing to the first of the *Carolene Products* rationales, what John Hart Ely calls—"clearing the channels of political change."<sup>11</sup> Judicial action was necessary, it was thought, because incumbent politicians had no incentive to redraw the favorable districts that elected them, to make the ballot more inclusive, or to expand the franchise to include voters that might be less reliable supporters.

Although the Court may have been the major agent of political change in the 1960s and early 1970s, Congress also played an influential role in expanding the franchise and attempting to prevent capture of the electoral process by the powerful. With the Voting Rights Act of 1965,<sup>12</sup> Congress eliminated literacy tests<sup>13</sup> and secured to African-Americans, and later other groups, the promise of enfranchisement made in the Fourteenth and Fifteenth Amendments. Whereas Congress' principal concern with the Voting Rights Act was protection of discrete and insular minorities, the Federal Election Campaign Act, particularly as amended in 1974,<sup>14</sup> sought to release the political process from the supposed stranglehold of wealthy campaign contributors (FECA). At least before *Buckley v. Valeo*<sup>15</sup> mauled it beyond recognition, FECA represented for its supporters some hope for clearing the channels of political change by muting the corrupting effect of money on the political process.

Like Congress, the national political parties also played a role in pluralizing and invigorating the electoral process. Throughout this time period, the parties slowly expanded the number of states that nominated their candidates in direct primaries, as opposed to back-

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<sup>7</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

<sup>8</sup> *Kramer v. Unified Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

<sup>9</sup> *Williams v. Rhodes*, 393 U.S. 23 (1968).

<sup>10</sup> *Bullock v. Carter*, 405 U.S. 134 (1972).

<sup>11</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105-34 (1980).

<sup>12</sup> 42 U.S.C. §§ 1971, 1973 (2000).

<sup>13</sup> Not too long before *Baker*, the Court had upheld literacy tests as constitutional. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

<sup>14</sup> 2 U.S.C. §§ 431-442 (2000).

<sup>15</sup> 424 U.S. 1 (1976) (per curiam).

rooms filled with much smoke and few party apparatchiks. With the reforms of the early 1970s, the Democratic Party completely transformed the national party conventions that would follow: providing for proportional representation according to race and gender, and enacting a series of reforms that transferred power from party leaders to the mass party membership.<sup>16</sup>

## II. THE CO-OPTATION OF *CAROLINE PRODUCTS*

The judicial and legislative innovations of the 1960s had several unintended, even if not entirely unforeseeable, consequences. In their dissents in *Baker v. Carr*<sup>17</sup> and *Reynolds v. Sims*,<sup>18</sup> Justices Frankfurter and Harlan warned of judicial entanglement in politics, fearing both the lack of administrable standards for redistricting and the erosion of confidence and credibility in the judiciary once it involved itself in the inherently political task of drawing district lines. History has vindicated them, for reasons even beyond those explicit in their predictions. One of those reasons is the co-optation of the promisority and anti-entrenchment rationales in the service of normal partisan conflict.

The redistricting arena presents the most glaring examples of this co-optation. The one-person, one-vote rule has become a vehicle for pushing redistricting plans into the courts when political losers feel that their chances of success might be greater. In *Karcher v. Daggett*,<sup>19</sup> the Republican plaintiffs who lost out in the New Jersey congressional redistricting fight argued successfully that even a 0.2% deviation in population—a figure well under the margin of error in the census data used for redistricting—violated the Constitution. Once created, this supplemental rule of no de minimis population variance then became a standard claim for each fight in the 1990 and 2000 rounds of congressional redistricting litigation.<sup>20</sup>

Redistricting rules under the Voting Rights Act have fared no better than those arising out of the Constitution when it comes to their potential for co-optation by political actors. Most recently, New Jer-

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<sup>16</sup> See generally NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM (1983).

<sup>17</sup> 369 U.S. 186 (1962) (Frankfurter, J., dissenting).

<sup>18</sup> 377 U.S. 533 (1964) (Harlan, J., dissenting).

<sup>19</sup> 462 U.S. 725 (1983).

<sup>20</sup> See, e.g., *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (striking down redistricting plan with 19-person total deviation). See generally Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 735-36 (1998) (discussing the partisan use of one person, one vote); *id.* at 741 (noting that one third of post-1980 redistricting was done either directly or indirectly by courts). I should note that fights against partisan gerrymanders could be justified as "clearing the channels of political change," since the plaintiffs in these cases felt that parties in control of the redistricting process were rigging the system for their advantage.

sey Republicans challenged the 2002 districts for the state legislature. To do so, they felt that a claim under Section Two of the Voting Rights Act presented their best opportunity for forcing the Redistricting Commission to go back to the drawing board on the district lines. Noticing that several districts had lower percentages of African-Americans than under the previous plan, the Republicans enlisted some African-American plaintiffs in an ultimately unsuccessful vote dilution lawsuit.<sup>21</sup> The Democrats adopted a similar strategy with Mexican-American plaintiffs in litigation challenging New Mexico's congressional districts.<sup>22</sup>

The co-optation of the *Carolene Products* rationales is not limited to redistricting fights. In its most significant, recent case concerning political parties, for example, the Court declared California's blanket primary, which allowed any voter to vote in any party's primary in any race, to be unconstitutional under the First Amendment.<sup>23</sup> Instead of campaigning against the initiative,<sup>24</sup> the established political parties (hardly discrete and insular minorities), as well as the minor parties, challenged the initiative in court, arguing that forcing them to accept "outsiders" in their primary elections violated their freedom of association. Analogizing political parties to other more-private associations,<sup>25</sup> the Supreme Court agreed with their position.<sup>26</sup> Contrast *Jones* with *Timmons v. Twin Cities Area New Party*,<sup>27</sup> discussed later, in which the Court's upholding of a ballot regulation effectively made it more difficult for minor parties (with a greater claim on minority status) to become significant electoral players.

*Bush v. Gore*<sup>28</sup> represented the worst-case scenario of co-optation of the *Carolene Products* rationales. The per curiam opinion cited classic precedent largely justified through appeals to minority protection

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<sup>21</sup> *Page v. Bartels*, 144 F. Supp. 2d (D.N.J. 2001) (three-judge court) (holding that a legislative reapportionment plan did not violate the Voting Rights Act).

<sup>22</sup> *Jepsen v. Vigil-Giron*, No. D-101-CV-200102177 (1st Jud. Dist. Santa Fe County Jan. 2, 2002) (holding that drawing a Hispanic-majority district is not required by the Voting Rights Act, and that the establishment of this kind of district should be left to the legislature, not the courts).

<sup>23</sup> *Cal. Dem. Party v. Jones*, 530 U.S. 567 (2000). See generally Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001) (discussing *Jones* and other party primary cases).

<sup>24</sup> See Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731 (2000) (explaining how California's parties sat out the political fight surrounding the initiative in favor of litigating against it).

<sup>25</sup> *Jones*, 530 U.S. at 574-75.

<sup>26</sup> I should note that I agree with the result in *Jones* and have argued in favor of substantial constitutional protection for party autonomy based largely on the *Carolene Products* rationales. See Persily, *supra* note 23 (justifying party autonomy from the standpoint of protection of minorities and promoting electoral competition).

<sup>27</sup> 520 U.S. 351 (1997).

<sup>28</sup> 531 U.S. 98 (2000).

and entrenchment prevention. In support of the halting of recounts mandated by the new interpretation of the Equal Protection Clause, the Court cited its one-person, one-vote precedents (*Reynolds v. Sims*,<sup>29</sup> *Gray v. Sanders*,<sup>30</sup> and *Moore v. Ogilvie*<sup>31</sup>) and its precedent in striking down the poll tax (*Harper v. Virginia Board of Elections*<sup>32</sup>). That Bush was not a “discrete and insular minority”<sup>33</sup> or that political institutions, such as the Florida State Legislature or the United States Congress, were ready, willing, and able to vindicate his rights played no role in the Court’s opinion. The equal right to vote included the equal chance that identical ballots would be counted identically, the Court concluded, at least in the factual context presented at the time. Despite the original intent of the Court that manufactured the right to vote, the right could not be constrained to its purposes: in *Bush v. Gore*, it morphed into a cause of action that was judicially cognizable regardless of the position of power, available alternative forums for resolution, or even the existence of the injury of the plaintiff.

### III. THE COURT’S FOOTNOTE TO FOOTNOTE FOUR

In addition to expanding the constituency for the *Carolene Products* exceptions to judicial abstinence from political conflict, the Court has created new rationales for judicial forays into the political thicket. Although generalization obscures the jurisprudential subtleties and the differences among the coalitions that have formed to create this new justification for judicial involvement in politics, the various decisions might be summarized as protecting certain institutional and political “traditions.” More troubling than the lack of constitutional justification for these moves is the Court’s selective, or even made-up, notion of tradition in the recent political process cases.

The “wrongful-districting” cause of action provides a case in point. In *Shaw v. Reno*<sup>34</sup> and its progeny, the Court established an “analytically distinct”<sup>35</sup> cause of action arising when a state subordinates “traditional districting principles”<sup>36</sup> to race in the construction of a legislative district. The Court has enumerated such principles as “compactness, contiguity, and respect for political subdivisions”<sup>37</sup> while recognizing that other variables, such as incumbency protec-

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<sup>29</sup> 377 U.S. 533 (1964).

<sup>30</sup> 372 U.S. 368 (1963).

<sup>31</sup> 394 U.S. 814 (1969).

<sup>32</sup> 383 U.S. 663 (1966).

<sup>33</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>34</sup> 509 U.S. 630 (1993).

<sup>35</sup> *Id.* at 652.

<sup>36</sup> *Id.* at 686 n.8.

<sup>37</sup> *Id.* at 647.

tion and respect for communities of interest, might make the list in an individual case. Although the Court originally justified the *Shaw* action in the name of preventing racial stereotyping and segregation, the subsequent cases established that this was not a cause of action particular to discrete and insular minorities. Indeed, any resident in the unconstitutional district, regardless of the resident's race or injury, could challenge these districts.<sup>38</sup> And now that the cause of action has been established, political interest groups have begun to use *Shaw* to challenge funny looking districts, regardless of their racial composition. *Shaw's* invocation of tradition is particularly inapt and selective, given that it leaves out some of the most truly traditional districting principles: namely, malapportionment and the use of districting to dilute minority votes and to entrench incumbent parties and candidates.

The political party cases—the results in which I tend to agree—also provide examples of the Court's explicit or implicit reliance on tradition, over minority rights or anti-entrenchment, to adjudicate political controversies. In *Jones*,<sup>39</sup> a majority of the members of both parties supported the law (i.e., the law was not one party's attempt to entrench itself at the other's expense), but the leaders of the party (again, hardly a discrete or insular minority) successfully argued the law violated the party's First Amendment associational rights. Indeed, proponents of the law justified it as a means of breaking the stranglehold party leaders held on the nomination process and a way of enfranchising independent voters that otherwise had no say in primary elections. The Court, however, viewed the associational rights claim as “consistent with [the] tradition” of political parties<sup>40</sup>—apparently overlooking the strong anti-party tradition stretching from Federalist No. 10 through the Progressive Era of enlisting the state in breaking up and controlling party machines.<sup>41</sup>

The reliance on the “traditional two-party system” in the ballot access cases also highlights the change in priorities regarding judicial intervention into the political process. In these cases the Court has not established a new cause of action; rather, it has codified tradition

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<sup>38</sup> See *United States v. Hays*, 515 U.S. 737 (1995) (holding that any resident, regardless of race, has standing to bring a *Shaw* claim against his or her own district). On the problems of *Shaw* standing, see John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997) (arguing in favor of the Court's holding in *Hays*); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998) (responding to Ely).

<sup>39</sup> 530 U.S. 567 (2000).

<sup>40</sup> *Id.* at 574.

<sup>41</sup> See generally Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873 (2000) (describing early political party cases).

as a state interest. In *Timmons v. Twin Cities Area New Party*,<sup>42</sup> the Court upheld a ban on “fusion” candidacies that prevented minor parties from nominating a candidate already nominated by a major party. As with the blanket primary, proponents of fusion viewed it as a means of increasing minority participation and challenging duopolistic control of the electoral process. Nevertheless, noting that the law favored the “traditional two-party system,” the Court found the fusion ban tailored toward “temper[ing] the destabilizing effects of party-splintering and excessive factionalism.”<sup>43</sup> To its credit, the Court in *Timmons* at least paid heed to the tradition of fusion candidacies in the late-nineteenth century, although in most minor party ballot access cases the vibrant political tradition of smaller parties gets short shrift.

The Court’s support for tradition in the political process cases is not limited to the predictable coalition of the five more conservative Justices. In *U.S. Term Limits, Inc. v. Thornton*,<sup>44</sup> and *Cook v. Gralike*,<sup>45</sup> for example, Justice Stevens’ opinions for the Court interpreted the Constitution as preventing states from indirectly or directly limiting the terms of its Members of Congress. Although the debate in *U.S. Term Limits* concerns federalism more than tradition per se, the fundamental question there was whether states could innovate beyond the congressional qualifications listed in the Constitution to add a limit on terms. Consistent with its rejection of other political innovations, the Court said no.

### CONCLUSION

What began as a judicial revolution to expand the franchise and break political lock-ups has matured into opportunities for partisan manipulation and judicial reinforcement of traditional power structures. It is worth considering whether this entire enterprise, on balance, has done more harm than good. To engage in the inquiry is, I admit, somewhat akin to asking how many angels can dance on the head of a pin. Judicial involvement in politics is here to stay, so time might be more fruitfully spent in justifying when courts should be involved rather than whether they should have ever waded into the political thicket. Moreover, all would admit that *some* judicial involvement is necessary to prevent the worst abuses by political actors: for example, outright disfranchisement, Soviet-style ballots, or draconian political speech codes.

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<sup>42</sup> 520 U.S. 351 (1997).

<sup>43</sup> *Id.* at 367.

<sup>44</sup> 514 U.S. 779 (1995).

<sup>45</sup> 531 U.S. 510 (2001).

Nevertheless, I think a good argument can be made that judicial involvement in politics—whatever its philosophic appeal—has deserved the values that formed its original justification. Although the one-person, one-vote rule may have led to greater representation of urban areas and temporary reshuffling of the political structure, decennial redistricting has allowed parties and incumbents to make elections less competitive, and has often created legislatures that are less representative. Although the Court's discovery of the right to vote led it to strike down poll taxes, most of the "important" moves in expanding the franchise were accomplished through constitutional amendments that prevented discrimination in the right to vote based on race, gender, age and (even) failure to pay a poll tax. It was Congress, moreover, through the Voting Rights Act, that eliminated literacy tests the Court had upheld earlier as constitutional and put teeth in federal protections of voting rights for racial minorities. Admittedly, the Court was indispensable in enforcing these pro-minority laws and amendments. In most cases, however, an interpretive regime that clung closely to the available text rather than dangerously expanding judicial authority in service of the *Carolene Products*-type values would have proven sufficient to prevent the disturbing types of laws that export political costs onto unrepresented and powerless groups.

Although no one can deny that judicial intervention has sometimes done wonders in the service of protecting minorities and breaking political lockups, the recent political process caselaw has placed a lot of weight on the other side of the balance. Plaintiffs have successfully used the Fourteenth Amendment precedents on behalf of partisan interests often completely at odds with the pro-minority and anti-entrenchment principles. And the courts have used their relatively new role in the political arena to shore up traditional power structures and even impose their own partisan preferences.

This balancing of the pros and cons of judicial involvement in politics is not merely an academic enterprise. It should serve as a warning shot to those who would expand judicial authority into uncharted territory.<sup>46</sup> The history of lawsuits brought against the government in order to control it teaches us lessons about the unintended consequences of constitutional innovation. It should caution us against further steps down the same or similar roads. With each new constitutional rule or judicial accretion of power comes the risk that the next Court will justify an incremental move in the direction ideologically opposite to its predecessor. Those of us who advocate

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<sup>46</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (urging courts to become the equivalent of trust-busters of political cartels).

such innovations should do so cautiously and humbly. For we may later need to bear the responsibility for providing the weapons our opponents use to injure the very groups we intended to help.