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ELECTION LAW AND LITIGATION

The Judicial Regulation of Politics

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Election Law and Litigation
The Judicial Regulation of Politics

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To Miranda, Max, and Robbie, who have been enthusiastic supporters of this project ever since its origins.

—Ned

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—Mike

To my wife Bari and daughter Caitlyn, who gave me the vote of confidence to take on this project.

—Josh

To our wonderful students, whose feedback on earlier drafts helped make this book as student-friendly as possible.

—Ned, Mike, and Josh

INTRODUCTION

This book covers the law that governs the operation of elections as well as the campaigns leading up to those elections. Implicit in this very first sentence is the fact that this field can be subdivided between "election" law on the one hand and "campaign" law on the other. Further subdivisions of election law are useful. There is the law that governs the nomination of candidates, sometimes called "ballot access" law and which includes the distinctive rules concerning primary elections, to be distinguished from the law that governs the casting and counting of votes for the nominated candidates. This latter area, regulating the voting process itself, is sometimes called "election administration," although that term is confusing since the distinctive rules for nominating candidates could be considered an aspect of election administration. Consequently, we prefer to call this latter area simply "voting" law.

Another distinctive component of election law is the law that governs the drawing of boundary lines for legislative districts, to define the specific constituency that will elect each member of the legislature. Obviously, this "districting" law is inapplicable to the election of candidates for statewide offices, such as Governor or U.S. Senator. Thus, districting law might be considered as belonging to a subfield of election law that concerns the special rules for different types of election offices. The distinctive rules for the operation of the Electoral College, which uniquely govern the election of the U.S. President, would be considered another component of this office-specific set of election laws. (The same holds true for the distinctive rules concerning referenda, initiatives, and other ballot propositions, even though they involve voting on issues rather than candidates.)

Nonetheless, the U.S. Supreme Court cases in the particular area of districting law loom sufficiently large over the entire field of election law that not only do they deserve separate consideration, but they also provide the best place to start one's study of this field. In the 1960s, as the Warren Court was reaching the apex of its activism, the Court ushered in what has been called the "reapportionment revolution," whereby the Court interpreted the Equal Protection Clause of the U.S. Constitution to require both houses of every state legislature to comply with a requirement of equally populated districts (or at least approximately so—more on that later). Not only did this revolution newly subject the districting of state legislatures to federal judicial oversight, but the interpretive principle upon which this revolution relied—that the Equal Protection Clause guarantees each citizen equal voting rights and, even more broadly, equal rights with respect to participating in the electoral process in various ways—has had profound ramifications in other areas of election law besides districting.

As we shall see, soon after the reapportionment revolution, the Warren Court extended this Equal Protection principle to the nomination of candidates, to assure that each citizen had an equal opportunity to run for office. Most significantly, and much more recently, the Supreme Court invoked this same Equal Protection principle in *Bush v. Gore*, 513 U.S. 98 (2000), to rule that a state's procedures for recounting ballots must contain standards of sufficient specificity to avoid disparate treatment of similar ballots depending upon the particular recounting panel that happens to review them. Thus, one of the major unsettled questions of U.S. election law is whether, or the extent to which, the Court will continue to apply this same Equal Protection principle to other aspects of the vote casting-and-counting process: for example, the administration of voter identification requirements or the verification of so-called "provisional" ballots.

If one had studied election law in 1950, before the reapportionment revolution occurred, the subject would have seemed entirely different than it does today. Consisting mostly of state-court cases interpreting state statutes and some state constitutional provisions, a book like this one would have contained hardly any federal law—and almost none of it federal constitutional law. Now, we have major federal statutes regulating various aspects of the subject: the Voting Rights Act of 1965, the Federal Election Campaign Act of 1974 (when its most important provisions were adopted), and the Help America Vote Act of 2002, among the most significant. Although many students today are surprised when they first learn how much state law, rather than federal law, still controls even elections to federal office (Congress and the President), the degree of federal-law control over U.S. elections, including those for state and local offices, is vastly greater than it was a half-century ago. And a considerable portion of this new federal-law control results from judicial interpretation of the U.S. Constitution, starting with the reapportionment revolution of the 1960s.

While it is conceivable that judicial oversight of elections as an exercise of interpreting the U.S. Constitution may recede somewhat in the future, it is also possible that it might not, and perhaps might even increase. In any event, one objective of this book is to convey an appropriate balance between the roles that federal and state law play in resolving election-related disputes. Although we start with federal constitutional law, because it is the "supreme law of the land" and thus necessarily frames the consideration of any election-related issue to which it might conceivably apply, we end by devoting considerable attention to the vote-counting questions that remain largely governed by state law notwithstanding *Bush v. Gore*. Even if the domain of *Bush v. Gore* increases significantly over the next several decades, as the Equal Protection principle is extended to other issues that arise in the vote-counting process, the basic decision of whether to overturn the outcome of an election because of a defect that emerges in the counting process—the issue at the heart of the dispute over the presidential election in 2000 and the issue that with increasing frequency is the focus of election-related disputes—will be determined largely by state law. Nonetheless, whatever the balance of federal and state

law proves to be applicable to this particular area of election law, the law of the vote-counting process is undoubtedly an important topic. In this respect, one might say that this book has saved the best for last.

In another sense, however, we end with the same fundamental question with which we begin: to what extent, if at all, should the judiciary attempt to resolve election disputes, being as they are often contests between the two major political parties in our democracy and it is important that judges be seen as independent of partisan politics? Before the Warren Court could undertake its reapportionment revolution, it first had to consider whether it should consider challenges to legislative districting as being off-limits to the judiciary, according to the so-called "political question" doctrine. The Court said no, but the same basic question remains whenever the judiciary purports to settle an election-related dispute. As we shall see, the applicability of this same "political question" doctrine was raised in *Bush v. Gore*, and state law also must wrestle with whether it wishes to give its judges the authority to invalidate elections on the ground of vote-counting improprieties. Consequently, from beginning to end, as you consider each judicial ruling you read, you should be asking yourself whether judges should be deciding the dispute at all in the first place.

The four-part division of this book is designed to reflect what might be considered the natural lifecycle of the process that governs any particular election. First, it is necessary to define the office to which the election applies. Thus, we start with the law of districting, which defines each seat in the legislative body. Then, it is necessary for candidates to appear on the ballot, and so we turn in Part II to the law of candidate nominations. Once the candidates are on the ballot, the campaigning to win the election officially can begin. Consequently, we next consider, in Part III, the various regulations of campaign practices, including campaign finance. Finally, the election itself consists of casting and counting votes, and thus the Law of Voting in Part IV addresses not only the basic question of who is eligible to vote, but also the subsidiary questions of how to implement the voting process—including registration laws, voter identification rules, the times and places for casting ballots, and the procedures for resolving any disputes that may arise over the counting of ballots. This order roughly tracks the chronological cycle of an election, although there are certainly overlaps. The goal of presenting the material in this manner is to help you place the doctrine within the setting of how an election actually proceeds.

Before we move on, a note about how we edited the judicial opinions that appear in this casebook. We view a casebook as a tool for teaching students fundamental principles and as a launching off point for discussing the intricacies of election law rather than as a reference resource. For this reason, we have tried to edit the opinions in a streamlined manner so that instructors can construct assignments of reasonable length for students while still having the capability of covering the entire casebook within the confines of a

three-credit law school course. We have also tried to edit the opinions to make them relatively easy to read. Many of the opinions in the area of election law are quite lengthy and in some instances we have substantially trimmed the opinions. The omissions in the opinions are not indicated with ellipses; however, we have endeavored to indicate when we have edited out an entire part (e.g., Part I) of an opinion. We also adopted the editing philosophy of limiting citations to precedent and quotations from precedent, and limiting the citations themselves to the case names, years (where necessary), and court (when it is not the U.S. Supreme Court). We did this to make the opinions easier for students to read, and on the theory that when an opinion quotes directly from a prior opinion, it is adopting that language verbatim. While we recognize there is no perfect way to edit an opinion, we hope that our editing assists students in understanding the basics of this admittedly complex area of the law. Finally, we strongly encourage you to read the notes after the cases. We believe that they are unlike the notes you may typically have encountered in other case books, which often present many "case notes" describing detailed permutations of the law or citations to law review articles. We have chosen a different path that we hope is more helpful to students: the notes are designed to present the exact kinds of questions your professor might ask in class. In this way, the notes are intended to focus your reading and help you prepare for each day's class. We hope that this book, with its focus on being as accessible to students as possible, will serve as a valued introduction to the exciting field of election law.

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March 2014

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PART I

THE LAW OF LEGISLATIVE DISTRICTING

Districting law, generally speaking, involves four distinct concepts, each with its own line of cases.

- The first is the constitutional principle of one person, one vote.
- The second is the prohibition against racial vote dilution under the U.S. Constitution and Section 2 of the Federal Voting Rights Act.
- The third is the constitutional constraint against race-based districting (i.e., "racial gerrymandering").
- The fourth is the constitutional treatment of "political gerrymanders"—that is, the distortion of district boundaries to secure partisan advantage.

Although each of these areas has developed its own separate set of rules, it is also true that these areas are interrelated, and cases in each often refer to cases, principles, and doctrines developed in the others. This book presents the four lines of cases in the order listed, from first to fourth, because that way they become least entangled with one another. Even so, it will be necessary—especially as one reviews all four—to consider how they have affected each other's developments.

In addition to the four lines of cases, there is a fifth area that merits discussion—Section 5 of the Voting Rights Act. As you will learn, Section 5 was essentially neutralized by the Supreme Court's 2013 decision in *Shelby County v. Holder*. Yet even though Section 5, in essence, has been stripped of much, if not all, of its vitality, it is still worth studying because of its importance to the development of voting rights for racial and ethnic minorities, the recency of the Supreme Court's decision in *Shelby County*, and because discussion of Section 5 and some of its basic principles will likely remain salient for the foreseeable future. For these reasons, this book discusses Section 5 between the discussion of racial vote dilution and the constitutional constraints on race-based districting.

Before considering any of these various topics in districting law, however, it is first necessary to address whether the judiciary should review the legality of legislative districting at all, a question that implicates the so-called "political question" doctrine.

A. The Political Question Doctrine

The most fundamental question to be addressed in the law of legislative redistricting (at least as it relates to constitutional, rather than statutory, law) is whether there should be a "law" of legislative redistricting at all. By "law" in this context, what is connoted is whether the judiciary should pass judgment upon the merits of claims that legislative redistricting plans violate some provision of the U.S. Constitution. The case you are about to read, *Baker v. Carr*, lays the groundwork for judicial intervention in the realm of legislative redistricting, and in many respects the *Baker* decision is the foundation for the entirety of the federal constitutional cases that appear in this casebook.

Before reading *Baker*, it is useful to have some background on a case that was decided about 16 years earlier—*Colegrove v. Green*, 328 U.S. 549 (1946). *Colegrove* was a case that presented a similar federal constitutional question as the one you are about to encounter in *Baker v. Carr*: whether legislative malapportionment (i.e., legislative districts with different numbers of people) violates the federal Constitution. In *Colegrove*, the Illinois legislature had failed to change the congressional district lines since 1901, with the result that population disparities developed between the districts. In *Colegrove*, the most populated congressional district had 914,000 persons while the least populated congressional district had 112,116. Residents of the most populated districts sued, alleging a violation of the federal Constitution.

Only seven justices participated in *Colegrove*, and they split 4-3 on the result without a majority opinion for the Court. A three-justice plurality opinion written by Justice Frankfurter invoked the political question doctrine and refused to consider the merits of any federal constitutional challenge to the alleged malapportionment of Illinois's congressional districts. Justice Frankfurter wrote these words, which have become oft-quoted in the area of election law:

> Courts ought not enter this political thicket. . . . The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.

Justice Rutledge, who provided the necessary fourth vote for the Court's ruling, wrote a cryptic concurrence saying that even if the federal judiciary had the power to order a redrawing of the state's congressional districts, it should decline to do so. Because the issuance of an injunction is always a matter of discretion, Justice Rutledge thought that the public interest weighed in favor of withholding injunctive relief, in part because of the timing of the litigation in relation to the next upcoming election.

Justices Black, Douglas, and Murphy dissented and would have found a violation of the Equal Protection Clause. Justice Jackson did not participate in *Colegrove*, and Chief Justice Stone had recently died without his successor yet in place.