

The Scope of Equal Protection

Abner Mikva

Abner.Mikva@chicagounbound.edu

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Articles

The Scope of Equal Protection

Hon. Abner Mikva[†]

Thank you, Dean Levmore, for that very generous introduction. I'm very sensitive to introductions. Some of you have heard me tell this story. When I was in the Illinois state legislature, there was an at-large election because the legislature couldn't agree on a reapportionment map. As a result, we had this three-foot-long ballot with two-hundred-and-some-odd names on it, and it just was utter confusion. The only good thing was that it brought a lot of groups into the political arena for the first time. This garden club on the North Shore asked me if I would come speak to them. The woman who invited me said, "Now, Mr. Mikva, we are a not-for-profit, nonpartisan group. Please don't make one of your political speeches. Just come out and tell us what the long ballot is about, and what we are supposed to do on it." I promised I would be a good boy. But she obviously didn't trust me, because when I came out there her introduction went something like this: "Now, Mr. Mikva is a member of the blank political party, and in the last session of the legislature the blank political party had eighty-five members, and Mr. Mikva was one of the biggest blanks down there." I like your introduction better, Dean.

I'm not easily intimidated, even when I have to speak in front of my boss. I have had occasion to pry into the footnotes of some

[†] Former Chief Judge, U.S. Court of Appeals for the District of Columbia; former Congressman from Illinois; former White House Counsel; and Visiting Professor of Law, University of Chicago Law School.

of our most respected jurists and legal scholars while I served as a judge. I found that sometimes the cases and authorities didn't exactly stand for the proposition that they were cited for. So, as I say, I'm not easily daunted. But when it was suggested that I weigh in on the question of the use of the Equal Protection Clause to resolve the last presidential case, I felt more than a little trepidation.

I'm holding in my hand a book called *The Vote*,¹ edited by Professors Sunstein and Epstein of this distinguished institution. Devoted entirely to the case of *Bush v Gore*,² it includes articles by some of the national experts on the Equal Protection Clause from every part of the legal spectrum. Now, it is true that the publication of the book was as much a rush to judgment as was the case of *Bush v Gore* itself, but still some of the best scholars in the country gave the subject their best shot. The world will little note nor long remember what I say here in that kind of competition. So why am I here? Why did I say yes?

I have one credential that none of the authors of this great book can claim. In fact, none of the United States Supreme Court Justices can claim it—except one, and her credential is much smaller than mine.³ I ran in twenty-two separate elections. My name was counted and miscounted on the ballot that many times. In addition, I participated as an interested party or as a recounter in numerous election contests and election procedures, including mine and others in the country. I've judged dimples, pimples, and simples. I've participated in, watched, and judged thousands of official roll calls and votes on legislative matters. I've seen the procedures involved in every kind of voting: paper ballot, punch card, voting machine, electronic device, *viva voce*, show of hands, division, and teller. As a great enthusiast of that splendid ambiguity, the Equal Protection Clause of the Constitution, it never occurred to me that equal protection was involved, or that I had suffered or observed a violation of equal protection rights in any of those matters.

Now let me be perfectly clear: Illinois is the political turf where most of my election experiences occurred, and Illinois has

¹ Cass R. Sunstein and Richard A. Epstein, eds, *The Vote: Bush, Gore, and the Supreme Court* (Chicago 2001).

² *Bush v Gore*, 531 US 98 (2000) (holding that presidential ballot recount procedures violated the Equal Protection Clause).

³ Justice Sandra Day O'Connor served in the Arizona State Senate from 1969 to 1975.

had more than its share of election disputes in and out of court. But equal protection never seemed to be a viable argument for a whole variety of reasons. First of all, we have 102 counties in Illinois, and each has its own procedures for counting and recounting ballots.⁴ It has been that way since Illinois became a state. Second, by statute, Cook County is treated separately from the other 101 counties.⁵ Cook County was the first to use voting machines in the state. Cook County went to punch cards while the other counties were still using paper ballots. And within Cook County there are two separate and different election authorities. The County Clerk's office runs most of the suburbs, while the city and some of the suburbs are run by the Board of Election Commissioners of the City of Chicago. The procedures for running elections, counting the ballots, and recounting the ballots are wholly different. Every one of the thousand precincts in the state applies various procedures, which differ from each other somewhat depending on: (1) the quality of election day judges (usually fair to awful); (2) the presence or absence of party representatives or watchers; and (3) customs and usages sometimes known only to the *cognoscenti*.

To compound the differences, the state courts in Illinois, elected as they are, have on occasion been the final arbiters of some of these election day disputes. Like most Illinois caselore, you can find a precedent on every side of every imaginable election question. Sometimes the same personnel on the Illinois Supreme Court decided the exact same question in opposite ways in different cases; it wouldn't surprise you to know that it might have had something to do with the party label of the candidates whose elections were being challenged.

In Chicago, where precinct captains still exist in large number and once existed in every precinct, the precinct captains have as much to do with the way the entire election and count are conducted as anybody else. My first election was a primary fight against organization candidates. My main election day task was to make sure that I could get observers in every precinct to watch the precinct captains and the way that the count was conducted. In Chicago, the precinct captain runs the precinct, including the counting of the ballots. Now the really capable precinct captains, even in the bad old days, did their work before election day and

⁴ For general Illinois election law, see 10 Ill Comp Stat 5/1 et seq (West 2000).

⁵ See, for example, Ill Stat Ch 60 § 1/50-5 (West 2000); Ill Stat Ch 60 § 1/50-10 (West 2000).

didn't require that much watching. I couldn't really complain that the nice Jewish voters in the Drexel Home for the Aged asked for help to vote for that nice Jewish boy Nathan because the captains told them to, and that the captains never told them that the nice Jewish boy Nathan's last name was Kinally. That was hardly cause for a lawsuit. In other precincts, my watchers went to jail because they tried to insist that the voting and counting procedures be enforced.

Many years later, after I became a Congressman, I was gerrymandered to the North Shore suburbs. I could tell you some things about that gerrymander, and the court approval of it, which have to do with equal protection and the lack thereof, but that is a different tale. I took my Chicago experiences with me and continued to have watchers in all precincts of the district. There wasn't really very much to watch, except to note that, in Kenilworth, one of the judges in the precinct complained about having to open up the stack of bound Democratic ballots for the first time in many elections. That obviously made her job more difficult, because they had to count ballots of both parties. But once again, we never thought of equal protection concerns.

I lost my Congressional seat the first time I ran on the North Shore in 1972, and I regained it in 1974. In 1976, Jimmy Carter was our candidate for President; he lost the district by 30,000 votes. My watchers reported the votes on election night, which showed me losing my seat by 250 votes out of over 200,000 votes cast. There were 10,000 absentee ballots sitting in the Cook County Clerk's office that had not been counted, because state law required that those ballots be physically in the precincts before they could be counted.

The late Mayor Richard J. Daley, the present mayor's father, assumed that absentee ballots were Republican anyway, and so there had not been much diligence in getting those ballots out to the precincts. I knew that most of those absentee voters were college students, because I had recruited them at some seventy separate college campuses. All of them resided in the district, I hasten to add. (I knew I had to add that for you suspecting out-of-staters.) I knew that, more than likely, they were my votes. So on the morning after election day, I filed suit in state and federal court demanding that the absentees be counted. I think I threw in every possible ground I could imagine. I did not claim a violation of the Equal Protection Clause. I claimed violation of due

process and a number of statutory violations, state and federal—but not equal protection.

Later on I received a call from the County Clerk. “Ab,” he said, “I don’t know what all those lawsuits are about. Our figures show you won by 201 votes.”

“Stanley,” I yelled, “this is a federal election. I’ve got FBI agents crawling all over the place. You want to steal the election for me? Are you crazy?” “No, no,” he said, “this is legit, this is straight up. Come and look.”

So with several lawyers in tow, I went to the County building and examined all of the totals on the voting machines. It turned out that, as a result of transpositions and other mathematical errors, my watchers had miscalculated the results, and I had in fact won by 201 votes. Now those of you who have already had federal jurisdiction know that I no longer had standing to pursue my lawsuits. I had won the election. I didn’t have a stake. I offered to turn my claims over to my opponent, but he declined. He knew where those votes had come from, even though Mayor Daley did not.

My opponent instead brought a recount challenge to my election to the House of Representatives, as the Constitution prescribes in Article 1, Section 5. The House resolved the challenge in my favor—*viva voce*—and again, the Equal Protection Clause was not mentioned. There was a lot said about political parties, but nothing about the Equal Protection Clause.

As a member of the state legislature, I participated in many recounts of legislative elections. Even though one or more went on to a court challenge after we finished the legislative procedure, I don’t recall the Equal Protection Clause ever being implicated. And some of the recounts were doozies. Whatever you think goes wrong in Cook County, you have to go downstate sometime to find out the creativity of people who have a stake in an election.

As a member of Congress, I voted on challenges to various House elections. Again, we struggled through without the Equal Protection Clause. I was there for a piece of the attempts to fine or unseat Adam Clayton Powell. Those efforts led to *Powell v McCormack*,⁶ one of the leading election law precedents. You have seen it, or will sometime soon. Once again, neither of the opinions in *Powell*, and none of the fights that went on before it in the

⁶ 395 US 486 (1969) (holding that the political question doctrine did not bar federal courts from adjudicating a Congressman’s claim that he was unconstitutionally excluded from the U.S. House of Representatives).

House of Representatives, implicated the Equal Protection Clause. We talked about exclusion as opposed to Powell's not being seated, we talked about suspension, and we talked about all kinds of other things. We never talked about the Equal Protection Clause.

Let me spend a moment on the other kind of voting that goes on in official circles. Now I won't reference voting by judges in deciding how to resolve cases, since that is not covered by the Constitution, nor, or as far as I know, by statute. More importantly, I don't really know of any major variations in the process, although on some courts the junior judge votes first, and on some courts the senior judge votes first; I assure you that does sometimes make a difference in how the case comes out. But let me talk about legislative voting, which is mentioned in several articles of the Constitution.

The House uses all kinds of procedures to reflect legislative decisions, as does the Senate. Oral votes in the House turn on which ear of the Speaker works better on any particular day. Sometimes he hears the left side, and sometimes he hears the right; sometimes he hears both sides. The same is true with division votes. I have seen amazing counts of people that are standing. And even the supposedly reliable electronic voting procedure that the House uses has sometimes been suspected of being the means for ghost voting by absentee members. In the State Legislature, we had a special verification procedure to guard against such absentee voting. After members had voted using the machine that was at their desk, some of the members who were on the losing side suspected that various absentees were being voted by other members going around and pulling their switches. So there was a verification procedure, under which each member would have to stand up when his or her name was called and remain standing until the entire vote was verified.

In all of those situations, I never heard anybody claim that they were unequally protected. There were fights about whether caucus votes for leadership, very important decisions, should be by secret ballot or by open ballot. And believe me, a lot turns on that decision, and that decision frequently was made by the Chair. People muttered and complained about it, but they never talked about equal protection.

Why does it matter that I denigrate the equal protection ground advanced by the court in *Bush v Gore*? Well, first off, it apparently attracted enough adherents on the Supreme Court,

including two of the dissenters, to be worth the effort. Or so it would appear, depending on how you parse the per curiam opinion. And I assure you, as a federal judge who used to write some per curiam opinions, don't ever think you've figured out why the court went to a per curiam opinion, because there are more reasons than your imagination can produce as to why courts write per curiam opinions.

Nevertheless, people have guessed as to why this was a per curiam opinion, rather than a signed opinion. It sounds like the Equal Protection Clause argument was the only ground that had at least five votes. It is hard to find five votes for any of the other grounds that were advanced by the majority Justices. That would mean that if the equal protection argument is not valid, then maybe the decision really does not have any validity at all. Don't tell that to the people in the White House. And even though the per curiam opinion sought to limit the precedential value of the case to "the present circumstances" because "the problem of equal protection in election processes generally presents many complexities,"⁷ it is the Supreme Court and it is interpreting the Constitution. That is no small potatoes.

The experts are all over the place on the Equal Protection Clause. Professor Strauss suggests, in the marvelous book that I referred to earlier, that the equal protection argument was "wildly out of character" for most of the members of the Court.⁸ I am inclined to agree. By the time I left my judicial position in 1994, most of the "inferior court" judges, of which I was one, thought that the Equal Protection Clause had been pretty much relegated by the Supremes to be used only as the last desperate gasp of some unsuccessful appellant, never to be taken seriously again. Professor Epstein, also in the book, regarded the equal protection argument as "a confused nonstarter at best, which deserves much of the scorn that has been heaped upon it."⁹ I have always admired his candor. He goes on to say that the result is defensible in *Bush v Gore* on the alternative ground, involving

⁷ *Bush v Gore*, 531 US at 109.

⁸ David A. Strauss, *Bush v Gore: What Were They Thinking?*, in Sunstein and Epstein, eds, *The Vote* 187 (cited in note 1) (arguing that the Supreme Court's decision was not in accordance with the law, but rather served as a means to prevent the Florida Supreme Court from electing Gore).

⁹ Richard A. Epstein, *In Such Manner as the Legislature Thereof May Direct*, in Sunstein and Epstein, eds, *The Vote* 14 (cited in note 1) (arguing that the equal protection rationale for the decision in *Bush v Gore* was flawed).

Article II, Section 1 of the Constitution.¹⁰ But he acknowledges that this argument only had three adherents on the Court, and, as the late Justice Brennan used to say, the first rule of the Supreme Court is that you have to be able to count to five.

Professor Karlan thinks that the use of the Equal Protection Clause in the circumstances of *Bush v Gore* promotes “less, rather than greater, equality in democracy.”¹¹ Professor McConnell says that the equal protection argument would not preclude any of my different counties from adopting different voting systems.¹² In fact, as I read his article, every jurisdiction can have its own set of rules; as long as the errors and deviations are random, they don’t matter. Judge Posner thought that the equal protection argument was weaker than the Article II argument, although he also noted that the Article II argument received the votes of only three justices.¹³ Professor Sunstein, in that nice euphemistic way he has, denied that the decision was senseless. He said it just “lacked support in precedent or history,” and gives “the appearance of having been built for the specific occasion.”¹⁴

Well, I think elections are too important to be measured by judicial standards that can be so wide of the mark. I recall that Justice Brennan, one of my great heroes, thought that once the Court got into the reapportionment thicket, it had to seek mathematical precision. He threw out a perfectly legitimate, well-crafted, New Jersey congressional map because it deviated by some tiny fraction in one or two of the districts.¹⁵ Long after the case was over, he and I would argue, hypothetically of course, about the need for mathematical precision. As far as he was concerned, that was an important way to keep the politicians from being politicians. I never understood that.

Justice Stevens has tried to preclude political gerrymandering. That’s like asking politicians not to breathe. Of course politi-

¹⁰ Id at 19–30.

¹¹ Pamela S. Karlan, *The Newest Equal Protection*, in Sunstein and Epstein, eds, *The Vote* 97 (cited in note 1).

¹² Michael W. McConnell, *Two-and-a-Half Cheers for Bush v Gore*, in Sunstein and Epstein, eds, *The Vote* 116 (cited in note 1) (arguing for the validity of the equal protection arguments in *Bush v Gore*).

¹³ Richard A. Posner, *Bush v Gore: Prolegomenon to an Assessment*, in Sunstein and Epstein, eds, *The Vote* 165 (cited in note 1).

¹⁴ Cass R. Sunstein, *Order Without Law*, in Sunstein and Epstein, eds, *The Vote* 215 (cited in note 1).

¹⁵ See *Karcher v Daggett*, 462 US 725, 727 (1983) (declaring reapportionment plan unconstitutional where the difference in population between the smallest and largest districts was 0.7 percent).

cians are going to look at who is helped and who is hurt and who lives where and which votes are included and which votes are excluded. My point is that when the elections are close, when the decisions to be made are narrow, as they frequently are in elections ranging from dogcatcher to President, and in reapportionments from the County Board to the Congress, let the political process resolve the dispute.

We may need to have some recourse to the higher authority of the courts. But we ought to accept the proposition that the best place such decisions should be made is in the political arena where they arose. In such political arenas, the tools of the debate are altogether different than in the courts. It is important for courts to strain to avoid involvement, lest we end up with the courts choosing our political leaders. It is a “political thicket,” as Justice Frankfurter reminded us many, many years ago,¹⁶ and most judges have never run in an election. They understand neither the language nor the territory. It is important for judges not to try to assume that they can replicate the experiences, the gives and the takes, and the backs and the forths that go on in a legislative or political arena. Courts should avoid jumping needlessly into the fray if they don’t have to.

That is my basic premise. I think the Court should not have touched the dispute that resulted in *Bush v Gore*. Would it have mattered as to the final result? I doubt it. There, I agree with Judge Posner that the facts on the ground probably precluded the Vice President from ever being certified as entitled to Florida’s electoral votes. It was quite likely that, even if the recounts had been allowed to continue, the Florida Legislature would have certified George Bush as the winner of the Florida electoral votes. It is quite possible that even if all the recounts that were contemplated had been pursued, Governor Bush would have retained a narrow lead—maybe even narrower than my landslide win of 1976. But I think Governor Bush would have been declared the winner. In any event, Congress, under the Constitution, and the federal statute designed particularly for this kind of impasse,

¹⁶ This term comes from Justice Frankfurter’s opinion in *Colegrove v Green*, 328 US 549, 556 (1946) (plurality opinion) (holding that Congress had exclusive authority over securing fair representation by states).

passed under the powers given to the Congress, would have decided the question, and Bush would have won. That was the apparent political crisis that the Court sought to protect us from. I think such a resolution by the political actors would have had far more legitimacy, and the Court would not have used up any of its own legitimacy. Maybe some members of Congress would have lost their seats because of their vote to resolve the dispute in favor of Bush or in favor of Gore. That's as it should be. Every important political question that comes before a body of politicians has losses, necessary and otherwise. No Supreme Court Justice will lose his or her seat because of the decision, and that too is as it should be. But then that's all the more reason why courts should not jump quickly into that kind of fray.

I like the way that Professor Garrett summed it up. She said, quoting again from the book, “[t]he lesson of *Bush v Gore* is that we do not need to be saved *from* politics. Instead . . . [the Constitution] allows us to be saved *by* politics.”¹⁷

Mr. Dooley, Chicago's great political philosopher, sagely observed that “the Supreme Court follows the election returns” in making some decisions.¹⁸ We can accept that the Supreme Court follows the elections. The Court just should not decide them.

¹⁷ Elizabeth Garrett, *Leaving the Decision to Congress*, in Sunstein and Epstein, eds, *The Vote* 54 (cited in note 1).

¹⁸ *Supreme Court and Election Returns*, AP (Dec 5, 2000), available online at <http://quest.cjonline.com/stories/120500/gen_1205007222.shtml> (visited Oct 6, 2002) [on file with U Chi Legal F].