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Judging the Law of Politics

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THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKKER V. CARR* TO *BUSH V. GORE*. By *Richard H. Hasen*. New York: New York University Press. 2003. Pp. xii, 226. $45.

Election law scholars are currently engaged in a vigorous debate regarding the wisdom of judicial supervision of democratic politics. Ever since the Court's 1962 decision in *Baker v. Carr*,[1] the Court has increasingly supervised a dizzying array of election-related matters. These include the regulation of political parties,[2] access to electoral ballots,[3] partisanship in electoral institutions,[4] the role of race in the design of electoral structures,[5] campaign financing,[6] and the justifications for limiting the franchise.[7] In particular, and as a consequence of the Court's involvement in the 2000 presidential elections in *Bush v. Gore*,[8] a central task of election law has been to ascertain the proper limits of judicial review of the electoral process. These events have spurred many scholars to argue that the Court should play a reduced role in supervising the democratic process.[9]

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* Russell M. and Elizabeth M. Bennett Professor of Law, University of Minnesota Law School; Faculty Affiliate, Center for the Study of Political Psychology, University of Minnesota. B.A. 1992, Spring Arbor; J.D. 1997, University of Michigan. — Ed. I have benefited tremendously from comments by Dan Farber, Luis Fuentes-Rohwer, Jim Gardner, Rick Hasen, Sam Issacharoff, Angela Onwuachi-Willig, and Rick Pildes.

1. 369 U.S. 186 (1962).

2. California Democratic Party v. Jones, 530 U.S. 567 (2000).

3. Burdick v. Takushi, 504 U.S. 428 (1992).

4. Vieth v. Jubelirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986).

5. Shaw v. Reno, 509 U.S. 630 (1993).

6. McConnell v. FEC, 540 U.S. 93 (2003).

7. Richardson v. Ramirez, 418 U.S. 24 (1974); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

8. 531 U.S. 98 (2000).

9. *See, e.g.*, Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527 (2003); James A. Gardner, *Forcing States to be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467 (2003); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95; Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

Other scholars have countered that judicial supervision of democratic politics is justified in order to safeguard democratic principles.[10]

Recently, two important and extremely thoughtful scholars of law and politics have staked opposing positions on this dynamic debate. Professor Richard L. Hasen[11] is one of the most accomplished, respected, and prolific scholars of law and politics. He is also one of the leading advocates of the position that courts should be minimally involved in judging politics. In his new book, *The Supreme Court and Election Law: Judging Equality from* Baker v. Carr *to* Bush v. Gore, Professor Hasen offers the first complete account, among contemporary election law scholars, of the purpose and scope of judicial review in democratic politics.

Professor Hasen pursues two central aims in his book. His most critical objective is to provide a framework for understanding the role of the Court vis-à-vis the political process. In particular, he argues that the Court should intervene in politics only in a very limited set of circumstances. He explains that the Court's primary purpose is to protect a narrowly defined group of important core principles of political equality. Outside of that framework, the Court ought to defer to the political and policy judgments of the political branches.

Recognizing that the Court may not be able to resist the urge to enter the political process, Professor Hasen maintains that if the Court must adjudge political equality claims beyond the core equality principles, the Court should promulgate vague pronouncements, or what he terms judicially unmanageable standards. Such pronouncements would not commit the Court to a substantive vision of political equality and would concomitantly permit lower courts to create more-developed standards that could be later adopted by the Supreme Court.

Professor Hasen's second and complimentary aim in *The Supreme Court and Election Law* is to alter the field's understanding of the purpose of judicial review in the democratic process. A central inquiry in law and politics — indeed one of the organizing themes of the field — concerns the purpose of judicial supervision of the political process.

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10. Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretative Approach of* Baker v. Carr, 80 N.C. L. REV. 1103 (2002) [hereinafter Charles, *Constitutional Pluralism*]; Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003) [hereinafter Charles, *Racial Identity*]; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) [hereinafter Issacharoff, *Gerrymandering*]; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999) [hereinafter Pildes, *Political Competition*].

11. Richard L. Hasen is a professor of law and William M. Rains Fellow at Loyola Law School, Los Angeles. Professor Hasen is a nationally-recognized expert in election law and campaign finance regulation, is co-author of a leading casebook on election law and co-editor of the Election Law Journal.

Some scholars, including Professor Hasen, argue that the sole purpose of judicial review is to protect individual rights.[12] I shall refer to these scholars as the individualists. Other scholars who I shall refer to as the structuralists, argue that the purpose of judicial review is to assure that democratic institutions behave in ways that are respectful of democratic principles.[13] Leading structuralists — and the explicit targets of Professor Hasen's criticisms — include some of the founding lights of the field such as Professors Samuel Issacharoff and Richard Pildes. In *The Supreme Court and Election Law*, Professor Hasen takes on these giants and seeks to reorient the field's telos from what he perceives to be a mistaken and "radical" preoccupation with propagating structuralist-driven theories of judicial review to a more appropriate — again in his view — concern with the vindication of individual rights (p. 139).

On the other side of the debate, one finds Professor Richard H. Pildes. Using the prestigious Foreword to the *Harvard Law Review* as his platform and in what truly can be described as an academic tour de force, Professor Pildes offers a different and divergent vision of the role of courts in the political process.[14] In sharp contrast to Professor Hasen's approach, Professor Pildes argues that the current problem with judicial review of democratic politics is its failure to come to terms with the underlying values that sustain democratic politics.[15] The purpose of judicial supervision, he contends, is to "address structural problems and enforce structural values concerning the democratic order as a whole."[16] In particular, he maintains that "courts have a distinct calling . . . to address the structural problem of self-entrenching laws that govern the political domain."[17]

Whereas Professor Hasen views structural claims as requiring "great intrusion by the judiciary into the political process without sufficient justification" (p. 139), Professor Pildes argues that judicial review is unduly aggressive only when the Court "inappropriately

12. *See* Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589 (1999); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics — And Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245 (David K. Ryden ed., 2000).

13. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 561 (2004); *see generally*, Issacharoff, *Gerrymandering*, *supra* note 10; Issacharoff & Pildes, *supra* note 10; Pildes, *Political Competition*, *supra* note 10.

14. Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) [hereinafter Pildes, *Democratic Politics*].

15. *Id.* at 44.

16. *Id.*

17. *Id.* at 54.

extend[s] rights doctrines into the design of the democratic institutions."[18] This is because the "rights of politics — the right to vote, the right of association, the right of free speech, the right to political equality — are of vast potential sweep, for most features of democratic institutions and elections could, at some level of abstraction, be viewed as implicating one of these rights."[19] Thus, for Professor Pildes, the Court's failure to adjudicate political process claims as structural claims creates "a danger for the practice of democracy."[20]

This Review uses the *Supreme Court and Election Law* by Professor Hasen juxtaposed against Professor Pildes's recent contribution to explore this rights-structure debate that is dominating the field.[21] One basic point of this Review is that although the debate produces much heat, it does not significantly advance the goal of understanding and evaluating the role of the Court in democratic politics. Additionally, I aim to return election law to a dualistic understanding of the relationship between rights and structure; an understanding that prevailed in the early articulation of structuralism's relevance to judicial review of democratic politics.[22] I shall argue that election law cases cannot be divided into neat categories along the individual rights and structuralism divide. Election law cases raise both issues of individual and structural rights. Therefore, the label attached to election law claims is immaterial. The fundamental questions are what are the values that judicial review ought to vindicate and how best to vindicate those values. These are questions that transcend the rights-structure divide.

Part I of this Review describes Professor Hasen's claims in greater detail. Part II takes on Professor Hasen on his own terms and proposes some modifications to his approach. Part III addresses the rights-structure debate in election law and concludes that not much rides on whether election law claims are styled as sounding in individual rights or as raising structural concerns. Whether styled as individual rights claims or structural claims, courts can, and most likely will and sometimes must, use an individual rights framework to confront the structural pathologies of the electoral process. Part IV examines the costs of the debate to the field.

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18. Pildes, *Democratic Politics*, *supra* note 14, at 41.

19. *Id.* at 48.

20. *Id.* at 55.

21. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 244 (2003); Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 374 (2004); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217 (1999).

22. *See infra* text accompanying notes 55-93.

I. LAW, POLITICS, AND JUDICIAL REVIEW: HASEN'S FRAMEWORK

A. *Core Political Rights*

Professor Hasen's theory of judicial review of democratic politics is driven by three primary and mutually reinforcing values. The first of these, the fundamental idea that drives Professor Hasen's approach to judicial regulation of law and politics, is his departing contention that judicial supervision of the political process is justifiable only to the extent that the Court limits its review to protecting core political-equality rights (p. 7). Core political-equality rights, which he defines in contradistinction to "contested political rights," are the "few basic rights essential to a contemporary democracy" or are political-equality rights that are the product of "social consensus" (p. 81). Thus, an ostensible right becomes a core political right to the extent that it is deemed essential to democratic governance (the essentiality prong) or becomes accepted by a majority of the electorate or political elites (the consensus prong). Both essentiality and consensus are determined by one's subjective observation of what rights are essential or what rights are the products of consensus in contemporary society. Thus, explaining his methodology, Professor Hasen notes that he "derive[s] [his core political-equality] principles from [his] view of the few basic rights essential to a contemporary democracy as well as from [his] observation of social consensus on political equality as a citizen of the United States at the beginning of the twenty-first century" (p. 81).

From this vantage point, Professor Hasen proposes three principles that he argues are core axioms of political equality: the essential political rights principle (p. 82); the antiplutocracy principle (p. 86); and the collective action principle (p. 88). The essential political rights principle protects the individual from state action that infringes upon her "basic political rights," which includes the right to engage in political speech and the right to organize for political action (p. 82). The essential political rights principle also protects the individual from denial of the right to vote on the basis of literacy, religion, gender, race, sexual orientation, "or on any other basis absent compelling justification" (p. 82). Lastly, the essential political rights principle incorporates the Court's one-person, one-vote doctrine by stipulating that "[v]oters have the right to have their votes counted and weighed roughly equally to the votes of other voters" (p. 82).

The antiplutocracy principle precludes the state from limiting the franchise on the basis of wealth (p. 86). Professor Hasen explicitly draws this principle from *Harper v. Virginia State Board of Elections*,[23] one of the Court's reapportionment era cases. In *Harper*, the Court

23. 383 U.S. 663 (1966).

struck down Virginia's poll tax.[24] The Court stated that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[25] For Professor Hasen, "*Harper* represents the strongest application" of the antiplutocracy principle, "which can be stated in the simplest terms — conditioning the vote on the payment of money discriminates against the poor" (p. 86).

The collective action principle prevents the state from imposing "unreasonable impediments on individuals who wish to organize into groups to engage in collective action for political purposes" (p. 88). Professor Hasen's proximate concern here seems to be with legislative entrenchment. He maintains that it "is essential to a democracy that takes equality seriously that those who are in power not pass laws for the purpose of protecting their own positions through a stifling of political competition" (p. 89). The collective action principle "recognizes these self-interest concerns and requires the government not to impose, and indeed to remove if imposed, unreasonable impediments on individuals who wish to organize into groups to engage in collective action for political purposes" (p. 89).

Professor Hasen's principal support for this principle is *Williams v. Rhodes*[26] (p. 89). In *Williams*, the Court concluded that certain provisions of Ohio's election laws that essentially prohibited third parties from qualifying for ballot access in presidential elections violated the Fourteenth and First Amendments.[27] The Court stated: "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[28] The Court reasoned that Ohio's statute sheltered the Republican and Democratic Parties from political competition in violation of the Constitution.[29]

Professor Hasen argues that when a state statute invades these core political principles, the Court should invalidate the statute unless "the government defends the law on the basis that plaintiff's equality interest is outweighed by some other government interest" (p. 93). In such cases — when the state statute presents a clash of competing fundamental interests — the "Court must engage in a careful balancing" (p. 93). The purpose of the balancing is to smoke out election laws that are motivated by legislative self-interest.[30] If the law

24. *Id.* at 666.

25. *Id.*

26. 393 U.S. 23 (1968).

27. *Id.* at 34.

28. *Id.* at 32.

29. *Id.* at 31-32.

30. P. 98. Professor Hasen argues that "[c]ourts have to distinguish election laws that impinge on core equality values to serve an important government interest from those in

is motivated by legislative self-interest, then the Court should strike it down.

B. *Hasen's Judicially Unmanageable Standards*

The second value that informs Professor Hasen's theory is the complementary contention that only the political branches are justified in imposing contested visions of political equality upon the political process (p. 8). When the legislative process — broadly defined to include initiatives and referenda — "expand[s] political equality principles into contested areas," the Court "should defer to legislative value judgments" (p. 8). But the Court itself should not enshrine its own vision of political equality when to do would be to enforce contested political-equality rights.[31] Consistent with Professor Hasen's theory of judicial review of state statutes that infringe upon core political-equality interests, the Court should strike down statutes that implement contested visions of political equality only where the Court is convinced that those statutes represent an attempt by legislators to entrench themselves or to limit political competition (pp. 8, 103).

Professor Hasen is a sophisticated scholar of law and politics, and he recognizes that the Court is not sufficiently disciplined as to be able to restrict itself to deciding only core political-equality claims. Consequently, Professor Hasen advises that if the Court feels compelled to address contested equality claims, the Court should resolve those claims by enacting "murky (or vague) political rule[s]" (p. 8). By enacting these murky rules, which Professor Hasen calls judicially unmanageable standards, the Court would not "enshrine the [then] current Court majority's political theory" (p. 48). Professor Hasen argues that judicially unmanageable standards allow the Court to "gain valuable information before the Court itself settles upon the ultimate contours of a particular equality rule" (p. 49).[32]

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which the asserted government interest is feigned in order to serve legislative self-interest." *Id.*

31. Professor Hasen maintains that "the Court should leave political equality decisions to politically accountable branches when dealing with contested equality claims." P. 49.

32. Professor Hasen explains further:

> [W]here the Court does not articulate a manageable standard, it leaves room for future Court majorities to deviate from or to modify rulings in light of new thinking about the meaning of political equality in a democracy or about the structure of representative government, based on experience with the existing standard. It also allows for greater experimentation and variation in the lower courts using the new standard. Following modification and experimentation, the Court appropriately may articulate a more manageable standard.

P. 48.

Professor Hasen finds support for this theory in Justice Stewart's dissent in *Lucas v. Forty-Fourth General Assembly of the State of Colorado*.[33] In *Lucas*, the Court confronted a reapportionment scheme, enacted by the voters of Colorado, which failed to apportion the state Senate on an equal population basis. The Court struck down the plan on the ground that both houses of a state's legislature were subject to the commands of the one-person, one-vote principle.[34] Justice Stewart dissented, arguing that:

> [T]he Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that, in light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State.[35]

Justice Stewart further noted:

> What constitutes a rational plan . . . will vary from State to State . . . . But so long as a State's apportionment plan reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational.[36]

Professor Hasen argues that Justice Stewart's framework "is an homage [sic] to judicial unmanageability" (p. 57). He suggests two reasons to support this contention. First, Justice Stewart "did not define carefully" the terms that would render his standard manageable.[37] Second, Justice Stewart's standard would have led to "[l]ong and protracted litigation" and, thus, "experimentation" and "variation" (pp. 58-59).

C. *Rights Against Structure*

Professor Hasen's third substantial purpose in this book is to address the rights-structure debate in law and politics. Professor Hasen argues that the structural approach is "dangerous" (p. 139, 142) because courts cannot be trusted to make the substantive value judgments that are a necessary part of a structural approach. Structural theories, Professor Hasen explains, will promote "judicial

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33. 377 U.S. 713 (1964).

34. *Id.* at 734-35.

35. *Id.* at 753-54.

36. *Id.* at 751.

37. Pp. 57-58. Professor Hasen states, "[a]mong the terms he did not define carefully . . . are 'subordination,' 'fair, effective and balanced representation,' 'rational,' 'reasonably designed,' 'reasonable achieve[ment],' 'effective and balanced representation,' 'substantial interests,' 'effective majority rule,' and 'systemic frustration of the will of the majority.'" *Id.*

hubris" and would "require great intrusion by the judiciary into the political processes without sufficient justification" (p. 139).

He takes on Professors Issacharoff and Pildes who argue that the Court should selfconsciously regulate the political process to prevent partisans from entrenching themselves and limiting political competition. Professor Hasen responds that he is not convinced that Professors Issacharoff and Pildes have made the case that judicial supervision of the political process is necessary to ensure that the political processes, in particular elections, are adequately competitive (p. 154). Fundamentally, Professor Hasen regards the individual rights approach as necessary to limit and delimit judicial supervision of the political process. By contrast, he views the structural approach as providing a license for the judiciary to intervene willy-nilly in democratic politics. Thus, his conclusion that structuralism is misguided and dangerous (p. 13).

II. PROFESSOR HASEN ON HIS OWN TERMS

Professor Hasen is a superb scholar and there is much to admire about this book. For example, Professor Hasen's distinction between core political rights and contested political rights is an important conceptual distinction.[38] Leaving aside for now disputes regarding the content of those categories and recognizing that no one seriously contends that the Court must completely abdicate all responsibilities for curing defects in the political process, the fundamental question becomes, what constitutes a defect necessitating judicial intervention? The standard account is the Elyan one: Courts should vindicate essential democratic rights where those rights are being trammeled by self-interested political actors.[39] While Professor Ely constructed the framework, it has been left to subsequent scholars to supply the content, which Professor Hasen does very nicely in his book.

Additionally, the concept of judicial unmanageability is quite clever, though I am not convinced that Justice Stewart propounded an umanageable standard. Moreover, I am also not convinced that anything would be gained by adopting Justice Stewart's standard if the Court was going to end up adopting an equipopulation standard

38. More precisely, Professor Hasen's distinction is between core political-*equality* rights and contested political-*equality* rights. But, for some of the reasons explored *infra* text accompanying notes 42-45, I do not believe that judicial review of democratic politics should be limited to equality claims. Consequently, I find Professor Hasen's distinction more compelling without the equality limitation.

39. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 117 (1980). For a gloss on Ely's process theory and an argument that the Court should protect core democratic principles see Charles, *Constitutional Pluralism*, *supra* note 10, at 1107, which states that judicial review of the political process is "warranted only where politics fail to give effect to core democratic principles."

anyway. Further, as Professor Ortiz has wonderfully argued, there are limitations to the argument that the Court should not privilege its own theory of politics in order to permit the development of other theories by the political process.[40] Nevertheless, certainly there is something to be said for a more thoughtful approach by the Court to the problems of politics, and allowing the lower courts and the political branches the room to operate when they are attempting to implement a legitimate democratic value.

Professor Hasen's approach also raises a number of interesting issues that are not necessarily resolved by *The Supreme Court and Election Law*. Three are most pressing, and I shall address them in this Part in increasing order of importance.

A. *Essential Political Rights*

Professor Hasen builds upon Professor Ely's theory by providing content to the category of political rights: essential political rights, antiplutocracy, and collective action. But it is not clear what purpose is served by the antiplutocracy and collective action principles, save to preclude the state from conditioning political participation on wealth and to safeguard the right of political association.

One could create a more streamlined framework by collapsing those three categories into one: essential political rights. Professor Hasen's essential political rights principle, as it currently stands, is capable of absorbing a prohibition on political participation on wealth grounds and a prohibition on undue limitations on associational rights. Professor Hasen's essential political rights principle precludes limitations on the right to vote "on the basis of gender, literacy, national origin, race, religion, sexual orientation, or on any other basis absent compelling justification" (p. 82). It is not clear why one cannot add wealth as one of the prohibited categories and do away with the antiplutocracy principle as such.[41]

Similarly, the essential political rights principle, as it stands, seems poised to absorb a constitutional prohibition on restrictive limitations

40. Professor Ortiz calls this the "got theory" argument and explains that the "got theory" argument "fails on its promise to encourage states to choose a political theory. By simply hypothesizing legitimate purposes that could underlie [a proposed state action], it forecloses discussion about the very issues it claims are so important." Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 475 (2004).

41. For the reasons I articulate *infra* notes 46-53, I would revise the content of that category to include prohibitions on state statutes that restricted the right to vote on any basis, including criminal status. The argument here would be that voting is a fundamental right and any limitations on that right must be justified by a compelling interest. This argument is also based upon the recognition that the state does not have any good reasons for limiting the right to vote except with respect to age and citizenship status. These foregoing arguments would both be consistent with Professor Hasen's individual rights approach and more faithful to his framework.

on political association. Professor Hasen maintains that the essential political rights principle provides each person with "basic formal political rights, including the right to speak on political issues, to organize for political action, and to petition the government" (p. 82). At the very least, the right to organize for political action assumes the collective action principle — that the "government may not impose, and must remove if imposed, unreasonable impediments on individuals who wish to organize into groups to engage in collective action for political purposes" (p. 88). Thus, the collective action principle is superfluous. In any event, it is unnecessary.

B. *The Limits of Equality*

Second, one must wonder whether Professor Hasen's exclusive focus on the concept of equality limits the utility of his core political rights principles.[42] Though the Court and many election law scholars continue to frame most questions of law and politics in equality terms, as a conceptual matter, there are many issues in election law that can only be addressed if understood outside of an equality-based framework. To take an obvious example, consider the problem of the constitutionality *vel non* of campaign finance legislation. One cannot resolve that issue by asking whether campaign finance statutes infringe upon an individual's equality right as Professor Hasen's framework asks us to do. Leaving aside the fact that the equality framework is unhelpful in most contexts,[43] it is useless in thinking about problems — such as campaign finance legislation — that are outside of that framework.

Tellingly, though Professor Hasen is an expert in campaign finance of considerable renown, *The Supreme Court and Election Law* does not provide any insight on the constitutionality of campaign finance reform measures.[44] While the book contains a short discussion of campaign finance reform (pp. 101-20), the discussion does not address the anterior question of the constitutionality of such measures — that is whether they violate an individual's right to free speech or free association — which is the relevant threshold inquiry. Instead, Professor Hasen focuses on whether the Court should uphold

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42. On the limits of equality-based conceptions of political rights, see Charles, *Racial Identity*, *supra* note 10, at 1209.

43. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 (1982) (stating that equality "is an empty form having no substantive content of its own").

44. Professor Hasen's other works are quite insightful on these issues. For some recent examples, see Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. 31 (2004); Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. (forthcoming May 2005).

campaign finance statutes when the state argues that "the role of money in politics must be reduced to assure political equality."[45] Undoubtedly, this focus is the consequence of Professor Hasen's equality-based framework and is its shortcoming.

The narrow focus on equality and equality-based principles has hampered both the Court and election law scholars in their thinking about the fundamental problems of democracy. With respect to Professor Hasen's book, it is not clear that anything would be lost by removing the equality limitation. By broadening the focus of his approach, one could apply it to all questions of election law without artificially forcing those questions into an equality framework.

C. *The Limits of Minimalism*

Professor Hasen by his own terms attempts to create a theoretical approach to judicial review of democratic politics that limits as much as possible the Court's oversight role (p. 187). The lynchpin of his approach is the proposition that the Court can be cabined by restricting the Court's ability to recognize a new political right only when the right is a product of social consensus[46] or when the right is one that is essential to democratic governance. Even if one accepts Professor Hasen's approach on his own terms, applying his approach would not cabin judicial discretion. Moreover, and perhaps more importantly, it is not clear that we would want to cabin judicial discretion to intervene in democratic politics in the manner prescribed by Professor Hasen.

Take first the issue of whether Professor Hasen's approach would cabin judicial discretion. Professor Hasen does not provide enough guidance to courts wishing to apply his framework. Given that Professor Hasen's goal is to create a minimalist approach to judicial review of law and politics, Professor Hasen must, as a matter of necessity, define narrowly, but more importantly clearly, the category of essential political rights and the construct of social consensus. Thus, a judge applying Professor Hasen's approach must be able ascertain with relative ease when a putative political right is an essential political right, the subject of social consensus, or a contested right, in which case the judge must defer to the political judgments of political actors.

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45. P. 104. Professor Hasen states: "The question instead that I consider in this part is whether the Court or the political branches should determine how to strike the balance between these equality and liberty interests in campaign finance regulation." P. 105.

46. On the problems of identifying a social consensus, see Luis Fuentes-Rohwer, *Of Platonic Guardians, Trust and Equality: A Comment on Hasen's Minimalist Approach to the Law of Elections*, 31 J. LEGIS. 25 (2005).

The problem with Professor Hasen's approach is that a judge applying his approach would be hard pressed to figure out when an ostensible right falls under which category. Consider some concrete examples.

Professor Hasen argues that the Court is right to uphold laws that disenfranchise felons because there is not yet a social consensus that felon enfranchisement is an essential political right (p. 84-85). Similarly, Professor Hasen argues that the Court was right to reject the Hasidim's equal protection claim in *United Jewish Organizations v. Carey*[47] ("*UJO*"), because the Hasidim were urging the recognition of a contested political right. In *UJO*, the Hasidim argued that their political rights were violated when the State of New York diluted their voting rights by splitting their community — a cohesive ethnic, religious, and political minority — into multiple districts so that the State may protect the political power of African Americans and Latinos.[48] Professor Hasen explains that the Court was right to turn the Hasidim away because there is "no core political equality right to proportional interest representation" (p. 137).

By contrast, Professor Hasen argues that the Court was wrong to uphold Alabama's scheme disenfranchising African Americans toward the turn of the twentieth century in *Giles v. Harris*.[49] Professor Hasen exclaims that "[i]f the guarantee of the equal political rights principle means anything, it is that the right to vote cannot be denied on the wholly arbitrary ground of race" (p. 83). Similarly, Professor Hasen notes that the Court was also mistaken in its failure to extend the right to vote to women in its nineteenth-century decision, *Minor v. Happersett*.[50] Further, Professor Hasen argues that if the states or the federal government were to pass statutes depriving Arab Americans of the right to vote as part of the war on terrorism, the "Court should unequivocally strike such laws down, regardless of popular opinion and regardless of the consequences for the justices on the Court" (p. 80). This is because the right to vote is a core political right and not subject to social consensus (p. 79-80).

These distinctions are puzzling and would not be intuitive to a judge applying Professor Hasen's framework. Professor Hasen argues that race and gender discrimination in the nineteenth century was unconstitutional because voting is an essential political right. But he also argues that felon disenfranchisement in the twenty-first century is constitutional because there is no social consensus that discrimination

47. 430 U.S. 144 (1977).

48. *Id.* at 145.

49. 189 U.S. 475 (1903).

50. 88 U.S. 162 (1875).

in voting on the basis of criminal status implicates an essential political right. He argues that the Court should have prohibited the state from depriving African Americans of political power in *Giles* because African Americans have an essential political right to participate in the political process. But he argues that the Court was right not to protect the Hasidim from similar deprivation in *UJO* because they were claiming a contested right and, thus, were subject to social consensus analysis. He approves of majoritarian deprivation of the franchise with respect to felon disenfranchisement but disavows majoritarian deprivation of the franchise in *Minor*.

What is confusing about Professor Hasen's analysis is not the argument that race, gender, or ethnic (in his example of Arab Americans) distinctions in voting are unconstitutional or the argument that courts should recognize political rights when they are the product of social consensus. The confusion stems from the failure to help us understand why certain distinctions are constitutional and why others are not. It is not clear to me why discrimination in voting on the basis of religion or ethnicity, à la *UJO*, is a contested political right but discrimination on the basis of race, à la *Giles*, is a core political right. It is not clear why the Court should protect Arab Americans from deprivation of their voting rights but not felons.

On the basis of Professor Hasen's framework, it is either the case that discrimination in dispensing the franchise is unconstitutional because the franchise is an essential political right or discrimination is not per se unconstitutional but subject to social consensus analysis. There is no principled basis for distinguishing between gender discrimination in voting and criminal status discrimination. Or put differently, distinguishing felon disenfranchisement from gender discrimination in voting is as persuasive as distinguishing gender discrimination from race discrimination in voting.

To the extent that these distinctions do not necessarily follow from Professor Hasen's approach, Professor Hasen cannot limit the discretion of judges. Moreover, given the examples provided by Professor Hasen, it is not clear that one would really want to limit the discretion of judges to supervise democratic politics. The logical application of Professor Hasen's approach would be to conclude that *Giles*, *Minor*, and *UJO* were correctly decided. Whether one agrees or disagrees with those opinions, they are certainly minimalist decisions. In each case, the Court refused the invitation to activist and radical interpretations of the Equal Protection Clause. This is exactly the result called for by Professor Hasen's judicial minimalism. But, with the exception of *UJO*, it is a result that Professor Hasen goes out of his way to repudiate.

One could certainly understand the sentiment. To borrow from Professor Farber, who argues a similar point, a theory of judicial review of the political process that would approve of gender and race

discrimination in voting on majoritarian grounds "is as unsettling as a vision of discrimination law that rejects the legitimacy of *Brown*."[51] Interestingly, one is hard pressed to find the election law equivalent of *Plessy v. Ferguson*, *Dred Scott v. Sanford*, or *Lochner v. New York*. These are cases that almost everyone agrees were wrongly decided and are examples of egregious judicial activism. Putting aside *Bush v. Gore*, the egregious cases in election law are cases such as *Giles* and *Minor*, cases in which the Court failed to intervene in the political process to vindicate political rights. Indeed, perhaps the case that best represents muscular judicial intervention in the political process is *Baker v. Carr*.[52] And yet, no one has seen fit to argue that *Baker* was wrongly decided. In fact, *Baker* is widely viewed as representing the Court's finest hour.[53] This, then, is the limit of a theory committed to unwavering judicial minimalism: one hopes judicial minimalism fails precisely where it ought to succeed.

III. THE DUALISTIC NATURE OF ELECTION LAW CLAIMS

Professor Hasen's framework is driven in great part by his concern that structuralism will become the new "orthodoxy" in election law (p. 139). For example, he intimates that structuralism is too amorphous a concept to direct judicial involvement in the political process. His fundamental objection to structuralism is that structuralism depends too heavily on what he characterizes as a juriscentric approach by which the Court supervises the political process on the basis of what the Court believes are the values that ought to be reflected in that process. Professor Hasen maintains that he "no longer trust[s] the Court to make contested value judgments in political cases" (p. 154). Because structuralism would require the Court to make such value judgments, Professor Hasen finds the approach dangerous and misguided (p. 13).

Professor Hasen raises some legitimate and persuasive concerns with respect to the deployment of structural theories in election law. In this Part, I shall argue that Professor Hasen is right to take issue with the structuralists. But I shall argue that Professor Hasen focuses on the wrong problem with structuralism as it is currently articulated. Structuralism is not necessarily juriscentric and structuralists are not

51. Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 383 (2004) ("Yet, a vision of electoral law that questions the legitimacy of [one person, one vote] is as unsettling as a vision of discrimination law that rejects the legitimacy of *Brown*.").

52. 369 U.S. 186 (1962). On this score, see Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603 (2002).

53. Charles, *Constitutional Pluralism*, *supra* note 10, at 1104.

necessarily judicial maximalists.[54] Thus, the problem with the current direction of structuralism is not that structuralism focuses on the value choices made by courts as they regulate the political process. Value choices by courts are inevitable. The question is not whether courts are making value choices, but rather what sorts of values are being promoted by courts.

Indeed, Professor Hasen is something of a structuralist himself by asking courts to vindicate structural values — such as guarding against legislative self-dealing or entrenchment — to protect the integrity of the political process. Structuralists are right to focus on the values that are promoted (or trampled) by judicial review. Consequently, I shall argue that structuralism contains a profound and central insight — namely, that political rights are best protected by regulating the institutions within which politics are conducted — and election law scholars must take this insight into account as they think about judicial regulation of the democratic process.

Nevertheless, I shall also explain that Professor Hasen is correct in his intimation that the structuralists pushed structuralism too far. In particular, structuralists unhelpfully maintain that election law claims are only or essentially structural claims, and that there is no room for an individual rights concept to play in resolving those claims. Structuralists sometimes lose sight of the fact that the ultimate point of judicial supervision of politics is to protect, operationalize, or give content to the individual right to self-government. This is the telos of judicial review of the political process. While structuralism is a necessary means of achieving that end, it is not itself the end. Structuralism is potentially "dangerous and misguided" to the extent that structural theories in election law lose sight of this ultimate aim. Part III.A discusses the roots of the rights-structure debate. Part III.B explores why structuralism is important in election law, but also criticizes the current articulation of structuralism on the ground that structuralists have become too essentialist in their advocacy in favor of structuralism.

A. *The Rise of Rights-Structure Debate*

Part of the problem with the right-structure debate is that the terms are now quite muddled and that the essence of the debate's disceptations is ambiguous. One coming into this debate midstream would be hard pressed to figure out what the fight is all about. But this was not always so. The initial exposition of the structural approach is quite insightful — not always right — but certainly thoughtful and, at

54. *See, e.g.*, Pildes, *Democratic Politics*, *supra* note 14, at 78-83 (noting the limitation of courts and constitutional law in addressing the self-entrenching tendencies of incumbents and the need for intermediate institutions).

one level, compelling. Thus, in order to fully understand the nature of this debate, one must begin by appreciating its origins.

The identification of structural claims in election law is, of late, most closely associated with Professor Pam Karlan, who in a series of articles explained that the "Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted."[55] But while Professor Karlan provides the working definition for understanding structural claims, the seeds that spawned the modern structural-individual rights debate were sown quite early on by her frequent collaborators, Professors Issacharoff and Pildes.

For example, in an early and important article, Professor Issacharoff explored why it would be implausible for courts to assume that political solutions would develop to remedy the structural pathologies of political institutions.[56] Using the reapportionment cases to demonstrate how the Court can respond to such pathologies, Professor Issacharoff explained that "[o]ne can understand the role of the one-person, one-vote rule as that of an externally imposed constraint prompted by the failure of legislative bodies to bind themselves to a meaningful precommitment strategy for apportionment."[57] He went on to explain that in the reapportionment cases, the "Supreme Court provided the functional equivalent of a first-order precommitment strategy by creating a presumption of unconstitutionality every ten years should the legislature fail to reapportion after the decennial census, and by forcing the legislatures to channel their reapportionment procedures through the threshold requirements of the equipopulation principle."[58]

In *Polarized Voting and the Political Process*,[59] Professor Issacharoff explained how the Voting Rights Act transformed voting rights jurisprudence from a concern with individual rights to a proper inquiry on group-based rights.[60] Specifically, he argued that the

55. Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection From* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1346 (2001) [hereinafter Karlan, *Nothing Personal*]; *see also* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch out of the Political Thicket*, 82 B.U. L. REV. 667, 672 (2002).

56. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1666-69 (1993).

57. *Id.* at 1669.

58. *Id.*

59. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

60. *Id.* at 1842-43.

Court's concern with dilutive properties of at-large election schemes necessarily brought to the fore the importance of group rights to resolving the problem of vote dilution.[61] In a later article, Professor Issacharoff broadened his inquiry and explicitly began to examine the limitations of an individual rights framework.[62] He remarked that the Court's conception of individual rights is too atomistic to address the group-based nature of the right to vote.[63]

For the earliest articulation of the distinction between structural versus individualist conceptions of political rights in election law, one must turn to Professor Pildes. In an article entitled *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*,[64] Professor Pildes delineated two broad conceptions of political rights reflected in constitutional law. First, there is an individualist conception. Here rights protect interests that are peculiar to the individual such as individual autonomy, individual choice, or individual dignity.[65] The purpose of judicial review is to vindicate a harm perpetrated by the state against a person or groups.[66] This is why the justiciability doctrine of standing requires claimants to articulate individualized injury as an antecedent to judicial adjudication.

Second, there is a structural conception. In the structural conception, the object of judicial review is not the individual or individualized harm but the proper relationship among political institutions.[67] The constitutional harm is the illegitimate exercise of power by the state.[68] From the perspective of the structural conception, traditional articulations of the standing doctrine are mere formalistic incantations that fit poorly, if at all, within a framework in

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61. *Id.* at 1859 ("In order to find vote dilution, however, the Court of necessity began looking to the outcomes of the political process. This required turning away from the individual voter to determine how cognizable groups of voters fared in order to assess the fundamental fairness of the process.").

62. *See* Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869 (1995).

63. *Id.* at 884. Professor Issacharoff stated:

> Unfortunately, the rhetoric of rights is most comfortably conducted as if it were the discourse of individual autonomy from state encroachment. This is true regardless of whether the claims are made for transcendent natural rights of a Kantian sort, or whether framed in the language of positivism and rooted in the prohibitory commands of the Bill of Rights. Neither is well-suited to group-based claims, but the right to effective voting is incomprehensible without that conception of the group.

Id.

64. Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994) [hereinafter Pildes, *Avoiding Balancing*].

65. Pildes, *Avoiding Balancing*, *supra* note 64, at 722-23; *see also* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 353-55 (1993).

66. *Id.*

67. Pildes, *Avoiding Balancing*, *supra* note 64, at 723.

68. *Id.* at 726 ("The exercise of state power itself is the object of judicial evaluation.").

which the putative complainant is the instrumental artifact of the adjudicatory process.[69] Put differently, for standing purposes, the plaintiff is truly standing in for and representing the structural values that are ostensibly infringed by the state's action.

In *Avoiding Balancing*, Professor Pildes not only identified these two conceptions of political rights, but he also suggests rather strongly that the structural conception is necessary to understanding a great deal of what the Court does in constitutional law. In a subsequent article, *Why Rights are Not Trumps*,[70] Professor Pildes is much more explicit about this argument and pushes it a bit further. In that article, Professor Pildes argues that "American constitutional practice is frequently misunderstood, both by judges who participate in it as well as by academics who comment on it."[71] The misunderstanding is the consequence of a conception of rights as belonging purely to the individual and as trumps against the state.[72] "This is the picture of the direct clash between the interests of individuals (in liberty, or dignity, or autonomy) and that of the community, with rights trumping the second to secure the first."[73] This view is mistaken, Professor Pildes argues, because rights can be limited to serve the public good.[74]

Moreover, and perhaps more importantly, this individualistic account of rights as trumps does not accurately describe American constitutional practices. The more precise account stems from a "'structural conception of rights.'"[75] In the structural account, "rights are seen as linguistic or rhetorical tools the law deploys for pragmatic reasons and aims."[76] Rights are used instrumentally to protect common interests.[77] The structural conception of rights is superior to the individualistic conception because the structural conception "clarifies that the point and justification of constitutional rights is not

69. *Id.* at 726-27; *see also* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1814 (1999) ("In this structural conception of constitutional rights, rights are less protections for intrinsic interests of individuals than linguistic tools the law invokes in the pragmatic task of bringing certain issues before the courts for judicial resolution.").

70. Richard H. Pildes, *Why Rights Are Not Trumps, Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998).

71. *Id.* at 726-27.

72. *Id.* at 727.

73. *Id.*

74. *Id.* at 729-30, 760-61.

75. *Id.* at 730 ("I believe such a structural view of rights is more closely tied to the basic features of actual constitutional practice.").

76. *Id.*

77. *Id.* at 731.

the enhancement of the autonomy or atomistic self-interest of the right holder but the realization of various common goods."[78]

Professors Issacharoff and Pildes applied this framework explicitly to the field of election law in their landmark article, *Politics as Markets*.[79] In that article, they advanced three central claims. First, they maintained that democratic politics is best understood from the vantage point of democratic institutions. They explained: "The democratic politics we experience is not an autonomous realm of parties, public opinion, and elections, but a product of specific institutional structures and legal rules."[80]

Second, individual rights discourse is limited in its ability to address this institution-based account of democratic politics.[81] Moreover, individual rights discourse does not adequately describe how constitutional law interacts with democratic politics. For example, individual rights discourse fails to capture "the range of considerations that the courts actually take into account."[82]

Third, one of the features of democratic institutions that courts have ignored as a consequence of their myopic focus on individual rights is the tendency of self-interested, incumbent political actors to devise and revise political rules to insulate themselves as best as possible from political competition. Borrowing from the corporate law context, Professor Issacharoff and Pildes describes this occurrence as the pathology of "political lockups," which are the natural consequence of institutional "devices that constrain the effectiveness of the voting power of [voters] by entrenching the incumbent position of [political insiders]."[83] Political lockups reduce competition — indeed, that is their whole purpose — and decrease responsiveness to voter preferences.[84] They argue that "a self-conscious judiciary should destabilize political lockups in order to protect the competitive vitality

78. *Id.* at 732.

79. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

80. *Id.* at 644.

81. *Id.* at 645.

82. *Id.*

83. *Id.* at 648.

84. As Professors Issacharoff and Pildes explain:

> The key to our argument is to view appropriate democratic politics as akin in important respects to a robustly competitive market — a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition. Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.

Id. at 646.

of the electoral process and facilitate more responsive representation."[85]

From this article, Professors Issacharoff and Pildes developed an approach to the constitutionalization law and politics that has come to dominate the field: structuralism. Structuralism's basic tenets are:[86] (1) The Supreme Court does not have a coherent theory for judging the law of politics; (2) the lack of a coherent theory is the consequence of the inadequacy of the individual rights approach, which the Court has used, ineffectively, to address the problems of democratic politics;[87] (3) in order to effectively police the political process, the Court needs to adopt a structural approach to constitutional adjudication — an approach that focuses on the relationship among institutions;[88] (4) the most important structural value that courts should vindicate is ensuring that political contests are adequately competitive;[89] and

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85. *Id.* at 649.

86. I am thankful to Luis Fuentes-Rohwer for helping me work out the tenets of structuralism.

87. Professor Pildes has recently articulated two reasons why the individual rights approach is ineffective. First, "leaving aside the few remaining access to the ballot box issues, such as voter-registration laws or felon disenfranchisement ones," disputes in American democratic politics rarely involve first-order questions regarding the substantive content of basic political rights. Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 687 (2004) [hereinafter Pildes, *Rights-Oriented Democracy*]. He also went on to explain:

> Unlike the right to religious freedom or free speech, where issues of intrinsic liberties might be thought still at stake, the "rights" at stake in political cases are already highly structured by underlying judgments about the proper structural aims of democratic politics. Because these rights no longer involve intrinsic liberty, but are already instrumental tools for realizing specific goals of the system of democracy, there is no logical way to give content to these rights other than by reasoning from these structural goals. This is not a pragmatic or strategic point; it is a conceptual truth. Even if such reasoning is implicit or hidden from a judge, the content of political rights in these cases necessarily derives from a judgment about the proper structural aims to attribute to democracy. As a result, it confuses analysis to reason directly from any other domain — particularly from the broad domain of civil society — to the more specifically structured domain of democratic politics. Politics must be interpreted on its own terms.

Id. Second, politics is about aggregating and mobilizing groups to affect the political process. *Id.* But, as Professor Pildes articulates:

> [R]ights approaches atomize the effects of legal rules on these critical units of politics, groups and coalitions. Courts could, potentially, interpret the rights at stake in politics — the right to vote, the right to association, the right to political speech, the right to political equality — in more pragmatic or more formal ways, but the tendency of the Supreme Court has been to reason about these rights in more formal, abstract ways that neglect the systemic consequences of constitutional decisions that enforce claims of individual rights.

Id. Third, rights depend upon structures. Thus, courts cannot effectively enforce individual rights without paying attention to the structures that give content to individual rights. Pildes, *Political Competition*, *supra* note 10, at 1606.

88. Pildes, *Democratic Politics*, *supra* note 14, at 44, 54; Pildes, *Political Competition*, *supra* note 10, at 1606.

89. Pildes, *Rights-Oriented Democracy*, *supra* note 87, at 688; Pildes, *Democratic Politics*, *supra* note 14, at 44.

lastly, (5) a structural approach to judicial supervision of the democratic process is less intrusive than an individual rights approach.[90]

From that framework, the structuralists have derived three particular principles that are becoming axiomatic in election law. First, they maintain that election law claims are essentially structural claims.[91] This axiom is what I call "election law essentialism." Second, structuralists argue that, because election law claims are in essence structural claims, courts cannot resolve those claims using an individual rights framework.[92] Third, they conclude that an individual rights approach is unhelpful, and perhaps even damaging, in resolving election law problems.[93]

It is against these ideas that Professor Hasen is reacting.

B. *Election Law Dualism*

The problem with the structural-individual rights debate is that its very assumptions are open to challenge. The structural-individual rights debate is based upon two assumptions. The first is that one can separate political rights into neat categories of individual rights and structural rights. Second, both sides of the debate assume that courts can decide political rights claims without using either a structural framework or an individual rights framework. For example, the individualists argue that a structural framework is unnecessary — and is a hindrance — to resolving political rights. The structuralists argue the converse.

In this subpart, I take issue with both assumptions. First, it is not clear that political rights can be divided neatly between structural and

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90. Pildes, *Political Competition*, *supra* note 10, at 1619 ("Central to this approach is the position that, when the background second-order conditions of effective partisan competition are met, there is less cause for judicial intervention on first-order issues of equality and liberty.").

91. Issacharoff, *Gerrymandering*, *supra* note 10, at 599-600, 606-09; Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y 91, 100 (2000).

92. In his recent article, Professor Pildes writes:

> Constitutional lawyers are trained to think in terms of rights and equality and to elaborate the conceptual structure, legal and moral, of these core constitutional commitments. But politics involves, at its core, material questions concerning the organization of power. A central dimension is the effective mobilization of political power through organizations, such as political parties and coalitions.

Pildes, *Democratic Politics*, *supra* note 14, at 40 (footnote omitted).

93. Issacharoff, *Gerrymandering*, *supra* note 10, at 609 ("If the gravamen of the harm of gerrymandering lies in the inability of a majority of the whole body to govern, the continued attempt to restrict the voting rights inquiry to simply an individual claim must be doomed."); Pildes, *Democratic Politics*, *supra* note 14, at 40 ("Understandings of rights or equality worked out in other domains of constitutional law often badly fit the sphere of democratic politics; indeed the unreflective analogical transfer of rights and equality frameworks from other domains can seriously damage and distort the processes of politics.").

individualist components. It is probably the case that political rights are best thought of as dual rights;[94] they are individualist at the core but also structural. Second, both structuralists and individualists have failed to appreciate how the Court has used both a structural and individualist frame to resolve political claims.

1. *Rights and Structure in the Doctrine*

The distinction between individual rights and structural rights made its most notable appearance before the Supreme Court in *Giles v. Harris*,[95] in which the Court addressed Alabama's attempt to disenfranchise its African American citizens. The plaintiffs in *Giles* sought a declaration that the disenfranchising scheme was unconstitutional and sought to be added to the voting rolls.[96] In an opinion authored by Justice Holmes, the Court stated that the Court could not grant the equitable relief requested.[97] This is because the "traditional limits of proceedings in equity have not embraced a remedy for political wrongs."[98] Justice Holmes explained that "[a]part from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[99]

In *Colegrove v. Green*,[100] Justice Frankfurter essentially adopted Justice Holmes' framework. In an opinion announcing the judgment of the Court, Justice Frankfurter rejected the plaintiffs' challenge to Illinois' failure to reapportion its congressional districts. Justice Frankfurter argued that this "is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity."[101] Justice Frankfurter, echoing Justice Holmes, argued that relief from political wrongs must

94. For a similar argument from a slightly different perspective, see Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998), which argues that political rights are both group rights and individual rights.

95. 189 U.S. 475 (1903).

96. *Id.* at 482.

97. *Id.* at 486.

98. *Id.*

99. *Id.* at 488.

100. 328 U.S. 549 (1946).

101. *Id.* at 552; *see also id.* ("In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation.").

necessarily come from the political process and not from courts. Thus, he maintained:

> The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress.[102]

But the Court's later cases, including some authored by Justices Holmes and Frankfurter, belied the tidy individual rights–structure dichotomy created by Justice Holmes in *Giles* and adopted by Justice Frankfurter in *Colegrove*. For example, in *Lane v. Wilson*,[103] the Court addressed Oklahoma's persistent efforts to disenfranchise its African American voters.[104] The plaintiff, an African American citizen of that state, maintained that the state's registration scheme was racially discriminatory.[105] The plaintiff argued that the registration scheme violated the Fifteenth Amendment to the U.S. Constitution and sued for damages. The defendants retorted with *Giles*.

Writing for the Court, Justice Frankfurter cryptically and unpersuasively offered two grounds for distinguishing *Giles*. First, he noted that *Giles* was an action in equity and not an action for damages.[106] Justice Frankfurter intimated that equitable claims are diffuse claims and the harm is to the instrumentalities of the democratic process or even democracy itself. By contrast, legal claims are individual rights claims and the harm is to the individual who has been excluded from a political right enjoyed by other citizens. Second, Justice Frankfurter argued that *Giles* was a political participation or right to vote case, whereas *Lane* is a race discrimination case.[107] Justice Frankfurter explained that the plaintiff in *Lane* was alleging a

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102. *Id.* at 554; *see also id.* at 556 ("The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.").

103. 307 U.S. 268 (1939).

104. *Id.* at 269-71. The Court had previously struck down Oklahoma's discriminatory literacy test requirement in *Guinn v. United States*, 238 U.S. 347 (1915).

105. The registration scheme grandfathered all voters who had voted in an election in which most black voters could not vote as a consequence of an earlier discriminatory registration device, but required all others to register within a twelve-day period. If you could not register within that twelve-day period you were permanently barred from registering to vote. *Lane*, 307 U.S. at 270-71.

106. *Id.* at 272-73.

107. *Id.* at 274.

violation of an individual right not be discriminated on the basis of race as opposed to a general political right not to be denied the vote.[108]

It is not clear that *Giles* and *Lane* can be distinguished persuasively on the grounds articulated by Justice Frankfurter. With respect to the argument that the cases are distinguishable because the plaintiff in *Giles* sought equitable relief in contrast to the plaintiffs in *Lane*, who asserted a claim rooted in law, as some commentators have pointed out, the plaintiff in *Giles* subsequently and unsuccessfully filed an action for damages.[109] Giles's claim was dismissed by the courts of Alabama, and the Supreme Court affirmed the dismissal.[110] As those commentators have concluded, "Giles's efforts to seek damages, injunctive relief, or mandamus were all judicially rejected."[111] Thus, Justice Frankfurter's attempt to distinguish *Lane* from *Giles* is belied by subsequent facts.

Second, Frankfurter's argument that *Giles* is a case about politics and *Lane* is a case about race discrimination is even less persuasive. In both cases, black plaintiffs sought access to the federal courts to vindicate their constitutional rights, as guaranteed by the Reconstruction-era amendments, against state-sponsored racial discrimination. In *Giles*, the Court went out of its way to deny the plaintiffs access to the federal courts, but in *Lane*, the Court went out of its way to secure access. It is not clear how one case can be about race and the other about politics.

It is probably the case that *Giles* and *Lane* cannot be reconciled. Perhaps the best way to make sense of the structural-individual rights distinction is as a shorthand or a phrase of art by which the Court communicates its conclusion that it will or will not entertain a particular claim. By labeling and categorizing the claim, one obviates the need for further analysis.[112] Put differently, the individual rights–structure distinction simply becomes an element of the Court's justiciability doctrine: individual rights claims are justiciable and structural claims are nonjusticiable.

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108. *Id.* ("The basis of this action is inequality of treatment though under color of law, not denial of the right to vote.").

109. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 94 (rev. 2d ed. 2002).

110. Giles v. Teasley, 193 U.S. 146 (1904).

111. ISSACHAROFF ET AL., *supra* note 109, at 94.

112. Recall here the elegant phrase by Justice Frankfurter in his *Baker* dissent: "From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. *To classify the various instances as 'political questions' is rather a form of stating this conclusion than revealing of analysis.*" Baker v. Carr, 369 U.S. 186, 280-81 (1962) (Frankfurter, J., dissenting) (emphasis added).

2. *Election Law Dualism*

That these categories — individual rights and structural rights — are terms of art does not mean that the process of categorization is meaningless. To understand the stakes of categorization one must come to terms with the symbiotic — really parasitic — relationship between individual rights and structural values (or what I prefer to think of as institutional arrangements). Courts have long understood this relationship and its implications.[113]

a. The importance of structure to individual rights. The implications are twofold. The first implication is that courts cannot protect political rights solely by vindicating individual rights. The principle here is that individual rights can be profoundly undermined (or conversely, efficiently effectuated) depending upon the nature of the institutional arrangements within which politics takes place. Put differently, the central insight of structuralism — or, perhaps, what should more accurately be described as institutionalism — is that one cannot make sense of individual rights unless one comes to terms with the institutional and electoral structures that provide content to those rights. This insight reflects the dualistic properties of political rights and is one that courts have long appreciated.

Consider once again *Giles*, and this time from a less cynical perspective. Holmes raised two objections to Giles's claim for relief. First, he noted that the plaintiffs alleged in their complaint that the "whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States . . . but asks to be registered as a party qualified under the void instrument."[114] If the registration scheme is unconstitutional as the plaintiff avers, Holmes reasoned, then the Court would not be able to provide the relief requested — adding the plaintiff to the registration rolls.[115]

Second, Holmes argued that the Court is unable to provide the equitable relief requested by the plaintiff because the Court could not "enforce any order that it may make."[116] Holmes penned:

> The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the

113. *See generally* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 510-13 (2004).

114. *Giles*, 189 U.S. at 486.

115. *Id.* ("If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?").

116. *Id.* at 487.

> voting in that State by officers of the court, it seems to us that all that the plaintiff would get from equity could be an empty form.[117]

Giles has been criticized strongly, and rightly so.[118] But, we must take seriously Holmes's basic point in *Giles* that asserting an individual right would be futile given the breakdown in the political process. As Holmes intimated, an individual right to vote is of no use — an "empty form" — without reforming the electoral structures that are necessary to give effect to the right. Holmes seemed to understand the intimate relationship between individual rights and the institutional frameworks of the political process.

Consider also the argument between Justices Frankfurter and Brennan in the Court's landmark decision in *Baker v. Carr*.[119] Justice Frankfurter advanced two complimentary arguments. First, he observed that malapportionment claims are structural claims — claims about the "general frame and functioning of government"[120] — and such claims are not meet for judicial judgment.[121] Second, he argued that there was no credible allegation that the plaintiffs' individual rights were violated — a necessary condition to judicial action.[122] He observed: "Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils."[123]

What is remarkable about Justice Brennan's response in *Baker* is the fact that he and the majority discerned, however dimly, the relationship between individual rights and structural values. Of what use is a "citizen's right to a vote free of arbitrary impairment by state action," a right that "has been judicially recognized as a right secured by the Constitution,"[124] Justice Brennan asked, if the right can be impaired when the state intentionally renders the individual's vote less "effective[]" through vote "dilution"?[125] Of what use is the right to

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117. *Id.* at 488.

118. *See, e.g.*, Richard H. Pildes, *Democracy, Anti-Democracy, and the Cannon*, 17 CONST. COMMENT. 295 (2000); *but see* Charles A. Heckman, *Keeping Legal History "Legal" and Judicial Activism in Perspective: A Reply to Richard Pildes*, 19 CONST. COMMENT. 625 (2002).

119. 369 U.S. 186 (1962).

120. *Id.* at 287.

121. *Id.* at 268.

122. *Id.* at 300 (Frankfurter, J., dissenting) ("This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote.").

123. *Id.* at 299-300 (footnote omitted).

124. *Id.* at 208.

125. *Baker v. Carr*, 369 U.S. 186, 208 (1962).

vote if the state does not count the votes, or does not have a reliable mechanism for counting votes, or engages in ballot stuffing?[126] To paraphrase Holmes in *Giles*, such a right is an empty form outside of the electoral structures that give it effect.

What makes *Baker* a remarkable case and the self-luminous celestial body in the center of the law-and-politics universe is the Court's appreciation that individual rights must be understood within the context of institutional arrangements. This appreciation is what in fact motivated the Court's involvement into the political thicket.[127] *Baker v. Carr* can be understood only in structural terms; judicial intervention was the only remedy for the structural pathologies that were evident in the political process.[128] If structuralism is unhelpful to understanding and resolving conflicts in democratic politics, then the Court was wrong to intervene in *Baker v. Carr*.

Understood properly, *Baker* demonstrates that engagement with structural theories in election law is inescapable. Thus, when Professor Hasen maintains that the right to an equally weighted vote is an essential principle of political equality (p. 33), the right is only sensible if one comes to terms with the manner in which the design of electoral structures affects the primary right to simply cast a ballot. Or, when Professor Hasen asks the Court to guard against self-dealing by legislators in election law cases (p. 135), that request is only sensible from a structural perspective. Structuralism provides the necessary framework for understanding that the formal right, though necessary, is insufficient when examined in combination with the institutional framework within which the formal right is exercised. If there is a truth in this field, surely this is it.

b. The importance of individual rights to structure. But the second implication is almost as important as the first. The second implication is that an individual rights framework is often necessary for resolving structural claims. This is because structural claims in law and politics, which generally stem from democratic theory, are often amorphous esoteric ideals that are difficult to domesticate for adjudicative purposes. To illustrate more concretely, scholars have identified majoritarianism,[129] responsiveness,[130] political competition,[131]

126. *Id.* at 185.

127. For a more in-depth discussion of this issue, see Charles, *Constitutional Pluralism*, *supra* note 10.

128. Pildes, *Democratic Politics*, *supra* note 14, at 44.

129. Charles, *Constitutional Pluralism*, *supra* note 10, at 1146.

130. *Id.* at 1148; Issacharoff, *Gerrymandering*, *supra* note 10, at 615.

131. Issacharoff & Pildes, *supra* note 10, at 648.

expressive harms,[132] entrenchment,[133] inter alia, as structural values that courts should vindicate. How are courts supposed to translate these worthy structural principles from abstract theory to workable constitutional adjudication?

Relatedly, structural claims in law and politics are rarely traceable to violations of specific constitutional provisions[134] or even nonspecific but familiar constitutional structural traditions such as federalism or the doctrine of separation of powers. Moreover, there is seldom an available clear-cut constitutional remedy for structural violations.

The traditional objection to structuralism, from the time of Frankfurter to today, is that courts cannot do political philosophy.[135] There is a basic incompatibility between what structuralists ask courts to do and what classical constitutional theory presumes to be the role of the judiciary. Moreover, as between courts and legislators, courts are at a distinct institutional disadvantage. These are all familiar objections but modern-day structuralists have no ready answers.[136]

Instead, structuralists urge, rather unhelpfully, that courts adopt an interpretative approach that "moves away from the notion of individual rights as the prime protector of the integrity of the political process, and looks instead to the structural vitality of politics."[137] Or, as one leading commentator has noted, the "frameworks of rights and equality are often ill-suited to the problems courts actually address."[138] The deployment of a rights framework has been described as "unfortunate[]"[139] and presenting "a danger for the practice of democracy."[140] In their urge to underscore the importance of structuralism, structuralists have become essentialists in a manner that is detrimental to the long-term structuralist agenda.

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132. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-07 (1993).

133. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997); Pildes, *Democratic Politics*, *supra* note 14, at 54.

134. Indeed, one of the challenges to scholars of law and politics is the fact that the constitutional text is often unhelpful regarding these fundamental disputes. This issue is addressed in Charles, *Constitutional Pluralism*, *supra* note 10, at 1133-38.

135. This and other criticisms by Justice Frankfurter are explored in Charles, *Constitutional Pluralism*, *supra* note 10, at 1108-31.

136. For a nice summary of these criticisms, see pp. 143-55.

137. Issacharoff, *Gerrymandering*, *supra* note 10, at 630.

138. Pildes, *Democratic Politics*, *supra* note 14, at 48.

139. Charles, *Constitutional Pluralism*, *supra* note 10, at 1114 n.54 (describing the Court's use of an individual rights framework to give effect to structural values as "unfortunate[]").

140. Pildes, *Democratic Politics*, *supra* note 14, at 55.

Rather than being an unfortunate departure from the structuralist ideal, the deployment of an individual rights approach for the purposes of effectuating structuralist values is necessary and beneficial in ways that structuralists have failed to appreciate. An individual rights framework is how courts translate structural values into adjudicatory claims capable of resolution by jurists as opposed to philosophers or policymakers. Beyond this critical benefit, an individual rights framework provides the patina of constitutional legitimacy — the assurance (or illusion) that courts are not simply fashioning doctrine out of whole cloth without regard to the constitutional text. An individual rights framework also helps courts think more concretely about structural problems and may direct them toward judicially manageable remedies. This is the best way to understand the Court's transition from *Baker v. Carr* to the substantive rule of one person, one vote.

While Justice Brennan in *Baker* devoted a great portion of the opinion to the question of justiciability, he offered very little with respect to the doctrinal standard that would govern malapportionment claims. His only comment was the confident assertion that "[j]udicial standards under the Equal Protection Clause are well developed and familiar."[141] In the cases following *Baker*, in particular *Gray v. Sanders*,[142] *Wesberry v. Sanders*,[143] *Reynolds v. Sims*,[144] and *Lucas v. Forty-Fourth General Assembly*,[145] the Court used an individual rights framework — specifically the one-person, one-vote principle — to remedy what it perceived, rightly or wrongly, as a structural defect in the political process.[146] The Court thus gave credence to Justice Brennan's confidence that coming up with standards was the least of the Court's problems.[147]

While some have identified the Court's post-*Baker* jurisprudence with an individual rights approach, this conclusion turns out to be a bit too facile upon closer examination. When one examines carefully the post *Baker* cases, in particular the foundational cases of *Gray*, *Wesberry*, and *Reynolds*, it becomes apparent that whenever the Court uses rights-speak, the Court is doing so instrumentally to mask and rectify structural concerns.

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141. *Baker v. Carr*, 369 U.S. 186, 226 (1962).

142. 372 U.S. 368 (1963).

143. 376 U.S. 1 (1964).

144. 377 U.S. 533 (1964).

145. 377 U.S. 713 (1964).

146. For a very nice piece questioning the one-person, one-vote standard, see Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 (2003).

147. On the availability of standards under the Equal Protection Clause, see Luis Fuentes-Rohwer, Baker*'s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353 (2002).

Admittedly, the equipopulation principle certainly seems like an individual right in the classical sense. For example, the Court has described the right explicitly in individualist terms.[148] As the Court famously stated in *Reynolds*, these rights are "individual and personal in nature."[149] The Court has also explicitly remarked on the dignitary interest that is protected by the political right as well as the dignitary injury that results when the right is infringed.[150] Thus, again in *Reynolds*, the Court maintained, "To the extent that a citizen's right to vote is debased, he is that much less a citizen."[151] Further, the Court has intimated that the right is absolute and inviolable — a trump in the classical individual rights sense.[152]

But, these conceptions of rights in individualist terms are not as prevalent as one might think. Indeed, most of the language in these opinions that support an individual rights approach to political rights is found in *Reynolds v. Sims*. A closer look at the relevant cases reveals opinions that are more self-conscious about the structural choices that are being made than might at first appear. A close look also reveals opinions that are more self-conscious with respect to the instrumental manner in which the Court deploys the individual right.

Take *Gray v. Sanders* as an illustration. The fundamental question in *Gray* was whether the state could preserve the power of an important numerical minority, rural constituents, by biasing the state's fundamental structure of representation in favor of those constituents. Georgia's county unit system sought to insure that the political process was receptive to the interests of rural voters even at the expense of a majority of the state's citizens. Rural interests, which were once the dominant political interests in Georgia but had witnessed the dissipation of their political power as a consequence of population shifts, sought to guarantee themselves a minimum level of representation notwithstanding the possible cost of majoritarian control of the state legislature. Thus, *Gray* is a case about the constitutionality of the state's intentional choice to privilege minority interests over majority interests in the design of the electoral structure.[153]

148. *See, e.g.*, *Lucas*, 377 U.S. at 736.

149. *Reynolds*, 377 U.S. at 561.

150. *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

151. *Reynolds*, 377 U.S. at 567.

152. *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964).

153. Contrast this to *Baker* where the choice was not an intentional decision to design electoral structures to represent minority interests but the consequence of intentional neglect.

So stated, *Gray* is not an individual rights case.[154] The case tells us very little about the plaintiff other than the minimum that communicates the plaintiff's standing to challenge the county unit system.[155] We do not know the plaintiff's name, gender, or race. There is no discussion in the case of the harm suffered by the plaintiff. The plaintiff is simply a convenient vehicle for permitting the Court to address the structural issues, what Frankfurter called the general frame and functioning of government.

In *Gray*, the mantra of one person, one vote,[156] this "constitutionally protected" individual right,[157] allowed the Court to address two structural defects with Georgia's county unit system: majoritarianism[158] and responsiveness.[159] The application of the one-person, one-vote principle in *Gray* endeavored to make majoritarianism the baseline for legislative control. Similarly, the principle also sought to vindicate the structuralist value of responsiveness.[160] Georgia's county unit system sought to assure that the political process would be sensitive to the needs of rural interests irrespective of the underlying preferences of the electorate.[161] The Court found that arrangement problematic. Regardless of how one views the merits of the Court's decision in *Gray*,[162] it is hard to gainsay that both of these structuralist concerns are given effect through the aegis of an ostensibly individual rights principle.[163]

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154. Professor Karlan has offered a similar observation with respect to the Court's *Shaw* line of cases. *See* Karlan, *Nothing Personal*, *supra* note 55, at 1352; Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 296-97 (1996).

155. *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

156. *Id.* at 381 ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote.").

157. *Id.* at 380.

158. *Id.* at 373.

159. *Id.* at 379.

160. "Responsiveness conveys how well democratic institutions track the substantive preferences of the electorate." Charles, *Constitutional Pluralism*, *supra* note 10, at 1149.

161. To be clear, the point is not whether the political process can be unduly responsive to minority interests. Rather, the point is whether the state can ensure responsiveness to minority interests in the manner that Georgia tried to do.

162. I think judicial intervention in *Gray* is defensible to safeguard the two values noted above. *See supra* text accompanying notes 139-142. As among *Gray*, *Wesberry*, *Reynolds*, and *Lucas*, I am much less sure about *Lucas*.

163. For those looking for more recent examples, there is no need to look further than the Court's *Shaw* jurisprudence. Shaw v. Reno, 509 U.S. 630 (1993).

IV. THE COSTS OF THE RIGHTS-STRUCTURE DEBATE

When one examines the Court's political rights cases, it becomes apparent that the Court uses both individual rights and structural approaches complimentarily to address or stem the structural pathologies, such as legislative self-entrenchment, of the political process. In the context of political rights, the Court uses the Constitution, in particular the Equal Protection Clause "to regulate the institutional arrangements within which politics is conducted."[164] This is not a new application of the Equal Protection Clause, but one which the Court has been using since *Baker*. One can thus reframe Professor Karlan's observation with respect to the deployment of structuralism in the *Shaw* line of cases and in *Bush v. Gore* beyond those specific cases. There is very little doubt that the structural deployment of the Equal Protection Clause within an individual rights framework best explains *Baker v. Carr* and its progeny.

What, then, does this tell us about the rights-structure debate? If the Court deploys both a structural and individual rights approach to address effectively the problems in the political process, it is immaterial whether one casts political rights claims in a structuralist or individualist frame. It is then unsurprising that this debate has produced very little insight. Instead of debating the essentialist question — whether political rights claims are structural or individual — the focus ought to be on the utility or inutility of judicial review, of the costs and benefits of constitutionalization, the underlying values vindicated by judicial review, and how to achieve those values.

Take the Court's struggle over the constitutionality of political gerrymandering as vividly represented in its recent decision in *Vieth v. Jubelirer*.[165] In *Vieth*, a plurality of the Court, led by Justice Scalia who authored the plurality opinion, concluded that political gerrymandering claims are nonjusticiable. Four other Justices — Stevens, Souter, Ginsburg, and Breyer — dissented, and concluded that political gerrymandering claims are justiciable. Remarkably, the four dissenting Justices produced three different remedial standards for resolving political gerrymandering claims. Justice Kennedy, the swing Justice on this issue, noted that he was not yet prepared "to bar all future claims of injury from a partisan gerrymander."[166]

Justice Kennedy's opinion is equally notable for signaling a willingness to shift the locus of disputation from a concern with

164. Karlan, *Nothing Personal*, *supra* note 55, at 1346.

165. 124 S. Ct. 1769 (2004).

166. *Id.* at 1794 (Kennedy, J., concurring in the judgment).

equality under the Equal Protection Clause to a concern with representation under the First Amendment. Justice Kennedy argued:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations [of partisan gerrymandering] involve the First Amendment interest of not burdening or penalizing citizens because of their participating in the electoral process, their voting history, their association with a political party, or their expression of political views . . . . Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest . . . . First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.[167]

Though this move is the most promising suggestion for resolving the problem of political gerrymandering offered by any of the justices so far, it has been met almost reflexively with swift and utter condemnation by leading election law scholars. For example, Professor Hasen argues that Justice Kennedy's move to the First Amendment is futile because the First Amendment does not present any standards for resolving gerrymandering claims.[168] Likewise, Professors Issacharoff and Karlan argue that Justice Kennedy's approach is unhelpful because "'representational rights' are as yet undefined."[169] They go on to explain:

> The First Amendment itself cannot be the source of those rights, for it has nothing to say about *which* groups of voters deserve to have districts drawn that reflect their interests. All districting has political consequences, and those consequences are largely predictable to politically sophisticated actors. Thus, those consequences are rarely entirely unintentional. Indeed, it is safe to conclude that the sophistication of political actors in contemporary redistricting eliminates any explanation for line drawing other than intentionality. But those consequences, even if intentional, may have nothing to do with voter-oriented representational rights.[170]

Professor Pildes rounds out this criticism by remarking that representational rights cannot be conceived as individual rights because representational rights reflect "[s]tructural judgments about the proper processes of redistricting or about the fair distribution of

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167. *Id.* at 1797.

168. *See* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after* Vieth, 3 ELECTION L. J. 626, 628 (2004).

169. Issacharoff & Karlan, *supra* note 13, at 564.

170. *Id.* at 563-64.

seats among groups."[171] These structural judgments are "unavoidable. And the First Amendment is utterly unsuited for that kind of judgment."[172] As he explains, "[n]othing better exemplifies the mistaken impulse to view structural issues of governance as matters of individual rights (and among individual rights, to turn so many rights claims into First Amendment ones)."[173] Professor Pildes notes that the cases cited by Justice Kennedy to support the First Amendment approach "involve the classic framework of individual rights claims; they test whether a partisan purpose is a constitutionally permissible one for denying specific individuals a government job or contract."[174] These cases are not translatable to the political gerrymandering context, Professor Pildes argues, because in the context of political gerrymandering, the question is not whether a partisan purpose has been used but whether a partisan purpose has been used in a manner that is excessive.[175] He concludes with the observation that the "instinct to turn to the First Amendment reflects a recurring search for grounding in familiar and conventional models of individual rights. But those models will provide no solace in addressing structural problems concerning the proper allocation of political representation."[176]

One must pause before disagreeing with four of the leading scholars of the field, some of the best minds in law and politics, the authors of the field's only casebooks, and four individuals who do not always agree with one another but find common ground on the inutility of the First Amendment to resolving the problem of political gerrymandering. So let us consider carefully these criticisms of Justice Kennedy's approach.

The criticism of Justice Kennedy's approach as offered by Professors Hasen, Issacharoff, Karlan, and Pildes, at bottom, is a fundamental challenge to Justice Kennedy's assertion that the First Amendment is relevant to understanding the harm caused by political gerrymandering and to providing a judicially manageable remedy. All four critics conclude that the First Amendment has nothing useful to say about representational rights. All four are mistaken.

The critics argue that the cases cited by Justice Kennedy, specifically the patronage cases, are unavailing. The critics provide four reasons to support their conclusions. Professors Issacharoff and

171. Pildes, *Democratic Politics*, *supra* note 14, at 59.

172. *Id.*

173. *Id.* at 58.

174. *Id.*

175. *Id.*

176. *Id.* at 59.

Karlan explain that the patronage cases do not provide an apt blueprint for thinking about political gerrymandering problems because "the burden that the plaintiffs in the patronage cases experienced fell on them *outside* the political process: they lost jobs as public defenders or road workers or were denied contracts to haul trash or tow cars."[177] Professor Hasen maintains that, whereas the burden on associational rights in the patronage cases is "tangible," the burden on associational rights when, say the Democrats pack Republican voters in a district "so as to give Democratic representatives an edge in securing more legislative seats," is not tangible because the harm "is not easily identified."[178] Professor Pildes, in particular, argues that because the First Amendment is concerned with individual rights and not structural rights, a First Amendment analysis is not applicable.[179] All four critics stress the distinction between the patronage cases, which they argue precludes state actors from acting on the basis of impermissible motives, and Justice Kennedy's concurrence in *Vieth*, which attempts to divine a line between excessive and sufficient partisan motivation.[180]

Professors Issacharoff's and Karlan's criticism provides a useful starting point for understanding what Justice Kennedy is up to in *Vieth*. As a description of the holding of the patronage cases, Professors Issacharoff and Karlan are undoubtedly right that plaintiffs in the patronage cases were burdened outside of the political process. But that conclusion does not get us very far because the very question presented by the patronage cases is whether patronage practices constitute a legitimate part of the political process. That is, the question at issue in the patronage cases is whether the government can dispense employment-related benefits on the basis of partisan identity. There is nothing inherent to patronage that ineluctably leads to the conclusion that job-related benefits cannot be conditioned on the ebbs and flows of the political process.[181] Patronage practices are outside of the political process because the Court put them there.

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177. Issacharoff & Karlan, *supra* note 13, at 563.

178. Hasen, *supra* note 168, at 635.

179. Pildes, *Democratic Politics*, *supra* note 14, at 59.

180. Here, I believe that the critics have identified a genuine problem with Justice Kennedy's approach. This, however, is not a problem without a genuine solution. While the solutions are beyond the scope of this Review, some possibilities include: eschewing an intent-based standard; a restriction on single-member districting, see Charles, *Racial Identity*, *supra* note 10, at 1277; and promulgating a vague standard similar to Professor Hasen's unmanageability standard, see Richard L. Hasen, *The Supreme Court and Election Law: A Reply to Three Commentators*, 31 J. LEGIS. 1, 11-12 (2004); Pildes, *Democratic Politics*, *supra* note 14, at 68-70.

181. O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 717 (1996) (stating that it is "by no means self-evident" that the First Amendment applies to patronage practices).

Take as an illustration *Elrod v. Burns*,[182] a case in which the plaintiffs challenged their partisan dismissal from their government jobs after a new sheriff came into town.[183] One of the arguments offered by the government in *Elrod* in support of patronage practices is that hiring and firing individuals on the basis of their partisan identity is a necessary part of the political process.[184] In a plurality opinion announcing the judgment of the Court, Justice Brennan rejected that argument. He stated that patronage practices restrict the "free functioning of the electoral process"[185] and are "inimical" to that process.[186] Consequently, Justice Brennan concluded that patronage is not a legitimate part of the political process.

Justice Brennan's exclusion of patronage from the political process prompted pointed replies from Chief Justice Burger and Justice Powell in dissent in which they argued that patronage practices form a traditional part of politics with a long historical pedigree.[187] Similarly, in his dissenting opinion in *Rutan v. Republican Party of Illinois*,[188] another patronage case, Justice Scalia maintained that the burdens of a patronage system fall inside the political process because a patronage system is "a political arrangement" and, as such, should be left to the political process.[189]

Having rejected the coherent arguments of the dissenters, the patronage cases, at the very least, stand for the proposition that the government cannot target individuals or groups simply because the government disagrees with their partisan identities. Rephrased in more lofty terms, the government oversteps the boundaries of permissible politics when the government screws you because you are a member of the wrong party. An important corollary to this principle

182. 427 U.S. 347 (1976).

183. Plaintiffs were Republicans who were in the Cook County Sheriff's Office when the incumbent Republican sheriff was replaced by a Democrat. *Id.* at 350-51. Most of the plaintiffs were discharged, and one threatened with discharge, because they were members of the defeated party. *Id.* They filed suit to appeal their discharge.

184. *Id.* at 368 ("It is argued that a third interest supporting patronage dismissals is the preservation of the democratic process."); *see also id.* (stating that the state's "argument is thus premised on the centrality of partisan politics to the democratic process").

185. *Id.* at 356.

186. *Id.* at 357.

187. *See, e.g.*, *id.* at 375 (Burger, C.J., dissenting) ("The Court strains the rational bounds of First Amendment doctrine and runs counter to longstanding practices that are part of the fabric of our democratic system to hold that the Constitution *commands* something it has not been thought to require for 185 years." (emphasis in original)); *id.* at 377 (Powell, J., dissenting) ("As the plurality opinion recognizes, patronage practices of the sort under consideration here have a long history in America.").

188. 497 U.S. 62 (1990).

189. *Id.* at 110 (Scalia, J., dissenting).

is the proposition that an individual suffers harm in a manner that is constitutionally relevant where the government targets the individual simply on the basis of the individual's political identity.

Fundamentally, the central question at issue in the patronage cases concerns the appropriate limits on politics.[190] Whether patronage practices are inside or outside of the political process is, as a descriptive matter, a function of whether the legal regulatory framework believes that patronage practices unduly infringe upon relevant constitutional values. The very same reasoning can be applied to political gerrymandering. Whether political gerrymandering imposes burdens that legitimately can be considered as emanating from within the political process is a function of whether the legal regulatory framework believes that political gerrymandering unduly infringes upon relevant constitutional values.

This is precisely the First Amendment construction that Justice Kennedy advanced in *Vieth*. As Justice Kennedy argued, the First Amendment precludes the government from using partisan identification as a basis for singling out individuals or groups for disfavored treatment.[191] There is more to be said about "representational rights" at another time, but suffice it to say for now that representation — just like a contract to haul garbage — need not be the product of the government's favor (or disfavor) because the government approves (or disapproves) of one's political identity. Put differently, the First Amendment is implicated when the government packs, cracks, or shacks,[192] say Republican voters simply because they are Republicans in order to maximize the chance of electing a Democratic representative.[193]

Thus, one can agree with the following conclusion drawn by Professors Issacharoff and Karlan while disagreeing with the implied premise of that conclusion. As they stated, the First Amendment "has nothing to say about *which* groups of voters deserve to have districts drawn that reflect their interests."[194] While the First Amendment has nothing to say about *which* groups deserve to have districts drawn that reflect their interests, the First Amendment is very clear that the

190. As Justice Brennan stated in the first sentence of his opinion for the Court in *Rutan*, "[t]o the victor belong only those spoils that may be constitutionally obtained." *Id.* at 64.

191. Justice Kennedy stated, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." Vieth v. Jubelirer, 541 U.S. 267 (2004) (Kennedy, J., dissenting).

192. On packing, cracking, and shacking, see Issacharoff & Karlan, *supra* note 13, at 555.

193. Charles, *Racial Identity*, *supra* note 10, at 1259.

194. Issacharoff & Karlan, *supra* note 13, at 563.

government cannot draw districts to harm political groups qua political groups. Under the First Amendment, targeting of voters by the state on partisan grounds constitutes constitutional harm.

From this vantage point, we are in a better position to evaluate and reject Professor Hasen's criticism of Justice Kennedy's approach. Professor Hasen explained that the difference between the patronage cases and political gerrymandering is that in the patronage cases, "the burden on associational rights is tangible: just ask a Republican state employee who lost a job when a Democratic administration came into the Illinois governor's office."[195] By contrast, political gerrymandering does not generate palpable harms.[196]

Whether Professor Hasen is correct or not that political gerrymandering harms are not palpable, it does not follow — from the patronage cases or from the Court's political association cases more generally — that the harms caused by political gerrymandering are not constitutionally cognizable. There is no requirement in the patronage cases that the harm must be "tangible" in order to be cognizable. It is true that in some of the patronage cases the Court sometimes remarked on the harm suffered by the plaintiffs.[197] But there is nothing in the patronage cases to support the conclusion intimated by Professor Hasen that only employment-related burdens count as constitutional harm or that representational harms are not "tangible" in a constitutionally relevant sense.

Indeed, if Professor Hasen is correct, then one would be hard pressed to explain the Court's political association cases.[198] Are the harms caused by a state's restrictive ballot access provisions any more or less tangible than the targeting of a group of voters because of their partisan affiliation?[199] What about *Anderson v. Celebrezze*,[200] in which the Court concluded that Ohio's early filing deadline for independent candidates unduly impinged upon the right of voters to associate?[201] The Court stated that the early filing deadline "limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group."[202] If

195. Hasen, *supra* note 168, at 635.

196. *Id.*

197. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 75 (1990).

198. One would also be hard-pressed to explain the Court's one-person, one-vote cases, as well as the Court's recent racial gerrymandering jurisprudence.

199. *See* Williams v. Rhodes, 393 U.S. 23 (1968) (holding Ohio's ballot access laws unconstitutional).

200. 460 U.S. 780 (1983).

201. *Id.* at 806.

202. *Id.* at 794.

an early filing deadline can be construed as impacting the associational rights of like-minded voters, surely voters are harmed in a manner that is constitutionally relevant when the state intentionally cracks, packs, or shacks them into districts precisely so as to limit the effectiveness of their association.

Recall here the Court's statement in *Buckley v. Valeo* that contributions and expenditure limitations "impinge" upon associational rights because "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals."[203]

Admittedly, one could argue that the Court in *Buckley* upheld contribution limitations as consistent with associational rights. But this observation does not blunt the importance of the associational right. First, the point here is to demonstrate the relevance or applicability of the right of association. Second, taking the observation on its merits, one could easily retort that, in *Buckley*, the Court emphasized the importance of the associational right with respect to expenditure limitations. The Court stated that expenditure limitations "preclude[] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association."[204]

This is the point that animated Justice Kennedy's concurrence. Quoting *California Democratic Party v. Jones*,[205] a political association case, he observed, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."[206] As he remarked, representative democracy is undermined where the state precludes individuals from banding together.[207] As Justice Kennedy implicitly recognizes, the Court's political association cases are based in great part upon the proposition that electoral outcomes — including representational contests — ought to be the product of political competition and cannot be dictated or prescribed by the state.[208] Where those outcomes are a function of state laws that infringe upon the rights of political association, the First Amendment is implicated.

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203. Buckley v. Valeo, 424 U.S. 1, 22 (1976).

204. *Id.*

205. 530 U.S. 567 (2000).

206. *Id.* at 574.

207. This is what I believe Justice Kennedy meant when he stated, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." Vieth v. Jubelirer, 541 U.S. 267 (2004) (Kennedy, J., dissenting).

208. Charles, *Constitutional Pluralism*, *supra* note 10, at 1254-55.

One would be hard-pressed then to excuse electoral structures from the purview of the First Amendment. Indeed, if the right of association applies to ballot access, early filing deadlines, political contributions, and expenditure limitations, can one argue seriously that the right of political association does not apply to the most elementary feature of the political process, *viz.*, the manner in which the state aggregates voters into voting districts? Of what use are liberal ballot access laws, or generous early filing deadlines, or low contribution limitations, if the state can shape political outcomes by the manner in which it aggregates voters through the construction of electoral institutions?

We are now left with Professor Pildes's contention that Justice Kennedy's First Amendment approach to resolving political gerrymandering claims is doomed to failure because the First Amendment is concerned with individual rights but political gerrymandering problems entail a structural solution.

As I argued in Part III, the Court has used effectively an individual rights approach to address the structural issues in apportionment. The Court's early forays into the political thicket have won near-universal approbation. Moreover, as Professor Karlan has argued, the Court has used an individual rights approach in the *Shaw* line of cases to address structural concerns with the limitations on race consciousness in the political process. Incidentally, this is an engagement that Professor Pildes views as having been relatively successful.[209]

Further, it is not clear that Professor Pildes's central point — that the First Amendment is profoundly individualistic — is accurate. As Professor Schauer has recently argued, the failure to come to terms with the fact that the First Amendment vindicates structural values is the consequence of a "mistaken belief that the First Amendment exists, at moral bedrock, as an individual right."[210] Moreover, as some have argued, one of those values represented by the First Amendment is democratic self-government.[211]

Further elaboration on the structural underpinnings of the First Amendment will have to await a different opportunity, but consider briefly the campaign finance cases as a more direct response to Professor Pildes's inquiry. If Professor Pildes were right — that the First Amendment is truly and exclusively an individualist constitutional provision — then one would be hard-pressed to reconcile the First Amendment with campaign finance reform; in

209. *See* Pildes, *Democratic Politics*, *supra* note 14, at 66-69.

210. Frederick Schauer, *Towards an Institutional First Amendment*, 15 MINN. L. REV. (forthcoming 2005)

211. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper & Bros., 1948).

particular, the most recent effort by Congress as represented by the Bipartisan Campaign Reform Act and the Court's wholesale acceptance of that effort in *FEC v. McConnell*. If the First Amendment is exclusively individualist, then First Amendment purists are certainly right that the Court has got the First Amendment exactly "backwards" and that the majority opinion in *McConnell* "is wrong on just about every point."[212] But if the First Amendment is instrumental, if "instead we see the First Amendment as a social and not as an individual value . . . things look quite different."[213] Things look different because the First Amendment can be used to give effect to the values that ought to be reflected by the political process.

It then appears, that just like other contexts in election law, we have "two competing conceptions of the First Amendment":[214] one structural, one individualist. Under a structural approach to the First Amendment, the analysis looks very much like the Court's analysis in the reapportionment cases. Is the government action promoting a legitimate democratic value (such as faith in the democratic process)? Or are political incumbents regulating the political process to insulate themselves from challenge by political outsiders? These are legitimate value questions; they are only sensibly asked from a structural perspective though they are perhaps best resolved using an individualist framework.

But they need not be cast in rights-structure terms. It may be the case that courts should not constitutionalize election law questions. It may be the case that courts should constitutionalize some but not others. Let us debate those questions. Essentializing election law claims extracts its costs by depriving us of the necessary tools to resolve those problems without much advancing the debate.

CONCLUSION

Notwithstanding my disagreement with Professor Hasen on the nature of election law claims, *The Supreme Court and Election Law* is undoubtedly a must-read for anyone interested in the intersection of law and politics. The Court seems poised between a judicial minimalist posture, as represented by *Vieth* and *McConnell*, and an interventionist one, as represented by *Bush v. Gore*. Professor Hasen has strongly argued the case in favor of minimalism. If the Court decides to retreat from the political thicket, its path would be been nicely marked by Professor Hasen's marvelous effort. His is an

212. Lillian R. BeVier, McConnell v. FEC: *Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 127 (2004).

213. Schauer, *supra* note 210, at 15.

214. Lillian R. BeVier, *Campaign Finance Regulation: Less, Please*, 34 ARIZ. ST. L.J. 1115, 1115 (2002).

important framework against which election law scholars will react and upon which they will build for some time to come.