

## SYMPOSIUM

# THE SUPREME COURT AND ELECTION LAW: A REPLY TO THREE COMMENTATORS

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### I. INTRODUCTION

The *Journal of Legislation* and Notre Dame Law School invited three distinguished scholars to comment<sup>1</sup> on my recent book, *The Supreme Court and Election Law*,<sup>2</sup> and have kindly given me this chance to reply. The commentators' arguments are interesting and provocative. After a brief summary of the main points of my book, I focus on what I consider to be the central critical claim of each commentator.<sup>3</sup> Professor Nagle gently suggests that election law itself may not be a coherent field of study, noting that much election law jurisprudence appears to turn on matters of appearance over that of substance.<sup>4</sup> Professor Fuentes-Rohwer agrees with much of my analysis, but argues that I do not go far enough—suggesting that the logical end-point of my argument is for the Supreme Court to extricate itself from the political thicket entirely.<sup>5</sup> Professor Charles argues that my distinction between core and contested equality rights eliminates any purpose for judicial review and is too difficult to put into practice.<sup>6</sup>

In this Reply, I defend my approach. Professor Nagle is correct that the Court often strays from the right path when it decides election law cases on appearances alone, but he fails to recognize how conceiving of election law synthetically informs Court decision-making on issues such as the justiciability of partisan gerrymandering claims. Professor Fuentes-Rohwer's general suggestion that the Court exit from the political thicket has much to commend it in the abstract, but he fails to evaluate my proposal as a "second best" approach, particularly compared to the main alternative floating around election law circles today: the structuralist approach that focuses on "appropriate" political competition. Finally, Professor Charles puts his finger on the most difficult

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1. Guy-Uriel E. Charles, *Law, Politics, and Judicial Review: A Comment on Hasen*, 31 J. LEGIS 17 (2005); John Copeland Nagle, *The Appearance of Election Law*, 31 J. LEGIS. 37 (2005); 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).

2. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003).

3. Naturally, there is much about which we all agree. I focus here on the most important disagreements.

4. See generally Nagle, *supra* note 1.

5. See generally Fuentes-Rohwer, *supra* note 1.

6. See generally Charles, *supra* note 1.

aspect of my book, and I welcome his decision to take my proposed distinction between core and contested equality claims seriously.

## II. THE SUPREME COURT AND ELECTION LAW IN A NUTSHELL<sup>7</sup>

*The Supreme Court and Election Law* examines the Supreme Court's role in regulating the U.S. political process since its 1962 decision in *Baker v. Carr*,<sup>8</sup> when the Court first held reapportionment claims justiciable.<sup>9</sup> Before 1962, the Supreme Court decided an average of ten election law cases per decade with a written opinion.<sup>10</sup> After 1962, the number of cases increased to sixty per decade, and the *percentage* of election law cases as a portion of the entire Supreme Court docket went up by more than seven-fold.<sup>11</sup>

Along the way, the Court has: required the reapportionment of virtually every legislative body in the country to comply with the principle of "one person, one vote"; ended the practice of political patronage employment; prevented local governments, states, and the federal government from limiting campaign spending in the name of political equality; curtailed the extent to which legislatures may take race into account in drawing district lines; and most recently (and, some would add, notoriously) determined the outcome of the 2000 presidential election.<sup>12</sup>

The book has four central objectives: (1) to chronicle the Supreme Court's political equality cases; (2) to give the Court tools to use to decide such cases carefully; (3) to make a substantive argument for when the Court should intervene in political equality cases; and (4) to argue against structuralist interpretations of election law.

Chapter One surveys the Supreme Court's regulation of political equality since 1960 in four key areas: formal equality requirements, wealth, race, and political parties. Rather than canvass every case that arguably falls into each of these categories, the survey shows general trends. The Chapter concludes with a look at *Bush v. Gore*,<sup>13</sup> the 2000 presidential election case.

Chapter Two argues for the use of judicially *unmanageable* standards in deciding election law cases. My claim is that the Court, in cases involving contested political equality issues, initially should use murky or unclear standards in articulating new political rights. Unclear standards lead to variations in the lower courts, and the

7. This part of my article is a modified version of HASEN, *supra* note 2, at 10–13.

8. 369 U.S. 186 (1962).

9. *See id.* at 209.

10. *See* HASEN, *supra* note 2, at 1, 3 fig.1.1.

11. *See id.* at 1, 3 fig.1.2.

12. *See* Reynolds v. Sims, 377 U.S. 533, 568–69 (1964) (mandating reapportionment on state level); Avery v. Midland County, 390 U.S. 474, 478 (1968) (mandating reapportionment of local body); *but see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 727–28 (1973) (carving out exception to one person, one vote rule for special purpose government districts); Elrod v. Burns, 427 U.S. 347, 350 (1976) (banning patronage firing); Rutan v. Republican Party of Ill., 497 U.S. 62, 64–65 (1990) (banning patronage hiring, transfers and promotions); Buckley v. Valeo, 424 U.S. 1, 26–29 (1976) (rejecting political equality as a compelling interest justifying campaign spending limits); Shaw v. Reno, 509 U.S. 630, 658 (1993) (creating cause of action for an "unconstitutional racial gerrymander"); Bush v. Gore, 531 U.S. 98, 103 (2000) (striking down recount rules created by Florida Supreme Court in 2000 presidential recount controversy).

13. 531 U.S. 98 (2000).

Supreme Court can learn from such variations the best way to ultimately craft new political equality rules.

Chapter Three argues that the Court should play a central role in protecting the *core* of three equality principles: the “essential political rights” principle, the “anti-plutocracy” principle, and the “collective action” principle. The three principles are *limits* on the government’s power to treat people differently in the political process. The principles are derived primarily from social consensus (or near consensus) about the contemporary understanding of political equality, and Chapter Three defends this basis for determining the scope of political equality claims.

The “essential political rights” principle prevents the government from interfering with basic political rights and requires equal treatment of votes and voters. The “anti-plutocracy” principle prevents the government from conditioning meaningful participation in the political process on wealth or money. The “collective action” principle prevents the government from impeding through unreasonable restrictions the ability of people to organize into groups for political action.

Chapter Three argues that if the government attempts to place a limit on the exercise of one of these three core political equality principles, the Court, with an eye on legislative self-interest and agency problems, must engage in a skeptical balancing of interests. This kind of balancing is very different from the deferential balancing we have seen from the Court, particularly in recent years when it has acted to protect the Democratic and Republican parties from political competition. Although the Court’s role is to protect the core, the Court should not act on its own to take sides in cases involving *contested* equality principles. When a plaintiff raises such a claim, the Court should reject its constitutionalization.

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

Chapters Three and Four defend strict balancing tests as appropriate in the political equality cases. The balancing called for differs significantly from the Court’s balancing tests by requiring a close connection between legislative means and ends as an indirect way to police legislative self-interest. Nonetheless, balancing represents the typical way that the Court has (at least ostensibly) handled such claims in the past.

A reader familiar with the Supreme Court’s constitutional jurisprudence might not think balancing needs much defending. To the contrary, however, we are in the midst of a disturbing trend, moving away from a focus on individual rights and toward “structural arguments” about workings of the political system. Chapter Five considers these structural arguments, which have come from both the Court in its racial

gerrymandering cases such as *Shaw v. Reno*,<sup>14</sup> and from some election law scholars, calling for the Court to promote a certain kind of political competition rather than engage in what they term “sterile” balancing of individual rights and state interests. Far from being a sterile concept, equality claims, both individual and group, remain at the core of how the court should evaluate election law claims. Structural arguments, whether made by the Court or commentators, are misguided and potentially dangerous. They evince judicial hubris, a belief that judges appropriately should be cast in the role of supreme political regulators.

In sum, the book argues in favor of preserving room for Supreme Court intervention in the political process, but for intervention that is (1) tentative and malleable, (2) focused on individual (or sometimes group) rights and not on the “structure” or “functioning” of the political system, (3) protective of core political equality principles, and (4) deferential to political branches’ attempts to promote contested visions of political equality.

### III. NAGLE AND THE APPEARANCE OF ELECTION LAW

Much like Gertrude Stein’s description of the city of Oakland,<sup>15</sup> Professor Nagle’s description of “election law” suggests the field may not exist.<sup>16</sup> Professor Nagle (who teaches a course in this field)<sup>17</sup> does not mean that the discipline itself does not exist within academic institutions; election law—or the law of democracy<sup>18</sup>—surely is thriving as a subject studied in law schools and elsewhere.<sup>19</sup> Rather, Professor Nagle suggests that the search for a “unified theory” of election law may unfortunately “encourage the viewing of all legal issues related to elections through the lens of the viewer’s particular normative aspiration for elections.”<sup>20</sup> He concludes that “the laws governing elections may reflect a patchwork of insights, just like the laws enacted by those who are elected.”<sup>21</sup>

Professor Nagle is particularly concerned about the search for a unified theory in light of the Supreme Court’s tendency to decide election law cases on the basis of “appearances”: the appearance of corruption justifies campaign finance regulations;<sup>22</sup> the bizarre appearance of districts justifies striking down certain state districting

14. 509 U.S. 630 (1993).

15. “[T]here is no there there.” GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 289 (1937, reprinted 1971).

16. Nagle, *supra* note 1, at 43–44.

17. See Election Law Teacher Database, at <http://electionlawblog.org/archives/database.xls> (last visited Nov. 10, 2004).

18. There is considerable debate over what to name the field. See Samuel Issacharoff & Richard H. Pildes, *Election Law As Its Own Field of Study: Not by “Election Law” Alone*, 32 *LOY. L.A. L. REV.* 1173, 1183 (1999) (defending the alternative “law of democracy” label).

19. See Symposium, *Election Law as Its Own Field of Study*, 32 *LOY. L.A. L. REV.* 1095, 1095–96 (1999); Heather K. Gerken, *Election Law Exceptionalism? A Bird’s Eye View of the Symposium*, 82 *B.U. L. REV.* 737, 738 (2002); Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 *ELECTION L.J.* 685, 696 (book review) (noting that most major law schools besides Yale have at least one faculty member specializing in this field).

20. Nagle, *supra* note 1, at 43.

21. *Id.* at 44.

22. *Id.* at 39–40 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

plans;<sup>23</sup> and the appearance of unfairness of the Florida recount process leading to the decision to end the recount in *Bush v. Gore*.<sup>24</sup> On this narrower point about appearances, Professor Nagle and I agree. The Supreme Court should *not* decide election law cases on the basis of *appearance* rather than reality. The proper question in a case like *Shaw*, which established the unconstitutional racial gerrymander claim, is the extent to which taking race into account in districting inflicts *real harm*: “Even when the government ‘sends a message with its conduct’ in a political equality case, we should view that message as irrelevant if it has no bearing on real political power relationships.”<sup>25</sup>

But on the broader question, the search for a unified theory of election law is undoubtedly necessary, for three reasons. First, in election law cases, the partisan motivations of judges and justices are commonly (if unfairly) called into question. The extent to which courts can delineate the ground rules before any controversy serves to diffuse claims of partisan bias. It does not matter whether the theory is process theory,<sup>26</sup> the political markets approach,<sup>27</sup> or my own normative approach. Some theory to constrain judges is better than none.<sup>28</sup> Pre-commitment to theory, like adherence to *stare decisis*, preserves the legitimacy of the courts as well as public confidence in the judiciary as an institution.

Second, a unified theory holds out the promise of a bedrock component of the rule of law: that like cases be treated alike. In *The Supreme Court and Election Law*, I offer numerous examples of the Court getting caught up in doctrinal categories over maintaining consistency across similar cases. For example, I criticize the Supreme Court for having different “one person, one vote” rules for congressional districting on the one hand, and state and local districting on the other, without support in constitutional text or theory.<sup>29</sup> It is silly to consider the equal population principle for creating legislative districts in these two areas in isolation simply because one is decided under Article I, Section 2,<sup>30</sup> and the other decided under the Fourteenth Amendment<sup>31</sup> of the Constitution.<sup>32</sup>

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23. *Id.* at 41 (citing *Shaw v. Reno*, 509 U.S. 607 (1993)).

24. *Id.* at 41–42.

25. HASEN, *supra* note 2, at 142. I similarly attack *Bush v. Gore* when read as a structural equal protection case. See *id.* at 143. The appearance of corruption in campaign finance cases plays a somewhat different role. There, the appearance serves more as a proxy for the evidentiary difficulty in proving actual corruption than it does as a basis itself for the establishment of a constitutional right. I address this evidentiary difficulty, and argue against reliance on the appearance of corruption, in a separate article. See generally Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, S. CAL. L. REV. (forthcoming 2005), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=621321](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=621321) (last visited Nov. 19, 2004).

26. See Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 927–28 (2001).

27. See *infra* note 56 and accompanying text.

28. This point itself is controversial. See 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* 283, 283–84 (David Ryden ed., 2d ed. 2002).

29. See HASEN, *supra* note 2, at 24.

30. U.S. CONST. art. I, § 2.

31. U.S. CONST. amend. XIV.

32. See HASEN, *supra* note 2, at 24.

The Court itself is looking for connections among its election law cases. For example, in *Vieth v. Jubelirer*<sup>33</sup>—the Supreme Court’s most recent foray into the partisan gerrymandering question—Justice Stevens looked to the racial gerrymandering cases,<sup>34</sup> while Justice Kennedy suggested that the political patronage cases might be fertile ground for lessons.<sup>35</sup>

Because election law cases raise common questions about the law governing the processes by which the people choose their representative and otherwise participate in political decisionmaking, it makes sense to think of diverse election law cases comparatively. That is not to say election law cases cannot benefit from consideration of constitutional law issues outside the election context—it is that treating an election law case simply as another constitutional case runs the risk of the Court mechanically applying constitutional doctrine without considering how the Court’s ruling will affect political rights more broadly.<sup>36</sup>

Consider the *Vieth* case again. The question before the Court was the extent to which it is impermissible for those drawing legislative district lines to take voters’ party identification into account in drawing lines for partisan advantage.<sup>37</sup> Doctrinally, the issue has been couched by the Court since *Davis v. Bandemer*<sup>38</sup> in 1986 as one involving the Fourteenth Amendment’s Equal Protection Clause.<sup>39</sup> But how much does equal protection law generally tell us about how the Court should resolve such claims? As the Court’s *six* opinions in the case reveal, very little indeed.<sup>40</sup> Nor does Justice Kennedy’s call to look at First Amendment precedents to resolve partisan gerrymandering cases seem likely to be successful.<sup>41</sup>

Instead, lessons for how to resolve partisan gerrymandering claims are more likely to be found in Voting Rights Act cases and even the Supreme Court’s campaign finance

33. 124 S. Ct. 1769 (2004).

34. *See id.* at 1802–03 (Stevens, J., dissenting).

35. *See id.* at 1796–97 (Kennedy, J., concurring).

36. *See* Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1515–16 (2003) (discussing whether election law exceptionalism is justified); Gerken, *supra* note 19 at 741–48 (discussing whether election law exceptionalism is justified); Pamela S. Karlan, *Constitutional Law, the Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1188 (1999). Karlan states that:

My sense is that the emergence of courses like the ones the contributors to this symposium teach is a good thing. But in addition to teaching students how to think about problems related to the political process they may encounter as law clerks, litigators, or policymakers, the major virtue of treating the law of the political process as a coherent subject lies in enabling scholars and students to see connections among the various pieces of constitutional law and statutes that influence how our politics is conducted. It would be unfortunate for everyone concerned if legal regulation of the political process were to hive off completely from constitutional law and the two bodies were to evolve separately to the point where there is little possibility of continued cross-fertilization. Just as other aspects of constitutional law cannot be fully understood divorced from the political institutions that produce them, so too our political institutions and practices cannot be understood in a vacuum: they are a piece of constitutional law.

*Id.* (footnotes omitted).

37. *See Vieth*, 124 S. Ct. at 1770.

38. 478 U.S. 109 (1986).

39. *See id.* at 111.

40. *See Vieth*, 124 S. Ct. at 1770–73.

41. *See* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 635–36 (2004); Richard H. Pildes, *Foreword—The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 39 n.55 (2004).

cases.<sup>42</sup> Despite the fact that partisan gerrymandering fits doctrinally in the equal protection box, Voting Rights Act cases involve issues of Congressional intent and statutory interpretation, and campaign finance cases raise First Amendment freedom of speech and association issues, consider the following questions common to these three areas: (1) To what extent may incumbents pass laws likely to benefit their own reelection in the name of promoting equality or other democratic values?;<sup>43</sup> (2) In evaluating legal challenges, should courts consider the role that groups, rather than individuals, play in the allocation of political power?; and (3) When is it appropriate for courts to defer to the political processes rather than set the ground rules for electoral competition?

To ask these questions is not to answer them, of course. But to ignore the benefits of learning across similar cases seems foolish. Certainly *McConnell v. Federal Election Commission*,<sup>44</sup> a campaign finance case decided primarily on First Amendment grounds,<sup>45</sup> tells us more about how the Court should decide *Vieth* than does *Lawrence v. Texas*,<sup>46</sup> the homosexual sodomy case decided on equal protection grounds.<sup>47</sup>

Finally, while I agree with Professor Nagle that a unified theory requires adoption of some normative vision for election law, the decision to *avoid* a uniform theory raises the same normative pitfalls. To use Professor Nagle's own example, one could view campaign finance issues primarily through the lens of First Amendment free speech cases.<sup>48</sup> But a free speech focus creates its own normative agenda—an agenda that would lead the Court to strike down most campaign finance regulations.

My point here is not to argue whether it is better for the Court to strike down or uphold campaign finance regulation, but rather to illustrate the benefits of a unified theory. I could imagine someone crafting a “libertarian” election law with a unified theme of the Court crafting election law case outcomes to maximize individual rights and liberties. This unified theory would be similarly deregulationist with respect to campaign finance as a First Amendment approach. But it would have the added benefit of allowing the Court to decide other election law cases outside the First Amendment area in a consistent manner.

#### IV. FUENTES-ROHWER AND THE SECOND-BEST THEORY OF ELECTION LAW: A COURT OF BOLDNESS OR A COURT OF HUMILITY?

Professor Fuentes-Rohwer, while finding much in my book with which he agrees, contemplates whether the Supreme Court should exit the political thicket entirely. After noting my confession that I “no longer trust the Court to make contested value

42. See generally Heather Gerken, *Lost in the Political Thicket: The Court, Election Law, and Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004) (drawing connections among these cases).

43. Professor Pildes notes Justice Scalia's strong concern about incumbency protection in the campaign finance context but not in the partisan gerrymandering context. See Pildes, *supra* note 41, at 65.

44. 540 U.S. 93 (2003).

45. *Id.* at 134–185.

46. 539 U.S. 558 (2003).

47. See *id.* at 578–79. I have, however, noted a connection between *Vieth* and *Lawrence*: Justice Kennedy's willingness to change constitutional standards with changing social values. See Hasen, *supra* note 41, at 640.

48. Nagle, *supra* note 1, at 42.

judgments in political cases,”<sup>49</sup> he suggests judicial abdication is the natural ending point of my analysis: “If we don’t trust the Court to decide questions involving contested equality values, why should we trust the Court to make *any* determinations at all?”<sup>50</sup> Moreover, he believes that even my prescription for a minimalist Court that involves itself only in matters of core equality rights would eventually lead to the re-emergence of the Court as Platonic guardian of the political process.<sup>51</sup>

Professor Fuentes-Rohwer’s position has much to commend it, but he is fighting the wrong battle. As an academic exercise, it is surely fair game to note, as Professor Farber wrote in a recent review of my book, that “a vision of electoral law that questions the legitimacy of [the one person, one vote] rule is as unsettling as a vision of discrimination law that rejects the legitimacy of *Brown [v. Board of Education]*.”<sup>52</sup> But as a matter of current Supreme Court jurisprudence, the choice is not between some intervention and no intervention. As the book demonstrates time and again, the Court is nowhere near exiting the political thicket. And since the book’s publication, the Court has decided three blockbuster election law cases: *McConnell v. Federal Election Commission*,<sup>53</sup> *Georgia v. Ashcroft*,<sup>54</sup> and *Vieth v. Jubelirer*.<sup>55</sup>

Rather, the Court faces a choice among: (1) a potentially more modest role for the Court in the electoral arena as I suggest; (2) the current high level of Supreme Court intervention in the electoral arena; and (3) a markedly more aggressive role as set forth by those in the structuralist, or political markets, camp of election law scholars.<sup>56</sup>

There is, of course, no guarantee that a Court that has self-consciously and publicly committed to my “minimalist”<sup>57</sup> election law agenda would not inevitably slip into activism; but surely it will be harder to intervene actively than under current

49. Fuentes-Rohwer, *supra* note 1, at 29 (quoting HASEN, *supra* note 2, at 154).

50. *Id.* at 29; see also *id.* at 30 (“[I]f the Court is simply ‘making stuff up’ as it goes along, why not simply throw our hands up in the air and give up, exhort a return to the non-justiciability days of *Colegrove [v. Green]*?”).

51. Fuentes-Rohwer, *supra* note 1, at 35.

52. Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 383 (2004) (footnote omitted). Note, however, that while I *question* the legitimacy of *Reynolds* (though not *Baker*), I do not necessarily *reject* it. See HASEN, *supra* note 2, at 164. The aspect of *Reynolds* I question most is the strict application of the one person, one vote principle, particularly on the local level. See *id.* at 56–60 (questioning whether the Court should have adopted Justice Stewart’s unmanageable alternative). I do not now question the right to a roughly equally weighted vote, a right that *Reynolds* itself helped to create. See *id.* at 82–83.

Farber expresses some ambivalence on the structuralism question. See Farber, *supra*, at 376. However, Farber makes an important point consistent with the rights-based approach: “[C]ourts should require evidence that a practice has actually caused identifiable harm that a court can remedy. . . . If the court cannot identify a specific harmful impact, it is likely to be sucked into a morass of speculation about systematic political effects.” *Id.* (footnote omitted).

53. 540 U.S. 93 (2003).

54. 539 U.S. 461 (2003).

55. 124 S. Ct. 1769 (2004).

56. See Pildes, *supra* note 41; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998); see also Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARV. L. REV. 684, 690 (2002). For a sustained critique of Issacharoff and Pildes, see HASEN, *supra* note 2 at 143–55 (2003); see also Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 662 (2002); Lowenstein, *supra* note 28, at 299–301; Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1600 (1999).

57. Fuentes-Rohwer, *supra* note 1, at 29.

jurisprudence that provides little such constraint. Additionally, the structural/political markets approach is an invitation to judicial command-and-control of the political process.

Contrast my minimalism with the hubristic approach of the structuralists. Professor Fuentes-Rohwer mentions the important *Vieth* case, and it is here that structuralists waged their strongest battle yet to move the Court away from a rights-based approach and toward a focus on assuring an appropriate level of political competition.<sup>58</sup> In the end, the Court—by accident, rather than by design—reached the right result.

*Vieth* was a 4-1-4 split decision. Four Justices issued a plurality opinion stating that partisan gerrymandering claims should be considered nonjusticiable because of the absence of a “judicially manageable” standard for separating permissible from impermissible consideration of party affiliation of voters in the redistricting enterprise.<sup>59</sup> Four Justices would have adopted one of three invigorated tests to police partisan gerrymandering.<sup>60</sup> Justice Kennedy, writing only for himself, cast the decisive vote on the Court. He agreed with the four dissenters that partisan gerrymandering cases remain justiciable, but he also agreed with the four Justices in the plurality that the *Vieth* plaintiffs’ claim must fail.<sup>61</sup> According to Justice Kennedy, no one has yet devised an acceptable test to separate out unconstitutional partisan gerrymandering from constitutionally permissible consideration of voters’ party information in redistricting.<sup>62</sup>

As I have explained at greater length elsewhere,<sup>63</sup> the *Vieth* result is perfectly defensible (though Justice Kennedy’s suggestions of where to find a workable partisan gerrymandering standard are a likely dead end).<sup>64</sup> No social consensus existed in 1986, when the Court decided *Bandemer*, or exists today on the extent to which it is permissible to take voter party identification information into account in drawing district lines. Justice Kennedy’s crucial fifth vote in *Vieth* serves that same backstop purpose as *Bandemer* has served: for the foreseeable future, partisan gerrymandering claims will fail. But Justice Kennedy’s vote allows the courts to reconsider the question periodically as circumstances and perhaps, attitudes, change.

Professor Fuentes-Rohwer incorrectly suggests that a social consensus against partisan gerrymandering exists, at least when measured through elite opinion.<sup>65</sup> This elite opinion criticizes “partisan gerrymandering” in the abstract—as did the *Vieth* plurality, it is worth noting<sup>66</sup>—and, so far as I can tell, it offers no meaningful standard

58. See generally Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 56 (advocating aggressive judicial intervention to prevent gerrymandering).

59. See *Vieth*, 124 S. Ct. at 1792 (plurality).

60. See *id.* at 1799 (Stevens, J., dissenting); *id.* at 1815 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 1822, 1828 (Breyer, J., dissenting).

61. See *Vieth*, 124 S. Ct. at 1794–97 (Kennedy, J., concurring).

62. See *id.* at 1796 (Kennedy, J., concurring) (“Because, in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants cannot establish that the alleged political classifications burden those same rights.”).

63. See generally Hasen, *supra* note 41.

64. See *Vieth*, 124 S. Ct. at 1793.

65. See Fuentes-Rohwer, *supra* note 1, at 32 (“Could it really be said that a social consensus against the gerrymander does not exist? One would be hard-pressed to find a newspaper editorial in support of the egregious gerrymanders of recent years, as seen in Georgia, Michigan, Pennsylvania and Texas, to name a few.”).

66. *Vieth*, 124 S. Ct. at 1785 (plurality).

for separating permissible from impermissible consideration of voter identification information in districting. Moreover, the issue does not appear to be on the public's radar screen. If, indeed, there is such social consensus against partisan gerrymandering, why do we not see more attempts in the twenty-four states with the initiative process to put limitations on partisan gerrymandering, such as a requirement of non-partisan redistricting commissions?

But the structuralists would not stop at intervention by the Court to end *partisan* gerrymandering. Indeed, a great debate among structuralists today concerns the best way for the Court to use the Constitution to prohibit the practice of *bipartisan* gerrymandering. The discussion of *bipartisan* gerrymandering takes for encouragement some structural language in Justice Breyer's dissenting opinion in *Vieth*,<sup>67</sup> as well as a footnoted statement in Justice Souter's dissenting opinion (joined by Justice Ginsburg) noting that the Justice is "intrigued" by the political markets approach to resolving election law disputes, and might eventually consider constitutional challenges to bipartisan gerrymanders.<sup>68</sup>

The structuralists are forthright that bipartisan gerrymandering—where legislators create safe districts for both parties, often proportional to their strength in the legislature—imposes no particular harm on any identifiable group of voters. Professor Gerken calls the claim against bipartisan gerrymandering a "diffuse structural harm": "Such an injury implicates an interest shared equally by all voters, such as a desire for healthy democratic competition or an interest in the values the state privileges in drawing district lines."<sup>69</sup> Similarly, Professor Pildes notes:

Bipartisan gerrymandering is emerging as a new, equally serious but different kind of threat to American democracy. . . . Unlike partisan gerrymandering, bipartisan gerrymandering does not represent a problem of skewed representation; [if Democratic registrants and voters are 60% of a state,] 60% of the seats will be controlled by Democratically-dominated election districts. The concern about bipartisan gerrymandering is that it achieves representational parity and the cost of eliminating competitive elections.<sup>70</sup>

In Chapter Five of my book, I detail a number of arguments against judicial intervention to prevent bipartisan gerrymandering including: (1) there is no strong evidence that gerrymandering, rather than other factors, is primarily responsible for the great incumbency advantage (consider, for example, the incumbency advantage enjoyed by governors, who are elected statewide); (2) it is not clear why "political competition"

67. See *id.* at 1825 (Breyer, J., dissenting).

68. See *id.* at 1819–20 nn. 5, 6 (Souter, J., dissenting).

69. See Gerken, *supra* note 43, at 522.

70. Pildes, *supra* note 41, at 62–64. But see Farber, *supra* note 52, at 377 ("[T]he victims [of bipartisan gerrymandering] are independent voters—a significant share of the population—who have effectively been disenfranchised.") Farber of course does not mean that such voters are literally disenfranchised. He means they are "stripped of meaningful participation in the electoral process." *Id.* Although Professor Farber concludes that "judicial intervention seems warranted" to cure bipartisan gerrymandering, he favors an approach that "direct[s] courts to remedy identifiable group or individual harms." *Id.* Unfortunately, Professor Farber offers no guidance for how he would construct a remedy to ensure "meaningful participation" by independent voters or even how to measure such harm. See *id.*

should be the prime normative criterion under which the Court should craft its election rules; (3) it is not clear that bipartisan gerrymanders lead to a lack of meaningful political competition—there is more than ample political competition *within* state legislatures and Congress, which many view as more polarized than ever; (4) there is a danger in a court imposing a “one size fits all” solution for a perceived political problem, which prevents state experimentation and different political arrangements that may work well in particular jurisdictions.<sup>71</sup>

Structuralist scholarship continues to frustrate me because, among other reasons, it spends so little time *justifying* Court intervention to “cure” the “problem” of bipartisan gerrymanders. But the scholarship has improved on its consideration of the question of *remedy*. Professor Pildes, for example, notes that “the remedial problem is genuinely difficult.”<sup>72</sup> And both Professor Pildes and Professor Gerken seem to reject Professor Issacharoff’s earlier proposition,<sup>73</sup> criticized at length in the book’s Chapter Five, that the Supreme Court declare all legislative districting conducted by elected officials presumptively unconstitutional.<sup>74</sup>

Professor Pildes notes that Professor Issacharoff’s solution “might have taxed the institutional limits of even the Warren Court.”<sup>75</sup> He also notes it could be “self-defeating,” “given how easily politicians can design purportedly independent institutions that still enable politicians to have indirect influence or control.”<sup>76</sup> Professor Gerken similarly notes that if Professor Issacharoff’s prescription were followed, we can be confident that the emergence of independent commissions “would likely generate a whole new line of scholarship surrounding what kind of districting plans best serve our democratic aims. [And] independent commissions would also raise a different set of concerns about the proper policing of such intermediary institutions....”<sup>77</sup>

Professor Gerken has not yet had the opportunity to offer an alternative remedial model the Court to address for the bipartisan gerrymandering issue.<sup>78</sup> Professor Pildes offers a somewhat more promising route than Professor Issacharoff. He suggests that the Court should issue a vague pronouncement on the impermissibility of bipartisan gerrymandering, which would lead politicians to limit their most egregious gerrymanders so as to avoid litigation and the potential for a court-imposed districting plan.<sup>79</sup>

This suggestion echoes my call for the Supreme Court to use “judicially unmanageable standards” when imposing a new political equality right.<sup>80</sup> Judicial

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71. See generally HASEN, *supra* note 2, at 138–56.

72. Pildes, *supra* note 41, at 66.

73. See Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 56, at 601.

74. See *id.*

75. Pildes, *supra* note 41, at 75 n.198.

76. *Id.*

77. Gerken, *supra* note 41, at 539. It is therefore surprising that Professor Gerken concludes that the move to independent commissions would “extricate the *Court*,” from these problems. See *id.* It sounds as though courts would need to adjudicate such questions over the commissions.

78. See *id.* (suggesting, without elaboration, that “courts might limit their intervention to more tractable, readily identifiable problems, like entrenchment”).

79. Pildes, *supra* note 27.

80. See HASEN, *supra* note 2, at 73–75.

unmanageability allows the Court to gather information from lower courts and the political process before locking in a particular rule to be applied nationwide. Professor Pildes similarly hopes that vague rules create incentives for political actors to avoid uncertainty.

I am, however, less sanguine than Professor Pildes that vague rules will create enough incentives for political actors to rein in their self-interested behavior. He points to how unconstitutional gerrymandering cases under *Shaw* seemed to have dried up following the 2000 census, and attributes this to legislators' new understanding of a requirement for reasonable compactness in district shapes emanating from the vague law in the *Shaw* line of cases.<sup>81</sup> I have offered a different explanation, however, for the demise of the *Shaw* claim, which I had predicted in my book: "[R]ecent Court interpretations of the Voting Rights Act likely will deter the Justice Department from pressuring states to create more majority-minority districts, thereby lessening the number of successful *Shaw* claims."<sup>82</sup> More evidence is needed to show that it is the vague standard of *Shaw*, rather than an end to pressure from the federal government, that has stemmed the tide of *Shaw* cases.

Or take another example of lack of legislative self-control. In Illinois, if the state legislature cannot agree on a legislative districting plan, redistricting is referred to a commission containing four Democrats and four Republicans.<sup>83</sup> In the event a majority of the commission cannot agree on a plan, a lottery is held, and one member of the commission is given a tie-breaking vote.<sup>84</sup> One might expect that this procedure would be an external constraint to induce compromise. In fact, compromise does not result: in each of the last three decades, there has been a lottery—not to mention litigation over the system itself.<sup>85</sup>

Still Professor Pildes's proposed remedial solution is indeed a step in the right direction. Modesty on the part of structuralists, like modesty on the Court, is commendable indeed. On this point, I am sure I would find Professor Fuentes-Rohwer heartily agreeing.

#### V. CHARLES ON CORE AND CONTESTED EQUALITY RIGHTS: WHAT ROLE FOR THE SUPREME COURT IN ELECTION LAW CASES?

Professor Nagle does not say too much about my normative approach, beyond noting that there may be clashes among my three core principles of political equality.<sup>86</sup> I readily concede the point, and these are the kinds of cases, as I recognize in the book,<sup>87</sup> that are the most difficult and require a careful balancing of rights and interests. Professor Fuentes-Rohwer similarly focuses on other issues. But it is here that Professor Charles puts his energies, and it is to this issue I now turn.

81. *Id.*

82. HASEN, *supra* note 2, at 142; *see also id.* at n.18 (crediting Dan Lowenstein with this observation).

83. *See* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW—CASES AND MATERIALS 323 (3d ed. 2004).

84. *See id.*

85. *See id.* at 323–24.

86. Nagle, *supra* note 1, at 38–39.

87. *See* HASEN, *supra* note 2, at 102–03.

Professor Charles raises two related concerns. First, he contends that my core-contested rights distinction “cannot be utilized to guide judicial review of the political process” because I do not explain “why certain rights fit into one category as opposed to another.”<sup>88</sup> Second, to the extent my categorization of core political rights depends upon social near-consensus, it “renders judicial supervision unnecessary, except perhaps to rein in jurisdictions that are outliers.”<sup>89</sup>

Thus, along the way, Professor Charles questions why I include in the core no discrimination in voting on the basis of race or ethnicity<sup>90</sup> but I don’t include in the core a right of no discrimination in voting on the basis of felon or ex-felon status,<sup>91</sup> or a right to vote in *presidential* elections,<sup>92</sup> or the right of an identifiable political minority (the Hasidim) to something akin to proportional interest representation.<sup>93</sup> During Reconstruction, Professor Charles correctly notes, there was no consensus in Southern states against discrimination in voting against African-Americans. How are we to know what is core and what is contested?

I readily admit that my book is not a tome in political theory in which I defend in detail certain timeless principles of democratic governance. “I do not claim to possess the incontrovertible Truth on political equality issues. Instead, I intend this analysis as a means of starting a dialogue about which political equality principles belong in the core.”<sup>94</sup> Moreover, I wrote the book from the position of “a citizen of the United States at the beginning of the twenty-first century.”<sup>95</sup> I welcome Professor Charles to the dialogue over which political equality principles belong in the core.

From my perspective, on the issues Professor Charles flags, it is easy to separate core from contested political equality rights through the lens of social consensus. “Today, no credible speaker in the public sphere would contend that the right to vote should be denied, for example, to African-Americans or Jews.”<sup>96</sup> But there are many who defend felon disenfranchisement laws, even against legal challenge.<sup>97</sup> Controversies during the 1990s over the appointment of Lani Guinier to the Justice Department’s Civil Rights Division show that there remains deep social division over the propriety of proportional representation in U.S. legislative bodies. And Professor Raskin has recently written a strong argument in favor of adding a right to vote for President to the U.S. Constitution,<sup>98</sup> but there does not appear yet to be much political backing for such a change.

88. Charles, *supra* note 1, at 21.

89. *Id.* at 22.

90. *Id.* at 23.

91. *Id.* at 23–24.

92. *Id.* at 21.

93. *Id.* at 23.

94. HASEN, *supra* note 2, at 81.

95. *Id.*

96. *Id.* at 82.

97. See generally Richard L. Hasen, *Ending Felon Disenfranchisement in the United States: Litigation or Legislation?*, Democratic Audit of Australia, (Sept. 2004), available at <http://democratic.audit.anu.edu.au/HasenFelonDisenfranchisementPaper.pdf> (last visited Nov. 8, 2004).

98. See generally Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004).

As a matter of personal political preference, I would very much favor an end to felon disenfranchisement (even for those currently incarcerated) as well as adoption of Professor Raskin's amendment (although I am more ambivalent about moves toward proportional representation). But the question is where such decisions should be made, in the courts or through the political process? Once the door is opened for judicial intervention, it cannot be closed. And liberal judicial activism begets conservative activism in another era. So the Warren Court begets the Rehnquist Court.

The alternative to judicial intervention is not stagnation; it is the court allowing the political process to work as it should. As Professor Karlan has detailed, a number of states are repealing or limiting their felon disenfranchisement laws.<sup>99</sup> Congress, too, could limit such laws on the state level.<sup>100</sup>

Gerrymandering provides another example. In the book, I note my agreement with the Supreme Court's decision in *City of Mobile v. Bolden*<sup>101</sup> not to create a constitutional right to proportional interest representation for minorities<sup>102</sup> (just as I noted above my agreement with the Court in *Vieth* not to create an aggressive test to police claims of partisan gerrymandering). But I also urge the Court to defer to the Congressional decision (through Section 2 of the Voting Rights Act) to create a similar right to proportional interest representation *legislatively*.

Professor Charles is right that the role I have set forth for the Supreme Court is certainly a limited one—mainly to police the outliers, like those few states by 1966 that had not eliminated poll taxes.<sup>103</sup> Professor Charles concludes that “if the purpose of judicial review of laws that affect the fundamental nature of democratic politics is to simply reinforce and ratify majoritarian norms, of what use is it?”<sup>104</sup>

Professor Charles minimizes the values of policing outliers; to those poor voters in Virginia who suffered with a state poll tax as late as 1965, I am certain Court intervention was welcome. Professor Charles also ignores the other important, yet less frequently used, role for the Court, namely, to protect the few basic rights essential to a democracy that exist beyond social consensus. To use the example I give in the book, “Imagine what I hope is a very unlikely scenario: in the ongoing ‘war on terrorism,’ public opinion shifts in a dramatic and antidemocratic fashion so that jurisdictions started passing popular laws denying the right to vote to Arab-Americans.”<sup>105</sup> I conclude that the Court “should unequivocally strike such laws down, regardless of popular opinion and regardless of the consequences for the justices on the Court.”<sup>106</sup> This is the answer to Charles's question about why the Court should have protected African-American voting rights despite white Southern opposition during reconstruction.

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99. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, Stanford Law School Public Law Working Paper No. 75 at 2, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=484543](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=484543) (last visited Nov. 8, 2004).

100. But it has not necessarily done so through the Voting Rights Act. See Hasen, *supra* note 97, at 2–3.

101. 446 U.S. 55 (1980).

102. See *id.* at 75–76.

103. See HASEN, *supra* note 2, at 74.

104. Charles, *supra* note 1, at 24.

105. HASEN, *supra* note 1, at 79–80.

106. *Id.* at 80.

In addition to these two crucial roles (policing outliers and protecting the deep core of equality rights), the Court is to play another crucial role: it must engage in careful balancing to determine when it is appropriate to defer to legislative decisions to enact certain political equality measures that clash with individual rights.<sup>107</sup>

Still, the role for the Supreme Court in election cases would be comparatively minimal: no policing of partisan (much less bipartisan) gerrymanders, no “discovered” constitutional right to proportional interest representation for certain groups, no judicial elimination of felon disenfranchisement through interpretation of the United States Constitution.

A more minimal role for the Supreme Court might be bad for election law as its own field of study (though students would appreciate a casebook under 1,000 pages!<sup>108</sup>). But it would be good for the United States and the health of its democracy.

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107. *See generally id.* at 101–37.

108. The casebook I co-edit is 1024 pages exclusive of the index and tables. LOWENSTEIN & HASEN, *supra* note 85. The other election law casebook is 1172 pages exclusive of index and appendices. SAMUEL ISSACHAROFF, PAMELA S. KARLHAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* (rev. 2d ed. 2001).

