

THE TEXAS AND PENNSYLVANIA PARTISAN GERRYMANDERING CASES

LOST IN THE POLITICAL THICKET: THE COURT, ELECTION LAW, AND THE DOCTRINAL INTERREGNUM

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During the last year and a half, the Supreme Court has issued three important election law decisions in each of election law's main fiefdoms: race and redistricting,¹ campaign finance,² and the regulation of political parties.³ Each has already been the subject of extensive analysis and critique by specialists in each area. What has been missing from the commentary thus far, including that provided in this Symposium, has been an effort to connect the dots. Thus, in keeping with the move in election law toward understanding it as a coherent field of study,⁴ this Essay claims that these three seemingly disparate

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¹ See *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498 (2003) (setting a new standard for evaluating retrogression).

² See *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003) (upholding most of the key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 18, 28, 36, 47 U.S.C.)).

³ See *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (rejecting a partisan gerrymandering claim based on Pennsylvania's congressional districts).

⁴ In recent years, scholars of the laws governing the political process have developed the subject into its own field of study. See, e.g., Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999) (discussing the various reasons why election law should be considered a distinct legal subject). The field now boasts two casebooks, SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* (2002); DANIEL H. LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW* (2d ed. 2001); at least three books on the subject, RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* (2003) [hereinafter HASEN, *SUPREME COURT*]; RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); DENNIS F. THOMPSON, *JUST ELECTIONS* (2002); an active listserv moderated by Professors Richard Hasen and Daniel Lowenstein, *ELECTION-LAW_GL*, at http://majordomo.lls.edu/cgi-bin/lwgate/election-law_gl/ (last visited Sept. 6, 2004); classes devoted to the subject at almost every major U.S. law school; and regular symposia like this one.

decisions can be understood as part of a story that began more than four decades ago, when the Court first entered the political thicket.⁵ The Court has long tried to use a conventional individual-rights framework—the bread-and-butter of legal analysis—to adjudicate what are often claims about the structure of the political process.⁶ An individual-rights framework, however, does not provide adequate analytic tools for resolving such challenges, as the Court’s most recent opinions reveal.

Although these problems have long plagued the Court’s election law jurisprudence, the cracks in the doctrinal edifice have become sufficiently apparent to prompt a number of individual Justices to call for change.⁷ And the Court as a whole seems to be in a doctrinal holding pattern, unsure of where to go next. In other words, we seem to be witnessing a doctrinal interregnum in election law.

Part I of this Essay charts the course the Court has taken thus far, exploring the connections between the Court’s three most recent election law decisions and its prior jurisprudence. It argues that, despite their many differences, each case reveals the dilemma the Court now faces in resolving what are fundamentally structural claims with an individual-rights framework.

Part II speculates on the next steps the Court will take. In doing so, it attempts to do three things. First, it sharpens the terminology deployed in the “rights-structure” debate thus far. Second, it suggests a novel reading of *Georgia v. Ashcroft*,⁸ the Supreme Court’s most recent race and redistricting case, as a bridge between the Court’s prior strategy for adjudicating vote-dilution claims—policing substantive outcomes—and a more process-oriented approach that deploys a variant of the minority veto. Finally, the Essay closes by reflecting on how courts might use their regulatory powers to create incentives for other institutional actors to work toward improving the structural health of our democracy.

⁵ See *Baker v. Carr*, 369 U.S. 186 (1962) (holding that an equal protection claim against a state for its apportionment scheme was justiciable).

⁶ For a description of a “structural approach” and its progenitors, see *infra* notes 19-34 and accompanying text.

⁷ See *infra* text accompanying note 64 (discussing the range of the Justices’ opinions in *Vieth*).

⁸ 539 U.S. 461, 123 S. Ct. 2498 (2003).

I. INTO THE WOODS

A. *Vieth v. Jubelirer: An Admission of Defeat*

The Supreme Court's most recent election law decision—*Vieth v. Jubelirer*⁹—offers the clearest evidence to date that the Supreme Court has reached an intellectual dead end in election law. There, the Court voted five to four to reject the Democrats' claim that Pennsylvania's congressional districting map—the product of a deliberate effort by the Republican-dominated state legislature to increase the number of seats the GOP held in Congress—was an illegal partisan gerrymander.¹⁰

What is most interesting about *Vieth* is not what has been reported in the newspapers: stories about a deeply divided Court and a messy set of opinions that leave the door open, but only a crack, for future partisan gerrymander claims.¹¹ *Vieth's* real significance lies elsewhere. It contains the Court's most public acknowledgment to date of the problems it routinely encounters in adjudicating election law claims.¹²

⁹ 124 S. Ct. 1769 (2004).

¹⁰ The term "partisan gerrymander" usually refers to efforts by one party to undermine the voting power of the other—to dilute the other party's votes—by drawing district lines strategically. Partisan gerrymandering usually involves concentrating members of the other party in a single district so their votes are wasted (packing), scattering one's opponents across many districts so their votes are submerged (cracking), and/or placing two incumbents from the same party in the same district (pairing). Throughout this Essay, I use the term in its conventional sense, although I should note that Justice Stevens has tried to recast the partisan gerrymander into a quasi-*Shaw* injury. See *infra* text accompanying notes 91-125 (commenting on the dissenting opinion of Justice Stevens).

¹¹ See, e.g., Charles Lane, *Supreme Court Upholds GOP Redistricting in Pa.*, WASH. POST, Apr. 29, 2004, at A03 ("A deeply divided Supreme Court yesterday upheld a redistricting plan that sought to give the Republican Party an edge in races for Pennsylvania's 19 congressional seats but refused to close the door on court challenges to such 'partisan gerrymandering' in future cases."); David E. Rosenbaum, *Justices Bow to Legislators in Political Gerrymander Case*, N.Y. TIMES, Apr. 29, 2004, at A22 ("But the court, in a 5-to-4 decision, left open the possibility that someday a case of gerrymandering might arise that was so egregious that it violated the Constitution.")

¹² The Court's summary affirmance in *Cox v. Larios*, 124 S. Ct. 2806 (2004), provides further evidence of the Court's dilemma. *Cox* affirms a lower court's decision to strike down a districting plan as a violation of one person, one vote. Although the plan fell well within the accepted standard for population deviations usually allowed under that doctrine, the district court refused to accept them because they stemmed from efforts to protect incumbent seats and, more significantly for these purposes, protected only *Democratic* incumbents. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347 (N.D. Ga. 2004) (per curiam) (three-judge panel). While one ought not read too much into a summary affirmance, *Cox* is certainly in some tension with the plurality's decision in *Vieth*

In *Vieth*, the Democratic Party alleged that the Republican-controlled state legislature had violated the Equal Protection Clause by drawing federal congressional districts so as to ensure that Republicans won a disproportionate share of seats in that closely divided state.¹³ The Democrats' claim was straightforward: the Republicans drew bizarrely shaped districts, including one shaped like a dragon,¹⁴ to win two-thirds of the state's nineteen congressional seats even though Republicans make up about half of Pennsylvania's voters.¹⁵

In ruling on the Pennsylvania map, the Justices found themselves all over the intellectual map. As a result, the Court split dramatically in adjudicating the Democrats' claim. In an opinion written by Justice Scalia, four Justices pointed to the absence of manageable standards for resolving partisan gerrymander claims and argued that the Court should get out of the business of adjudicating such claims altogether.¹⁶ Four dissenters thought the Court should intervene but could not agree upon how to do so.¹⁷ And Justice Kennedy, in a remarkably forthright concurrence, admitted that he had no idea how to adjudicate a partisan gerrymander claim but was unwilling to give up on the enterprise entirely.¹⁸

We should not be surprised that *Vieth* caused the Justices so many headaches. Partisan gerrymander claims do not fit into a traditional individual-rights framework. An individual-rights framework is suitable for addressing a concrete and personal harm, like the disenfranchisement of a voter blocked from the polls by an illegal tax or literacy test. In a partisan gerrymander case, however, no individual has been denied the right to vote; the claim is about who wins, not who votes.

and with the Court's one person, one vote precedent. Further, as two contributors to this Symposium note, it suggests that the Court continues to struggle with the problem of partisanship even outside the partisan gerrymander context. See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 564-69 (2004) (discussing second-order judicial review).

¹³ *Vieth*, 124 S. Ct. at 1773-74 (plurality opinion).

¹⁴ *Id.* at 1812 (Stevens, J., dissenting).

¹⁵ *Id.* at 1805 (Stevens, J., dissenting).

¹⁶ *Id.* at 1778 (plurality opinion).

¹⁷ See *id.* at 1799 (Stevens, J., dissenting) (recasting the political gerrymander as a *Shaw*-like injury); *id.* at 1815-17 (Souter, J., dissenting) (arguing that the *McDonnell Douglas* summary judgment standard should be used as a model for a new political gerrymandering test); *id.* at 1822-27 (Breyer, J., dissenting) (describing an approach to partisan gerrymandering that requires a broad examination of the political dynamics of an electoral scheme).

¹⁸ *Id.* at 1792-99 (Kennedy, J., concurring).

Nor could one imagine an individual “right” to vote for a winner. In our system *every* district contains winners and losers; some Democrats live in predominantly Republican districts, and vice versa.

The essence of a partisan gerrymander claim is not that one’s preferred candidate *lost*. Rather, it is that candidates from the other party were, on average, more likely to succeed than those from one’s own. To resolve *that* claim, one has to make a judgment about what constitutes a “fair” electoral scheme, i.e., how legislative power ought to be divided among voters. Should the group that won fifty-one percent of the vote wield all of the legislature’s power and thus govern without impediment? Should minorities get some share of the legislative seats and, if so, how large a share? A proportional number? Enough seats to influence legislative outcomes? And which types of minorities ought to count for these purposes? Should we worry only about the electoral fate of discrete and insular minorities, like African Americans? Or should the court be equally solicitous of the fate of the major political parties? In short, to resolve a partisan gerrymander case, one must decide how to structure the election process—how to “regulate the institutional arrangements within which politics is conducted.”¹⁹ Talk of individual rights does not fully capture what is at stake in these cases.

¹⁹ 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); see also Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998) (contrasting “individualistic conceptions of harm” with “questions about the essential political structures of governance”); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (noting that election law scholarship has moved “away from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements”).

Samuel Issacharoff and Richard Pildes have led the charge in favor of a structural analysis of election law cases. See Issacharoff & Pildes, *supra*, at 646 (analogizing the democratic process to a market). They have been joined by a number of scholars, including Richard Posner. See POSNER, *supra* note 4, at 244-46 (explaining that political markets have the same basic constraints and provide the same basic incentives as economic markets). The antistructure camp also includes scholars of many stripes. See, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 168-211 (2001) (discussing judicial maintenance of political institutions); HASEN, SUPREME COURT, *supra* note 4, at 138-56 (advocating that the court system focus on rights over structure); Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1590 (1999) (condemning a “structural approach” that “would lead courts down a slippery slope of inappropriate intrusiveness, while locking in a theory of political competition that is not fundamental to the proper working of a democracy”); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, in THE U.S.

While Justice Kennedy's opinion acknowledging the difficulty of adjudicating a partisan gerrymander claim²⁰ evoked howls of protest from Justice Scalia,²¹ it ought to generate some sympathy for his dilemma. It is hard to figure out what is "fair" or "equal" in districting without speaking in structural terms. Any such conclusion would require a theory of representation, an idea about how a healthy democracy is supposed to function.²²

Consider just one example: the division among the dissenting Justices as to whether an illegal partisan gerrymander could be established by reference to a single district. Justice Stevens, for example, argued that the strongest claim presented in the case was that of an individual voter in a district drawn for partisan purposes. In Stevens's view, "the grotesque configuration of that district itself imposes a special harm on the members of the political minority residing [there]"—a "representational harm" akin to that recognized in *Shaw v. Reno*.²³ Justice Souter similarly sought to "concentrate[] as much as possible on suspect characteristics of individual districts instead of state-wide patterns."²⁴ Justice Breyer, in contrast, proposed a standard that hinged upon statewide election results: whether the party that garnered a majority of the votes could win a majority of seats.²⁵

Lurking beneath the surface of this disagreement is a debate about the nature of the harm. Justices Stevens and Souter were pushing for an individualist conception of the harm: the inadequate representation suffered by a voter in a single district²⁶ or evidence that individual voters were intentionally moved in and out of districts be-

SUPREME COURT AND THE ELECTORAL PROCESS 245, 264 (David K. Ryden ed., 2000) (arguing that "using any political theory as a guide is the wrong way to decide cases").

²⁰ See, e.g., *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring) ("Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.").

²¹ See *id.* at 1790 (plurality opinion) ("The first thing to be said about Justice Kennedy's disposition is that it is not legally available.").

²² As Justice Kennedy himself noted, resolving a partisan gerrymander case would require a "substantive definition of fairness in districting." *Id.* at 1793.

²³ *Id.* at 1807 (Stevens, J., dissenting); see also *Shaw v. Reno*, 509 U.S. 630, 647-48 (1993) (asserting that racial gerrymanders harm individuals by perpetuating notions that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidate at the polls").

²⁴ *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting).

²⁵ *Id.* at 1828 (Breyer, J., dissenting).

²⁶ *Id.* at 1807 (Stevens, J., dissenting).

cause of their political affiliation.²⁷ It is not surprising, then, that Justice Stevens invoked the invidious intent strand of the *Shaw* cases,²⁸ and Justice Souter looked to the *McDonnell Douglas* burden-shifting framework, which is designed to smoke out discriminatory intent in employment discrimination cases.²⁹ Conceptualizing the harm as one involving intent—treating an individual differently because of her group membership—is consistent with an individualist understanding of the harm, the type of personal injury courts routinely adjudicate.³⁰ On such a view, we do not need to have a theory of how we ought to distribute political power among groups; we simply need to know that the state has injured a single individual based on an improper motive.³¹

²⁷ *Id.* at 1819 (Souter, J., dissenting).

²⁸ *See, e.g., id.* at 1810 (Stevens, J., dissenting) (“If . . . the sole justification for [the district’s] bizarre shape[] was a purpose to discriminate against a political minority, that invidious purpose should invalidate the district.”).

²⁹ *See, e.g., id.* at 1817 (Souter, J., dissenting) (advocating the adoption of “a political gerrymandering test analogous to [the employment discrimination] summary judgment standard” that would “concentrate[] as much as possible on suspect characteristics of individual districts instead of state-wide patterns” (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (per curiam))).

³⁰ *See* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2507 (1997) (“[A]n intent standard emerges out of more conventional individual-rights adjudication contexts.”). Intent claims can be structural as well. *See infra* text accompanying notes 91-97 (discussing the types of suits that might be brought under the rubric of “partisan discrimination”).

³¹ For now, I leave aside the difficulty that those endorsing a purely individualist approach to the partisan gerrymander would encounter in describing the injury in sufficiently concrete terms to confer standing, as both Justices Stevens and Souter have explored that problem in their dissents to the line of cases begun in *Shaw v. Reno*, 509 U.S. 630 (1993). *See* *Bush v. Vera*, 517 U.S. 952, 1045-46 (1996) (Souter, J., dissenting) (arguing that *Shaw v. Reno* vindicates only generalized interests); *Shaw v. Hunt*, 517 U.S. 899, 921-22 (1996) (Stevens, J., dissenting) (criticizing *Shaw v. Reno* for its failure to identify a discrete injury). I take it that Justice Stevens’s response here would be that, as long as *Shaw v. Reno* is good law, he need not question the existence of an individual injury. *See Vieth*, 124 S. Ct. at 1807 (Stevens, J., dissenting) (“The risk of representational harms identified in the *Shaw* cases is equally great, if not greater, in the context of partisan gerrymanders.”); *see also infra* text accompanying notes 91-125 (analyzing Justice Stevens’s *Vieth* dissent). And Justice Souter explicitly acknowledges that his test is designed to identify—and prevent—use of the *tools* commonly deployed in gerrymandering without adopting a “full-blown theory of fairness” for measuring dilution itself. *Vieth*, 124 S. Ct. at 1821 (Souter, J., dissenting). He thus envisions his test as a proxy for identifying the districting techniques associated with egregious partisan gerrymanders, not a measure of the gerrymander itself. *Id.*; *see also infra* note 34 (discussing Justice Souter’s dissent).

Justice Breyer, in contrast, conceived the harm as one involving vote dilution—a numeric majority unable to wield majority power—and thus properly sought a statewide measure.³² After all, dilution cannot be established by reference to a single district.³³ As noted above, the mere presence of a voter in a district where she cannot elect a candidate of choice is not sufficient to establish unfairness of any sort. To determine whether the voter has been treated “unfairly,” we need to know whether other members of her group have been systematically treated unfairly—something that requires a statewide (or at least region-wide) perspective of the sort Breyer endorses.³⁴ And any such assessment of “fairness” requires a yardstick of some sort—a theory of how much power *ought* to be accorded to members of an electoral group within a democratic institution—which returns us to the need to think structurally about what constitutes a healthy democratic process.

B. *The Past As Present*

The problems that Justice Kennedy and the dissenters encountered in *Vieth* are hardly new. Indeed, *Vieth* is part of a pattern that dates back to the days of the Warren Court. Four decades ago, the Warren Court entered what Justice Frankfurter famously called the “political thicket.”³⁵ For decades, state legislatures had refused to redraw electoral districts, even as the census showed large shifts in the

³² See *Vieth*, 124 S. Ct. at 1828 (Breyer, J., dissenting) (invoking a statewide assessment of the harm).

³³ For a more in-depth exploration of these issues, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665 (2001). Similarly, Justice O’Connor noted in *Ashcroft* that any assessment of retrogression, a form of vote dilution, “must encompass the entire statewide plan as a whole.” *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2511 (2003).

³⁴ Unless, of course, Justice Souter is correct that some practices are so clearly associated with an extreme partisan gerrymander that we can simply identify those practices without making an assessment of what is “fair.” *Vieth*, 124 S. Ct. at 1815 (Souter, J., dissenting). On this view, the courts would adjudicate only those partisan gerrymanders so extreme that, as with the early one person, one vote cases, see *infra* notes 45-46 and accompanying text, an individual injury can be identified no matter what one’s views on the appropriate distribution of power. See *supra* text accompanying notes 19-22 (attributing the difficulty involved in resolving gerrymandering cases to the lack of individual harm). Given Justice Scalia’s insistence that even the principle of majoritarianism is contestable as a baseline for assessing how power is divided, *Vieth*, 124 S. Ct. at 1782 (plurality opinion), it is hard to see precisely how such a consensus would emerge.

³⁵ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

population from the farm to the city. The result was dramatically overpopulated urban districts, with populations ten or twenty times those of rural districts. It is not hard to grasp why state legislators refused to fix the problem: most represented rural districts, and redrawing the lines would mean that some of them would be out of a job.

Faced with constitutional challenges to such egregious malapportionment, the Supreme Court initially refused to adjudicate the claim on the ground that, in Justice Frankfurter's words, this was "not a private wrong, but a wrong suffered by [the state] as a polity."³⁶ The claim was not that any individual was denied the vote, but that the structure for aggregating votes favored one group over another. In Frankfurter's views, this egregious malapportionment was an injury to democracy itself—on the "state as a state"³⁷—an injury too diffuse for any individual to claim standing to challenge it.

In 1962, the Court famously changed course in *Baker v. Carr*, over Justice Frankfurter's strenuous objections. (Some attribute his stroke that Term to the Court's switch.)³⁸ There the Court announced that malapportionment claims were justiciable under the Equal Protection Clause.³⁹ Over the course of the next decade, the Court developed what was to become the principle of one person, one vote: the requirement that electoral districts contain roughly the same population.⁴⁰

Looking back at *Baker* through the lens of *Vieth*, one is struck by the terms of the debate. Justice Frankfurter insisted that one person, one vote claims were claims about democratic structures, not individual harms—"a complaint that the political institutions are awry" rather

³⁶ *Id.* at 552.

³⁷ *Baker v. Carr*, 369 U.S. 186, 227 (1962) (Frankfurter, J., dissenting).

³⁸ See, e.g., Kim I. Esler, *A Defense of Activism*, 40 N.Y.L. SCH. L. REV. 911, 920 n.25 (1996) ("Whittaker quit and Frankfurter suffered a stroke, presumably related to the stress of the defeat.")

³⁹ *Baker*, 369 U.S. at 237. For more in-depth analyses of this debate, see Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1464 (2002); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 (2003); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 105-07 (2000).

⁴⁰ Congressional districts are subject to a strict equal population requirement, allowing for almost no deviation, whereas states' districting plans are given more leeway to depart from the requirements of one person, one vote. See *Mahan v. Howell*, 410 U.S. 315, 329-30 (1973) (holding that the Virginia General Assembly's reapportionment plan was constitutional despite population disparities).

than an “infringement of an interest particular and personal to himself”⁴¹—and argued that the Court lacked the analytic tools to resolve them.⁴² Because everyone could vote, the plaintiffs’ challenges concerned the way the electoral process aggregated those votes. The Court could not resolve that challenge without deciding how to divide power among members of the majority and minority—in other words, to make a judgment about how democracy would work in Tennessee.

In response, the wily Justice Brennan, well known for his ability to piece together a majority, insisted that the Court was merely remedying *individual* injuries.⁴³ It was simply insisting that a vote in one district counted as much as a vote in another. Justice Brennan’s message to his brethren was clear: we are just adjudicating an individual right, the kind of claim we routinely resolve. *We know how to do this.*

Although the “rights-structure” debate that divided the Warren Court still generates significant heat among academics,⁴⁴ it has been all but abandoned by the Justices even as they plunge deeper into Frankfurter’s thicket. In deciding election law cases, the Court generally adheres to a traditional individual-rights structure. It follows Brennan, not Frankfurter.

The problem is that Justice Frankfurter was right. Often the Court *is* regulating the structure of the democratic process: the role political parties play, how much power minorities will wield, how much political competition there will be, and what form it will take. But the devices it is using—all pulled from the individual-rights tool box—are often ill-suited for the task. Indeed, although there was a time in which a conventional individual-rights framework at least overlapped with the types of questions the Court was adjudicating—the injuries were obvious no matter what one’s theory of democracy⁴⁵—the

⁴¹ *Baker*, 369 U.S. at 287 (Frankfurter, J., dissenting).

⁴² *See, e.g., id.* at 286-301 (Frankfurter, J., dissenting) (arguing that the Court has declined to exercise jurisdiction over cases of a political nature due to a lack of judicial standards); *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (asserting that the Court “has refused to intervene in controversies . . . because due regard for the effective working of our Government revealed [an] issue to be of a peculiarly political nature and therefore not meet for judicial determination”).

⁴³ *See, e.g., Baker*, 369 U.S. at 204, 206-08 (casting the injury as an individual harm).

⁴⁴ *See supra* note 19 (discussing scholarship debating the merits of rights-based versus structural approaches).

⁴⁵ *Cf.* Samuel Issacharoff, *Introduction: The Structures of Democratic Politics*, 100 COLUM. L. REV. 593, 596 (2000) (“[G]iven the magnitude of the malapportionment in the early one person, one vote cases, the claim of debasement of each individual voter’s stake actually made some sense.”); Samuel Issacharoff, *Judging Politics: The Elu-*

more complex, fine-grained decisions demanded of the Court today require a sharper analytic tool.⁴⁶

C. Justice O'Connor as Political Theorist

Consider *Georgia v. Ashcroft*,⁴⁷ possibly the most important voting rights case in the last decade. The decision was the latest in a series of Supreme Court decisions on racial vote dilution. States dilute minority votes by packing racial minorities in a small number of districts or scattering them across many; both techniques prevent a group from capitalizing on its voting power. It was easy to identify a concrete harm to a discrete set of individuals in the early dilution cases, where African Americans or Latinos could not elect a single candidate of their choosing.

By the time of *Ashcroft*, however, the debate was not whether African Americans could elect a candidate of their choice, but whether it was better for them to be able to elect some representatives on their own (in “majority-minority districts”) or to elect *more* representatives—perhaps even enough to ensure the Democrats a majority in the legislature—with the help of white voters. The resolution of *that* question, again, demands at least a rough theory about how a representative democracy is supposed to function. Perhaps as a result, even the famously pragmatic, fact-driven Justice O'Connor took the unusual step of citing Hannah Pitkin, the political theorist, in acknowledging that

sive Quest for Judicial Review of Political Fairness, 71 TEX. L. REV. 1643, 1652 (1993) (arguing that it was possible to fit *Baker* into an individual-rights framework as long as voters were underrepresented due to population differentials of as much as 41-to-1).

⁴⁶ Consider *Vieth*, for instance. One might think that, no matter what one's theory of democracy, an individual could establish an injury by showing that her party could not control a majority of legislative seats even if it garnered a majority of the state's votes. That, indeed, was one of the main arguments put forward by the plaintiffs in *Vieth*: democracy, if it means anything, at least requires majority rule. See Brief for Appellants at 20, *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02-1580) (arguing that “[t]he Constitution prohibits state legislatures from manipulating congressional district lines to thwart majority rule”). Yet that is precisely the premise that Justice Scalia rejects in *Vieth*. See *Vieth*, 124 S. Ct. at 1782 (characterizing the appellants' argument as being based on “the principle that groups (or at least political-action groups) have a right to proportional representation” and holding that “the Constitution contains no such principle”). If the Court cannot reach agreement on the principle of majority rule, it seems unlikely that any other theory of democracy would be deemed sufficiently “thin” to garner consensus.

⁴⁷ 123 S. Ct. 2498 (2003).

the claim was really about what *kind* of representation people deserve in a democracy.⁴⁸

Justice O'Connor's candor about the need for a political theory to resolve such questions was unusual. Judges usually maintain a studied agnosticism in election law cases, claiming that they have no theory about the way democracy should work.⁴⁹ It may seem strange that a group constantly making rules about how the game of politics is played should admit that they have no view on why we play it and how we win. But it is quite consistent with long-standing judicial norms that judges are the neutral enforcers of individual rights, not quasi-legislators making discretionary policy judgments.

It is precisely these concerns that animated the battle between Justices Brennan and Frankfurter in the one person, one vote cases, and Justice O'Connor's citation to Pitkin is just another crack in the individual-rights foundation of election law. Judges do not often think that remedying concrete individual harms requires the invocation of political theory; that may, indeed, be one of the main attractions of an individual-rights framework in their eyes. Structural analysis, in contrast, seems to demand it. Indeed, *Ashcroft* may be the decision that comes closest to embodying a structural approach even though it is cloaked in the garb of traditional voting-rights doctrine. Both the majority and dissent seemed to grasp that the distribution of legislative power hinged upon the decision and that their assessments of the case turned on a conception of democratic fairness. And Justice Souter's well-placed concerns about the manageability of Justice O'Connor's approach—whether the political theorist's notion of “influence” could be translated into manageable judicial standards⁵⁰—echoed some of the larger themes of the dissents of Justice Frankfurter and his ally, Justice Harlan, in the wake of *Baker*.⁵¹

⁴⁸ *Id.* at 2512 (“[W]hile such districts may result in more ‘descriptive representation’ because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the representation may be limited to fewer areas.” (citing HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60-91 (1967))).

⁴⁹ For further development of this idea, see Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on Bush v. Gore*, 29 FLA. ST. U. L. REV. 407, 414 (2001).

⁵⁰ *Ashcroft*, 123 S. Ct. at 2519-21 (Souter, J., dissenting).

⁵¹ Because Justice Frankfurter retired shortly after *Baker* was decided, Justice Harlan assumed Frankfurter's mantle as the primary critic of the one person, one vote doctrine. And just as Souter took the majority in *Ashcroft* to task for establishing a dilution test that “is simply not functional in the political and judicial worlds,” *id.* at 2519 (Souter, J., dissenting), Harlan repeatedly challenged the *Baker* majority's claim that

D. *Treading Water in Campaign Finance Law*

That brings us back to the last of the past year's election law trilogy, *McConnell*, where the Court upheld McCain-Feingold's sweeping campaign finance regulation.⁵² The headline in the press was that the Supreme Court delivered a stunning victory for campaign finance reform by upholding the key provisions of the Bipartisan Campaign Reform Act of 2002.⁵³ The real story was how the Court got there. The majority opinion, jointly authored by Justices Stevens and O'Connor, was mechanical and unreflective. Even ardent supporters of reform were taken aback by its sloppiness.⁵⁴

Many commentators simply dismiss *McConnell* as an example of poor judicial craftsmanship.⁵⁵ Viewed against the background of the

the lower courts could develop manageable standards in implementing the one person, one vote doctrine. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 621-22 (1964) (Harlan, J., dissenting) (stating that "cases of this type are not amenable to the development of judicial standards" and expressing concern about lower courts' ability to cultivate such standards); *Wesberry v. Sanders*, 376 U.S. 1, 21 n.4 (1964) (Harlan, J., dissenting) (noting the difficulty lower courts would encounter in developing manageable standards); *Gray v. Sanders*, 372 U.S. 368, 389 (1963) (Harlan, J., dissenting) ("What then should be the test of 'rationality' in this judicially unfamiliar field?").

⁵² *McConnell v. FEC*, 124 S. Ct. 619 (2003).

⁵³ Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 18, 28, 36, 47 U.S.C.); see also, e.g., Jim Drinkard, *Campaign Ruling Alters Political Landscape*, USA TODAY, Dec. 11, 2003, at A18 (describing *McConnell* as a "nearly complete affirmation of the law"); Jan Crawford Greenburg, *Campaign Reform Law Upheld*, CHI. TRIB., Dec. 11, 2003, at 1 ("The Supreme Court . . . upheld key provisions of a wide-ranging federal law that limits large donations from corporations, unions and individuals."); David G. Savage, *The Nation; High Court Upholds Most of Campaign Finance Law*, L.A. TIMES, Dec. 11, 2003, at A1 ("The 5-4 decision upheld nearly all of last year's broad campaign finance reform law, calling it a modest effort to ensure that the political system responds to the interests of ordinary voters, not just those with the most money.").

⁵⁴ Cf. Daniel R. Ortiz, *The Unbearable Lightness of Being McConnell*, 3 ELECTION L.J. 299, 299 (2004) (discussing the Court's "thin" reasoning in *McConnell*).

⁵⁵ The commentators on this Symposium's campaign finance panel certainly seem to agree on *McConnell*'s analytic shortcomings. See, e.g., Robert F. Bauer, *When "the Pols Make the Calls": McConnell's Theory of Judicial Deference in the Twilight of Buckley*, 153 U. PA. L. REV. 5, 30 (2004) (arguing that the Court's analysis "lacks coherence and persuasiveness" and noting the "deleterious effects . . . of a continued, albeit weakened, commitment to the *Buckley* framework"); Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 55-56 (2004) (critiquing the Court's "cursory" and "conclusory" analysis); *id.* at 58 (stating that "[t]he Court can continue to dress up *Austin*'s barometer equality argument as one based on preventing 'corruption,' but no one is fooled") (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 652 (1990)); *id.* at 61 (terming the joint majority opinion's treatment of a particular issue

Court's election law jurisprudence, however, a different story emerges. What we see in *McConnell* is a Court going through the motions, reciting doctrinal mantras without showing the slightest interest in working out their implications.⁵⁶

Robert McCloskey described conventional constitutional law debates as fights conducted by aging boxing club members, who know each move that the other will make and fight mainly in order to tire each other out.⁵⁷ The same seems true of the legal battle over campaign finance. The language of individual rights—the right to free speech and the state interest in preventing corruption—seems too abstract or too narrow to capture what is at stake here. It offers categories for labeling arguments, but does not provide much intellectual traction.⁵⁸ Perhaps, as a result, the paradigm (or at least the Court) is exhausted.

McConnell, in short, is simply a less transparent strategy for doing what Justice Kennedy acknowledged that the Court was doing in *Vieth: treading water*.⁵⁹ The Court seems to sense the imminence of a para-

“unsatisfying and disingenuous”). I also take both Spencer Overton's article and the analysis employed by Nathaniel Persily and Kelli Lammie to offer at least implicit critiques of *McConnell*. Overton attempts to hoist the Court by its own petard, arguing that if the Court means what it said in *McConnell*, it is going to have to take economic disparities seriously, something we all suspect it will not do. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004). Persily and Lammie's paper is designed to show that the Court cannot possibly mean that the appearance of corruption justifies regulation. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004).

⁵⁶ For instance, Samuel Issacharoff describes the Court as “throwing in the towel” in *McConnell*. Samuel Issacharoff, *Throwing In the Towel: The Constitutional Morass of Campaign Finance*, 3 ELECTION L.J. 259 (2004). And Daniel Ortiz argues that the Court “discarded theory in favor of saving the edifice.” Ortiz, *supra* note 54, at 300.

⁵⁷ Credit for the metaphor goes to ROBERT G. MCCLOSKEY, *THE MODERN SUPREME COURT* 291 (1972). Thanks to Sandy Levinson for enlarging upon it and calling it to my attention.

⁵⁸ See, e.g., Spencer Overton, *Judicial Modesty and the Lessons of McConnell v. FEC*, 3 ELECTION L.J. 305, 308 (2004) (arguing that “abstract phrases like ‘the free marketplace of ideas’ or ‘democratic integrity’” are easily manipulated by judges). Justice Breyer has made a similar observation:

Some argue, for example, that “money is speech”; others say “money is not speech.” But neither contention helps much. . . .

. . . And to announce that [a reduction in speech opportunities] could never prove justified in a political context is simply to state an ultimate constitutional conclusion; it is not to explain the underlying reasons.

Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252 (2002).

⁵⁹ See *supra* text accompanying note 18.

digm shift, but it is not sure where the next analytic road will lead. It is thus content with going through the motions, patching the holes in the existing foundation, holding the doctrinal edifice together a little while longer.

We are, in short, witnessing a doctrinal interregnum.⁶⁰ The Court is lost in the political thicket and, at least for a while, seems content to stay put. If the cause of the Court's dilemma is the rights-structure debate, the question is where the Court will go from here.

II. NEXT STEPS

The most obvious solution to the Court's dilemma is muddling through, a time-honored a practice in judging as it is in politics.⁶¹ But it is a costly strategy in this context. Lacking a sound framework for adjudicating political process claims, the Supreme Court's election law opinions often lack analytic coherence and thus provide little guidance to lower courts or other political actors.⁶² Worse, because an individual-rights approach does not provide an adequate mooring for the Court's opinions, it leaves open the possibility that the Justices' own political or theoretical commitments will influence outcomes *sub silentio*, leaving the Court vulnerable to the type of criticism we saw in the wake of *Bush v. Gore*.⁶³

For these reasons, incremental change is no solution. Some of the Justices themselves seem to sense this, as several are quite eager for a change. *Vieth* represents the most obvious example, with Justices Scalia and Kennedy recognizing the deficiencies in the Court's existing approach, and Justice Souter suggesting that the Court "make a fresh start."⁶⁴ But we can see similar efforts to find a new way in the other cases. In *Georgia v. Ashcroft*,⁶⁵ for instance, both the majority and the dissent were remarkably quick to adopt the newly minted coalition

⁶⁰ Or, as Hasen suggests of *McConnell*, these are "transitional case[s]." Hasen, *supra* note 55, at 57.

⁶¹ See, e.g., Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959) (describing methods of policy formulation).

⁶² See *supra* note 55 (describing the criticisms the contributors to this Symposium direct at *McConnell*).

⁶³ 531 U.S. 98 (2000). See, e.g., <http://www.the-rule-of-law.com/archive/supreme/> (statement signed by 673 law professors that "the five justices were acting as political proponents for candidate Bush, not as judges") (last visited July 13, 2004).

⁶⁴ *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1816 (2004) (Souter, J., dissenting); see also *supra* Part I.A (discussing *Vieth*).

⁶⁵ 123 S. Ct. 2498 (2003).

district theory,⁶⁶ which is quickly emerging as the new “third way” in racial redistricting.⁶⁷ And if we need proof that *Buckley v. Valeo*⁶⁸ has fallen under its own weight, one need look no further than the four papers presented during this Symposium under the rubric of campaign finance,⁶⁹ which demonstrate how far *McConnell* departed from prior precedent.

There are, of course, three options when one is lost in a thicket: (1) retrace one’s steps, (2) find a better map, or (3) rely on a guide.⁷⁰ And we see hints of all three in the Court’s most recent opinions.

A. Retracing One’s Steps

The *Vieth* plurality, authored by Justice Scalia, seeks a retreat—a return to the days when the Court left the regulation of politics to politics. Justice Scalia argues that the Court’s efforts to regulate partisan gerrymandering has been an outright failure and thus urges his colleagues to withdraw from the political thicket, or at least the brambly section of the underbrush dealing with partisan politics.⁷¹ Indeed, Justice Scalia’s suggestion that Congress will take care of the problem⁷² returns us to the debate between Frankfurter and Brennan, who dis-

⁶⁶ See *id.* at 2518 (Souter, J., dissenting) (recognizing that minorities in coalition districts have the opportunity to elect candidates of choice through their vote when joined by “predictably supportive nonmajority voters”).

⁶⁷ To grasp how new the approach is to voting rights, consider the following: the three political scientists who conceptualized the coalition district strategy first wrote about it in 2001. Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001). The strategy’s leading advocate in the law schools, Richard Pildes, wrote his first article on it in 2002. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002). And the strategy was first implemented on the ground in New Jersey in 2001. See *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) (per curiam) (three-judge panel); see also Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002).

⁶⁸ 424 U.S. 1 (1976) (per curiam).

⁶⁹ See *supra* note 55 (describing the Symposium contributors’ criticisms of *McConnell*).

⁷⁰ For a helpful description of exit strategies generally, and their relationship to the Court’s *Shaw* jurisprudence in particular, see 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 (2002).

⁷¹ *Vieth*, 124 S. Ct. at 1778 (plurality opinion).

⁷² *Id.* at 1776.

agreed as to whether the responsibility to fix the reapportionment problem was a judicial or legislative one.⁷³

Retracing its steps would be a mistake for the Court. At least in those states which lack an initiative process for ameliorating the districting process (allowing voters to bypass their representatives, for instance, by putting in place an independent districting commission), state and federal legislators care too much about the outcome of districting to be left to their own devices. Scalia himself acknowledged this in *McConnell* with his typically pithy prose: “The first instinct of power is the retention of power.”⁷⁴ We thus face the same dilemma that plagued Frankfurter and Brennan: the self-interest of elected state legislators can undermine democratic values, and the intervention of unelected judges can promote them.⁷⁵

B. *Getting a Better Map*

Should the Court instead choose to remain in the political thicket, it could try to get a better map by adopting an explicitly structural approach. Justice Breyer’s dissenting opinion in *Vieth*⁷⁶ and his concurring opinion in *Nixon v. Shrink Missouri Government PAC*⁷⁷—which Richard Hasen’s contribution to this Symposium rightly flags as significant⁷⁸—point to this possibility. In both opinions, Justice Breyer frames the injury in structural terms: as a democratic or participatory

⁷³ Compare *Baker v. Carr*, 369 U.S. 186, 218-37 (1962) (holding that “allegations of a denial of equal protection present a justiciable constitutional cause of action” in the context of districting), with *id.* at 277-301 (Frankfurter, J., dissenting) (claiming that the problem should be fixed by the legislature, not the Court).

⁷⁴ *McConnell v. FEC*, 124 S. Ct. 619, 729 (2003) (Scalia, J., dissenting).

⁷⁵ For a contrary view, see HASEN, SUPREME COURT, *supra* note 4, at 138-56 (arguing that the courts should limit their intervention into the political process to a quite narrow range of cases).

⁷⁶ *Vieth*, 124 S. Ct. at 1822 (Breyer, J., dissenting).

⁷⁷ 528 U.S. 377, 399 (2000) (Breyer, J., concurring).

⁷⁸ Hasen is correct not only to identify Justice Breyer’s “participatory self-government rationale” as a distinctive contribution to the Court’s campaign finance jurisprudence, but to trace the movement in that direction, at least in part, to Justice Souter’s gradual expansion of the corruption rationale in opinions he drafted prior to *McConnell*. Hasen, *supra* note 55, at 32 n.7. It is worth noting that both Hasen and Spencer Overton argue that Breyer’s rationale was adopted, at least implicitly, by the *McConnell* majority. *Id.* at 58 (asserting that “a more natural reading of the more controversial aspects of the joint majority opinion [in *McConnell*] is as a *sub silentio* acceptance of the participatory self-government rationale”); Overton, *supra* note 55, at 82 (explaining that “the Court employed a participatory self-government rationale in upholding the ban on unlimited soft money contributions” (footnote omitted)).

harm.⁷⁹ He also seems ready to engage in the democratic theorizing necessary to conceptualize what Justice Frankfurter would have called an injury to the polity.⁸⁰

In many cases, this may be the Court's best option. To the extent that, as in *Baker*, no other actor is able to fix the democratic process, the Court ought to be forthright about what it is doing and engage directly with the theoretical issues that are necessarily involved in this endeavor. While there is much to be said for what Cass Sunstein has called "judicial minimalism,"⁸¹ the Court's election law cases reveal the costs of this strategy.⁸² The Court does not avoid making political judgments in election law cases. It simply cloaks those judgments in the ill-fitting garb of individual rights.

Justice Breyer's strategy is not without risks, however. Scholars—even without the constraint of needing to pull together a majority—have thus far failed to offer a full articulation of what a structural approach would look like.⁸³ That is not surprising. No one wants to give

⁷⁹ In *Shrink Missouri*, for instance, Justice Breyer recasts the campaign finance debate as one involving the protection of democratic structures and institutions, "the means through which a free society democratically translates political speech into concrete governmental action" and urges the Court to heed legislative assessments of such broad, systemic concerns as "electoral integrity" and "the need for democratization." *Shrink Missouri*, 528 U.S. at 401-03 (Breyer, J., concurring). Similarly, in *Vieth*, Justice Breyer turns to fundamental principles in order to sketch out his reasons for recognizing partisan gerrymanders as a harm and discusses the aims of a democratic system, including "maintaining relatively stable legislatures in which a minority party retains significant representation" and avoiding legislative entrenchment. *Vieth*, 124 S. Ct. at 1822-25 (Breyer, J., dissenting).

⁸⁰ See *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (differentiating between a private wrong and a wrong suffered by a state as a polity). For instance, in his James Madison Lecture at NYU Law School, Justice Breyer offered an extended rumination on how the participatory values associated with democratic governance ought to inform constitutional decision making. See Breyer, *supra* note 58, at 250 (suggesting that "increased recognition of the Constitution's general democratic participatory objectives can help courts deal more effectively with a range of specific constitutional issues").

⁸¹ See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-4 (1999) (describing "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided, as 'decisional minimalism'").

⁸² See Gerken, *supra* note 39 (examining the costs of minimalism in election law cases).

⁸³ For an intriguing initial attempt to do so, see Brief of Amici Curiae of Pennsylvania Voters Joann Erfer and Jeffrey B. Albert in Support of Appellants, *Vieth* (No. 02-1580). Although the brief garnered only a nibble from one Justice, *Vieth*, 124 S. Ct. at 1819 n.5 (Souter, J., dissenting), its mere presence among the amicus briefs in *Vieth* is noteworthy.

judges license to engage in free-form democratic engineering. But it is hard to identify sensible limiting principles without the aid of an individual-rights-based framework, which brings with it a set of well-developed strategies for cabinining judicial action.

For instance, consider the range of harms that a structural approach might address, from the concrete to the diffuse, from the group-based to the polity-wide. One reason it is difficult to speak precisely about these choices is that the rights-structure debate has not developed sufficiently to allow for widespread agreement on the terminology. In an effort to sharpen that analysis, let me suggest that there are at least *two* types of structural harms. One set—we might call them *discrete structural harms*—affect a discrete, identifiable set of individuals. Vote dilution—the injury at issue in both *Vieth* and *Ashcroft*—is a good example. Admittedly, some, like Richard Hasen, believe that because vote dilution claims concern “the allocation of political power among groups of voters, not the proper functioning of the political process in some abstract sense,” it is a mistake to label them as “structural” because it “obscures the real power relationships at issue in [those] cases.”⁸⁴

While Hasen’s arguments about the danger of abstract theorizing are well taken, I think that vote-dilution claims are fairly labeled as “structural.” Courts cannot decide whether power has been “fairly” or “properly” allocated among voters *without* having a broader theory of how a healthy democracy should function and which groupings ought to concern us.⁸⁵ As noted above,⁸⁶ identification of a concrete injury to members of relevant groups for dilution claims requires a baseline—that is, some theory about how power ought to be distributed systemwide (pure majoritarianism, rough proportionality, the influence model, etc.). To borrow a phrase from Justice Frankfurter,

⁸⁴ HASEN, SUPREME COURT, *supra* note 4, at 155.

⁸⁵ See Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 376 (2004) (reviewing HASEN, SUPREME COURT, *supra* note 4) (“[A] rights-based approach such as Hasen’s requires that we determine the effects of legal rules on the ability of groups . . . to achieve their aims. This will inevitably involve structural considerations.”); Gerken, *supra* note 39, at 1413 (noting that the Court had a problem implementing *Baker* because “the foundational norm it was applying—equality—is too abstract to have a real meaning in the context of malapportionment”); cf. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002) (describing what one person, one vote could mean). In offering this analysis, I do not wish to downplay the often close relationship between structure and rights in constitutional analysis. See *infra* text accompanying note 128.

⁸⁶ See *supra* text accompanying notes 18-19.

“[t]alk of ‘debasement’ or ‘dilution’ is circular talk”; one cannot claim a vote has been diluted without “a standard of reference as to what a vote should be worth,” a standard that requires the Court to “choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.”⁸⁷

Discrete structural harms, then, seem to represent a midway point between a purely individualist framework and a purely structural approach. For instance, injuries like vote dilution—where identification of an individual harm requires reference to the relative treatment of a group⁸⁸—inflict a sufficiently concrete harm upon members of a group to impose some limits on judicial intervention. But the *measure* of the harm nonetheless requires a structural judgment by the court.

On this view, Hasen’s quarrel is not with structural theories per se, but with a different type of structural injury, which we might call the *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. These are “wrongs suffered by the polity” in an even stronger sense than Frankfurter used the phrase.⁸⁹ And one can immediately see why these harms pose a difficult problem for the courts. They seem to affect everyone equally, making it harder to identify an appropriate stopping point for judicial intervention. Despite (or, perhaps, because of) their significance for the long-term health of our democracy, these claims resemble the sort of “generalized grievance”⁹⁰ that the Court uses standing rules and other prudential strategies to avoid.

Consider just one example of how these conceptual categories play out in one of the Court’s most recent cases: *Vieth*. Here I will focus solely on the harms associated with partisan discrimination and the role they play in Justice Stevens’s dissent in *Vieth*.⁹¹ Using the terminology mapped above, we can imagine a partisan discrimination claim taking the form of a purely individual injury, a discrete struc-

⁸⁷ *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

⁸⁸ See Gerken, *supra* note 39, at 1446-51 (arguing that structural claims do not fit easily within the conventional rights framework).

⁸⁹ *Colegrove v. Green*, 328 U.S. 549, 552 (1946). At least at the time Frankfurter was writing, it was quite possible to identify a discrete set of individuals—urban voters—who were harmed by malapportionment.

⁹⁰ *United States v. Hays*, 515 U.S. 737, 745 (1995).

⁹¹ *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1799 (2004) (Stevens, J., dissenting).

tural harm, and a diffuse structural harm. The remarkable thing about Justice Stevens's dissent is that he weaves together *all three types of harms* in arguing that the Court should adjudicate the claim in *Vieth*. And Stevens's opinion provides a useful illustration of how difficult it is to fit different types of structural harms into an individual-rights framework.

Early on in his dissent, Justice Stevens casts partisan discrimination as an individual harm. First, he argues that the patronage cases demonstrate that partisanship is a "rare and constitutionally suspect motive."⁹² The patronage cases, of course, involve traditional individual harms. The state has inflicted a concrete, personal injury on an identifiable individual: it has taken away someone's job because of his political affiliation. Stevens then invokes an individualist strand of equal protection doctrine by suggesting that the harm in *Vieth* stems from the state's use of this improper classification. In his view, in drawing districts for partisan ends, the state has stereotyped individual voters on the basis of their group membership: "Gerrymanders necessarily rest on legislators' predictions that 'members of certain identifiable groups . . . will vote in the same way.'"⁹³

The problem for Stevens, of course, is that this type of injury—being "classified"—is a bit abstract unless it involves some material consequence. Losing one's job on account of a classification is a serious injury. Being placed in one district rather than another on account of politics does not seem to involve any material consequences *unless* one has a right to vote for a winner. And one cannot possess such a right in a territorial-based scheme for the reasons identified above.⁹⁴

Perhaps sensing this problem, Stevens turns to the most natural description of the injury arising from partisan discrimination: vote dilution. Stevens argues that the Court in *Davis v. Bandemer*⁹⁵ was correct to recognize a claim that Democrats "were injured as members of a group because the number of Democratic representatives was not commensurate with the number of Democratic voters throughout Indiana."⁹⁶ Vote dilution, of course, is a discrete structural harm. It injures an identifiable group in a concrete way, but we cannot assess that

⁹² *Id.* at 1803.

⁹³ *Id.* at 1804 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 87 (1980) (Stevens, J., concurring)).

⁹⁴ See *supra* text accompanying notes 18-19.

⁹⁵ 478 U.S. 109 (1986).

⁹⁶ *Vieth*, 124 S. Ct. at 1805 (Stevens, J., dissenting).

injury without reference to a standard of fairness, which demands a structural judgment by the Court as to how power ought to be divided statewide.⁹⁷

Concluding that the Court's decision in *Hays* precludes statewide dilution claims,⁹⁸ Stevens purports to abandon the vote-dilution claim and argues that the truly justiciable claim in *Vieth* implicates what I would also term a discrete structural harm. Explicitly linking the partisan gerrymander to *Shaw v. Reno*,⁹⁹ he asserts that "the critical issue in both racial and political gerrymandering cases is the same: whether a single, non-neutral criterion controlled the districting process to such an extent that the Constitution was offended."¹⁰⁰

Here, the injury is not that the votes of one party or another were diluted; it arises instead from the "message a misshapen district sends to elected officials,"¹⁰¹ the focus on one value (race or party) to the exclusion of all others. Several commentators, of course, have argued that *Shaw v. Reno* is best read as embodying this type of expressive harm,¹⁰² and Stevens mines *Shaw v. Reno* for all of the language that has led commentators to that conclusion.¹⁰³ If we think undue parti-

⁹⁷ See *supra* text accompanying notes 47-49 (discussing the structural approach to the democratic process).

⁹⁸ See *Vieth*, 124 S. Ct. at 1805 (Stevens, J., dissenting) ("[T]he *Hays* standing rule requires dismissal of [a] statewide claim.").

⁹⁹ 509 U.S. 630 (1993).

¹⁰⁰ *Vieth*, 124 S. Ct. at 1804 (Stevens, J., dissenting). This statement seems to mirror, to some extent, Justice Kennedy's own sensibilities regarding the partisan gerrymander:

The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order.

Id. at 1798 (Kennedy, J., concurring).

¹⁰¹ *Id.* at 1806 (Stevens, J., dissenting).

¹⁰² See, e.g., Richard H. Pildes & Richard Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Richard H. Pildes, *supra* note 30, at 2507 (arguing that "[t]he injuries *Shaw* makes actionable are expressive harms").

¹⁰³ See, e.g., *Vieth*, 124 S. Ct. at 1802 (Stevens, J., dissenting) (citing *Shaw* for the proposition that "reapportionment is one area in which appearances do matter"); *id.* (quoting *Shaw* in asserting that bizarrely shaped districts are "so highly irregular" on their face that they "rationally cannot be understood as anything other than an effort" to segregate voters by race); *id.* at 1813 (arguing that the plan is "so irregular on its face that it rationally can be viewed only as an effort . . . to advance the interests of one political party" (internal quotation omitted)).

sanship in districting inflicts an expressive harm, we are not worried about discriminatory effects—even a dilutive plan would not convey the wrong message provided it adhered to traditional districting principles—but about the message it conveys about our democracy’s values.

One might speculate that such an expressive harm would fall equally on all voters and thus properly be classified as a *diffuse* structural harm.¹⁰⁴ If, as Stevens claims, the injury in *Vieth* arises from the perception that “the will of the cartographers rather than the will of the people will govern,”¹⁰⁵ we would expect that damaging message to affect *all* voters. Stevens even gestures toward that possibility, quoting Justice Powell for the proposition that “[t]he potential for voter disillusion and nonparticipation is great,” as even “[i]ntelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose.”¹⁰⁶

Nonetheless, the bulk of Stevens’s dissent emphasizes that the message conveyed by the gerrymander injures members of the “*minority*” group—here, the Democrats.¹⁰⁷ His argument thus parallels a line of equal protection analysis dealing with “objective” intent, the subordinating message conveyed about a minority group’s status by a state’s discriminatory conduct.¹⁰⁸ That connection may explain why Stevens refers to the shape of a district as “objective” proof of an “impermissible legislative purpose”¹⁰⁹ and why he focuses as much on the message the state’s action conveys as on the state legislators’ subjective “motive.”¹¹⁰ Stevens’s argument thus remains within the realm of the dis-

¹⁰⁴ See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2286 (1998) (arguing that an “expressive, noninstrumental injury” harms all citizens); Pildes, *supra* note 30, at 2539 n.122 (arguing that “a more apt standing principle [for expressive harms] would grant standing to any resident of the state, or perhaps to anyone at all”).

¹⁰⁵ *Vieth*, 124 S. Ct. at 1807 (Stevens, J., dissenting).

¹⁰⁶ *Id.* at 1802 n.6 (quoting *Davis v. Bandemer*, 478 U.S. 109, 177 (1986) (Powell, J., concurring in part and dissenting in part) (emphasis added)).

¹⁰⁷ See, e.g., *id.* at 1804, 1807-08, 1811 (discussing gerrymandering that discriminates against political minorities).

¹⁰⁸ See, e.g., Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. REV. 63 (1994) (arguing for an objective standard for gauging intent that takes social meaning into account); see also David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (arguing that equal protection should pay attention to the subordinating effects of a state decision, but concluding that the Court’s intent-based standard precludes such a reading).

¹⁰⁹ *Vieth*, 124 S. Ct. at 1809 (Stevens, J., dissenting).

¹¹⁰ See *supra* text accompanying notes 92-93 (discussing legislative motive).

crimination paradigm; he plainly means to confine the injured class in *Vieth* to Democrats.

The harm Stevens identifies, while discrete, nonetheless seems structural in nature. Indeed, the vote-dilution claim—which Stevens purported to abandon for this case¹¹¹—creeps right back into the analysis. To assess the plaintiff’s claim, we need to know how to identify the discriminated-against minority group. Presumably the only way we know that the Pennsylvania scheme “disadvantage[d] members of a minority group”¹¹² is that it gave Democrats less power statewide than the Republicans even though the two parties enjoyed a roughly equal share of the vote.¹¹³

To be sure, Stevens strives mightily to cast this injury as an individual one. He argues that only Democrats in a single, bizarrely shaped district have been harmed.¹¹⁴ In Stevens’s view, those voters are injured because “the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles.”¹¹⁵ But Stevens does not explain how the shape of *one* district establishes that this is a “districting scheme with discriminatory effects,”¹¹⁶ let alone proves that the Democrats are the “political minority,”¹¹⁷ the discriminated-against class of voters. For instance, what if every other district in the state was bizarrely shaped and contained a *Democratic* majority? Or what if Democrats were in the voting minority but enjoyed a fully proportional share of seats? Stevens is obviously talking about the unfair distribution of power. We thus still need to know what is happening to both Democrats and Republicans statewide—and have a baseline for measuring that treatment—to de-

¹¹¹ See *supra* text accompanying notes 95-99 (discussing *Hays* and vote dilution).

¹¹² *Vieth*, 124 S. Ct. at 1808 (Stevens, J., dissenting).

¹¹³ See *id.* at 1783 (plurality opinion) (“[T]he Democrats’ statewide majority of the major-party vote (50.6%) translated into a minority of seats . . .”).

¹¹⁴ See *id.* at 1806 (Stevens, J., dissenting) (“[T]he injury is cognizable only when stated by voters who reside in that particular district . . .”).

¹¹⁵ *Id.* This is, of course, precisely the move the Court made in *Shaw* itself. As Samuel Issacharoff and Pamela Karlan note in their contribution to this Symposium, by ruling that *Shaw* claims could be brought to challenge individual districts only, “the claim that the process as a whole was tainted by impermissible considerations was off the table,” thus providing another example of the Court’s “turn[ing] all claims—even claims that were fundamentally about political structure—into claims of individual rights.” Issacharoff & Karlan, *supra* note 12, at 553-54 (footnote omitted).

¹¹⁶ *Vieth*, 124 S. Ct. at 1803 (Stevens, J., dissenting).

¹¹⁷ *Id.* at 1804.

termine that the challenged district was designed to harm a discrete set of individuals. In other words, we return again to the problem of structure.

Even if Stevens does not mean to make some sort of structural judgment about who is the “minority” burdened by the districting plan—that is, even if the “minority” he identifies is not the statewide minority but simply those with fewer votes in a given district¹¹⁸—the injury he describes nonetheless seems inescapably structural. If some set of voters is harmed any time legislators go out of their way to create a safe district, no matter which party dominates it, then Stevens’s theory would apply equally to a bipartisan gerrymander.¹¹⁹ Indeed, late in his opinion Stevens claims that a “representational harm” occurs whenever a legislator might “perceive that the people who put her in power are those who drew the map rather than those who cast ballots” because “she will feel beholden not to a subset of her constituency, but to no part of her constituency at all.”¹²⁰

That characterization of the claim would seem to push the Court toward entertaining suits involving the more diffuse set of harms arising from the absence of political competition,¹²¹ injuries to the polity in the strongest sense. Here again, we would need to engage in structural analysis of some sort. At the very least, one would have to ascertain how much “competition” a voter was entitled to demand in her

¹¹⁸ While Stevens generally refers to the Democrats statewide as the “political minority” and surely refers to the Republicans’ statewide power in referring to them as a “transient majority” and “dominant political faction,” *id.* at 1799, 1809, at one point in the opinion he describes the plaintiff as a member “of the political minority residing in District 6.” *Id.* at 1807. It could be that Stevens means simply to refer to the minority as the *district’s* minority—a term that would apply to Republicans when they reside in Democrat-majority districts—although this reading is a bit of a stretch given Stevens’s language in the rest of the opinion.

¹¹⁹ Rick Pildes makes this point in his Foreword to the *Harvard Law Review* and notes, correctly, that other parts of Stevens’s opinion undermine this possibility. See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. (forthcoming 2004) (manuscript at 70-71 n.257) (“At some points, Justice Stevens’s opinion is written broadly enough to include bipartisan gerrymanders; thus, his concern that gerrymandering distorts ‘representational norms’ . . . could be read to include bipartisan gerrymanders.” (citation omitted)).

¹²⁰ *Vieth*, 124 S. Ct. at 1807 (Stevens, J., dissenting).

¹²¹ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 611-20 (2002) (exploring the relation between gerrymandering and political competition and endorsing the use of prophylactic rules instead of after-the-fact review in redistricting). But see Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (arguing “in favor of a judicial retreat from the political thicket”).

district, and it is hard to see how a court making that determination would avoid considering the fair distribution of power—or at least competition—statewide.

Thus, counterintuitively enough, the more Stevens tries to squeeze his theory of the case into the form of a discrete personal injury—to avoid adjudicating a “generalized grievance”¹²²—the more diffuse and structural the injury becomes. His opinion opens with a highly individualist conception of the harm: the right not to be stereotyped based on one’s group membership.¹²³ In his effort to explain why that harm is sufficiently concrete to be judicially cognizable, Stevens equates the voters harmed by the classification with an injured “minority,”¹²⁴ thus implicitly making a structural judgment about how power ought to have been divided in Pennsylvania. Perhaps recognizing this problem, Stevens works even harder to cast the argument in conventionally individualist terms. He assures us we are dealing not with a statewide group challenging a statewide injury, but with a discrete set of individuals who have experienced a concrete harm—inadequate representation. Yet, in describing that “individualized representational injury,”¹²⁵ Stevens ends up sketching a harm that is actually quite diffuse: a right to vote in a competitive district.

The point to untangling the many threads in Justice Stevens’s analysis is not to cast him as the hapless Sorcerer’s Apprentice (of either the von Goethe or Mickey Mouse variety), nor is it to impugn his motives or intelligence. It is simply to illuminate why the Court at this moment seems to be at sea when deciding election law cases. Stevens is an astute judge of the relationship between politics and judging.¹²⁶ He is doggedly searching for a sensible analytic framework in the Court’s jurisprudence, and he is not coming up with much that is useful. The harder he pushes on the Court’s doctrinal edifice, the more it crumbles away. His opinion in *Vieth*, like Justice Kennedy’s, provides further evidence that if the Court wishes to remain in this part of the political thicket, it should develop a structural approach.

¹²² *Vieth*, 124 S. Ct. at 1806 (Stevens, J., dissenting).

¹²³ *Id.* at 1805-06.

¹²⁴ *Id.* at 1807.

¹²⁵ *Id.* at 1805.

¹²⁶ See, e.g., Pamela S. Karlan, *Cousins’ Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 522 (1996) (stating that Justice Stevens’s opinions in cases involving politics “reflect a tough-minded realism about the limits of judicial regulation and reform”).

One might be tempted to call this Frankfurter's revenge. When one considers the lengths to which Stevens must go to make the case for adjudicating partisan gerrymander cases within an individual-rights framework, Frankfurter's opinion in *Colegrove* and his dissent in *Baker* look quite prescient. That is not to suggest that Frankfurter's underlying assumption—that courts are simply incapable of adjudicating structural claims—is correct. To the contrary, Frankfurter's categorical approach, holding that there are only two types of claims (those involving individual harms or diffuse injuries to the polity) seems too sharp. As the taxonomy above suggests, we are dealing with a continuum. For instance, some structural claims involve injuries to a discrete identifiable group, and thus share one of the great strengths of a traditional individual-rights paradigm: they both ground judicial decision making in a concrete, identifiable harm.¹²⁷ Other structural claims involve an "injury to the polity," a harm that affects all of us. While that fact may make those claims harder for the courts to remedy, it is worth remembering that even the category of "individual rights" is not as analytically pure as Frankfurter might suggest. As constitutional scholars of all stripes have argued, the Court's individual-rights analysis has often involved structural analysis of some sort.¹²⁸

I also do not mean to suggest that these problems are, as Frankfurter seemed to believe, intractable. For instance, one of the reasons that it is useful to clarify what we mean by a "structural harm" is that different types of harms require different judicial strategies.¹²⁹ For in-

¹²⁷ See Farber, *supra* note 85, at 376-77 (suggesting that, in election law cases, the Court should first require evidence of an identifiable harm, then strike a balance between making the legislature "representative of the population, responsive to their wishes, competitive enough to provide electoral choice, and stable enough to provide sound government"); Karlan, *supra* note 19, at 1363-64 (arguing that difficulties with ballot counting should give rise to a claim only if the remedy will benefit some identifiable group of voters).

¹²⁸ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (recasting the Bill of Rights in structural terms); Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 996-97 (1999) (reviewing AMAR, *supra*) (arguing that rights depend upon structures for their defense and definition); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999) (discussing the Court's individual-rights jurisprudence and arguing that "structural inquiries are everywhere appropriate—and often crucial").

¹²⁹ Cf. Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. (forthcoming 2004) (manuscript at 7) (speculating that "the lesson of *Democracy and Distrust* for our times is that the *Carolene Products* anti-entrenchment and

stance, if we agree with Justice Stevens's initial suggestion that the harm here is an individual harm—the harm of classifying individuals on the basis of their party affiliation—then the solution is simply to forbid the state from considering party membership in drawing districts. Similarly, discrete structural harms require a different set of doctrinal rules than traditional individual harms. For instance, as I have argued elsewhere, vote dilution claims, properly understood, cannot be established on a district-by-district basis, and standing and class certification rules must be adjusted.¹³⁰ As a result, if the harm inflicted by the partisan gerrymander is vote dilution, then neither Justice Souter's nor Justice Stevens' strategies for adjudicating such claims is likely to succeed in the long run. Finally, as Samuel Issacharoff has pointed out, the discrimination model (which rests on disparate treatment of some sort) may have to be scrapped if we are trying to remedy diffuse structural harms,¹³¹ such as those associated with the bipartisan gerrymander or expressive harms.

Moreover, the fact that the Court has not yet developed a set of strategies for cabinining structural analysis does not mean it is impossible to do so. The advantage of an individual-rights framework, of course, is that it embodies a well-established and shared set of conventions for cabinining judicial discretion: standing, ripeness, limits upon who can represent whom in a suit, restrictions on the type of judicial remedies available, etc. But one can imagine the courts developing a different set of strategies for limiting judicial action in structural cases. For instance, courts might limit their intervention to more tractable, readily identifiable problems, like entrenchment.

Alternatively, courts might confine themselves to certain types of “fixes.” They might eschew command-and-control solutions that dictate political outcomes and systematically favor strategies that create incentives for *other* institutional actors—the Department of Justice or

anti-discrimination rationales can highlight distinct pathologies in the redistricting process, and it is important for courts to be clear about which problem they are addressing”) (referring to *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) and JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)).

¹³⁰ See Gerken, *supra* note 39, at 1449-51 (describing the difficulties inherent in analyzing a vote dilution claim on a district-by-district basis).

¹³¹ E-mail from Sam Issacharoff to Heather Gerken (July 21, 2004, 00:33:43 EST) (on file with author) (“Perhaps we have too long thought, based on an extension of the race cases, that the structural difficulties of the law governing the political process could be addressed by expanding the notion of discrimination from individuals to groups . . .”).

state legislators—to fix the problem. I offer a sketch of one such implementation strategy below.¹³² Finally, we might look to other areas of constitutional analysis where structural concerns dominate to come up with a set of principles for designating the bounds of judicial intervention.

Thus, in terming the Court's current dilemma "Frankfurter's revenge," my point is simply that Frankfurter correctly anticipated some of the intellectual puzzles the Court faces in adjudicating law of democracy claims. And the crucial question is whether, contrary to Frankfurter's assumptions, the Court is capable of finding a better map: developing a structural approach for negotiating the terrain in this part of the political thicket.

C. *Relying on a Guide*

Although the Court could retrace its steps or find a better map, the strategy the Court is in fact most likely to choose in order to extract itself from its current dilemma is the last: relying on a guide. It is not only that judgments about the proper regulation of the political process sit uncomfortably with judges. Deferring to other actors—those either better equipped or more willing to make such judgments—seems like the path of least resistance.

We can already detect hints of this strategy emerging. In *McConnell*, the Court granted considerable deference to Congress's judgments.¹³³ The level of deference shown by the *McConnell* majority was quite remarkable given the Court's demonstrated willingness to second-guess congressional judgments elsewhere.¹³⁴

*Georgia v. Ashcroft*¹³⁵ offers another example of the Court's search for a guide to help it negotiate the political thicket. In finding that

¹³² See discussion *infra* Part II.C (arguing in favor of reliance on other institutional actors to regulate the political process).

¹³³ See Bauer, *supra* note 55, at 14 (terming *McConnell* the "[t]riumph of 'deference'"); Hasen, *supra* note 55, at 34 ("The court has replaced a general skepticism of campaign finance regulation with unprecedented deference to legislative determinations . . .").

¹³⁴ See, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 128-68 (2001) (characterizing the Rehnquist Court as one that shows no respect for congressional interpretations of the Constitution); Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 702 (2002) (describing *Bush v. Gore*, 531 U.S. 98 (2000), as a logical step in a larger pattern of "anarchic" decisions that demonstrate "glib unconcern . . . for the usual roles of other branches").

¹³⁵ 539 U.S. 461, 123 S. Ct. 2498 (2003).

the challenged districting plan did not harm racial minorities, the Court deferred to local decision makers, particularly the many African-American legislators who had supported the plan.¹³⁶ Perhaps it would be more precise to say that the Court deferred to a *process* in *Ashcroft*. The process by which the districts were drawn in Georgia seemed fair to the Court.

Under current conditions, deferring to the process may be a pretty good choice for the Court . . . and for our democracy. It may be that the Court is simply better at figuring out what a fair districting *process* looks like than making substantive judgments about what a fair districting *plan* looks like.¹³⁷ Here again, though, a bumpy path lies ahead.

Consider *Ashcroft* as an example. How exactly does the Court know that the districting process in Georgia was fair? The obvious answer is that the districting plan was supported by almost all of the African-American legislators in the state; indeed, it could not have passed without their votes.¹³⁸ Thus, one might well herald what took place in *Ashcroft* as a sign that we have reached “the regime of normal pluralist, interest-group politics to which the VRA aspired.”¹³⁹ If racial minorities have attained sufficient power in local politics to protect themselves, we no longer need to police substantive outcomes but can simply let members of those groups do what any other political minority does in a healthy democracy: negotiate the best deal possible. Rather than imposing a particular view of what kind of representation is “best,” the crux of the debate between the majority and the dissent in *Ashcroft*, we can simply let minority voters—or, more accurately, their

¹³⁶ See *id.* at 2515-16 (citing lawmakers’ testimony to support the view that Georgia’s redistricting plan was not retrogressive).

¹³⁷ The legal process school continues to have many modern adherents in election law circles. See, e.g., Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 925 (2001) (“[W]e defend a seemingly old-fashioned notion that the best constraint on judicial overreaching may still be the political process theory introduced by the famous *Carolene Products* footnote and developed through subsequent scholarship.” (footnote omitted)).

¹³⁸ See *Ashcroft*, 123 S. Ct. at 2506 (noting that the votes of ten of eleven black senators and thirty-three of thirty-four black representatives were necessary to pass the districting plan at issue).

¹³⁹ Pildes, *supra* note 119, at 37; see also Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 44-45 (2004) (“By the post-1990 round of redistricting, blacks and Hispanics had progressed from being literally locked out of the room in which political deals were cut to being key members of state legislative redistricting committees.” (footnote omitted)).

leaders—decide what makes the most sense for members of their communities.¹⁴⁰

While there are a number of important normative questions embedded in such a judgment (concerns about the role elites and political parties play in our system, its effect on racial politics, etc.), I want to focus here on a more narrow issue: the endogeneity problem. The difficulty that plagues anyone trying to predict whether Voting Rights Act enforcement is still necessary is that we do not know the extent to which legislators are “bargaining in the shadow of the law.”¹⁴¹ That is, on one view, African Americans in Georgia could negotiate a good deal for themselves because they wielded enough legislative power to do so. On another view, the process worked because African Americans had another “bargaining chip” when they came to the table: they could threaten their colleagues with a lawsuit.¹⁴² If the districting plan violated either section 2 or section 5 of the Voting Rights Act, it would not survive.

The problem, of course, is that for section 2 and section 5 to represent a useful threat—a necessary thumb on the scale to ensure a fair process—they have to mean something. And for these provisions to mean something, they have to offer some specific guidelines as to the minimum amount of power racial minorities deserve. That is, at some level they have to tell us something about *substantive outcomes*, which returns us immediately to the problem of deference. If these provisions mean simply that the Court will always defer to the judgment of *the state* as to whether influence, coalition, or majority-minority districts are best, it is not much of a bargaining chip. And if it is not much of a bargaining chip, going forward we might worry whether the *process* is fair—that is, whether African Americans or Latinos are playing on a sufficiently level playing field. One can imagine the infinite regress.

¹⁴⁰ Rick Pildes terms this “the paradox of success”: the idea that if “institutional strategies” designed to empower electoral minorities work properly, they will render those structures “obsolete.” Pildes, *supra* note 119, at 25.

¹⁴¹ See Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 36 (2004) (noting that minority voters’ gains “have all occurred in the shadow of Section 5”); cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (suggesting “an alternative way of thinking about the role of law at the time of divorce”).

¹⁴² See Karlan, *supra* note 141, at 36 (pointing to section 5 as an “invaluable bargaining chip”).

Given this dilemma, one way to read *Ashcroft*—and a concededly novel one at that—is as a transitional case between the traditional voting-rights regime, involving the policing of substantive outcomes, and “normal politics,” where racial minorities are free to negotiate the best deal possible without adhering to a rigid formula devised by the courts. On this view, the court will defer to the process only if it is confident that African Americans and Latinos were able to hold their own in the bargaining session. That is, one could read *Ashcroft* as resting on something akin to a *minority veto*: the Court will defer to the process, but only if it is satisfied that racial minorities back the plan.

What a minority veto would mean in practice, of course, is hard to say, as such judgments would depend on contextual assessments of what occurred on the ground. *Ashcroft* might be an easier case than most.¹⁴³ Not only was there relative unanimity among African-American representatives, but it was easy to see why they might have thought the “best deal” involved reducing the number of majority-minority districts in order to ensure that Democrats enjoyed control of the legislature. But what about a process that leaves reason to doubt—for instance, one where we suspect that African-American legislators negotiated from a position of weakness and supported a plan merely because they had no choice? Or where the costs of maintaining legislative control are not distributed evenly—for instance, a plan where districts that elected white Democrats were preserved and the only incumbents threatened were those elected in majority-minority districts?¹⁴⁴ What about districting processes where we have reason to doubt the motives of the minority representatives themselves—for instance, when they support a plan that guarantees safe seats for *all* incumbents even though they might have drawn districts that increased the power of minority voters?²

One strategy for implementing the minority veto as a process check might be for the courts to envision the Voting Rights Act (VRA)¹⁴⁵ as a de facto opt-in system: let community and legislative leaders negotiate the best deal, but give them a bargaining chip, a chance to “opt in” to VRA coverage and demand that its constraints

¹⁴³ See Pildes, *supra* note 119, at 34 (arguing that if “the perfect storm” of *Ashcroft* did not justify a flexible reading of the VRA, few cases would).

¹⁴⁴ I am indebted to Pam Karlan for this example.

¹⁴⁵ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

on districting outcomes apply should bargaining break down.¹⁴⁶ This is concededly not “normal politics,” for a strong version of a minority veto would excuse racial minorities from the obligation to “pull, haul, and trade.”¹⁴⁷ But it would generate a more dynamic solution to the problem of race and politics than is presently available by eliminating the risk that the deal could be upset by a court applying a rigid understanding of the VRA’s requirements even when minority representatives are satisfied with the deal.¹⁴⁸

Moreover, a de facto opt-in system might generate the right kinds of incentives for cross-racial coalitions to develop. Legislators would be aware that the fate of a districting plan depended on engaging with colleagues who represented racial minorities and thus have some incentive to tailor their plans to the needs of that community. Indeed, there is some empirical evidence pointing to this possibility. Consider what occurred during the post-2000 redistricting cycle in New Jersey and Georgia.¹⁴⁹ One story, of course, is that African Americans and Latinos had gained so much power prior to 2000 that they were able to play a major role in the districting process.

One might tell a different story, however, one involving a variant of the opt-in strategy I am describing. On this view, lawyers advising the Democrats were surely concerned that (1) the Republicans would challenge the plan in court, and (2) the Court’s prior jurisprudence endorsing majority-minority districts would prevent them from switching to a coalition-district strategy. And those lawyers might well have concluded that the best way to avoid such an outcome—the best way, in effect, to opt out of the VRA’s pre-2000 districting formula—would be to win the support of as many minority legislators as possible.

¹⁴⁶ Roderick Hills makes a loosely analogous argument in justifying the *Printz* doctrine, arguing that “*Printz* protects non-federal governments’ practical ability to bargain for [implementing] discretion by allowing them to decline to implement federal statutes unless Congress accedes to their terms.” Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 181 (1998) (discussing *United States v. Printz*, 521 U.S. 898 (1997)).

¹⁴⁷ Justice Souter coined this phrase in *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

¹⁴⁸ Cf. Issacharoff & Karlan, *supra* note 139, at 49-50 (“Much of contemporary equal protection law is now directed to . . . defending the rough and tumble world of interest-driven politics from the rights-focused intervention of constitutional law.”).

¹⁴⁹ The Georgia story is told in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003). Sam Hirsch recounts what happened in New Jersey. See generally Hirsch, *supra* note 67 (describing *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) (per curiam) (three-judge panel)).

Thus, the political power that minority legislators wielded by virtue of their votes was presumably buttressed by the incentives that the threat of VRA litigation created. The result? Impressive evidence of coalitions among whites, African Americans, and Latinos in both districting processes.¹⁵⁰ The opt-in strategy I am describing, then, would simply make explicit the incentives that, in my view, probably existed during the last districting cycle for those lawyers who wanted to pursue the coalition-district strategy.¹⁵¹

Further, a de facto opt-in system might tell us quite a bit about the state of racial politics in this country. For instance, it would be useful to know how often, and under what circumstances, opt-ins occur. And one could imagine the courts and Congress occasionally revisiting the substantive constraints imposed by the Voting Rights Act—which serve as the de facto default rule under this system—in light of the series of deals reached “outside” of it.¹⁵²

In some senses, this is how section 5 functions in practice. The Department of Justice (DOJ) receives so many preclearance requests that it cannot possibly investigate all of them. One of the ways it decides whether further inquiry is warranted is if civil rights groups or other community representatives tell DOJ staff that there is a problem. They thus effectively “opt in” to a more rigorous variant of section 5 enforcement. And the DOJ, in turn, uses that information to generate a set of warning flags—a list of practices that often prove to be discriminatory in intent or effect—for reviewing future preclearance requests.¹⁵³

¹⁵⁰ See, e.g., Hirsch, *supra* note 67, at 22-23 (claiming, as the attorney who represented the Democrats in New Jersey, that one of the crucial lessons to be drawn from that districting experience is the importance of cross-racial coalitions).

¹⁵¹ I should emphasize that, although I represented the Democratic party in districting litigation prior to becoming an academic, and the firm where I worked continues to do so, I was not involved in anything that took place in either New Jersey or Georgia. The argument I offer here is merely an educated guess as to what the lawyers involved were thinking.

¹⁵² Richard Pildes has reached a similar conclusion, suggesting that *Ashcroft* allows for a form of democratic experimentalism. Pildes, *supra* note 119, at 36 (citing Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998)). Although he does not specify the precise mechanism for generating this type of dynamism, he suggests that courts will be able to decipher “more ambiguous process-based signals” than those available in Georgia. *Id.*

¹⁵³ The source of this information is a series of interviews I conducted with lawyers and DOJ staff about the preclearance process in 1994. For a more recent analysis of DOJ practices confirming the continued salience of minority representatives to the DOJ’s review process, see Meghann Donahue, Note, “*The Reports of My Death Are Greatly*

One could also imagine other proxies that courts could use for assessing whether a districting plan reflects “normal politics.” For instance, if we worry that African-American or Latino legislators are, like all legislators, self-interested,¹⁵⁴ courts might take a chapter from the corporations rule book. In corporate law, when directors engage in a self-interested transaction, courts grant that transaction extremely deferential review *if* it is approved by a majority of disinterested shareholders.¹⁵⁵ Discerning who is “disinterested” in any political negotiation is, of course, a difficult task. But the *Ashcroft* majority certainly made such a judgment about Congressman John Lewis, explicitly deferring to his testimony in part because he was “not a member of the State Senate and thus ha[d] less at stake personally in the outcome of this litigation.”¹⁵⁶ One could imagine, for example, supporters of a plan seeking the endorsement of those who lack a direct stake in the outcome, like community leaders, civil rights groups, or good governance watchdogs. In short, this type of heuristic might create a built-in political mechanism for giving outsiders more of a “voice” in the districting process.

An even more radical form of the minority veto would involve giving the bargaining chip to the voters themselves. Under this scheme, the fate of a districting plan could hinge on the ability of elected officials—white and black—to convince a group of African-American voters (imagine the rough equivalent of the “named plaintiffs” in a class action suit)¹⁵⁷ that the plan furthers the needs and interests of their community.

Alternatively, a court could hold the type of hearing it usually does when a class action settles,¹⁵⁸ inviting all class members to testify about the proposed plan as a means of assessing the community’s support. As any lawyer who has been involved in such a settlement knows, this

Exaggerated”: *Administering Section 5 of the Voting Rights Act After Georgia v. Ashcroft*, 105 COLUM. L. REV. (forthcoming 2004) (manuscript at 29-30, on file with author).

¹⁵⁴ See Karlan, *supra* note 141, at 33-34.

¹⁵⁵ See, e.g., *In re Wheelabrator Techs., Inc. S’holders Litig.*, 663 A.2d 1194 (Del. Ch. 1995) (explaining that approval by fully informed, disinterested shareholders limits judicial review to issues of gift or waste). I am indebted to David Schleicher and Guhan Subramanian for helping me think through this question.

¹⁵⁶ *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2516 (2003).

¹⁵⁷ See FED. R. CIV. P. 23(a) (defining the prerequisites to a class action).

¹⁵⁸ See FED. R. CIV. P. 23(e)(1)(c) (providing that a court may approve a settlement only “after a hearing and on finding of fact that the settlement . . . is fair, reasonable, and adequate”).

type of hearing forces lawyers and named plaintiffs to return to the community they represent and educate class members about the settlement in an effort to turn out adequate community support at the hearing.

Districting, then, would no longer be the province of the elites, as politicians of every stripe would have to build adequate community support for any plan adopted. And enforcement of the Voting Rights Act might begin to look more like the radically democratic strategy adopted by British Columbia, which is redesigning its electoral process virtually from scratch.¹⁵⁹ The architects of the new design? One hundred randomly selected citizens of the province. These citizens will spend months deliberating over the alternatives and devising a plan. Most importantly, they will return to their communities to generate support for the proposed plan prior to a referendum vote in 2005.¹⁶⁰

In suggesting that we give a bargaining chip to “the people,” I do not mean to offer an unduly romanticized view of electoral politics. Most people, I suspect, would find it hard to grasp immediately what is at stake in choosing one districting plan over another. Here, as with much of mass politics, I would expect that political entrepreneurs will play a crucial role in shaping the agenda: framing the question, educating constituents, and generating support or opposition for a given plan.

Nonetheless, I think there is good reason to consider how to connect debates about electoral structures to everyday politics. We need to create an incentive for elected representatives and community leaders to insert these issues into public debate. Indeed, here is a place where the idealists and pragmatists ought to agree. Democratic theorists have called for deliberation not only about the substance of our disagreements, but the procedures by which we resolve those disagreements.¹⁶¹ Pragmatists have called for independent commissions that take districting away from self-interested legislators.¹⁶² Neither

¹⁵⁹ See *Decision Looms*, Citizens' Assembly on Electoral Reform, at <http://www.citizensassembly.bc.ca/public> (last visited Oct. 18, 2004) (on file with author) (listing the various electoral alternatives being considered as well as providing information on the Citizens' Assembly itself).

¹⁶⁰ *Id.*

¹⁶¹ See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 32 (1996) (suggesting that citizens have to deliberate about the substantive values of alternative procedures to determine if one is justified).

¹⁶² Issacharoff, *supra* note 121, at 644.

scenario seems likely to come to pass unless and until we find strategies for putting those issues on the political agenda in the first place.

The proposals above represent at least an initial sketch of how courts might institutionalize procedures that create useful incentives for other institutional actors. They might even encourage those actors to begin a longer-term conversation about the problems associated with democratic structure. These issues thus connect to many of the themes of this Essay—the difficulty courts face in policing substantive outcomes, the need to think about election law in structural terms, and the importance of developing a sensible strategy for limiting judicial intervention within a structural paradigm. Put differently, it may be that the most productive structural approach would require the courts to design appropriate incentives to get *other* institutional actors involved, generating a more dynamic process for resolving these problems than the command-and-control strategy deployed by the courts thus far.

Admittedly, though, much of this may simply be too cumbersome for the courts, and we may thus prefer the type of solution proposed by Samuel Issacharoff, who cuts the Gordian knot by demanding independent, nonpartisan districting commissions.¹⁶³ The emergence of independent commissions would not eliminate the need to address structural concerns. Instead, it would likely generate a whole new line of scholarship surrounding what kind of districting plans best serve our democratic aims. Independent commissions would also raise a different set of questions about the proper policing of such intermediary institutions by the courts. Nonetheless, the creation of independent commissions would certainly help extricate the *Court* from making such first-order judgments. And one can easily imagine that the beleaguered members of this Court would appreciate such a guide at this point.

CONCLUSION

The Supreme Court's decision in *Baker v. Carr*, decided four decades ago, and its most recent decisions are in some ways bookends to the same story. The Court is stuck in a period of doctrinal stasis and casting about for a new strategy for deciding election law cases. Part of the reason for this doctrinal interregnum may be that we are in a

¹⁶³ See *id.* (arguing in favor of independent districting commissions). *But see* Persily, *supra* note 121, at 674-77 (defending legislative districting).

political one: the Justices presumably recognize that the upcoming presidential election, no matter what its outcome, will bring dramatic change.

But the roots of this problem are also intellectual. Judges' views on these issues do not map neatly onto political affiliations. Specifically, judges' views on democracy and on the role the Court ought to play in regulating it do not mirror the left/right categories we typically use to classify judges.

The fact that views on the process do not map neatly onto political categories is heartening—and dismaying, as it makes clear just how complicated and contested these problems are. In deciding whether to retrace its steps, get a better map, or find a guide, the Court faces a difficult set of choices. However, given the extent to which political structures shape—even predetermine—political outcomes, much is at stake in the ultimate path the Court, and the polity, choose.