

1-1-2005

Of Platonic Guardians, Trust, and Equality: A Comment on Hansen's Minimalist Approach to the Law of Elections; Symposium

Luis E. Fuentes-Rohwer

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

Recommended Citation

Fuentes-Rohwer, Luis E. (2005) "Of Platonic Guardians, Trust, and Equality: A Comment on Hansen's Minimalist Approach to the Law of Elections; Symposium," *Journal of Legislation*: Vol. 31: Iss. 1, Article 3.
Available at: <http://scholarship.law.nd.edu/jleg/vol31/iss1/3>

This Address/Speech is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

OF PLATONIC GUARDIANS, TRUST, AND EQUALITY: A COMMENT ON HASEN'S MINIMALIST APPROACH TO THE LAW OF ELECTIONS

Luis Fuentes-Rohwer*

I. INTRODUCTION

There was a time when the U.S. Supreme Court refused to enter the realm of politics. The reasons were many, and arose partly out of concerns about its legitimacy, its own competence, or seeming precedents.¹ Yet this is no longer the world we know. With *Baker v. Carr*,² the Court proved willing to face questions of politics head on, its prior concerns notwithstanding. In due time, the Court became firmly enmeshed in the political thicket.³

It is within this context that Rick Hasen offers his prescription for judicial intervention in matters political.⁴ As he observes, quite correctly, the Court is very comfortable in this arena—perhaps too comfortable—and is not about to leave the field any time soon. The real question is thus one of judicial posture: How must the Court understand and approach questions of politics? “With *Baker* in place,” Hasen writes, “there is nothing else to do but to argue *how* the Court should decide election law cases.”⁵ And on this score, he exhorts judicial “intervention that is (1) tentative and malleable, (2) focused on individual (or sometimes group) rights and not on the ‘structure’ or ‘functioning’ of the political system, (3) protective of core political equality principles, and (4) deferential to political branches’ attempts to promote contested visions of political equality.”⁶ This model finds a middle ground between

* Associate Professor of Law, Indiana University-Bloomington.

1. See *Colegrove v. Green*, 328 U.S. 549, 552–56 (1946). For an elegant exposition of Justice Frankfurter’s position, see generally Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

2. 369 U.S. 186 (1962).

3. To some commentators, it hardly took any time. See Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 210 (1964) (“Courts not only have entered the thicket, they occupy it.”); see also Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999) (“In the relatively short time since [*Baker*], the United States Supreme Court has not only entered the ‘political thicket,’ but with remarkable speed has found conflicts of democratic politics coming to dominate its docket.”)(footnote omitted)(quoting *Colegrove*, 328 U.S. at 556).

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

5. *Id.* at 10.

6. *Id.*

aggressive forms of review, for which Hasen has little patience,⁷ and a return to the pre-*Baker* political question regime. It carves out an important interpretive role for the Court while reserving a space for the political branches as well. The hard question focuses on where to draw a line between the two.

Hasen draws this difficult line around what he calls core versus “contested” political equality rights.⁸ Core equality rights are those rights considered basic for governance in a representative democracy, as well as rights supported by broad social consensus.⁹ He includes among the former the right to nondiscrimination in voting along racial or ethnic lines; among the latter, the “one person, one vote” principle.¹⁰ For these rights, the Court has very little reason to defer to the political branches.¹¹ When the Court decides questions involving these rights, Hasen asks for close judicial supervision and the use of bright-line rules.¹²

In contrast, contested equality rights are rights that are neither supported by social consensus nor basic tenets of democratic governance.¹³ When deciding questions involving these contested rights, the Court should make use of murky, unmanageable standards.¹⁴ In so doing, it leaves the decision open for the future, all the while allowing the political process far more leeway in defining the nature and scope of the right.¹⁵ Hasen analogizes this approach to a leader making his/her way out of a deep forest, unsure of where the correct path lies.¹⁶ Under such conditions, it is best to stay in one place and send scouts in different directions.¹⁷ In due time, the scouts will report back to base with the information collected during their travails.¹⁸ Only then may a leader make an informed decision.¹⁹ Similarly, and as long as the Court remains in the political thicket, “unmanageability may be one of the best tools available for finding the right paths.”²⁰

Hasen develops his thesis with characteristic lucidity and thoughtfulness. I find many points of agreement with my own views about the Court and its incursions in electoral matters. For example, I agree that the Court should be far less aggressive in this area than it has been,²¹ yet far more demanding when analyzing the reasons given

7. See *id.* at 13 (contending that structural arguments for judicial review “evinced judicial hubris, a belief that judges appropriately should be cast in the role of supreme political regulators.”).

8. See generally *id.* at 73–100 (discussing core and contested political equality rights).

9. See HASEN, *supra* note 4, at 79–81.

10. See *id.* at 79.

11. See *id.* at 78.

12. See *id.* at 79–80.

13. See *id.* at 7.

14. See *id.* at 48–50.

15. See HASEN, *supra* note 4, at 71–72.

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. *Id.* at 72.

21. See HASEN, *supra* note 4, at 138 (contending that the Court would “show much greater institutional modesty in defining the scope of new equal protection rights, following as much as leading society); cf. Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation,” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 532 (2003) (counseling for a “minimalist” judicial approach to both racial and political gerrymandering questions.).

by the state for enacting the laws under scrutiny.²² In addition, like Hasen, I am cautious of claims that place the Court, an electorally unaccountable institution, at the center of disputed and often contentious political controversies.²³

With these agreements in mind, this Comment responds to Hasen's intriguing thesis over the course of two parts. Two general questions ground the discussion, questions that date back to the Court's full-fledged entry into politics in *Baker v. Carr*.²⁴ The first question asks *whether* the Court should decide questions of politics at all. Secondly, once it decides to take up these questions, *how* should the Court do so? Inevitably, answers to these questions are colored by the Court's recent opinion in *Vieth v. Jubelirer*.²⁵

II. TO BE OR NOT TO BE (IN THE THICKET): THAT IS THE QUESTION

Dating back to the time of *Baker*, and the judiciary's persistent refusal to inject itself into the existing redistricting malaise, the Court initially faced a straightforward, although difficult, question of whether to seemingly change course and exercise jurisdiction over these highly-charged political issues. This was a contested question then and remains so to this day. The first part of this article situates Hasen's model within this larger debate. The discussion also raises specific questions about Hasen's view of the Court and its proper role in the political realm.

A. *The Debate over Judicial Intervention: A Continuum*

Contemporary accounts of the Supreme Court offer a picture of a court comfortably atop the judicial Olympus, supreme in its power and not afraid to use it.²⁶ This is a model of aggressive judicial review, of judicial supremacy, of a Court who acts because it must. From this view, the Court intervenes in social and political affairs as a matter of course; it simply does not know any other way. In election law circles, the aftermath of *Reynolds v. Sims*²⁷ offers a clear example of this view.²⁸

22. See HASEN, *supra* note 4, at 94, 151.

23. See *id.* at 13.

24. See Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 649 (1963).

25. 124 S. Ct. 1769 (2004).

26. See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240–44 (2002); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 130 (2001); Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Discrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 516 (2000).

27. 377 U.S. 533 (1964).

28. I have in mind here the 1969 Term, and particularly *Wells v. Rockefeller*, 394 U.S. 542 (1969) and *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); see Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy grail of "One Man-One Vote,"* 1969 SUP. CT. REV. 219, 220 (1969) ("The result in *Preisler* and *Wells* gives pause even to firm friends of 'one man-one vote.'"). The 1963 Term also comes to mind, as the Court invalidated state and local practices across the country. See *Reynolds*, 377 U.S. at 624–25; *Lucas v. The Forty-Fourth Gen. Assembly*, 377 U.S. 713, 739 (1964); Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 8–9.

A contrasting account, grounded in Justice Frankfurter's opinion for the Court in *Colegrove v. Green*,²⁹ takes a much more passive stance. This is an account of a prudential Court, an institution cognizant of the world where its decisions will inevitably take effect.³⁰ On Justice Frankfurter's terms, such a Court is unwilling to interject itself into redistricting controversies, as it is hesitant to enter into "immediate and active relations with party contests."³¹ Such a Court is also mindful of its assigned duties and responsibilities under our constitutional system. These considerations, coupled with the implicit demands of the political question doctrine, lead the Court down the path of inaction, even in the face of "grave evils" that "offend public morality."³² This view of judicial intervention has gained many respectful followers in recent years,³³ including, apparently, the U.S. Supreme Court.³⁴

Between these two polar extremes—strong action and inaction—lies a third view, which Cass Sunstein has labeled "judicial minimalism."³⁵ This is an account of a Court respectful of democratic outcomes and aware of its own shortcomings. A minimalist Court is a cautious and pragmatic Court,³⁶ an institution that follows its own precedents closely and says only as much as necessary to decide a case. This is a Court that is very aware of its unaccountable persona, and thus issues narrow and shallow opinions. Such decisions afford legislatures ample room to render their own pronouncements on questions of policy. A clear example of a minimalist decision is the Court's opinion in *Baker*.³⁷

Hasen's model of judicial review for election law cases falls squarely, and self-professedly, within the minimalist camp. Hasen wishes for neither supremacy nor abdication and non-action; rather, he takes a middle course.³⁸ In advocating the use of unmanageable standards, he looks to draw the inevitable yet difficult line between legislative and judicial action.³⁹ His model draws this important line around the distinction between contested and core equality rights.⁴⁰ In this way, his model "asks

29. 328 U.S. 549 (1946).

30. Justice Frankfurter made this point quite forcefully in his dissenting opinion in *Baker*. See 369 U.S. at 267 (Frankfurter, J., dissenting) ("Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' . . . presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined.").

31. *Colegrove*, 328 U.S. at 553.

32. *Id.* at 554.

33. See generally SANFORD LEVINSON, CONSTITUTIONAL FAITH, (1988); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

34. See *Vieth*, 124 S. Ct. at 1778.

35. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, 3–4 (1999) [hereinafter "SUNSTEIN, JUDICIAL MINIMALISM"]; Cass Sunstein, *The Supreme Court 1995 Term Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–7 (1996) [hereinafter Sunstein, *Leaving Things Undecided*].

36. See Sunstein, *Leaving Things Undecided*, *supra* note 35, at 8–9 & n. 8.

37. See generally *Baker*, 369 U.S. at 186–237; see also Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1371 (2002).

38. See HASEN, *supra* note 4, at 10–13.

39. See *id.*

40. See *id.* at 7–10.

the Court to leave much of the future development of American democracy in the hands of those who are politically accountable."⁴¹

B. On Trust, Making Things Up, and Turning Back the Clock

It is hard to disagree with a thesis that assigns to the legislative branches an important role in questions of democratic politics. But what do we make of the concomitant judicial role? Toward the end of his book, Hasen writes that he "no longer trust[s] the Court to make contested value judgments in political cases."⁴² This is a curious confession, for two reasons. First, it opens the question whether Hasen *ever* trusted the Court to make such determinations. For my part, *Baker* may be sensibly defended as a minimalist opinion, as leaving these "contested value judgments" up for debate at the state and local levels.⁴³ Yet soon after *Baker*, any trust in the Court and its ability to manage this area lessened.⁴⁴ Judicial intervention in matters of politics soon gave way to judicial control and micromanagement.⁴⁵ While these value judgments about equality were no less contested, the Court marched ahead and ossified its own reading of equality as "one person, one vote," defensive as that particular reading may be.⁴⁶ The race cases have not fared much better, particularly the line of cases begun by *Shaw v. Reno*.⁴⁷

Second, it is very curious that this lack of trust directs Hasen not toward abdication of any judicial role in matters of politics, but to a more fine-tuned judicial approach.⁴⁸ If we do not trust the Court to decide questions involving contested equality values, why should we trust the Court to make *any* determinations at all? One answer is simply that the Court is not planning a return to the political question regime, as Hasen points out,⁴⁹ and so advocating such a course of action is unlikely to get very far. Fair enough. But if the inquiry begins from a view of mistrust, it is not altogether clear how the model Hasen advocates makes any of the mistrust go away. Yes, the Court will do less, its role confined to enforcing core equality rights and the "equality outliers."⁵⁰ But can we really trust the Court to draw this distinction between core and contested values as well as Hasen's argument demands?

41. *Id.* at 13.

42. *Id.* at 154.

43. See Fuentes-Rohwer, *supra* note 37, at 1371.

44. See Dixon, *supra* note 28, at 219–24.

45. "Courts not only have entered the thicket, they occupy it." Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 210 (1964); see Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999) ("In the relatively short time since [*Baker*], the United States Supreme Court has not only entered the 'political thicket,' but with remarkable speed has found conflicts of democratic politics coming to dominate its docket.").

46. For criticisms, see Dixon, *supra* note 45, at 220; Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1296–97 (2002); Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS, 375, 384–85 (1981).

47. 509 U.S. 630 (1993).

48. See HASEN, *supra* note 4, at 10–13.

49. See *id.* at 13.

50. *Id.* at 154.

To his credit, Hasen recognizes this difficulty and offers a response grounded on Pareto optimality and the justices behaving as strategic actors.⁵¹ Even assuming that we agree with Hasen on this point, however, the justices must still agree about the nature and scope of the core rights at the heart of Hasen's call for review. The Court's history inspires very little hope on this score.

Coincidentally, Hasen agrees with this view of the Court's conduct throughout history. In specific reference to the political equality cases, he writes that "there is little question the justices of the Warren Court (like the justices of the Burger and Rehnquist Courts that followed) have 'made it up' as they went along. . . ."⁵² I agree with Hasen that the Court "makes up" new rules in election law cases as it goes along. There is no better example of this phenomenon than the *Shaw* line of cases, although Hasen documents many others.

But, to repeat a common theme, if the Court is simply "making stuff up" as it goes along, why not simply throw our hands up in the air and give up, exhort a return to the non-justiciability days of *Colegrove*? This point takes us back, if implicitly, to the political gerrymandering cases. What is the value in having a court do anything in this area when they will simply make stuff up, no better than a legislature or a law professor might do? The recent *Vieth* case offers a paradigmatic example. The principal claim in *Vieth* focused on the constitutionality of a severely gerrymandered congressional districting plan.⁵³ This plan had many of the characteristics of a traditional gerrymander: one party control of the process; a resulting map whose district shapes seemed suspicious at best; and, *inter alia*, seat-vote ratios that greatly advantaged the controlling party.⁵⁴ For these reasons, if the Court ever wished to establish a strong judicial presence in the gerrymandering thicket, this case offered terrific facts through which to do so. Yet for the time being, the Court punted, professing an inability to formulate judicially—manageable standards with which to patrol this politically-charged arena.⁵⁵

It is hard to put much stock in the plurality's confession about the limits of its own ability. Surely the Court could formulate standards for handling gerrymandering questions; taking a page from the saga of the equipopulation revolution,⁵⁶ it would only take a judicial will to do so.⁵⁷ It would take, in Hasen's words, perhaps a willingness to "make things up." So even assuming one finds the Pennsylvania redistricting plan appalling, why should the Court play any role in this area? Why should it ultimately "make something up" at all? This point is tied to Hasen's analogy of the leader lost in the woods and the many scouts that set out to gather information about their surroundings.⁵⁸ It is quite telling that Hasen places the Court in the role of a leader, in

51. See *id.* at 159.

52. *Id.* at 158.

53. See *Vieth*, 124 S. Ct. at 1773.

54. See *id.* at 1773–74.

55. See *id.* at 1778 ("As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.")

56. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

57. See Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031–33, 1059–61 (1985).

58. See *supra* notes 16–20, and accompanying text.

charge of deciding how to find the proper way out.⁵⁹ This analogy places the Court at the center of our constitutional world for any and perhaps all questions of law and policy.⁶⁰ But shouldn't the Court sometimes play the role of follower, passively watching other leaders trying to ascertain the way out as well?

A final query focuses on the scope of those core rights at the heart of Hasen's model.⁶¹ Admittedly, these core rights are "a small universe of rights for the Court to protect."⁶² Yet arguably, the Court may be seen as protecting some if not many of these values even before *Baker*. Many cases could be cited here, most prominently *Gomillion v. Lightfoot*,⁶³ the White Primary Cases,⁶⁴ *Guinn v. United States*,⁶⁵ and, I suppose, footnote 4 of *United States v. Carolene Products Co.* If so, *Baker* could be understood as extending the Court's power largely towards "contested" equality rights, those very rights for which Hasen exhorts judicial passivity, while watchful of rights newly supported by social consensus.⁶⁶ On this view, the real question thus focuses on what is lost and what is gained by advocating a return to the time when *Colegrove* served as the Court's guidepost. This is a question at the heart of any model of judicial review of electoral law.

III. A DOCTRINAL PASS: BRINGING EQUAL PROTECTION TO THE LAW OF ELECTIONS

In fairness to Hasen, his model places the Court in the role of a leader perhaps because the Court has placed itself there. It is also safe to assume that the Court is not going anywhere. The second part of this Comment thus focuses on the "how" question: How should the Court patrol the famed thicket? Hasen's contribution aims directly at this question. This Part sets out Hasen's role for the Court in greater detail, in particular his distinction between core and contested values, and his particular brand of balancing.⁶⁷ The last part of this Comment concludes by offering its own, albeit tentative, model for a lessened role for the Court in electoral matters.

A. Equality Values and Social Consensus

As described earlier, Hasen marks a clear distinction between core and contested equality values.⁶⁸ The Court's policing focuses on the core equality values, while leaving the contested values to the interplay and jostle of the political process.⁶⁹ The real questions as Hasen recognizes are empirical: How to differentiate between core and contested values, how to differentiate between those situations when the Court must

59. *See id.*

60. *See id.*

61. *See* HASEN, *supra* note 4, at 75–78.

62. HASEN, *supra* note 4, at 163.

63. 364 U.S. 339 (1960).

64. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953) [hereinafter "White Primary Cases"].

65. 238 U.S. 347 (1915).

66. *See* HASEN, *supra* note 4, at 162–63.

67. *See generally id.* at 73–100.

68. *See supra* notes 8–12 and accompanying text.

69. *See id.*

act decisively or passively, and how the Court will identify these moments as such.⁷⁰ He offers some rather uncontroversial values as core values, such as the right to speak on matters of politics or the right to be free from discrimination in voting on account of race or ethnicity.⁷¹ The Court would identify these and others on account of the text or history of the Constitution, or “basic” political theory.⁷² By his own account, Hasen envisions a small universe of core rights.⁷³

Tellingly, Hasen argues that most of these core equality values have been socially constructed.⁷⁴ That is, they “depend[] upon a social consensus or near-consensus about the ground rules for contemporary democratic governments to function.”⁷⁵ He includes among these the aforementioned non-discrimination principle in voting on account of race or ethnicity, and even the notion of “universal suffrage.”⁷⁶ *Harper v. Virginia Board of Elections*,⁷⁷ striking down the state poll tax, is also included among these principles. In this way, the notion of social consensus thus provides the standard by which the Court can guide its political equality jurisprudence.⁷⁸ It also provides its own restraintist check—only those rights that have achieved the status of core values via social consensus demand close judicial supervision.⁷⁹ The Court need only focus on determining whether a particular practice has achieved social consensus.⁸⁰

This argument raises an immediate difficulty: How would a court, or anyone for that matter, determine whether a practice has achieved social consensus? Hasen looks to Justice Harlan’s dissent in *Harper* for support: “swift passage of the Twenty-Fourth Amendment”, repeal of the poll tax in most states and localities, and “contemporary [public] attitudes about the poll tax” all pointed towards the existence of a social consensus against the tax.⁸¹ Fair enough. Look to any new Amendments, recently passed legislation, or opinion polls. But the poll tax might be an easy case, perhaps too easy—as Hasen recognizes, the Court was simply reining in a few outlying states, such as Virginia.⁸² What to make of a harder case?

Take instead the political gerrymandering question, as examined by the Court in *Vieth*.⁸³ Could it really be said that a social consensus against the gerrymander does not exist? One would be hard-pressed to find a newspaper editorial in support of the egregious gerrymanders of recent years, as seen in Georgia, Michigan, Pennsylvania, and Texas, to name a few. One does find some states, such as Arizona and Colorado, engaging the public in a debate over the mechanics of the redistricting process.⁸⁴ A

70. See HASEN, *supra* note 4, at 79.

71. See *id.*

72. See *id.* at 79.

73. See *id.*

74. See *id.* at 80.

75. *Id.*

76. See HASEN, *supra* note 4, at 80.

77. 383 U.S. 663 (1966).

78. See HASEN, *supra* note 4, at 80–81.

79. See *id.*

80. See *id.*

81. See HASEN, *supra* note 4, at 80.

82. See *id.*

83. See generally *Vieth*, 124 S.Ct. 1769.

84. For an extensive list of cases and complaints filed in Arizona and Colorado regarding redistricting claims, see <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/redsum2000.htm> (last

defense of the political gerrymander as such also finds little support in the academy. With all this evidence in hand, can we confidently say that a social consensus is yet to form against the practice? And better yet, how would the Court know?

B. On Hardened Rationality, True Balancing, and Election Law Exceptionalism

This last question links empirics to a long-standing debate among judicial behavior scholars and constitutional theorists. Whether couched in the language of social consensus or judicially-manageable standards, either inquiry raises difficult epistemological questions about the nature and scope of the constitutional language at stake. How should a court interpret the language of equal protection, due process of law, or commerce among the several states? Similarly, a court would encounter grave difficulties in determining whether a social consensus has formed around a particular practice. This is not to say that courts must not act absent exigent circumstances, nor do I exhort Thayer's axiom of "clear mistake." Rather, it is to side with Hasen in wishing for judicial humility.⁸⁵

This point takes me back to *Baker* and the Court's entry into the thicket. If we use contemporary scholarly reactions to Justice Brennan's opinion for the Court as our guides, *Baker* was far from the Court's best moment.⁸⁶ Commentators identified the following characteristics: no standards, loose and ultimately disingenuous use of precedent, and improper respect of the difficulties inherent to the problem of redistricting.⁸⁷ Yet for all of its shortcomings, *Baker* is also one of the Court's finest hours. Facing a clear breakdown in the political process, the Court moved cautiously into this difficult area while placing broad and forgiving demands on political actors. In Hasen's terms, the Court needed a way out, and rather than barging ahead following its preferred way, it sent out scouts to investigate the myriad paths then available.⁸⁸ This is to say that the Court, while acting, left things open for the future, for political actors and courts alike.

On this reading, *Baker* may be seen as bringing the world of Constitutional law to bear on run-of-the-mill political questions. Prior to *Baker*, judicial intervention in electoral matters required an initial finding that elections had been corrupted by an impermissible value. The use of race is exemplary here, as seen in the White Primary Cases,⁸⁹ cases striking down grandfather clauses⁹⁰ and racial gerrymandering cases.⁹¹

visited Nov. 15, 2004).

85. See HASEN, *supra* note 4, at 164 ("[T]he Court could do much better than it already does by acting with some humility.").

86. See, e.g., Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 108 (1962); Philip B. Kurland, *The Supreme Court, 1963 Term: Foreword—Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 149 (1964); Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 62–64 (1962); see Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 252–53

87. See *supra* note 86.

88. See HASEN, *supra* note 4, at 71–72.

89. See White Primary Cases, *supra* note 64. But cf. *United States v. Classic*, 313 U.S. 299 (1941). *Classic* defies this characterization. The focus of *Carolene Product's* footnote four on prejudice against minorities offers a way to reconcile the case. See generally David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741

These may be seen as hybrid cases, in that the Court intervened in matters of elections not out of concern for the electoral system itself, but in defense of an independent value. *Baker* changed this judicial posture. After *Baker*, the Court was far more emboldened in its pursuit of a fair political system.⁹² Yet *Baker* itself was minimalist in scope, its demands on political actors couched in the language of “arbitrary and capricious action” and legitimate state interests.⁹³ These were also *real* demands, in that courts would analyze redistricting plans under a hardened rationality approach, with a sincere look to the legitimacy of the state interests in question and the nexus between the means and ends in question.⁹⁴ These were demands that many state legislatures could not meet in the early 1960’s, but could accomplish by mere passage of a redistricting act, something they had not done for many decades.⁹⁵

Hasen agrees with many aspects of this reading of *Baker*. For example, his model asks that courts require “strong proof of the need for and significance of the governmental interest.”⁹⁶ He similarly writes that a balancing approach must “look at the reasons behind the government action as well as its reasonableness. Reasonableness and strict means-ends scrutiny should separate permissible election laws that inhibit political competition from impermissible ones.”⁹⁷ Further, and to follow his own analogy, the *Baker* decision may be seen as the Court sending out scouts in many directions while setting reasonableness as a low threshold of review.⁹⁸ Yet the Court might have reined in the scouts too early on the traditional reading of *Reynolds*—a reading that understands the Court as enshrining its particular reading of what “fair and effective representation” demands under a theory of uncompromising population equality.⁹⁹

It is not altogether clear why the Court did not stay the course and appears to change approaches in *Reynolds*. Clearly, the Court’s composition changed, but that is hardly the whole story. This change in course raises a host of interesting questions. What if the Court had stuck with its rationality approach in *Baker* and simply asked for state actors to proffer a legitimate state interest in support of their actions while ensuring that the means in question are in fact furthering the asserted state interest? Further, what would that approach look like across the election law context? And how does it fare when compared to Hasen’s approach? In particular, what is the value of a Court constantly on the lookout for social consensus? To take an easy example, a rationality approach may find both literacy tests and poll taxes facially unobjectionable,

(1981).

90. See, e.g. *Guinn v. United States*, 238 U.S. 347 (1915).

91. See, e.g. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

92. Compare *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (holding that a North Carolina statute requiring that voters be able to read and write did not violate the U.S. Constitution on its face) with *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (holding that a Texas provision that prohibited members of the Armed Forces that move to Texas from voting there was unconstitutional).

93. See *Baker*, 369 U.S. at 226.

94. See *Fuentes-Rohwer*, *supra* note 37, at 1394–1408.

95. See *id.* at 1360–61 & n.23 (discussing the lack of reapportionment in the southern states during the period from 1900–1960).

96. HASEN, *supra* note 4, at 94.

97. *Id.* at 151.

98. See *id.* at 71–72.

99. See *Reynolds*, 377 U.S. at 565–66.

yet a Court looking for a social consensus may draw a constitutional distinction between the two practices. Is this a distinction worth making? This is another way of asking, why do we want the Court performing this particular function? And if an emerging social consensus provides the requisite constitutional line, why would the Court be better positioned to perform this function than Congress or state legislatures?

IV. CONCLUSION

In the final analysis, Hasen's model of judicial review offers many attractions. It demands judicial caution, modesty, and careful attention to the Court's place in our constitutional universe. What's not to like? My only hesitation in embracing Hasen's model across the board stems from the very source that bothers Hasen: a deep distrust of the Court and its ability to police the political process sensibly. For Hasen, the solution is found in judicially-unmanageable standards and the ultimate judicial responsibility to protect the core of political equality while recognizing social consensus as it arises. I agree with this model as a defense of a minimalist Court. I do wonder, however, how well the Court will be able and willing to carry out this function. And before we know it, we'll be back to the place where we began, with a Court acting the role of Platonic Guardian.

