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## THE ELYSIAN FOUNDATIONS OF ELECTION LAW

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*Three decades ago, John Hart Ely described and defended a theory of judicial review founded upon clearing the channels of political change and facilitating the representation of minorities. Ely's argument has had a mixed legacy in constitutional law, its principles inexorably present in constitutional theory and its applications seemingly unrealized in most contexts. Yet for all the criticism the theory received, features of Ely's theory are ingrained today as organizing principles in the election law jurisprudence, the realm where Ely's channel-clearing argument has the most traction. Ely's modern-day heirs in the election law field advocate approaches that evince an overriding concern for the casting of a meaningful vote, for robust political competition, and for policing the process of representation—all preeminent Elysian concerns. These advocates have faced critiques tracking those that Ely faced, particularly the indeterminacy critique. Ely's work has latent, overlooked lessons in responding to these objections, and this Article seeks to return them to prominence. In this Article, Luke McLoughlin takes Ely out of the "Cf." footnote to which he is often relegated and contends that the strengths and weaknesses of Democracy and Distrust have important insights for the body of current election law debates. The trajectory of Democracy and Distrust's argument as well as the argument's mixed legacy show that judicial review of the political process is more justifiable and effective where empirical evidence clearly demonstrates a representational burden, channel blockage, or democratic harm. Empirical evidence is important to the crafting of doctrine in any field of law and to all types of judicial decision making, but it is particularly crucial to doctrines governing the law of politics, which often rely (as Ely's theory did) on accounts of and assumptions about legislative motivation and political behavior. McLoughlin makes visible the undercurrent of Elysian concepts in contemporary debates about election law doctrine, and contends that Democracy and Distrust has concrete meaning and insight for the election law field beyond its mutually opposing positions as obligatory footnote and "holy grail" of judicial review. Courts have relied on a variety of standards, tests, and presumptions in crafting election law doctrine, sometimes based on strong empirics and other times on conjecture or conceptions of more ephemeral harms. McLoughlin contends that, by applying the obscured lessons of Ely's work, scholars and courts constructing election law doctrine can proffer and benefit from empirically convincing accounts of institutional and political dynamics in cases involving the law of the political process.*

## INTRODUCTION

Debates about judicial review are cyclical.<sup>1</sup> If the topic is the “obsession”<sup>2</sup> of the American legal culture, that obsession is marked by spikes and depressions, driven by the arguments and cases that give enduring questions new urgency. Roughly thirty years ago, the debate intensified in the aftermath of an attempt by John Hart Ely to describe and defend a theory of judicial review. Ely set forth in *Democracy and Distrust*<sup>3</sup> a theory of judicial review that took as its foundation the famous footnote four in *United States v. Carolene Products Co.*,<sup>4</sup> and developed an approach based on clearing the channels of political change and facilitating the representation of minorities.<sup>5</sup> Ely’s theory was a landmark achievement, permanently reshaping debates about judicial review and continuing to this day to undergird discussions on the role of courts. Its attempt to provide an account of a principled, representation-reinforcing theory of judicial review gained strength from its cogent and crackling first chapters dismantling the arguments in favor of the theory’s alternatives. It was bolstered by its compelling account of self-interested behavior by officeholders, and had wide appeal by offering a theory that promised to preserve the gains of the Warren Court while nevertheless cabining judges’ discretion.

Both halves of this theory, however, received intense scrutiny from the day *Democracy and Distrust* was unveiled,<sup>6</sup> and a variety of critiques—begun in the

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1. James E. Meeks, *Foreword: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1, 1 (1981) (discussing “apparent cyclical nature” of debate about judicial review, and noting that “[i]t seems to push itself forward to a prominent position in legal literature and thought at about twenty to thirty year intervals”). Such debates are obviously historically contingent. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 156–57 (2002).

2. See Friedman, *supra* note 1, at 155.

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

4. 304 U.S. 144, 152 n.4 (1938) (suggesting that “more exacting judicial scrutiny” may be called for when law “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” and that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”); see also Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1098 (1982) (“On its face, [the footnote] did no more than identify questions—the right questions, to be sure, as history has shown, but mere questions nevertheless.” [Lusky was Justice Stone’s law clerk when *Carolene Products* was decided]); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1090 (1982) (“Footnote 4 is . . . not a developed theory in itself. Nor is there reason to think that Stone intended it to be. . . . Far from suggesting that he had developed a comprehensive theory of constitutional adjudication, Stone’s cryptic language frames more questions than it implies answers.”).

5. ELY, *supra* note 3, at 76–77.

6. *Democracy and Distrust* was published in 1980, and several chapters were published in law

years immediately following publication and continuing in the three decades after—left Ely’s project battered. Insofar as the theory claimed to have found a way to keep judges’ substantive value choices out of judicial review, the claim failed.<sup>7</sup> Insofar as Ely indicated that the channel-clearing approach, put in the hands of judges, would lead to clearly predictable results, rule out certain outcomes, and reinforce democracy itself, that indication was never fully validated; the judiciary never explicitly adopted Ely’s channel-clearing approach.<sup>8</sup> And, overall, Ely’s theory came to be seen as never being able to live up to its promise, instead remaining a mystical, elusive presence in constitutional theory.<sup>9</sup>

These flaws aside, there is no dispute that Ely’s argument resonates today, particularly his channel-clearing approach.<sup>10</sup> Though no “thicker,” more comprehensive theory of representation-reinforcing review followed from Ely’s pen, and despite the fact that Ely’s breakthrough approach ultimately was not adopted wholesale by the judiciary, Ely’s theory drew legitimacy from its explanation of cases such as *Baker v. Carr*<sup>11</sup> and various others involving the rules and boundaries of the political process.<sup>12</sup> Ely succeeded in convincing many that his questions were the ones about which judicial review should be preeminently concerned.<sup>13</sup> Moreover, the election law<sup>14</sup> field eventually

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reviews in the years preceding. *E.g.*, John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

7. Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 142 (1981) (“[I]n his heroic attempt to establish a value-free mode of constitutional adjudication, John Hart Ely has come as close as anyone could to proving that it can’t be done.”).

8. See Samuel Issacharoff, *The Elusive Search for Constitutional Integrity: A Memorial for John Hart Ely*, 57 STAN. L. REV. 727, 734–35 (2004) (“[H]as constitutional law moved toward Ely’s vision? Here the result is more mixed. The Supreme Court rarely cited to the critical meaning of John’s work, and even then, generally in passing in a string of citations.”). For reasons that I provide later, I do not believe that the theory actually claimed to either (1) get the substance completely out of process or (2) provide a manual for how to decide all cases.

9. See Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 722 (1991) (“I also find myself fascinated by Ely’s argument—against my better judgment. Each year I find myself returning to his proposal only to find that its promise remains unfulfilled.”).

10. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 4* (2003) (“Although much of Ely’s theory of judicial review has been rejected by many constitutional law scholars, the part that appears to have survived the test of time is his idea that courts should intervene in the face of political market failure.” (footnote omitted)); Ortiz, *supra* note 9, at 722 (“[D]espite the great amount of criticism the book has drawn, *Democracy and Distrust* still fascinates the academy.”); Ortiz, *supra* note 9, at 722 (“[D]espite its defects, process theory still holds constitutional theory in its thrall.”).

11. 369 U.S. 186 (1962).

12. See HASEN, *supra* note 10, at 4; Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1333 (2005) (“Nothing provides a better model of anti-entrenchment judicial review than the Warren Court’s reapportionment cases.”).

13. See Ortiz, *supra* note 9, at 721–22 (“Although Ely has persuaded few theorists and gained few adherents, he did change the territory and define the arguments to which most constitutional theorists now feel obliged to respond. If he did not win the game, he at least forced the play onto his own court.” (footnotes omitted)).

coalesced, and competition-oriented, channel-clearing themes took root and gained adherents in the area where its applications are the most obvious.<sup>15</sup> Certain of Ely's academic heirs in this field have, in the years since Ely put forward his argument, sought to describe and promote ways of approaching constitutional and statutory cases in a manner resembling Ely's.<sup>16</sup> The current election law orthodoxy evinces an overriding concern for the casting of a meaningful vote, for robust political competition, and for appropriately policing the process of representation—all preeminent Elysian<sup>17</sup> concerns. In the same vein, many scholars in this field also urge that cases involving the democratic process be analyzed with an eye to the systemic aims of democracy, not merely the particular right invoked. These scholars frequently lament the inability or unwillingness of courts to analyze political process cases in ways any different from the rest of the constitutional law canon, or to offer politically attuned accounts of legislative behavior.<sup>18</sup> In short, Ely's theory, for all the criticism it has received, is ingrained as an organizing principle in the election law jurisprudence.<sup>19</sup> Many scholars in the election law field track Ely's approach—whether acknowledging it openly or not—as they pursue a mission of

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14. The field is also known as the law of democracy or the law of the political process.

15. HASEN, *supra* note 10, at 4 (“Process theory has an intuitive appeal as a rule to apply in election law cases because it purports to provide both a reason for and a limit on judicial intervention in political cases, but it has proven to be problematic . . .”).

16. Like all heirs, these scholars have distinguished their methods from their forebear's. *E.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 710 (1998) (“Ely focused primarily on the civil libertarian concern with individual rights and minority group interests, rather than on the task of constructing the core structure of the political process itself. Ely also focused on sociological and psychological reasons why some groups undervalue the interests of ‘others’ and focused less on the struggle for the monopoly capture of state institutions.” (footnote omitted)); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 n.38 (1997) (noting “subtle” differences between anti-entrenchment theory and political process theory).

17. JOHN HART ELY, ON CONSTITUTIONAL GROUND 466 n.117 (1996) (Ely stated with regard to his own adjective: “I’m not sure I get to choose, but I much prefer ‘Elysian.’”).

18. *E.g.*, Pamela S. Karlan, *Constitutional Law, the Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1196 (1999) (“What then does it mean to talk about the legal structure of the political process as its own field of study? . . . [L]ooking at the statutes, structures, and cases that govern our politics as it is actually conducted may offer a far richer avenue for understanding constitutional law generally than pursuing ever more theoretical and abstract forms of constitutional theory has done.”); Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525, 1532 (2003) (“Does it strain the capacity of judges too much to ask that they not conceive of ‘Constitutional Law’ as one vast general domain of rights, equality, and the like? This is the right question to ask. But I do not find it so heroic for judges to make sensible distinctions between how rights should be understood in the sphere of democratic elections and how rights should be understood in other contexts.”).

19. See John Hart Ely and Election Law, <http://electionlawblog.org/archives/000178.html> (Nov. 2, 2003, 21:28 EST) (“Ely’s process theory, it is safe to say even today, is election law orthodoxy. Indeed, one can trace to Ely the currently fashionable structural ‘lockup’ or ‘political markets’ approach to election law cases put forward most forcefully by Sam Issacharoff and Rick Pildes.”).

encouraging courts to examine political rights in the context of democratic structures.<sup>20</sup>

Not only is Ely's theory visible as part of the intellectual foundation of the election law field, but as part of a "theme" one Supreme Court Justice has identified as a source of judicial authority and an interpretive aid in deciding cases. Justice Breyer has articulated—in judicial opinions,<sup>21</sup> law review articles,<sup>22</sup> public speeches,<sup>23</sup> and culminating in his book *Active Liberty*<sup>24</sup>—a participation-oriented theory of judicial review.<sup>25</sup> The approach described in *Active Liberty*<sup>26</sup> and these related works has unmistakable echoes of *Democracy and Distrust*.<sup>27</sup> Like Ely's, Breyer's approach has shaped the field of election law and influenced its scholars.

These proponents—on the bench and in the academy—of approaches that remain attuned to the broader context of democratic structures have faced many of the same objections Ely faced. Critics claim that a competition-oriented or

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20. HASEN, *supra* note 10, at 4 ("Most election law scholars have embraced process theory—at least that part focused on curing political market failures—almost as a matter of religious conviction."); Nathaniel Persily, *The Place of Competition in American Election Law*, in THE MARKETPLACE OF DEMOCRACY 171, 171 (Michael P. McDonald & John Samples eds., 2006) ("In recent years it has become fashionable for legal academics to conceive of problems in American election law as ones concerning regulation of the political marketplace as opposed to infringements on constitutionally guaranteed individual or associational rights."); *see also* ELY, *supra* note 3, at 90 ("I don't suppose it will surprise anyone to learn that the body of the original Constitution is devoted almost entirely to structure . . .").

21. *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 356 (2004) (Breyer, J., dissenting); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 615 (1996) (plurality opinion).

22. *E.g.*, Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 TEX. L. REV. 761, 762–63 (2000).

23. *See* Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., Harvard University Tanner Lectures On Human Values: Our Democratic Constitution (Nov. 17–19, 2004), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_11-17-04.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html); Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., James Madison Lecture on Constitutional Law Delivered at New York University: Our Democratic Constitution (Oct. 22, 2001), revised text reprinted in 77 N.Y.U. L. REV. 245, 246 (2002) [hereinafter Breyer, Madison Lecture]; Interview by Charlie Rose with Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., (Oct. 26, 2005), available at <http://www.charlierose.com/view/interview/679>.

24. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15–16 (2005).

25. *See* Kathleen M. Sullivan, *Consent of the Governed*, N.Y. TIMES, Feb. 5, 2006, at 20 ("Stephen Breyer has offered a theory of democratic pragmatism that is very likely to play a powerful role in deciding [the Court's] controversies."); *id.* ("Active Liberty" echoes John Hart Ely's 1980 masterwork, "Democracy and Distrust.").

26. Though there are important differences between *Our Democratic Constitution* and *Active Liberty*, I refer to *Active Liberty* as a shorthand for Breyer's argument on this subject. *See, e.g.*, Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 100 (2006) (pointing out that Breyer switches his example of *Shaw* in *Our Democratic Constitution* to *Grutter* in *Active Liberty*).

27. *See* McLoughlin, *supra* note 26, at 101 n.266 (collecting articles by Judge Posner, Judge McConnell, James Ryan, and Cass Sunstein which note the similarity of *Active Liberty* to Ely's project).

“democracy-oriented” form of judicial review is neither possible nor justifiable.<sup>28</sup> Ely’s academic heirs have faced the objection that their “structural” approach is fatally indeterminate.<sup>29</sup> In the same way, Justice Breyer’s approach in *Active Liberty* has been challenged as vague, boundless, and lacking any true basis for predictable results other than what would appeal to *Active Liberty*’s author.<sup>30</sup>

Ely’s work has latent, overlooked lessons in responding to these objections, and this Article seeks to return them to prominence. These lessons have been obscured in part by time and in part by other aspects of Ely’s arguments that attracted disproportionate attention throughout the years. Specifically, his suggestion that a *Carolene Products*-style review could keep substance (values held by the public and appropriately accommodated by the legislature) out of process was challenged and rejected again and again by Ely’s contemporaries. While it is true that it is impossible to keep substance out of process, the suggestion to the contrary is not actually necessary to Ely’s overall argument (and indeed, he openly recognized that).<sup>31</sup> Nevertheless, that obvious weakness in the form of Ely’s argument obscured many of the argument’s strengths.

Another weakness resulted in part from Ely’s strengths as a writer and as a theorist. Ely’s ease in covering myriad cases and wide constitutional terrain in his discussion (ranging across criminal procedure, administrative law, equal protection jurisprudence, and a host of other subfields) meant that he did not spell out explicitly where his argument was weakest and where it was strongest, explain when courts would have to draw on more political capital as opposed to less, or detail circumstances in which courts would have an easy time applying his theory as opposed to where it would be hard. This led to an unfortunate slippage in Ely’s terminology and in the approach itself, as Ely quickly departed from his discussion of “blockages” in the political processes to advocating a form of judicial review that was engaged in constantly perfecting those processes, up to and including employing judicial review to change the forms of deliberation undertaken by legislative bodies. That drift in the wording and content of his argument invited the critique that Ely’s theory was unbounded and no better than the alternatives he had discarded.

Underemphasized in *Democracy and Distrust* but crucial to current election law debates is the fact that any concept of “representation-reinforcing” judicial

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28. See *infra* Part II.A.

29. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 701 (2008) (“Judges and law professors alike have worried that an avowedly structural approach to constitutional adjudication of political rights would embroil the courts in contested questions that are beyond their competence to resolve.”).

30. See, e.g., James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1645 (2006) (book review) (“Justice Breyer himself admits that his approach might not lead to concrete answers. But it points to a larger problem with Justice Breyer’s approach, namely that it seems incurably indeterminate. By this I *do not* mean that it is difficult to tell how concrete cases should come out under Breyer’s approach. I mean that we are not entirely sure what Breyer is looking for, other than reasonable solutions to difficult problems.”).

31. See *infra* notes 161–67 and accompanying text.

review exists on a continuum. There is a host of ways to reinforce representation—improve how elections are run, improve how officeholders respond to their constituents, improve participation by those constituents, improve the processes of legislative decision making, or even improve deliberation itself. Ely offered no natural stopping point for his theory in *Democracy and Distrust*, but it was plain from the structure of his argument and Ely's later writings that the potency of Ely's argument was directly related to the concreteness of the supposed blockages and the ability of courts to offer "standard[s] that not only act[] meaningfully to repair the constitutional violation the Court has identified, but also possess[] both judicial (and legislative) manageability and the saleable sound of constitutional principle."<sup>32</sup>

Even though Ely regarded both prongs of his approach as "representation-reinforcing," the channel-clearing prong (elaborated in chapter 5 of *Democracy and Distrust*) had more traction and won more praise because it dealt with actual electoral outcomes, of "ins" harming the "outs" in ways that could be measured at the ballot box. The prejudice prong (chapter 6), meanwhile, delved into a broader array of legislation involving public benefits as well as rights, and relied on an account of legislators' improper "we-they" psychologies, as well as other psychological causes and effects in deliberation.<sup>33</sup> Ely's second prong was the next logical step in his argument, where, "though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority . . . and thereby denying that minority the protection afforded other groups by a representative system."<sup>34</sup> The centrifugal nature of Ely's argument quickly led him past obvious, concrete blockages, because he believed that "popular choice will mean relatively little if we don't know what our representatives are up to."<sup>35</sup>

Ely's account of channel clearing flowed swiftly from the core electoral concerns and cases where harms are obvious to cases where they are much less definable. It moved quickly away from an account of competition for office and into the realm of deliberation by lawmakers and agencies. Thus, chapter 5 begins with a lengthy discussion of free speech and overbreadth, then the right to vote, then a discussion of a more "visible" legislative process, before finally concluding with a section on review that leads to a more "legislative" legislative process.<sup>36</sup> In short, representation has shades and components only implicitly acknowledged by the organization of Ely's argument; the trajectory of his thesis in *Democracy and Distrust* followed a continuum starting with the clearest burdens on political competition and free speech, before moving towards defects in deliberation.

Grouping a variety of concepts under the umbrella of "representation" or "democracy" needlessly indicated that there were no gradations to Ely's

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32. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 609 (1998).

33. ELY, *supra* note 3, at 162, 172.

34. *Id.* at 103.

35. *Id.* at 125.

36. *Id.* at 125, 131.

approach. Ely attacked “substantive due process” as a contradiction in terms akin to “green pastel redness,” but “participation-oriented, representation-reinforcing”<sup>37</sup> judicial review has a similar defect; it blurs both the constitutional injury and the judicial aim, and ultimately obscures the judiciary’s task. Nevertheless, the recognition of those shades and gradations couldn’t be clearer in Ely’s argument, even if he elected not to parse them or make them more visible.

Accordingly, the very structure of Ely’s own argument contains key insights for structuralists in the election law field. Frequently invoked and often derided, Ely’s work offers lessons beyond the sole structural aim of anti-entrenchment. Ely’s argument was most potent in cases of clear blockages, burdens, and harms<sup>38</sup> to the most visible channels of the political process (political speech, voting, ballot access, and redistricting). Where easily applied rules were available, Ely’s account was particularly strong, but he did not claim that reliance on standards would lead to unprincipled decisions. Structuralists can take these lessons into account when fashioning their arguments not only about how to decide cases but—crucially—how the Court ought to craft doctrine.

This Article takes Ely out of the “*Cf.*” footnote to which he is often relegated and contends that the strengths and weaknesses of *Democracy and Distrust* have important insights for the body of current election law debates. The trajectory of *Democracy and Distrust*’s argument as well as the argument’s mixed legacy shows that judicial review of the political process is more justifiable and effective where empirical evidence clearly demonstrates a representational burden, channel blockage, or democratic harm. Empirical evidence is important to the crafting of doctrine in any field of law and to all types of judicial decision making,<sup>39</sup> but it is particularly crucial to the law of politics, which often relies (as Ely’s theory did) on accounts of and assumptions about legislative motivation and political behavior. Moreover, while courts may often employ rules in deciding cases involving the political process, a search for perfect rules or rules at all is not required to manage election law cases. For most election law cases, there is no one-person, one-vote rule to be applied, and thus in the mine run of cases courts will fashion and apply standards.<sup>40</sup> Empirical indicia allow courts to apply “saleable” standards that give meaning to abstract constitutional principles

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37. *Id.* at 18, 87.

38. *Cf.* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 638 (2004) (“Justice Souter’s ‘extremity of unfairness’ is not much different from Justice Breyer’s ‘unjust entrenchment’ or even Justice Kennedy’s First Amendment ‘burden;’ all of these standards inevitably would lead courts to develop multipart tests for separating permissible from impermissible use of partisan information in districting, parallel to how the Court has articulated tests for judging vote dilution under section 2 of the Voting Rights Act or nonretrogression under section 5 of the Act.” (footnotes omitted)).

39. *See* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 79–80 (2000) (“In making ‘reasonableness’ a concept workable in court, how much should be decided case by case, and how much should be specified by bright-line rules? . . . If so, what should these rules look like? . . . Many of the issues here call for strategic, pragmatic, empiric, institutional, and second-best judgments as to which the document gives rather little specific guidance.”).

40. *See infra* Part III.B.

without descending into indeterminacy.<sup>41</sup> While obscured in *Democracy and Distrust*, the entire organization of Ely's argument (like Justice Breyer's in *Active Liberty*) depends on these concepts, and structuralist accounts can benefit from recognizing them.

By calling attention to the underappreciated lessons in Ely's argument, this Article seeks to make visible the undercurrent of Elysian concepts in contemporary debates about election law doctrine and contends that appreciating those undercurrents helps clarify those debates. This Article also brings together disparate critiques and paths of discussion in the election law field, and explains why certain aspects of current debates are so familiar. Finally, this Article seeks to show that *Democracy and Distrust* has concrete meaning and insight—beyond its mutually opposing positions as obligatory footnote and “holy grail”<sup>42</sup> of judicial review—for the election law field and for debates about judicial review of political process cases.

Part I describes Ely's argument and its criticisms. This Part calls attention to the latent continuum within his argument and makes visible its intersection with the building blocks of election law doctrine. Part II describes the election law field and certain of its current debates. This Part connects those debates (and *Active Liberty*) to *Democracy and Distrust*, and describes how successful election law doctrine depends upon developing rules and standards that incorporate accurate accounts of political behavior. Part III contends that the Court's successes and failures in operationalizing a structuralist form of judicial review in election law cases relate to the availability of empirics to cabin various judicially created standards. This Part concludes by discussing the limitations of openly embracing empirics in crafting doctrine, and suggests ways in which future election law arguments may expand upon Elysian concepts rather than retrace them.

Thirty years after its introduction, debates over judicial review have cycled back toward Ely's breakthrough.<sup>43</sup> Ely's theory retains a unique place in

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41. Ely, *supra* note 32, at 609; *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1312–13 (2006) (“Just as courts ultimately make all-things-considered judgments in determining whether particular proposed tests count as judicially manageable at all, they make substantially open-ended decisions in selecting among those judicially manageable standards that sufficiently approximate the Constitution's meaning to be eligible for adoption. . . . [T]he Court needs to make practical judgments, not just theoretical ones, and practical judgments almost always require attention to real-world consequences and their costs and benefits.”).

42. Brian Boynton, Note, *Democracy and Distrust After Twenty Years: Ely's Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 419 (2000).

43. *See* Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS., Summer 2004, at 149, 150; Douglas T. Kendall & James E. Ryan, *Liberal Reading: Taking Back the Constitution*, THE NEW REPUBLIC, Aug. 6, 2007, at 14, 15 (advocating approach to judicial review termed “progressive originalism”); Robert Post & Reva Siegel, *How Liberals Need to Approach Constitutional Theory*, THE NEW REPUBLIC, Sept. 18, 2007, available at <http://www.law.yale.edu/news/5658.htm> (arguing that Kendall and Ryan are misguided and contending that “[p]rogressives ought to be wary of a method of interpretation that strongly privileges the history of constitutional lawmaking over the experience of living under the Constitution”); Jeffrey Toobin,

constitutional law, its principles inexorably present in constitutional theory and its applications seemingly unrealized in most contexts. But a part of Ely's theory is alive and well in the election law field, where cases and arguments traverse the continuum that undergirds *Democracy and Distrust*. Re-examining Ely's argument and all its limitations helps demonstrate what the Court requires to craft election law doctrine and decide cases involving the law of the political process.<sup>44</sup>

## I. JOHN HART ELY'S BREAKTHROUGH

### A. *Ely's Argument*

Shortly after Chief Justice Warren, for whom Ely had clerked and whom Ely idolized, stepped down from the bench, Ely began to sketch out his answer to the problem of the countermajoritarian difficulty.<sup>45</sup> Ely's theory of judicial review sought to justify Warren Court decisions as process oriented<sup>46</sup> and, more generally, to promote an approach to judicial review grounded in footnote four

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*Bench Press: Are Obama's Judges Really Liberals?*, THE NEW YORKER, Sept. 21, 2009, at 42, 48 ("What you'll get with Obama is basically *Carolene Products* . . . ." (quoting Richard Epstein)).

44. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 154 (2004) ("The functional reasons that first led the Court into the arena of democratic-institutional design remain: constitutional law must play a role in constraining partisan or incumbent self-entrenchment that inappropriately manipulates the ground rules of democracy."); *see also* Allan C. Hutchinson, *A 'Hard Core' Case Against Judicial Review*, 121 HARV. L. REV. F. 57, 62 (2008), available at <http://www.harvardlawreview.org/forum/issues/121/may08/hutchinson.pdf> ("[L]egal theorists' attention must shift towards the critical elaboration of those process-related conditions which make legal enactments and decisions more or less democratic."); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1403 (2006) (noting that scenarios conceived of by Justice Stone in *Carolene Products* and discussed by Ely are outside Waldron's "core" argument against judicial review and weigh against it).

45. John Hart Ely, *Democracy and the Right to Be Different*, 56 N.Y.U. L. REV. 397, 399 n.4 (1981) (arguing that application of *Carolene Products* principles will "significantly minimize the 'countermajoritarian difficulty'").

46. The seeds of *Democracy and Distrust*, and, concomitantly, Ely's attempt to square Warren and the Warren Court with a process-oriented approach, are visible as early as 1974 in a two-page remembrance of Chief Justice Warren. *See* John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974) ("[L]ike any good lawyer, the Chief was preoccupied with questions of process—not simply of the criminal process which he so thoroughly understood, but more importantly of the democratic process as well."); *id.* (stating that Chief Justice Warren believed Court's proper role consists "not so much in second-guessing legislative value judgments as in tending the machinery of the democratic process to keep it from being captured, from becoming the self-serving organ of some privileged segment of society"). As Ely himself would later write, "Like most tributes, this one is about the tributor as well as the tributee, summarizing not only what I take to have been the Chief's underlying concerns but also the then-emerging themes of my own work." ELY, *supra* note 17, at 5; *see also* ELY, *supra* note 3, at 74 (stating that Warren Court was first "to move into, and once there seriously to occupy, the voter qualification and malapportionment areas. These were certainly interventionist decisions, but the interventionism was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis.").

of *United States v. Carolene Products Co.*<sup>47</sup> Specifically, Ely contended that judicial intervention is appropriate when the “political market” is “systemically malfunctioning,” with malfunction deemed to occur when

the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>48</sup>

The first prong advocated a channel-clearing theory of judicial review, the second for review triggered by prejudice against a particular group.<sup>49</sup> Chapter 5 of *Democracy and Distrust* was devoted to the first prong of Ely’s analysis (the second prong in *Carolene Products* footnote four), and chapter 6 was devoted to Ely’s second prong (the third under the *Carolene Products* footnote).

Ely rejected in the opening chapters of *Democracy and Distrust* the approaches advocated by originalists (whom he called the interpretivists) and those who urged that judicial review be based on values from outside the four corners of the Constitution (whom he called the noninterpretivists). Ely demonstrated the “impossibility of a clause-bound interpretivism,”<sup>50</sup> showing that various Constitutional provisions were “open-textured”<sup>51</sup> and “invite[d]” judicial interpretation.<sup>52</sup> At the same time, Ely demolished the purposeful judicial imposition of values—be they based on the judge’s own ideals, natural law, neutral principles, reason, tradition, consensus, or predictions of progress—as a flawed endeavor, at odds with the Constitution, and undemocratic.<sup>53</sup> Under Ely’s approach, however,

[o]ne might admit that a number of constitutional phrases cannot intelligibly be given content solely on the basis of their language and surrounding legislative history, indeed that certain of them seem on their face to call for an injection of content from some source beyond the provision, but hold nonetheless that the theory one employs to supply that content should be derived from the general themes of the

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47. 304 U.S. 144, 152 n.4 (1938). For earlier discussions of *Carolene Products*, see Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 202–03 (1952) (discussing Justice Stone’s “arresting conclusion that statutes which affected interests beyond political protection, or which limited the full democratic potentialities of political action, were not to be approached by the Court with the deference it usually accorded legislative decisions, by way of ‘presumption’ or otherwise”); *id.* at 210 (“One of the central responsibilities of the judiciary in exercising its constitutional power is to help keep the other arms of government democratic in their procedures.”).

48. ELY, *supra* note 3, at 102–03 (emphasis omitted).

49. *Id.* at 103.

50. *Id.* at 11.

51. *Id.* at 13.

52. *Id.* at 14.

53. ELY, *supra* note 3, at 44–70.

entire constitutional document and not from some source entirely beyond its four corners.<sup>54</sup>

And in that vein, the “general themes of the entire constitutional document” Ely found salient were those underpinning a vibrant democracy.<sup>55</sup> Structuring judicial review around those themes, judicial review would be recast as a complement, not an obstacle, to majoritarian democracy.<sup>56</sup>

The landmark political process cases from the Warren Court era were at the foundation of Ely’s channel-clearing theory,<sup>57</sup> though he himself questioned the remedies imposed in certain decisions.<sup>58</sup> Judges were obliged, Ely argued, to intervene to police the rules of the democratic game:

The approach to constitutional adjudication recommended here is akin to what might be called an “antitrust” as opposed to a “regulatory” orientation to economic affairs—rather than dictate substantive results it intervenes only when the “market,” in our case the political market, is systemically malfunctioning. (A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the “wrong” team has scored.)<sup>59</sup>

This market analogy would become emblematic of Ely’s approach. Crucially, the analogy carries with it the potential for viewing the market itself as a distinct whole, and for permitting some types of legal restrictions on political debate to enhance competition and representation, while barring others that would diminish it.<sup>60</sup> Market-oriented approaches also typically rely on objective indicia to show “systemic malfunctioning.” In short, Ely envisioned channel-clearing review as protecting the basic rules of democracy.

Importantly, *Democracy and Distrust* was suffused with the notion that certain blockages were more concrete than others and accordingly that its theory would be easier to operationalize in some cases than others, though Ely did not say so outright.<sup>61</sup> Only in a footnote did Ely note that certain cases (aside from

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54. *Id.* at 12.

55. Ely recognized, however, that the themes he found salient were not the only ones. *Id.* at 101 (“As I have tried to be scrupulous about indicating, the argument from the general contours of the Constitution is necessarily a qualified one. . . . [O]ur Constitution is too complex a document to lie still for any pat characterization.”); *id.* at 89 n.\* (noting that “the argument from the nature of the Constitution” must be “a qualified one” given “the complexity of the document”).

56. Ely, *supra* note 45, at 399 n.4 (application of *Carolene Products* principles will “significantly minimize the ‘countermajoritarian difficulty’”).

57. ELY, *supra* note 3, at 117 n.\* (“Other practices that go to the core of the right of the people to choose their representatives and express their preferences are the denial of places on the ballot to minor parties and the refusal to seat representatives the people have selected. The Warren Court moved quite actively into both these areas too.”).

58. *Id.* at 121 (with regard to one person, one vote, “administrability is its long suit, and the more troublesome question is what else it has to recommend it”).

59. *Id.* at 102–03 (footnote omitted). For a critique of the judge-as-referee analogy more generally, see Posting of Michael McCann to Sports Law Blog, <http://sports-law.blogspot.com/2005/09/evaluating-judge-john-roberts-analogy.html> (Sept. 14, 2005, 18:25 EST).

60. ELY, *supra* note 3, at 117 (“[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.”).

61. Ely did of course state that there were gradations in the Constitution itself. *See id.* at 13

those involving malapportionment) were at the heart of appropriate channel-clearing review, naming “practices that go to the core of the right of the people to choose their representatives and express their preferences” as “the denial of places on the ballot to minor parties and the refusal to seat representatives the people have selected.”<sup>62</sup> Chapter 5 is devoted to various aspects of the democratic process—a lengthy introduction about types of political speech, then a subsection on “The Right to Vote,” then “Toward a Visible Legislative Process,” then “Toward a Legislative Lawmaking Process.” Each of these examples is clearly “about” the “channels of political change,” and the first two subjects—speech and voting—are areas in which the Court has clear textual responsibilities in the Constitution. But after initially describing actual elections and actual outcomes, of “ins” harming the “outs” in ways that could be measured at the ballot box or on the basis of an overbreadth claim,<sup>63</sup> Ely expanded beyond examples where the process is worthy of distrust to discuss examples where the process requires improvement or perfection. The subsections on the lack of visible or “legislative” legislating addressed ways of prodding legislatures (even ones without blockages on the channels of political change) to act more like legislatures, and included a lengthy argument about the need to revive the nondelegation doctrine.<sup>64</sup> These passages also revealed some of the scorn that Ely would later heap upon Congress in his subsequent works for Congress’s cowardice, not its self-interest. The next chapter in *Democracy and Distrust* (chapter 6), which addressed legislation intent on prejudice and founded on bias, in some respects identified the far end of the spectrum towards which Ely was heading at the end of chapter 5, as it delved into a broader array of legislation involving “public benefits” as opposed to rights,<sup>65</sup> and relied on an account of legislators’ improper “we-they” psychologies, as well as other psychological causes and effects in deliberation.

In short, Ely moved quickly away from an account of competition for office and into the realm of deliberation by lawmakers and agencies. This drift in language is even visible in Ely’s own description of *Democracy and Distrust* decades later. In a 1991 *Virginia Law Review* article, he stated that *Democracy and Distrust* would have the Court intervene “where Congress appears to have been monkeying with the process so as to ensure the continued incumbency of its members ([e.g.,] reapportionment, campaign finance, political speech), or reflecting a skewed version of its actual constituency ([e.g.,] gender discrimination).”<sup>66</sup> But in the very next paragraph, Ely described something more expansive: “It is the point of the instant Article that the proper role of the courts is not to take the business of legislating over for [members of Congress]

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(“Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured.”).

62. *Id.* at 117 n.\*.

63. *Id.* at 116–25.

64. *Id.* at 125–34.

65. See generally ELY, *supra* note 3, at 135–79.

66. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 866–67 n.103 (1991).

but rather to get them back into it.”<sup>67</sup> In the same way, Ely declared on one page of a 1999 article that judicial review must be limited “except where the majority is subjecting some despised or negatively stereotyped minority to inferior treatment or effectively barring its members from the process of governing,”<sup>68</sup> yet described something far broader just one page earlier: “*Democracy and Distrust* is an extended argument for the proposition that the Court should not act as an elite impediment to what it takes to be the substantive excesses of the politically responsible branches but, on the contrary, *as a perfecter of the democratic process*.”<sup>69</sup> Channel-clearing is a long way from perpetual perfection. Yet in Ely’s description the entire “representation-reinforcing” endeavor was often presented as an undifferentiated whole.

Thus, there was some unfortunate slippage in Ely’s discussion of what fell under the heading “participation-oriented, representation-reinforcing review.” Logically, “participation-oriented, representation-reinforcing review” exists on a continuum in which there are myriad ways to reinforce representation or participation. Aside from choosing not to offer a natural stopping point for his theory, Ely did not pause to note that his theory incorporated and covered several aspects of “democracy”—competition, deliberation, and legislative responsiveness, to name just a few—or how they differed. Nor did he acknowledge that judges would have a far easier time justifying and applying his theory in subsets of cases invoking one aspect (competition) as opposed to others (deliberation).

By the conclusion of chapter 6, Ely’s argument had expanded beyond blockages discernable at the ballot box to attack prejudices, hidden biases, and defects in legislative deliberation. Left unsaid in *Democracy and Distrust* is Ely’s drift from concrete blockages towards more ephemeral obstacles to functioning democracy. Indeed, chapter 5 moves from core democratic concerns about speech and voting (and cases where channel-choking harms are obvious) to cases where they are much less definable.<sup>70</sup>

The subsequent trajectory of Ely’s career followed the trajectory of his argument. Ely’s academic interests continued to follow his emphasis in the last third of chapter 5 on Congress’s shirking of its responsibilities and its unwillingness to legislate. When late in his career Ely returned to issues of redistricting with three articles, it was a re-engagement with election law from the election law field’s perspective. But from Ely’s vantage point he had never left the arguments he pursued in *Democracy and Distrust*. Though he had left the zone of campaigns and elections, he had done so to concentrate on other types of

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67. *Id.* at 867 n.103.

68. John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 291 (1999).

69. *Id.* at 290 (emphasis added) (footnote omitted).

70. ELY, *supra* note 3, at 125–34.

democracy-enhancing review.<sup>71</sup> As he wrote in 1991, “the *courts* can play a useful role in forcing Congress to perform its constitutionally-contemplated functions. Helping devise such judicial Congress-prodding doctrines thus seems to me the most productive use that can currently be made of a constitutional scholar’s time; at any rate it’s how I’ve been spending mine lately.”<sup>72</sup>

“Representation” was never broken down by Ely into its constitutive components. Grouping concepts of competition, deliberation, participation, and responsiveness under the umbrella of “representation” and “democracy” needlessly indicated that there were no gradations in Ely’s approach. In fact, as shown above, the structure of Ely’s argument in chapter 5 showed that the opposite had to be true. And years later he singled out “reapportionment, campaign finance, [and] political speech” as areas “where Congress appears to have been monkeying with the process so as to ensure the continued incumbency of its members,”<sup>73</sup> thereby deserving of judicial scrutiny. Indeed, the issues to which he ultimately returned in the years just prior to his death—redistricting and the disenfranchisement of ex-felons<sup>74</sup>—are cases that invoked concerns under *Carolene Products* prong one (channel clearing). But in giving no real account in *Democracy and Distrust* of the different shades of “representation,” “participation,” and “democracy” that courts were to aim for and encourage, or of the ways in which judicial competence and capital would vary within each subset, Ely opened himself to serious criticism that his theory had no principled limitations. That criticism would hound his argument in the years that followed.

#### B. Criticisms of Ely’s Theory and Ely’s Responses

Both praise and criticism of *Democracy and Distrust* abounded in the academy’s reaction to Ely’s proposal.<sup>75</sup> For many of those seeking the words to explain, on something more than pure outcomes, why *Brown v. Board of Education*<sup>76</sup> was right and *Lochner v. New York*<sup>77</sup> was wrong, Ely provided one answer.<sup>78</sup> But for many readers, Ely’s attempt to sketch a method of process-

71. Others saw the shared thread. See Larry Sager’s blurb on the book jacket of ON CONSTITUTIONAL GROUND: “This book reminds the reader that Ely’s work over all this time has been a sustained and coherent effort to make sense of our constitutional arrangements.”

72. Ely, *supra* note 66, at 878–79 (footnote omitted).

73. *Id.* at 866–67 n.103.

74. See generally John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002); Ely, *supra* note 32, at 609; John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185 (2001).

75. See Boynton, *supra* note 42, at 415–19 (summarizing positive and negative receptions). Ely himself later wrote: “*Democracy and Distrust* is characteristically the object of ritual compliment and rapid dismissal.” Ely, *supra* note 68, at 290.

76. 347 U.S. 483 (1954).

77. 198 U.S. 45 (1905).

78. See Samuel Issacharoff, *The Elusive Search for Constitutional Integrity: A Memorial for John Hart Ely*, 57 STAN. L. REV. 727, 728 (2004) (referring to “the wholehearted endorsement Ely wished to give the *Brown* Court, but the sense of discomfort he felt before the apparent first-order policy choices animating *Roe*”).

oriented adjudication failed on its own terms. Criticism tracked two basic lines. The first criticism was that Ely's approach, particularly his attempt to facilitate the representation of minorities,<sup>79</sup> could not escape the charge of value-imposition Ely had leveled at many of the nonoriginalists.<sup>80</sup> The second, related criticism was that insofar as Ely's theory imported certain values, that theory and those values were at such a level of generality that the theory led to no principled or clearly predictable results.<sup>81</sup> Both critiques continue to color all debates regarding channel-clearing theory and judicial review.

In light of where the debate over judicial review stood at the time in which Ely wrote *Democracy and Distrust*, and indeed in light of Ely's attack on the imposition by judges of values, fundamental or otherwise, it was understandable that Ely's theory would come under attack for its normative underpinnings. This critique was relentless<sup>82</sup> and led many to conclude that process theory itself was a failed project.<sup>83</sup> The reader of the contemporaneous reviews of Ely's work will find this particular criticism somewhat curious, however, because Ely seemed to anticipate it and respond to it in *Democracy and Distrust*, and because his theory is not dependent on being divorced completely from substantive values.<sup>84</sup> Ely's

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79. *E.g.*, Brest, *supra* note 7, at 133 ("I shall skip over Professor Ely's discussion . . . in which he justifies the Court's reapportionment and other voting-rights decisions and urges the vigorous protection of political expression—and focus instead on the book's longest and, I think, most important chapter, on 'facilitating the representation of minorities.'").

80. See *infra* notes 82–89 and accompanying text.

81. See *infra* notes 90–104 and accompanying text.

82. See, *e.g.*, Brest, *supra* note 7, at 140 ("The representation-reinforcing enterprise is shot full of value choices, starting with the decision of just *how* representative our various systems of government ought to be and who ought to be included in the political community, and ending with (covert) choices about who is justifiably the object of prejudice and whether legislative goals are sufficiently important to warrant the burdens they impose on some members of society." (footnote omitted)); Gerard E. Lynch, *Democracy and Distrust: A Theory of Judicial Review*, 80 COLUM. L. REV. 857, 863 (1980) (book review) (stating that Ely's argument "is vulnerable to the same criticisms Professor Ely has made of attempts to find substantive values in that tradition"); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1071 (1980) ("Who votes, it turns out, is a profoundly substantive question."); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980) (positing that problem with Ely's theory is that "its basic premise, that obstacles to political participation should be removed, is hardly value-free"). Similar critiques of process theory have been voiced over the years. See HASEN, *supra* note 10, at 5 ("[P]rocess theory . . . masquerades as a purely procedural rather than a substantive basis for review of political cases. A close consideration of the theory, however, reveals its implicit normative agenda." (footnote omitted)); Ortiz, *supra* note 9, at 723 ("The central objection is not that process theory inevitably smuggles in a few values in deciding any particular question, but that the central inquiry of process theory, whether the political decisionmaking process has functioned properly, is substantive through and through.").

83. See Ortiz, *supra* note 9, at 744–45 (calling venture itself "futile" and hope for process-oriented judicial review "impossible").

84. See Issacharoff, *supra* note 78, at 730 ("[I]t is not clear in John's work, either in *Democracy and Distrust* or subsequently, why this was a process theory at all. Hence the charge in so many of the critiques of John's work, most famously in Laurence Tribe's critique of the 'puzzling persistence' of process-based theories, of the apparent inability to ground a complete normative account of the role of the judiciary in the task of ordering processes alone. John never did quite address these charges." (footnote omitted)).

response was that even if the criticism is correct, and process review necessarily includes some values, the values he named were better because they were present in the four corners of the Constitution.<sup>85</sup> Though Ely did not spend more than a footnote elaborating on his rejoinder to these (anticipated) attacks, he did provide it in *Democracy and Distrust*, and it is not easily overlooked (it is the longest asterisk footnote in chapter 4).<sup>86</sup> Ely acknowledged that

[p]articipation itself can obviously be regarded as a value, but that doesn't collapse the two modes of review I am describing into one. As I am using the terms, value imposition refers to the designation of certain goods (rights or whatever) as so important that they must be insulated from whatever inhibition the political process might impose, whereas a participational orientation denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made.<sup>87</sup>

He continued:

If the objection is not that I have not distinguished two concepts but rather that one might well "value" certain decision procedures for their own sake, of course it is right: one might. And to one who insisted on that terminology, my point would be that the "values" the Court should pursue are "participational values" of the sort I have mentioned, since those are the "values" (1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose "imposition" is not incompatible with, but on the contrary supports, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to "impose."<sup>88</sup>

Attempting to quell the objection that his approach was value dependent, Ely unflinchingly described his argument in value-based terms.<sup>89</sup> Despite the footnote's brevity, it seems clear that Ely was content to argue that, insofar as his approach required any value imposition, the participational values were better and more correct for the three reasons he described.

This terse rejoinder, however, was not an answer (or, at least, it was an incomplete one) to the charge that Ely's approach was hopelessly indeterminate. Along with the criticism that Ely's approach was subject to the same attacks he had levied upon the noninterpretivists, Ely's channel-clearing approach came under fire for failing to deliver clear answers on specific legal questions.<sup>90</sup> A

85. ELY, *supra* note 3, at 75 n.\*.

86. Ely used both endnotes and asterisk footnotes (appearing at the bottom of the page) in *Democracy and Distrust*. Ely's extended note on page seventy-five was in an asterisk footnote.

87. ELY, *supra* note 3, at 75 n.\*.

88. *Id.*

89. Ely also made this point in *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). "Of course the Warren Court was aggressive in enforcing its ideals of liberty and equality. But by and large, it attempted to defend its decisions in terms of inferences from values the Constitution marks as special." *Id.* at 943.

90. HASEN, *supra* note 10, at 6 ("[P]rocess theory . . . despite its implicit substantive dimension . . . is a shallow theory. It says nothing about how the courts should intervene in the face of political

number of commentators pointed out that Ely's own premises could be applied to reach entirely contradictory outcomes.<sup>91</sup> If Ely's approach did not provide a rough outline of how it would be applied in specific cases, or, because originalists often disagree amongst themselves,<sup>92</sup> the approach did not significantly narrow the field of disagreement, could it live up to its billing as "A Theory of Judicial Review"?

Ely seemed, both in *Democracy and Distrust* and afterwards, unconcerned about the indeterminacy objection. Indeed, Ely seemed to care more about getting the debate on the right terms and identifying the proper questions<sup>93</sup> than about particular outcomes, even though on some questions his answer was abundantly clear.<sup>94</sup> The opening lines to the Conclusion to *Democracy and Distrust* read:

The elaboration of a representation-reinforcing theory of judicial review could go many ways, and Chapters 5 and 6 are obviously just one version. But however elaborated, the general theory is one that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack.<sup>95</sup>

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market failure."); Archibald Cox, *Democracy and Distrust: A Theory of Judicial Review*, 94 HARV. L. REV. 700, 704 (1981) (book review) ("I have more doubt whether *Democracy and Distrust* offers useful guidance to the judge charged with deciding a case under the first amendment or in the area of voting rights. The case is within his commission. Active judicial review is justified. But by what criteria is he to decide? Is he to render the decision most consonant with his vision of representative self-government or is he to search for other standards? I find no answer in *Democracy and Distrust*."); cf. Ortiz, *supra* note 9, at 729 n.32 ("[I]nsofar as Klarman's [anti-entrenchment] approach identifies only appropriate occasions for judicial review, but not appropriate results for when those occasions arise, it solves a very small part of the difficulty.").

91. E.g., Brest, *supra* note 7, at 138 ("Professor Ely, of course, vehemently condemns the Supreme Court's decision in *Roe v. Wade* striking down the Texas anti-abortion law. Ironically, it is doubtful whether the law can survive judicial scrutiny under the representation-reinforcing mode." (footnote omitted)); Cox, *supra* note 90, at 711 ("But could not the Ely-ish attack upon the Hyde Amendment sketched two paragraphs above also be leveled against an antiabortion law?").

92. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989) ("Are the 'fundamental values' that replace original meaning to be derived from the philosophy of Plato, or of Locke, or Mills, or Rawls, or perhaps from the latest Gallup poll? This is not to say that originalists are in entire agreement as to what the nature of their methodology is; as I shall mention shortly, there are some significant differences. But as its name suggests, it by and large represents a coherent approach, or at least an agreed-upon point of departure.").

93. Commentary, *Morning Session*, 56 N.Y.U. L. REV. 525, 528 (1981) (statement by John Hart Ely); see also Ortiz, *supra* note 9, at 721-22 ("Although Ely has persuaded few theorists and gained few adherents, he did change the territory and define the arguments to which most constitutional theorists now feel obliged to respond. If he did not win the game, he at least forced the play onto his own court." (footnotes omitted)).

94. Ely, *supra* note 89, at 947 (calling *Roe* "a very bad decision" and declaring: "It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.").

95. ELY, *supra* note 3, at 181.

And at a symposium shortly after *Democracy and Distrust* was published, Ely addressed (and dismissed) the indeterminacy objection at more length. Declaring that he had said what he had wanted to say in *Democracy and Distrust* and that most of the criticisms following it “were anticipated in the book,”<sup>96</sup> Ely nevertheless chose to address “one particular style of response because it has been so recurrent, appearing in the reactions of commentators as diverse as Robert Bork, Paul Brest, Archibald Cox, and Mark Tushnet.”<sup>97</sup> According to Ely, the style of this response took the form of: “Ely’s theory is indeterminate to the point of virtual uselessness because *Carolene Products* premises could be used, in a way I am about to demonstrate, to generate conclusion X (which conclusion is either absurd or one that on other grounds we know or assume Ely would reject).”<sup>98</sup>

Ely’s answer was, again, that as long as the *Carolene Products* premises were elaborated or applied in a principled way, he was unconcerned that such elaborations or applications of his theory could arrive at results different from those that he would reach.<sup>99</sup> Proceeding from the *Carolene Products* principles would, in Ely’s view, “significantly minimize the ‘countermajoritarian difficulty.’”<sup>100</sup> Thus, Ely’s answer essentially was that as long as arguments over particular cases were being fought with his terms, and bounded by his principles,<sup>101</sup> he was not concerned by the suggestion that the bandwidth of outcomes even within his boundaries was too broad. Ely did acknowledge that his method, as with other methods, did not provide for predictable results in all cases, but in Ely’s view this was a virtue and a mark of his theory’s candor:

Throughout my discussion there obviously recurs the assumption that participation is not to be restricted without what the Court is prepared to agree is a very good reason for doing so. That presumption certainly tracks the development of our constitutional document . . . but just as certainly the answer to what should in a given context count as a very good reason is not something that will flow from a simple recognition that this is a democracy.<sup>102</sup>

At a 1981 symposium, responding to a statement by Ronald Dworkin, Ely explained that his theory would at some point leave the judge at a crossroads:

At some point there will be an inevitable interplay between premises and conclusions—a striving for “reflective equilibrium”—in which the

96. Ely, *supra* note 45, at 397.

97. *Id.*

98. *Id.*

99. *Id.* at 398 (“It would also be fair to criticize the particular ways in which I elaborated those [constitutional] premises in Chapters 5 and 6, if possible by suggesting an alternative elaboration that remains principled—by which I mean that it stops short of proving everything—but nonetheless generates results more to the critic’s liking. What seem beside any point I made are demonstrations that the premises with which I began, *Carolene Products* premises, might be elaborated in unprincipled ways.”).

100. Ely, *supra* note 45, at 399 n.4.

101. See Boynton, *supra* note 42, at 419 (“So what if judges have to make substantive decisions? Maybe under Ely’s approach we will find their outcomes more desirable and more bounded.”).

102. Ely, *supra* note 45, at 399 n.4.

judge will be left substantially on his or her own. But there are at least two differences [from Dworkin's approach]. First, under my theory this interplay takes place within a limited compass. Second, I start with a very strong presumption in favor of more access to the process, of freer political communication, and that helps to anchor the inquiry. That said, however, there will come a point at which my judge too will be substantially on his or her own.<sup>103</sup>

Ely emphasized that *Democracy and Distrust* was not an algorithm that would mechanically spit out results:<sup>104</sup> "As I said earlier, the value of my book is principally in defining the appropriate set of questions."<sup>105</sup> But even if Ely did strive principally to define the appropriate questions that would bound the approach, it must be asked whether his theory could be said even to have done that.<sup>106</sup> As others have pointed out, as a descriptive matter judges have not limited themselves to the areas Ely outlined.<sup>107</sup> And within those areas, the room for disagreement is quite broad. As now-Judge Gerard Lynch wrote in a 1980 review,

Even if we grant that judicial review should be "participation-orientated [and] representation-reinforcing," this succeeds only in isolating what sorts of issues are appropriate for constitutional adjudication (or more precisely, what sorts of issues are not). . . . Other than the judge's own reasoned preferences and what can be gleaned from judicial and political tradition, I don't see what sources of principle are available.<sup>108</sup>

103. See Commentary, *supra* note 93, at 527–28 (statement by John Hart Ely).

104. See Amar, *supra* note 39, at 53 ("[C]onstitutional textualism (broadly defined) is not mechanical. It requires judgment, and good interpreters will often disagree."); Ryan, *supra* note 30, at 1654 (defining interpretive theory as "reasonably specific basis for deciding cases that is explained and justified" not "an algorithm, which will spit out answers to a broad array of concrete cases. No theory of interpretation accomplishes this; originalism certainly does not.").

105. Commentary, *supra* note 93, at 528 (statement by John Hart Ely); cf. Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 690 (2004) ("The concrete aim here is to reduce the welter of values behind democracy to a structure that will helpfully orient judicial oversight of politics around one set of questions rather than another.").

106. Ely himself expressed distaste for academic writing that raised questions without answering them. His dedication to Chief Justice Warren in *Democracy and Distrust* is well known and oft quoted; the quotations to start *On Constitutional Ground* far less so.

They liked to begin a paper with some formula like "I want to raise some questions about so-and-so" and seemed to think they had done their intellectual duty by merely raising them. This manoeuvre drove Morris Zapp insane. Any damn fool, he maintained, could think of questions; it was *answers* that separated the men from the boys. If you couldn't answer your own questions it was either because you hadn't worked on them hard enough or because they weren't real questions. In either case you should keep your mouth shut.

ELY, *supra* note 17 (quoting DAVID LODGE, CHANGING PLACES 36 (1975)).

107. HASEN, *supra* note 10, at 5 ("First, the theory has not been successful in limiting judicial power: courts have not confined themselves to intervening in election law cases only in the face of political market failure."); Cox, *supra* note 90, at 703 ("The thesis of *Democracy and Distrust* does less to confine judicial review than may appear at first glance.").

108. Lynch, *supra* note 82, at 864–65 n.17; Cox, *supra* note 90, at 714 ("[Ely's] thesis goes far to legitimate active judicial intervention when political speech or association or access to the political

Thus, if the answer to the indeterminacy objection is that all serious forms of judicial review are inevitably indeterminate, and that Ely's approach is bounded by the concerns he has elaborated, the point may still remain that Ely's theory may nevertheless yield very little if it permits limitless "principled" elaborations. The indeterminacy objection weighed less heavily against Ely because his argument was less about what the Court had done and more about what it ought to do. It had the examples from the Warren Court, including the trump card of *Reynolds vs. Sims*,<sup>109</sup> where the application of a market-based approach was easily done via one-person, one-vote, and which had become part of the country's constitutional ethos. In short, because his theory of judicial review was groundbreaking in what it asked judges to think about, reviewers were dismissive with regard to the claim that it could avoid value imposition of any sort, but merely skeptical that the theory would lead to predictable results.<sup>110</sup>

Ely's responses to the two criticisms outlined have been overlooked due in part to the fact that Ely spent little time addressing them in *Democracy and Distrust*, and because subsequently he moved on to other areas of interest to him.<sup>111</sup> The "can't-get-the-substance-out-of-process" critique thus dominated the way scholars and students learned about Ely's effort, obscuring Ely's attempt to narrow the field of disagreement and orient judicial review around two principal questions.<sup>112</sup>

Similarly absent was any account of the fact, even as hotly contested as one-person, one-vote was, that few judicial remedies for channel "blocking" will sound in a rule as opposed to a standard. Ely's gruff and frequently cited aside regarding one-person, one-vote—"administrability is its long suit, and the more troublesome question is what else it has to recommend it"<sup>113</sup>—belied the fact that Ely thought that one-person, one-vote was superior to the alternative suggested by Justice Stewart in *Lucas v. Forty-Fourth General Assembly of Colorado*.<sup>114</sup> In a passage that sounds off-key when read in light of the Supreme Court's vote dilution jurisprudence, Ely quoted Professor Deutsch as suggesting that Stewart's "in-between" alternative would require

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process is at stake, but it does nothing to tell the judge where he should look for guidance in rendering decisions within his commission.").

109. 377 U.S. 533 (1964).

110. *E.g.*, Brest, *supra* note 7, at 133.

111. *See* Issacharoff, *supra* note 8, at 734 (referring to "Ely's reentry into the debates over the risks of manipulation in the political process" and noting that his "return enhanced the fledgling field that some of us term 'the law of democracy'"); Pildes, *supra* note 44, at 29 n.\* (referring to Ely's "reengagement in the last several years" with election law issues).

112. Pildes, *supra* note 105, at 696 ("Ely's book, which made issues of governance structures central to his constitutional theory, was immediately met with a barrage of criticism that insisted questions of substantive rights had to take priority over those concerning political process. Many younger scholars took away exactly that message from these critiques.").

113. ELY, *supra* note 3, at 121.

114. 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting) (asserting that Equal Protection Clause requires that state's voting standards be (1) rational "in light of the State's own characteristics and needs," and (2) not designed to systematically frustrate will of majority of electorate).

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the Court to canvass the actual workings of the floor leadership in the legislative branches, the mechanisms of party control not only over voters and the city government but also over elected representatives—in short, the details of the petty corruption and networks of personal influence that all too often constitute critical sources of power in municipal politics. . . . Even assuming that the evidence was available and would be forthcoming, is it likely that our society could accept, as a steady diet, the spectacle of the judiciary solemnly ruling on the accuracy of a political boss's testimony concerning the sources of his power over voters . . . ?<sup>115</sup>

Comparing the two choices, Ely found one-person, one-vote far superior, despite its flaws. But nowhere did he acknowledge that the mine run of election law cases would not involve judicially created rules but rather standards-based doctrines under which Courts would have to balance legitimate (or legitimate-sounding) legislative purposes against burdens on and obstacles in the political process.<sup>116</sup> He simply acknowledged that having entered the political thicket, the Court was forced to go to one-person, one-vote out of administrability concerns.

When discussing the *Shaw* line of cases fifteen years later, Ely likewise saw no standards-based way out for the Court after its decisions in *Shaw v. Reno*<sup>117</sup> and *Miller v. Johnson*<sup>118</sup> invalidating nondilutive district maps drawn with a predominantly race-based motive. A bizarre-shape test could be given “determinate content,” but removing bizarre shapes alone would not fulfill *Shaw*'s mandate and compactness could be easily achieved while retaining a map's intentions.<sup>119</sup> His own belief was that

[f]or the issue of gerrymandering to find its “one person, one vote” . . . it appears the Court is going to have to act as boldly as it did in *Reynolds*, by taking the next logical determinate step and holding that race is simply not to play a role in the drawing of voting district lines.<sup>120</sup>

His specific suggestions to the Court were (even stripped of their sarcasm) similarly escapist; he suggested that the Court (1) “[k]eep confusing us until the problem goes away of its own accord,” (2) “deny that anyone is hurt by prominority gerrymanders and thus no one has standing to challenge them,” or (3) “[j]ust let [legislators] do what they want.”<sup>121</sup> Drawn to the *Shaw* decision as a potential safeguard against partisan gerrymandering,<sup>122</sup> Ely ultimately saw the principled application of *Shaw* as unable to inhabit a middle ground, though that is precisely where courts are likely to find themselves, for *Shaw* claims and for other constitutional challenges.

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115. ELY, *supra* note 3, at 124 (quoting Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 247 (1968)).

116. *Cf.* Fallon, *supra* note 41, at 1310.

117. 509 U.S. 630 (1993).

118. 515 U.S. 900 (1995).

119. *See* Ely, *supra* note 32, at 625.

120. *Id.* at 609.

121. *Id.* at 627–29.

122. *Id.* at 623–27.

Thus, to the extent that Ely's theory relied on substantive values, Ely contended that the values imbued in his approach were more appropriate because they were those "(1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose 'imposition' is not incompatible with, but on the contrary supports, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to 'impose.'"<sup>123</sup> To the extent that his theory could lead judges in opposite directions, Ely contended that he had nevertheless narrowed the compass of judicial review, minimizing the countermajoritarian difficulty while anchoring the judge's approach as representation reinforcing. Though Ely did not concede that channel-clearing review would necessarily be more difficult where courts lacked indicia of "blockage," his theory's reliance on evidence of "political access" being infringed or obstructed was clear. Adamant that unblocking channels alone would not go far enough, Ely's discussion in chapter 5 turned to obstacles that were harder to quantify and more difficult to remedy. While Ely noted the turn his argument was taking, he did not address whether courts have the same institutional competence or capital to prod legislatures as to unblock the channels of political change. Nor did he address how courts were to offer saleable remedies that required the application of a standard rather than a rule, or whether such remedies were "susceptible to 'objective' implementation—that is [they] must deploy criteria of sufficient determinacy to enable judges of different political predisposition to generally derive consistent results in applying the theory to particular factual settings."<sup>124</sup> His structural theory of anti-entrenchment was compelling yet incomplete.

The next Part discusses how that theory intersected and overlapped with (1) Justice Breyer's *Active Liberty* and (2) the structuralist camp in election law. Both have roots in *Democracy and Distrust* and have encountered many of the same criticisms. Justice Breyer affirmatively embraced a "theme" informing his review of both statutory and constitutional interpretation. That theme, closely resembling Ely's, is applied with far more solicitude for standards than Ely's in *Active Liberty* and in cases in which Justice Breyer has fashioned election law doctrine. The structuralists' bandwidth is also broader than Ely's. The structuralists urge that both the constitutional and statutory rules of the political process be examined in a manner that accounts for the realities of politics, the importance of political competition, and the electoral context in which a particular right is invoked. These proponents of arguments linked to Ely's have emphasized the importance of empirics in developing election law doctrine that accounts for the realities of political activity.

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123. ELY, *supra* note 3, at 75 n.\*.

124. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768–69 (1991).

## II. STRUCTURAL ADVOCATES

Catapulted by *Bush v. Gore*<sup>125</sup> and the national attention drawn to the importance of the rules of the political process, the election law field (encompassing constitutional law and statutory law of the political process) has coalesced over the last decade and a half into what now can be called a unified field of study.<sup>126</sup> In the years following the writing of *Democracy and Distrust*, a subset of that field expanded upon Ely's approach and pursued a "structural" or "political markets" approach to judicial review.<sup>127</sup> Though the theories and approaches of scholars within the political markets approach differ as in any field, common to these scholars is a pronounced concern for the robustness of political competition, the casting of a meaningful vote, the overall vibrancy of political systems, and a belief that political rights are structured by electoral ground rules.<sup>128</sup> The most immediate structural value associated with these scholars is political competition, which is understood as the best means of protecting other structural values (e.g., representation and accountability).<sup>129</sup> In contrast, a separate camp has rejected that approach (or, at least, its label) and has instead contended that judges are best equipped to resolve cases involving the political process by focusing on the particular right invoked, and eschewing any attempt to import to judicial review an idea of how the political process "ought" to function. There is consistent debate about the actual distance between these two approaches, and both sides agree that each is not wholly divorced from the other.

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125. 531 U.S. 98 (2000).

126. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 651 (2002) ("Although the Supreme Court's decision in *Bush v. Gore* may have brought the field into the spotlight, the issues of voting rights, redistricting, campaign finance, political parties, and regulation of the ballot had been the source of considerable, even if disconnected, study for some time. Now a clearly defined discipline straddling constitutional and statutory law has emerged to sew together these related topics of access to political power and organization of the political process." (footnote omitted)).

127. E.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 505–10 (2004); Issacharoff & Pildes, *supra* note 16, at 650–52; Pamela S. Karlan, *Constitutional Law, the Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1185–88 (1999); Klarman, *supra* note 124, at 753, 810; Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1607–11 (1999).

128. Ortiz, *supra* note 127, at 1218 (noting that rise of election law as a field has had two effects: "First, it has broadened our understanding of how various electoral rules affect individual interests, and second, it has led us 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. In the latter view, we analyze electoral rules, whether they concern redistricting, ballot access, or campaign finance, not only by how they directly affect traditional individual rights, like free speech, but also by how they affect the overall dynamic and health of our political system and the relationships among its major players.").

129. Pildes, *supra* note 105, at 688 ("[O]f the various structural goals of democracy, the one courts ought to focus on is ensuring competition and, through it, electoral accountability.").

As these scholars acknowledge, the structural approach (in its various permutations) has roots in *Democracy and Distrust*.<sup>130</sup> Less acknowledged, however, is the fact that the critiques leveled at the structuralists parallel those leveled at *Democracy and Distrust*. Ely's answers to his critics hold lessons for (and bolster the responses of) the structuralists. More importantly, the strengths and weaknesses of *Democracy and Distrust*—indeed, the argument's structure itself—have key insights for implementing the structuralist approach.

A. "From Rights to Arrangements"<sup>131</sup>

The structuralist camp asks that judicial concern not be limited to atomistic and narrowly conceived rights held by individuals, or the Court's task understood to be purely balancing individual rights versus state interests, but to view political rights as structured by democratic institutions and frameworks, and to view laws controlling the political process realistically, functionally, and with an eye to their interaction with institutions and political power.<sup>132</sup> Structuralists contend that opinions involving the political process (whether the claims invoked are constitutional or statutory in nature) read better and are more convincing when they candidly account for the institutional arrangements at work and the factors that drive outcomes. Echoing Ely's "broad interpretivist" aim, this theory connects to the broader democratic elements of the founding document and the conditions for democratic rule.<sup>133</sup> Not only does this model seek to be faithful to the democratic thrust of the Constitution, but it contends that the job of judging political process cases is better performed where functional, realistic aspects of the democratic game are acknowledged openly.<sup>134</sup> In a sense, Ely's entire approach is telescoped through this strand of the election law field,<sup>135</sup> as scholars

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130. Issacharoff & Pildes, *supra* note 16, at 710; Klarman, *supra* note 16, at 498 n.38.

131. Ortiz, *supra* note 127, at 1217.

132. See generally HASEN, *supra* note 10, at 143–49 (summarizing approach); Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1099 (2005).

133. Pildes, *supra* note 105, at 688.

134. *Id.* at 690 ("Competitive theorists, like myself, believe that rights-oriented judicial decisions hide from the courts various structural consequences of their decisions; we believe that judicial decisions will be better if self-consciously tied to the goal of ensuring electoral accountability and competitive elections."); *id.* at 688 ("[W]here threats to competition are not present, courts left free to impose their view of 'rights' on politics run the risk of Lochnerizing the democratic system by making it more difficult for legislators or voters to experiment with changes to democratic processes to respond to ever-shifting disaffections with democracy.").

135. Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1174 (1999) ("What makes this field exciting, and what links it back to constitutional law and forward to new arenas of democratic participation, is taking democracy itself out of the background and placing it squarely at the center of our inquiries."); see also John Hart Ely and Election Law, *supra* note 19 ("Ely's process theory, it is safe to say even today, is election law orthodoxy. Indeed, one can trace to Ely the currently fashionable structural 'lockup' or 'political markets' approach to election law cases put forward most forcefully by Sam Issacharoff and Rick Pildes."). The need for heroic inferences, however, is soft-pedaled. See Pildes, *supra* note 18, at 1532–33 ("[T]he functional analysis of democratic institutions and processes that I advocate is already present in constitutional law, if only erratically so. The task does not require the courts to embark on

seek to orient judicial review towards examining political rights in the context of democratic structures.<sup>136</sup>

Structuralism does not entail merely having an idea of how rights should operate in light of broader ends or values; that concept is not unique to structuralism.<sup>137</sup> Nor are structural analyses divorced from individual rights.<sup>138</sup> “When one examines the Court’s political rights cases, it becomes apparent that the Court uses both individual rights and structural approaches compl[e]mentarily to address or stem the structural pathologies, such as legislative self-entrenchment, of the political process.”<sup>139</sup> In the end, individual rights approaches share much in common with the structuralists.<sup>140</sup> Where they principally differ is in the way the latter account for the fact that “[b]efore the

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some heroic revolution in consciousness; it only requires greater and more self-conscious realization of an approach to constitutional law that is present but imperfectly realized.”).

136. Karlan, *supra* note 18, at 1196; Ortiz, *supra* note 127, at 1218, 1220 (describing how emphasis on “structural implications, [and] on how the rules advantage and disadvantage different types of institutional players relative to each other” “encourages us to view campaign finance as implicating not just a narrow right of individual political speech, but also a broader right of individual electoral participation”); Persily, *supra* note 20, at 171 (“In recent years it has become fashionable for legal academics to conceive of problems in American election law as ones concerning regulation of the political marketplace as opposed to infringements on constitutionally guaranteed individual or associational rights.”).

137. Some claim that Justice Kennedy’s opinions in *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) amount to an attempt to “analyze[] partisan gerrymandering through what may amount to a structural lens,” discussing how Kennedy “insist[ed] upon a positive vision of fair politics as the normative baseline for partisan gerrymandering” and “rejected application of individual-based discrimination standards and instead discussed partisan gerrymandering in distinctly group-oriented terms.” Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1114 (2007). Aside from needing a “positive vision” or a baseline when analyzing a claim of nonjusticiability in any context, Justice Kennedy’s prime hint in *Vieth* was his observation that there was an undeveloped First Amendment claim, a classic individual-rights notion. 541 U.S. at 314–15 (Kennedy, J., concurring). Moreover, Justice Souter’s approach clearly drew upon the Court’s vote dilution jurisprudence, a jurisprudence that is clearly about group rights and representation. *Id.* at 343–55 (Souter, J., dissenting). I would not read Justice Kennedy’s rejection of that approach as a statement in favor of structural approaches, as a positive vision of fair politics is not unique to the structuralist camp.

138. Charles, *supra* note 132, at 1128 (“An individual rights framework is how courts translate structural values into adjudicatory claims capable of resolution by jurists as opposed to philosophers or policymakers. Beyond this critical benefit, an individual rights framework provides the patina of constitutional legitimacy—the assurance (or illusion) that courts are not simply fashioning doctrine out of whole cloth without regard to the constitutional text. An individual rights framework also helps courts think more concretely about structural problems and may direct them toward judicially manageable remedies.”).

139. *Id.* at 1131.

140. HASEN, *supra* note 10, at 148–49 (noting that distance between his individual-based approach and Pildes’s structural approach may turn out to be not all that great); *id.* at 156 (“Perhaps I am drawing a bigger distinction than necessary. At bottom, I suspect that structural theories are all about individual and group rights after all.”); *see also* Charles, *supra* note 132, at 1131 (“If the Court deploys both a structural and individual rights approach to address effectively the problems in the political process, it is immaterial whether one casts political rights claims in a structuralist or individualist frame. It is then unsurprising that this debate has produced very little insight.”).

first vote is cast or the first ballot counted, the possibilities for democratic politics are already constrained and channeled.”<sup>141</sup>

Even as structuralist arguments coalesced, however, the indeterminacy critique again reared its head:<sup>142</sup> two judges seeking to enhance democratic participation might vote differently on whether to uphold limits on contributions to political candidates, or on how much partisan gerrymandering is too much. And structural proponents agree that the indeterminacy objection is a fair one to raise, at a certain point.<sup>143</sup> Just as with rights-based approaches, in many cases there is nothing in the Constitution itself which gives a clear answer on specific questions. Despite confidence about structuralist approaches and their merits, in recent years the absence of guidance on how to choose amongst ways of operationalizing such approaches has been noted by many in the field.<sup>144</sup> This absence (if indeed real) stands as an obstacle to the full development of structuralist theories.

A number of scholars argued (and continue to argue) that the desire to promote competition or to render judicial decisions with an eye to political arrangements and structures is ill advised and undemocratic. Such a form of

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141. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1 (1998). That recognition is apparently not shared by all of the Justices on the Court. See *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759, 2774 (2008) (noting, in portion of opinion joined by five Justices, that “it is a dangerous business for Congress to use the election laws to influence the voters’ choices”).

142. See Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1600–03 (1999) (criticizing structural approach); Elizabeth Garrett, *The Political Process*, 34 PEPP. L. REV. 554, 554–66 (2007) (discussing splits among Justices).

143. Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 604 (2007) (“Structuralists in the academy have emphasized the shortcomings of individualism and the importance of competition to democratic elections. However, these structuralist responses have mainly served to highlight the fact that structuralism has not sufficiently evolved to provide a comprehensive framework for directing judicial supervision of democratic politics . . . .”); *id.* at 603 (“While the Court’s political gerrymandering decisions occasionally reflect an intuition that judicial review is necessary to cabin overreaching by state actors, it has failed to operationalize this intuition into a sound and coherent framework.”); Ortiz, *supra* note 127, at 1224–25 (“Some deregulationists claim that campaign finance regulation serves to entrench incumbents of both major parties. Reformers, on the other hand, argue that *inadequate* regulation can entrench incumbents against challenge. The point here is not to take sides in this debate, but to point out that the ballot access framework puts these larger concerns that the free speech framework overlooks full front and center.” (footnotes omitted)); Pildes, *supra* note 105, at 694 (“[W]hile the competitive alternatives to rights-oriented constitutional law offer a new framework for orienting judges to certain questions rather than others, ‘competition’ has remained a difficult concept to make determinate enough to guide judicial decisions . . . .”); Pildes, *supra* note 105, at 694 (“Competitive politics can be institutionalized in numerous ways. A pressing question for competitive theories of judicial oversight is therefore whether resources exist within competition theory for choosing among these approaches.”).

144. See Gerken, *supra* note 127, at 531 (“[T]he crucial question is whether . . . the Court is capable of . . . developing a structural approach for negotiating the terrain in this part of the political thicket.”); Pildes, *supra* note 105, at 690 (“The concrete aim here is to reduce the welter of values behind democracy to a structure that will helpfully orient judicial oversight of politics around one set of questions rather than another.”).

judicial review requires judges to rely on political philosophy and to conduct political science, these scholars argue.<sup>145</sup> They further argue that

a structural approach 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. The election law community should worry less about preventing lockups—except in the highly unusual cases of systematic exclusion—and more about preventing lockins of particular theories of representation.<sup>146</sup>

For example, single-member districting encourages, as Duverger's theorem explains, the entrenchment of two parties (though not necessarily *these* two parties).<sup>147</sup> Should competition-oriented review, in light of that fact, invalidate single-member districting?<sup>148</sup> What limitations should constrain competition-oriented review?<sup>149</sup> The judiciary might have to accept that “[t]he quest for a perfectly fair system is illusory,”<sup>150</sup> and that “[i]t is quixotic to look for the absolutely fair system. The danger of the Issacharoff-Pildes structural approach is that it might send the judiciary on just such a fruitless quest.”<sup>151</sup>

For as much as Ely is cited by structuralist scholars, the lessons of his landmark work are often overlooked for the reasons cited in Part I. But Ely's work bolsters the structuralists' responses to these critiques in some important ways. First, with regard to the challenge that a structuralist approach requires the imposition of judicially chosen *optimal* levels of competition, representation, and the like, it is important to note that *Democracy and Distrust* made no attempt to

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145. See Cain, *supra* note 142, at 1600 (arguing structural approach is overly intrusive on state politics).

146. *Id.* at 1590.

147. See Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361, 371 (2007).

148. See Cain, *supra* note 142, at 1602 (“[U]ltimately, the only really important discrimination against minor parties is the single-member simple plurality rule itself. At that point, one is left with the conclusion that either only the unimportant barriers that do not really matter much should be removed, or that the first-past-the-post system itself must go.”).

149. Gerken, *supra* note 127, at 520–21 (“No one wants to give judges license to engage in free-form democratic engineering.”).

150. Cain, *supra* note 142, at 1602.

151. *Id.* at 1603; see also HASEN, *supra* note 10, at 151 (“[A]lthough it may not be literally impossible to identify ‘artificial’ restrictions on political competition compared to real or natural ones, Issacharoff has not provided the tools to do so. We have no theory of natural political competition.”); Ortiz, *supra* note 9, at 729 n.32 (discussing Michael Klarman's argument that “the Court can identify all those laws springing from a flawed political process through uncontroversial analysis of the formal blockages to political participation” and arguing that “although Klarman's approach recognizes the impossibility of employing a nonsubstantive conception of prejudice, his own approach relies on an equally illusive concept: a nonsubstantive theory of appropriate political empowerment”). Because of these problems with an avowedly structural approach, Hasen “looks beyond the [process] theory and toward a broader view of how courts should decide election law cases,” ultimately “advocat[ing] a substantive theory of political equality to justify and limit the Court's role in regulating the political process.” HASEN, *supra* note 10, at 7. He acknowledges that in “making this move toward substance, I cannot avoid the charge that I am asking the Court to take on the role (or, more accurately, to continue in its role) as Platonic guardian of our political system.” *Id.* at 8.

try to define such optimal levels. And indeed an *optimal* level (of democracy, competition, representation, or accountability) need not be defined to know whether one regime is superior to the other in the vast majority of cases.<sup>152</sup> With various uncontroversial, objective indicia of competition (or the absence of competition) available, for example, such indicia can be relied upon to cabin judicial review and determine whether one structure is *more* competitive than another, or whether a particular law is an outlier compared to common practice.<sup>153</sup> In a related context Justice Scalia summed up a “what’s the baseline” argument by stating that it is impossible to know what watered beer tastes like if one doesn’t know what beer tastes like.<sup>154</sup> But that critique is flawed: one can—without knowing the ingredients to the *perfect* beer—determine when one beer is more watery than another.<sup>155</sup> Thus, even friendly critics of the structural approach contend that the judiciary usually can say that a particular law is “too much or too little,” even given the absence of a standard that identifies an optimal type of politics.<sup>156</sup>

Ely’s election not to flesh out what the optimal levels would be can be read as a dodge or as a dose of candor. He told the reader: “As I have tried to be scrupulous about indicating, the argument from the general contours of the Constitution is necessarily a qualified one. . . . [O]ur Constitution is too complex a document to lie still for *any* pat characterization.”<sup>157</sup> And he acknowledged

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152. Kang, *supra* note 137, at 1105 n.39; *see also* Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARV. L. REV. 684, 693 (2002) (finding evidence inconclusive as to whether removing redistricting power from politicians enhances competition and accountability). Part of applying this method, of course, requires the judge to recognize that political actors adapt to existing rules, and that particular laws would clear channels in one setting (or one time), and close channels off in others. For that reason, members of the election law field have urged allowing for flexibility such that politics can improve. *See* HASEN, *supra* note 10, at 10 (calling for “malleable” review); Pildes, *supra* note 44, at 39–40 (attacking constitutionalization of democratic politics); Breyer, *supra* note 22, at 772.

153. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (“[E]ven if one rejects an originalist approach, it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures.”). To the extent common or comparable state practices are used as a type of baseline, such practices essentially stand in as shorthand for acceptable empirical results. Of course, common state practices themselves are imbued with channel-blocking motivations, and thus state practices themselves must be viewed skeptically.

154. Transcript of Oral Argument at 8–9, *Chisom v. Roemer*, 501 U.S. 380 (1991) (Nos. 90-757, 90-1032).

155. One way to tell when one beer is more watered down than the other is to compare the amount of *water* in one compared to the other, though this begs the question. Nevertheless, it is useful to point out that all tests can be broken down into smaller, simpler components.

156. Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 756 (2007) (“If the question in *Sorrell* had been, with respect to campaign contribution limits, ‘how little is too little?’, the question in *LULAC* with respect to political gerrymandering was ‘how much is too much?’”); Persily, *supra* note 20, at 177 (“In many, if not most, election law contexts a court adopting the political markets approach can do no better than declare that those in charge simply went too far, were too greedy, or were too hostile to their opponents.”); *cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

157. ELY, *supra* note 3, at 101.

that his theory proceeded on the basis of a rough version of democracy; it did not aim for a specific baseline. His inquiry was essentially anchored on a presumption about entrenchment and political activity: “[U]nder my theory this interplay [between premises and conclusions] takes place within a limited compass. . . . I start with a very strong presumption in favor of more access to the process, of freer political communication, and that helps to anchor the inquiry.”<sup>158</sup> If our Constitution “is too complex a document to lie still for any pat characterization,” and “[i]n most if not all cases, the best semantic approximation of a vague constitutional guarantee is likely to be a vague judicial standard,”<sup>159</sup> it makes sense that Ely’s attempt to achieve “the ultimate interpretivism”<sup>160</sup> eschewed a claim of optimality in favor of paradigmatic examples of legislative excess that sketched the boundaries of appropriate judicial review. This is not to say that, at all points, structural accounts can avoid the task of articulating an affirmative vision of democracy. But Ely’s approach won converts because it put that task at the end of the analysis, not the beginning.

The second answer is that competition-oriented review doesn’t ask the judiciary to apply political philosophy or political science in a way it wouldn’t otherwise.<sup>161</sup> This answer parallels Ely’s rejection of the “you can’t get the substance out of process” critique, because deciding any case regarding democratic rules necessarily requires some vision of the body politic and how it operates. It is not possible to “lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former”<sup>162</sup> as if no human element were required. As Professor Richard Hasen concedes in eschewing a competition-oriented view in favor of an equality-based approach, he necessarily is “asking the Court to take on the role (or, more accurately, to continue in its role) as Platonic guardian of our political system.”<sup>163</sup> But for him, like the structuralists, the price of allowing democratic harm is too great to remain on the sidelines of the political thicket.

Ely’s analysis of *Reynolds v. Sims*<sup>164</sup> drives this point home. The only options, in his view, were for the Court to apply the one-person, one-vote rule or

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158. Commentary, *supra* note 93, at 527–28 (statement by John Hart Ely); *see also* ELY, *supra* note 3, at 105 (explaining that Court’s theory of a right to free political association “has been the right one, [and] rights like these, whether or not they are explicitly mentioned, must nonetheless be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process”).

159. Fallon, *supra* note 41, at 1310.

160. ELY, *supra* note 3, at 88.

161. Charles, *supra* note 143, at 653 (“[I]ndividualists . . . are simply wrong that structuralism leads courts to make contested value judgments they otherwise do not have to make. Courts must make value judgments in adjudicating election law claims no matter what framework they use.”); Gerken, *supra* note 127, at 520 (“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.”).

162. *United States v. Butler*, 297 U.S. 1, 62 (1936).

163. HASEN, *supra* note 10, at 8.

164. 377 U.S. 533 (1964).

to leave the political thicket entirely.<sup>165</sup> Retreating from the thicket (following *Baker*) would lead to a situation that was “no more compatible with the underlying theory of our Constitution than taking away some people’s votes altogether.”<sup>166</sup> That move would be no less value-laden, and it would ratify the political processes themselves as somehow outside the channel-choking, anticompetitive forces that inspire channel-clearing review, and concede that the democratic harm will go unchecked.<sup>167</sup>

The third lesson is implicitly suggested by Ely (and driven home by Justice Breyer): structural aims are most easily achieved where there are objective indicia supported by strong empirical evidence. This principle undergirds the political markets approach: clear harms are most deserving of judicial solicitude, because competition is a more concrete aim (and puts less strain on the judiciary) than the structural end of political accountability. Ely’s theory was not followed by a “thicker” theory of political markets or judicial regulation of politics. Ely didn’t say that political competition was more worthy of judicial concern than legislative deliberation (though perhaps he made his view clear by not writing another article about electoral politics for roughly twenty years, focusing instead on legislation-prodding judicial review.) But the structure of his argument in *Democracy and Distrust*, particularly chapter 5, belied the fluidity of Ely’s language and offered a way to give Ely’s theory its own inherent boundaries. Ely looked first to those areas where concrete, quantifiable blockages occurred. These were visible hindrances on speech (as quantified by an overbreadth test) and on the ability to cast a vote.<sup>168</sup> Next was a discussion of the ability to cast a meaningful vote in the presence of equipopulous districts.<sup>169</sup> As he would write two years later, these were the rights of “political access”: “The harder question is what should be protected under open-ended provisions of the sort I mentioned. . . . [C]ourts should protect rights of political access: the right to vote, to have one’s vote counted equally, to run for office, to organize politically, to speak, and so forth.”<sup>170</sup> Ely’s initial emphasis on concrete, measurable hindrances is hard to ignore.

When Ely began to turn to the more deliberation-based blockages in chapter 5—the invisibility of legislation and the recalcitrance of properly elected legislators—Ely only briefly noted a key shift: “So far in this chapter I have been

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165. See ELY, *supra* note 3, at 124 (“It thus turns out that there were two ways to avoid the unadministrability thicket. One was to stay out of the area altogether. That would have meant, however, that the ins would simply have gone on maintaining their positions by valuing one person’s vote at a sixth of another’s.”). From the viewpoint of one scholar, for the court to remove politics from redistricting requires courts to “be very confident that they have discovered a way to strike the balance between the competing political values central to democratic government. Lacking that confidence, I would leave the ultimate decision to the admittedly self-interested but more accountable political bodies that have found various ways of striking the balance.” Persily, *supra* note 126, at 680–81.

166. ELY, *supra* note 3, at 124.

167. See Charles, *supra* note 143, at 634 (noting legislatures are not “outside” the system).

168. ELY, *supra* note 3, at 105–20.

169. *Id.* at 120–25.

170. ELY, *supra* note 17, at 7.

concerned, as the Supreme Court has been primarily concerned, with assuring the free and effective popular choice of our representatives. But popular choice will mean relatively little if we don't know what our representatives are up to."<sup>171</sup> Cognizant of the danger that his theory, not taken far enough, might paper over the lethargy of legislative bodies, Ely moved to another type of review, one that still sought to make representation meaningful but that required courts to go beyond the empirics of elections and campaigns. By making that turn, Ely chose not to flesh out his theory as it applied to the right to vote and political speech. He did not stake a claim to a certain level of robustness in competition, and he did not provide a roadmap for how to operationalize his channel-clearing method.

As noted above, scattered examples in *Democracy and Distrust* showed that politicians' "monkeying" with the machinery of politics was deserving of judicial distrust, but Ely did not flesh these out, only returned to these concepts in greater depth two decades later,<sup>172</sup> and did not do so out of any expressed need to "tie everything together." In short, Ely's argument started to break down when it moved away from paradigmatic cases of political blockage and toward cases involving breakdowns in democratic deliberation. Ely could have acknowledged that, *where his argument was strongest*, "substance" still played a role, but that subjectivity was restrained through objective measures, and the cost of greater subjectivity is outweighed by the benefits of eradicating the instant harm to the democratic process.<sup>173</sup> But he did not.

At this point, one might ask whether relying on clear harms and burdens truly means deriving something from Ely's theory. A demand for the best data available can be independent of Ely, and the crafting of any type of doctrine will benefit from supportive empirics.<sup>174</sup> But in light of *Democracy and Distrust's* continued hold on the academy, the fact that Ely's theory is strongest where blockages of political channels are most evident is an important lesson for all structural theories. Moreover, Ely's account drew strength from its account of self-interested legislative behavior presumed to be all but inherent in representative government. To that end, "[w]hen judges base their decisions on untested empirical assumptions about political behavior, there is always a risk that a more serious inquiry into the data will prove them wrong."<sup>175</sup> The best and

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171. ELY, *supra* note 3, at 125.

172. See generally ELY, *supra* note 17.

173. Cf. Scalia, *supra* note 92, at 863 ("It seems to me, moreover, that the practical defects of originalism are defects more appropriate for the task at hand—that is, less likely to aggravate the most significant weakness of the system of judicial review and more likely to produce results acceptable to all. If one is hiring a reference-room librarian, and has two applicants, between whom the only substantial difference is that the one's normal conversational tone tends to be too loud and the other's too soft, it is pretty clear which of the imperfections should be preferred.").

174. See Amar, *supra* note 39, at 79–80 (noting necessity of empirical data); Mitchell Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 849 (2005) ("The instant question is whether the incidence of excessive partisanship in mid-decade redistrictings is likely to be sufficiently high that it becomes reasonable to adopt a decision rule that directs courts to presume excessive partisanship from mid-decade redistricting.").

175. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role*

most candid way to locate Ely's theory within the election law field is to recognize how his argument becomes much more difficult to apply and to justify toward the end of chapter 5, and that the operationalization of his structural approach would require strong empirical foundations.

Not only does the academy find itself facing many of the same challenges Ely faced, but certain members of the Supreme Court do as well. The second half of this Part describes how Ely's effort and the critiques that followed are visible in present-day discussions of the participation-oriented judicial review advocated by Justice Breyer. The echoes of Ely's work are unmistakable in Justice Breyer's *Active Liberty*, and that work has been subjected to much the same criticism. However, Justice Breyer's method points the way towards applying an Elysian approach in a manner more susceptible to standards than Ely's was, and in doing so, Breyer links Ely to a more empirical approach to election law cases.

#### B. *Echoes of Ely: Justice Breyer's Active Liberty*

In a 2002 article, *Our Democratic Constitution*,<sup>176</sup> and a 2005 book, *Active Liberty*, based largely on the same, Justice Breyer outlined for the general public a "theme" informing his approach to judging that resembled that of *Democracy and Distrust*.<sup>177</sup> Echoing Ely, Justice Breyer argued in *Our Democratic Constitution* and *Active Liberty* for greater emphasis in constitutional and statutory interpretation on the Constitution's "democratic nature." Justice Breyer emphasized that he was presenting a "theme," not a theory;<sup>178</sup> his aim was to elaborate on a concept which steps in only after other interpretive methods fail to yield an answer. Justice Breyer's core argument was that review by judges of statutes and constitutional provisions should be done with attention to the Constitution's commitment to democracy and with the aim of promoting a highly participatory version of democracy. Connecting the Constitution with an "active" form of liberty—a form associated with participation in public life, as opposed to freedom from government coercion—Justice Breyer outlined an

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*of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1758 (2008).

176. Breyer, Madison Lecture, *supra* note 23.

177. Part of this approach had been hinted at in Justice Breyer's judicial decisions, as well as in a 2000 law review article. *See* Breyer, *supra* note 22, at 771–73 (calling into question formulaic tests that sacrifice flexibility for efficiency).

178. "To illustrate a theme is not to present a general theory of constitutional interpretation. Nonetheless, themes play an important role in a judge's work. . . . The matter is primarily one of approach, perspective, and emphasis. And approach, perspective, and emphasis, even if they are not theories, play a great role in law." BREYER, *supra* note 24, at 7. *Active Liberty's* economy and its avowedly limited scope attracted various comments. *See, e.g.*, Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1675 (2006) (book review) ("It would be a mistake to see this book – as some of its critics have – as offering a 'theory' about the Constitution."); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2388 (2006) (book review) (referring to *Active Liberty* as a "slim volume"); Emily Bazelon, *Take That, Nino*, SLATE, Sept. 12, 2005, <http://www.slate.com/id/2125479> ("Calling Breyer's missive a book is a bit of an oversell.").

approach oriented around the principle that, once a judge's typical tools for interpreting text (precedent, legislative history, linguistic canons, etc.) yield no answer, the question should be decided consistent with the Constitution's "democratic nature."<sup>179</sup> That approach envisions deciding cases so as to promote democratic participation.

*Active Liberty* is not a swashbuckling defense of zealous judicial review, written with gusto to promote a vision of a flourishing democracy. Nor is it the grinding, gruff slashing of *Democracy and Distrust*. Justice Breyer's argument for his brand of structural review relies instead on calm reasoning and deflection of possible counterarguments through careful concessions and rejoinders. According to Justice Breyer, "[i]ncreased recognition of the Constitution's democratic objective—and an appreciation of the role courts can play in securing that objective—can help guide judges both as actors in the deliberative process and as substantive interpreters of relevant constitutional and statutory provisions."<sup>180</sup> Put simply, Justice Breyer does not cast his approach as a break with other, traditional methods of adjudication. Justice Breyer instead employs a bear hug approach to his principal adversary, originalism. Justice Breyer casts the universe of cases where his and other approaches will reach different results as extremely limited,<sup>181</sup> narrowing the distance between his approach and the more textualist<sup>182</sup> alternative. Additionally, Justice Breyer positions his approach as stepping in after various other interpretive devices have failed to yield an answer.<sup>183</sup> The result is that the theme Justice Breyer advances is—akin to

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179. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 159 (2005) ("The abiding heart and spirit of the document lay in the structure of its rules for political participation and political power, and these rules were, as we have seen, generally populist yet also proslavery."); *id.* at 472 ("I argue that the Preamble's words and deeds made clear that the Constitution was essentially democratic."); *But see id.* at xii ("In the chapters that follow I offer my own take: This book is an *opinionated* biography of the document."); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1094 n.180 (1981) ("The claim that the Constitution is preeminently concerned with participational values is based on a selective and idiosyncratic reading of the document.").

180. BREYER, *supra* note 24, at 37.

181. The difference between originalism and *Active Liberty* is one of degree, in Justice Breyer's view. See Breyer, *Madison Lecture*, *supra* note 23, at 249 ("In truth, the difference is one of degree. Virtually all judges, when interpreting a constitution or a statute, refer at one time or another to language, to history, to tradition, to precedent, to purpose, and to consequences.").

182. One critique of Breyer pointed out that his taxonomy of originalists and textualists was imprecise. Ilya Somin, "*Active Liberty*" and *Judicial Power: What Should Courts Do to Promote Democracy?*, 100 *NW. U. L. REV.* 1827, 1851–53 (2006) (critiquing Justice Breyer for conflating textualism and originalism).

183. "I am not arguing for a new theory of constitutional law. . . . Only a handful of constitutional and statutory issues are as open in respect to language, history, and basic purpose as those I have here described." BREYER, *supra* note 24, at 110; *see also id.* at 9 ("[M]y view can differ from the views of various others in the way in which I understand the relation between the Constitution's democratic objective and its other general objectives. My view can differ in the comparative significance I attach to each general objective. And my view can differ in the way I understand how a particular objective should influence the interpretation of a broader provision, and not just those provisions that refer to it directly. These differences too are often a matter of degree, a matter of perspective, or emphasis,

Ely's—not divorced from traditional modes of interpretation but acts to supplement and actualize them.<sup>184</sup> Justice Breyer goes out of his way to stress that the number of cases that call for the application of the approach he describes is very small,<sup>185</sup> and that to a great extent his approach is that of what might be called a “broad” originalist.

As many noted after *Active Liberty* was written, Justice Breyer's work had strong roots in that of Ely, his former Harvard Law School colleague. But that comparison has not been fully explored—though nearly every book reviewer has noted the connection.<sup>186</sup> The similarities between Ely's and Justice Breyer's approaches are extensive. In appealing to the Constitution's “democratic nature,” Justice Breyer aligned his general aim with Ely's.<sup>187</sup> Justice Breyer also relied on several of the same historical sources Ely had used in contending that the Constitution is preeminently concerned with providing a democratic form of government.<sup>188</sup> Justice Breyer and Ely both put a heavy focus on the First Amendment: Justice Breyer's section on speech in the “Applications” chapter of *Active Liberty* is almost twice the length of the other subsections in that chapter, and Ely likewise began chapter 5 of *Democracy and Distrust* by discussing free speech at length.<sup>189</sup> Like Ely, Justice Breyer saw the Warren Court as a Court that often acted in harmony with his model.<sup>190</sup> Like Ely, Justice Breyer did not envision his project as making a clean break with originalist or textualist modes of interpretation, but rather working as a continuation of, or a more general version of, those methods.<sup>191</sup> And Justice Breyer, much like Ely, recognized the

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rather than a radical disagreement about the general nature of the Constitution or its basic objectives.”).

184. Cf. Klarman, *supra* note 16, at 498 n.38 (“[P]rocess theory, both for Justice Stone and for Professor Ely, is a supplement, rather than an alternative, to textual interpretation.”).

185. Justice Scalia shares this view as to the scope of cases where jurisprudential differences are most acute, but for different reasons. See Scalia, *supra* note 92, at 862 (“It is, I think, the fact that most originalists are faint-hearted and most nonoriginalists are moderate (that is, would not ascribe evolving content to such clear provisions as the requirement that the President be no less than thirty-five years of age) which accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions.”).

186. See McLoughlin, *supra* note 26, at 101 n.266 (collecting examples); Michael A. Livermore & D. Theodore Rave, Book Note, *Conversation, Representation, and Allocation: Justice Breyer's Active Liberty*, 81 N.Y.U. L. REV. 1505, 1511 (2006) (“John Hart Ely's argument in *Democracy and Distrust* forms a backdrop for Justice Breyer's conception of active liberty.” (footnote omitted)).

187. Compare BREYER, *supra* note 24, at 5–7, with ELY, *supra* note 3, at 88.

188. E.g., ELY, *supra* note 3, at 76 n.15, 79 n.24, 83 n.36, 90 n.56 (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 18, 57–63, 447 (1969); The Federalist No. 10 (Madison); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 166–67 (1967); 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 163 (1911)); BREYER, *supra* note 24, at 21 n.1, 29 n.13 (citing WOOD, *supra*; BAILYN, *supra*; The Federalist No. 10, at 77–78 (Madison) (Clinton Rossiter ed., 1961); MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, I, at 562 (1937)).

189. Compare BREYER, *supra* note 24, at 39–55, with ELY, *supra* note 3, at 105–16.

190. Compare BREYER, *supra* note 24, at 10, with ELY, *supra* note 3, at 73–75.

191. See Interview by Charlie Rose with Stephen Breyer, *supra* note 23 (noting that, between he and Justice Scalia, “[W]e agree, I think, that we're trying to interpret this document, that we want to interpret a document in terms of the framers' original objectives. And I'm perhaps a little broader in

limitations of the project: “I am not saying that focus upon active liberty will automatically answer the constitutional question in particular campaign finance cases. I argue only that such focus will help courts find a proper route for arriving at an answer.”<sup>192</sup>

Despite the similarity of the approaches in *Active Liberty* and *Democracy and Distrust*, Justice Breyer does not rely on Ely in shaping his discussion. Justice Breyer cites Ely once, and only in the race context.<sup>193</sup> It is possible that Justice Breyer associates Ely with two concepts, neither of which is helpful to his argument. The first is the notion that Ely never overcame the criticism that *Democracy and Distrust* failed in its attempt to achieve a judicial review that does not rely on substantive values. The second could be Ely’s position that *Roe* was wrongly decided, a view Justice Breyer (presumably) does not share.<sup>194</sup> A variety of other rationales are possible: for example, *Democracy and Distrust* has no notion of ancient versus modern liberty. Alternatively, Justice Breyer may have thought that Ely did not share his notion of statutory as opposed to constitutional interpretation or his approach to administrative law. For whatever reason, the similarity between their projects goes unexplored in *Active Liberty*.

The most subtle similarity to Ely’s work, however, is structural. Justice Breyer elaborated on his approach by describing how he has applied it in diverse contexts including free speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law. Like the first few subsections of chapter 5

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the terms in which I would put those framers’ objectives”); cf. Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1716–17 (2006) (book review) (“Justice Breyer . . . insists that . . . he is the better originalist because he grasps the democratic character of the Constitution.”).

192. Breyer, Madison Lecture, *supra* note 23, at 254. Though there are many similarities between Justice Breyer and Ely’s methods, there are also notable differences, including the divergent applications of their similar approaches. For example, Ely attacked *Buckley v. Valeo*, 424 U.S. 1 (1976) for permitting restrictions on contributions to political candidates, ELY, *supra* note 3, at 234 n.27, while Justice Breyer would either defend *Buckley* or attack it from a different vantage point. Justice Breyer authored the opinion for the Court in *Easley v. Cromartie*, 532 U.S. 234 (2001), a case involving redistricting, and Ely excoriated it. Ely, *supra* note 74, at 493 (“I’ve known Steve Breyer a long time—we clerked the same Term and were on the same faculty for ten years—and can certainly testify to what you presumably already know, that he is as intelligent (indeed, all-round good) a justice as we’ve seen in a long time.”); *id.* (calling Justice Breyer’s observation “pointless,” his argument “a flaming non sequitur,” and Justice Breyer himself, “Justice Houdini”). Indeed, one could press the indeterminacy objection by highlighting the disagreements between these two prominent structuralists. Kathleen M. Sullivan & Pamela S. Karlan, *Foreword: The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 701 (2004) (speculating that Ely would have agreed with dissenters in *McConnell*, though allowing that “[t]his is not entirely self-evident, since John’s theory opposes the entrenchment of political power, and there were antientrenchment arguments on both sides in the BCRA litigation”). Compare Boynton, *supra* note 42, at 435 (speculating that because the “Qualifications Clause is sufficiently specific, I doubt that Ely would need to go beyond pure interpretivism to construe it” to decide *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)), with Breyer, *supra* note 22, at 769 (describing difficulties in deciding *Thornton*).

193. BREYER, *supra* note 24, at 146 n.14.

194. See *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (“[T]his Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman’s right to choose. We shall not revisit those legal principles.” (citation omitted)).

of *Democracy and Distrust*, it is the first example, free speech in the context of a system of private financing of political campaigns, where the author's approach has the most traction. Indeed, one cannot help but feel that the application of Justice Breyer's method to other contexts beyond the political arena is strained; the discussion of free speech is twice as long as any of the other of examples and is the most compelling. Justice Breyer's other examples of applications of his theory are harder to justify on participation grounds because they are much farther removed from the political process, and criticism of his book weighed far heavier on these later chapters. Like Ely, the farther Justice Breyer strays from the actual ground rules of American democracy and toward more general concepts of participation, the greater the difficulty in justifying a decision as "democracy-driven." The locus of elections can at least produce some agreement that a channel-clearing form of judicial review is being applied *in the right place*, once past the objection as to whether it should be applied at all. Cases involving elections, ballot access, and political contributions are clearly "about" the law of democracy; as Archibald Cox put it in a review of *Democracy and Distrust*, "the case is within the judge's commission." It is far harder to say the same with regard to cases involving vouchers and religious schools.<sup>195</sup>

*Active Liberty* peaks midway, just as *Democracy and Distrust* does. The reader from the election law field will find the disproportionately lengthy discussion of campaign contributions the jumping-off point for turning to Justice Breyer's opinion in *Randall v. Sorrell*<sup>196</sup> and his other election law cases. And aside from the page count, there is little explicit recognition that a significant shift is being made from protecting the basic rules of elections to providing for the conditions of a thriving democratic state. Yet this is a crucial shift and, like Ely, there is barely a pause before drifting towards other examples from other fields.

*Active Liberty* nevertheless fills a gap between Ely and the structuralist debates of the twenty-first century by offering an empirics-based response to the same indeterminacy critique that hounded Ely. Justice Breyer's book, while hailed by some,<sup>197</sup> received criticism from unsympathetic<sup>198</sup> and sympathetic

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195. Pildes, *supra* note 44, at 151 ("To the extent Justice Breyer and others on the Court offer this nascent participation rationale as an independent justification, one question becomes how concretely this justification is meant to be understood. If participation means voter turnout in elections, the participatory rationale would offer a clear objective yardstick against which courts could assess regulations of election financing or other electoral laws. But it seems unlikely that anything as concrete as voter turnout could be tied empirically to election-financing regimes. However, if participation means something broader than turnout, this rationale might provide no more firm an anchor for judicial assessment of campaign finance laws than the earlier anticorruption rationale. In that case, 'participatory self-government' would provide a different rhetorical justification than avoidance of 'corruption,' but it would not otherwise change the judicial role. Justice Breyer or the Court will have to develop this rationale further before it becomes clear how significant a jurisprudential change might be at stake.").

196. 548 U.S. 230 (2006).

197. *E.g.*, Gewirtz, *supra* note 178, at 1675.

198. *E.g.*, Peter Berkowitz, *Democratizing the Constitution*, POL'Y REV., Dec. 2005–Jan. 2006, at 87 (book review).

readers<sup>199</sup> alike.<sup>200</sup> Justice Breyer's description of the Constitution's "democratic nature" was attacked as wrong as a matter of history.<sup>201</sup> The argument that judges should enforce the democratic nature of the Constitution was attacked as imposing a judicially selected vision of democracy.<sup>202</sup> The approach's preference for standards over rules led to it being criticized as standardless.<sup>203</sup> Its willingness to look to consequences was attacked as results-oriented decision making.<sup>204</sup> It was criticized for not addressing *Roe v. Wade*.<sup>205</sup> But above all, it was attacked as indeterminate, providing no meaningful guidance for how judges were actually to decide cases.<sup>206</sup>

Justice Breyer's anticipatory response to this last objection provides a structuralist defense of standards-based adjudication of political process cases. The response to the indeterminacy objection was threefold. First, his method was a supplement to existing interpretive methods; it was not intended to displace other methods and thus any indeterminacy already existed because the Constitution provided no clear answer under traditional modes of interpretation. Second, originalism (and the "literalism" it demands) has weaknesses of its own: "[S]ubjectivity" is a two-edged criticism, which the literalist himself cannot escape. The literalist's tools—language and structure, history and tradition—often fail to provide objective guidance in those truly difficult cases about which I have spoken.<sup>207</sup> Third, his rejection of originalism did not open the door to subjectivity.<sup>208</sup> Under his approach "important safeguards of objectivity remain[ed],"<sup>209</sup> including empirics.

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199. E.g., Ryan, *supra* note 30, at 1627; Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719 (2006) (book review).

200. See *supra* Part I.B for a discussion of the main criticisms of Ely's *Democracy and Distrust* and Ely's responses to those critiques.

201. Posner, *supra* note 191, at 1702–03.

202. Somin, *supra* note 182, at 1834–36.

203. McConnell, *supra* note 178, at 2412.

204. Somin, *supra* note 182, at 1859.

205. McConnell, *supra* note 178, at 2401 ("No theory of interpretation today is complete without some discussion of *Roe v. Wade*, abortion, and substantive due process. Yet these words do not so much as appear in Justice Breyer's book.").

206. Posner, *supra* note 191, at 1706 ("The broader problem is that abstractions like 'democracy' and 'active liberty' are so vague and encompassing that they can be deployed on either side of most constitutional questions."); Ryan, *supra* note 30, at 1645 (arguing that Justice Breyer's approach "seems incurably indeterminate. By this I *do not* mean that it is difficult to tell how concrete cases should come out under Breyer's approach. I mean that we are not entirely sure what Breyer is looking for, other than reasonable solutions to difficult problems."); cf. Gewirtz, *supra* note 178, at 1689 ("The most significant criticism of [Justice] Breyer's methodological approach, even by those who praise the book, is that it leads to judicial subjectivity and legal indeterminacy."). As noted, many of these critiques tracked the critiques of *Democracy and Distrust*.

207. BREYER, *supra* note 24, at 124.

208. *Id.* at 118 ("I would ask whether it is true that judges who reject literalism necessarily open the door to subjectivity. They do not endorse subjectivity. And under their approach important safeguards of objectivity remain.").

209. *Id.*

These answers form a bridge between *Democracy and Distrust*, which focused more heavily on rules as opposed to standards, and the political process cases of today. Ely's account, as noted, was disdainful of the "on the ground" model of policing malapportionment, rejecting it on administrability grounds. And he believed "pluralism" to be an empty promise for those who had been kept out of the political process for so long.<sup>210</sup> Ely also expressed concern that certain standards would give way to meaningless balancing and leave constitutional rights unprotected. "The First Amendment simply cannot stand on the shifting foundation of ad hoc evaluations of specific threat,"<sup>211</sup> Ely wrote, and accordingly he preferred the rule-like "'unprotected messages' approach" under which "the consideration of likely harm takes place at wholesale, in advance, outside the context of specific cases."<sup>212</sup> But while Ely recognized that rules were in many ways better protection for First Amendment rights,<sup>213</sup> he made clear that a standards-based approach was necessary as well and ultimately settled on a hybrid approach in the context of certain restrictions on speech: "I would like to suggest . . . that the First Amendment will best be served if the two approaches [(specific threat and unprotected messages)] are treated as complementary rather than contending, each with its own legitimate and indispensable role in protecting expression."<sup>214</sup> Ely preferred a rule to govern these First Amendment disputes, but in the context of free speech found a purely rules-based position untenable. Justice Breyer favors standards-based approaches rather than rules-based ones because the democratic costs of rules-based approaches are often too high. And his approach, while more likely to allow subjectivity to enter the equation, relies on various empirical indicia to help guide judges' decisions.<sup>215</sup> For Justice Breyer, the mine run of election law cases must be policed by doctrines that incorporate standards, and accordingly such doctrines depend on empirical indicia to carry out a structural end.

This section has sought to locate Justice Breyer's account as promoting structural aims similar to Ely's in the language of a judge who believes that most political process cases will be resolved via standards as opposed to rules. As structuralist aims are necessarily general, the most faithful application of a general textual command is most often a standard, not a rule: "In most if not all cases, the best semantic approximation of a vague constitutional guarantee is likely to be a vague judicial standard."<sup>216</sup> But semantic approximations are only

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210. ELY, *supra* note 3, at 135; *see also* Karlan, *supra* note 12, at 1332–33 (discussing Ely's attack on pluralism).

211. ELY, *supra* note 3, at 109.

212. *Id.* at 110.

213. "An 'unprotected messages' approach cannot guarantee liberty—nothing can—but it's the surest hedge against judicial capitulation that humans have available." *Id.* at 112. "A case can be made . . . that even though a justice must know deep down that no one can *really* mean there can be no restrictions on free speech, there is value in his putting it that way nonetheless." *Id.* at 109.

214. *Id.* at 111.

215. *See* BREYER, *supra* note 24, at 124.

216. Fallon, *supra* note 41, at 1310; *see also* Scalia, *supra* note 153, at 1185 ("If I did not consider my judgment governed by the original meaning of constitutional text, or at least by current social

part of the judge's responsibility; the translation of textual meaning into workable doctrine is a separate obligation.<sup>217</sup> That work, done right, requires assessments (based on fact, not just surmise) about relevant actors and institutions. The Court has relied on a variety of standards, tests, and presumptions in crafting election law doctrine,<sup>218</sup> sometimes based on strong empirics and other times on conjecture and conceptions of more ephemeral harms. As shown below, that crafting has taken place with various levels of reliance on data on electoral outcomes and political behavior. Ely himself offered little in the way of a blueprint for constructing doctrine for election law's various subfields, other than a reliance on an overriding presumption of self-interested legislative behavior. The next section describes how structural advocates and courts can apply the obscured lessons of Ely's work in constructing election law doctrines founded on sound empirical underpinnings.

### C. *Empirics and the Foundations of Doctrine*

While bright-line rules have significant benefits in deciding election law cases and in managing an election law docket,<sup>219</sup> they will typically prove elusive, in part because courts are often uneasy about fixing a rule in the absence of clear textual meaning or of strong indications of how such a doctrine would function. "One person, one vote" is not easily translatable into other areas of election law, and courts are not likely to declare, for example, that every election-related requirement of photographic identification is constitutional. Thus, the search for rules *alone* to govern the election law docket is a pointless quest.

Something more must fill the vacuum to create workable doctrine and decide cases. As Justice Souter wrote in *Vieth v. Jubelirer*,<sup>220</sup> the Court's job is to "translate" constitutional norms into "workable criteria,"<sup>221</sup> and empirical

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practice as reflected in extant legislation, I would feel relatively comfortable deciding case-by-case . . . but I would feel quite uncomfortable announcing firm rules . . .").

217. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 6–10 (2004).

218. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 76–101 (2001).

219. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 684–85 (2008) ("[The] preference for formalism . . . is entirely understandable. It keeps the courts from getting mired in technically complicated questions about measurement. It often yields bright line rules, whose prudential virtues are obvious enough when the courts are asked to adjudicate the disputes of warring political parties and their interest-group allies over the ground rules of political competition. And it allows the Supreme Court to avoid articulating a precise account of the constitutional harms that supposedly warrant judicial intervention in the political process, which is convenient given how little the Constitution says about the law of democracy, and given the conventional understanding that courts should only enforce personal constitutional rights.").

220. 541 U.S. 267 (2004).

221. *Vieth*, 541 U.S. at 344 (Souter, J., dissenting). As noted by Richard Fallon, even the determination as to judicial manageability requires examination of certain empirical indicia: "If we ask why some indeterminate standards are judicially manageable whereas others are not, the answer seems to lie largely in predictive judgments about the pattern of results that decisionmaking pursuant to any particular standard would likely produce." Fallon, *supra* note 41, at 1289; cf. Ansolabehere &

evidence can help achieve that goal. Structuralists can show that critiques of their approaches are often critiques of standards, simpliciter. Attacks on structural accounts often boil down to rehearsals of the familiar “rules vs. standards” debate, a debate that permeates all aspects of law, not solely the law of democracy. To that end, the Court’s ability to craft election law doctrine depends on its ability to marshal empirics in a manner no different from its ability to craft other doctrines. The real question is how successfully empirics can be marshaled to make plain the institutional and political dynamics at work.

If Ely obscured the gradations in his argument and did not successfully flesh out how his theory could be operationalized, empirical data helps do so in the election law context for structural aims beyond entrenchment. Justice Breyer’s response to the indeterminacy critique also helps give Ely’s lessons added force in current debates. A structuralist form of review does not ask the judiciary to apply political philosophy or political science in a way it wouldn’t otherwise, that much was as clear from Ely’s discussion of the First Amendment in the context of national security.<sup>222</sup> And as Justice Breyer elucidates both directly and indirectly in *Active Liberty*, structural aims are most easily achieved where there is strong empirical evidence.<sup>223</sup> Empirical data is a defense against the limitless malleability of standards to suit the judge’s will. As Ely wrote, “[o]ne doesn’t have to be much of a lawyer to recognize that even the clearest verbal formula can be manipulated. But it’s a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing.”<sup>224</sup>

Empirics are crucial regardless of where one stands on the “rights vs. structure” debate in the election law field. Even under an approach that sought to examine not the robustness of competition under Vermont’s system of political contributions but whether the law was “closely drawn to promote political equality,” political science is necessary.<sup>225</sup> The argument often made in favor of the “equality” or “rights” approach is that the political science questions are somehow easier to decide under that approach.<sup>226</sup> But Professor Hasen, a key scholar in the “rights” camp, acknowledges that his argument is not founded on a claim to superior empirical analysis (rather, it is a claim of superior transparency about state interests), and that “there is a danger that my approach produces no more of a coherent or predictable means of judging the constitutionality of campaign finance laws than the current and earlier approaches that I have criticized.”<sup>227</sup> Thus, whether under the “rights” or

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Persily, *supra* note 175, at 1740 (describing the “admittedly challenging predictive judgments as to the greater constitutional threat posed by actual fraud or by attempts to prevent it”).

222. ELY, *supra* note 3, at 110–12.

223. See generally BREYER, *supra* note 24, at 37–55.

224. ELY, *supra* note 3, at 112.

225. Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 850 (2007).

226. See *id.* at 888 (“[T]he kinds of political science questions that courts would need to examine under my proposed test are more likely to lead to determinate results than the anti-competition test of the *Randall* plurality.”).

227. *Id.* at 889.

“structure” banner, empirics allow courts to judge political process cases and fashion workable election law doctrine based on data as opposed to speculation and supposition about causes and effects in campaigns and elections.

In short, empirical evidence helps demonstrate a constitutional burden or disprove an alleged democratic harm along a given axis. Under this type of review of political process cases, judges must rely on “objective, empirically discernable phenomenon as the predicate for judicial intervention, rather than the individual judge’s sense of political justice.”<sup>228</sup> Such evidence does not answer a constitutional question entirely, but it narrows the field of disagreement. Of course, this may in some cases create a “battle of the experts” and some would argue that such a battle will obscure the “real” battle of values transpiring. But for species of election law doctrine that account for institutional arrangements as well as legislative intent and effect, it is difficult to conceive of the “best” analysis omitting the best data available. Indeed, the argument that courts look to quantifiable burdens on and blockages to representation coincides with recent arguments in favor of a “Democracy Index,” and the gathering and analysis of nationwide data on the procedures of American elections.<sup>229</sup>

There are several rejoinders to this claim. First, generalist judges have a relative lack of sophistication when it comes to empirical evidence and statistics. Courts do not necessarily have the time or support needed to delve deeply into data put before them. Indeed, a court may lack any relevant data source for a given question, or may find that the important indicators are in fact not what the parties have proffered. Similarly, a turn to empirics might itself be considered a burden on the very litigants (the “outs”) that Ely wanted courts to assist. As *Crawford* showed, a heavily empirical approach puts a strong onus on the plaintiff to build a good district court record, and can be unforgiving where it finds empirics lacking.<sup>230</sup> While all of these factors are reasons to be skeptical about the implementation of empirics-based approaches, they ultimately do not challenge the importance of looking to actual outcomes and real-world effects in deciding election law cases.

The second possible critique that the argument in favor of empirics simply begs is the question of how courts are to approach election law cases. Empirical data may often conflict, shift, or give no clear answer. The critic might contend that this Article has essentially added a new category to the list of theories Ely would have rejected in chapter 3 of *Democracy and Distrust*, and that it relies on empirics to create a sort of amalgamation of “Reason,” “Consensus,” “Tradition,” and “Neutral Principles”—all rejected (standing alone) by Ely as theories of judicial review. Empirics might similarly be called a stalking horse for

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228. Elmendorf, *supra* note 219, at 677.

229. See generally HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009) (discussing use of democracy index to encourage electoral reform).

230. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008) (“[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.”).

one's own vision of democracy, and the notion of implementing a structural approach via reliance on empirical data another judicial review daydream. This critique has been anticipated (and, hopefully, defeated) by agreeing at the outset that examining the concreteness of purported representational harms only helps provide "an agreed-upon point of departure,"<sup>231</sup> not that it leads irrevocably towards one, and only one, answer. Relying on quantitative data is not intended to re-import values that would otherwise have to be excluded from the analysis, though it of course could be used in such a fashion (as can any form of judicial review). Indeed, I have tried to stress that even where there is agreement about which facts matter, there will be disagreement as to how to weigh those facts relative to one another, and the facts themselves will not decide the given question. The continuum undergirding Ely's argument is not a linear chart that eliminates subjectivity as empirical evidence is piled up to the skies. But review of election law cases is more justifiable and convincing where it takes into account empirics, deals forthrightly with them, and explains decisions in terms of outcomes rather than abstractions. Even where the empirics are debatable or their import contested, the doctrine that emerges is more likely to be successful on account of having addressed them forthrightly.

The next Part contends that the Court's election law docket reflects the empirics-based continuum undergirding Ely's argument and many of the structuralists'. In areas where a standard must be applied and empirical evidence of a harm or a burden is clear, the Court has succeeded in articulating empirics-based standards that command strong majorities and public respect. Where the empirics are weaker, the Court's foundation has been shakier. This Part concludes by turning to the issue of partisan gerrymandering, a practice loathed by Ely and which has paralyzed the current Court. Partisan gerrymanders seem to be paradigmatic cases of channel-blocking, yet the elusiveness of widely accepted standards has called structuralist accounts into question. This Part contends that judicial ambivalence about the empirical success of partisan gerrymandering as an enterprise underlies the hesitation in crafting a partisan gerrymandering doctrine.

### III. THE CRAFTING OF ELECTION LAW DOCTRINE

The foregoing discussion has argued that, tracking the organization of Ely's argument, the analysis of election law cases works best where "harms," "burdens," and "blockages" are evident and measurable,<sup>232</sup> and where indicia have allowed a standard to be applied that "has the saleable sound of

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231. Scalia, *supra* note 92, at 855.

232. *Cf.* Hasen, *supra* note 38, at 638 ("Justice Souter's 'extremity of unfairness' is not much different from Justice Breyer's 'unjust entrenchment' or even Justice Kennedy's First Amendment 'burden': all of these standards inevitably would lead courts to develop multipart tests for separating permissible from impermissible use of partisan information in districting, parallel to how the Court has articulated tests for judging vote dilution under section 2 of the Voting Rights Act or nonretrogression under section 5 of the Act." (footnotes omitted)).

principle.”<sup>233</sup> This discussion has sought to flesh out the legacy of John Hart Ely in the election law field, and demonstrate the connections between Ely, Justice Breyer, and the election law structuralists. The aim has been to try to demonstrate that certain election law debates raise issues that trace back to Ely’s argument, and, with those connections made more visible, to draw insight from the strengths and weaknesses of that argument about how successful election law approaches can be crafted. In this Part, I discuss how the concepts that undergird Ely’s approach and his heirs’ are reflected as an undercurrent of several areas of the Court’s election law docket. Where the harms identified are more attenuated and removed from actual electoral outcomes, the Court’s answers have been less satisfying. Where the harms are more evident and more directly related to electoral outcomes, there is not unanimity by the Court but the Justices are better able to address the arguments and craft workable doctrines. Recognition of this continuum can provide clarity for a docket that often blurs the working of politics and stages of representation.<sup>234</sup>

In a series of areas within election law over the last decades, members of the Court have relied on empirical indicia to identify a constitutional harm to the democratic system. In some areas—unconstitutional racial vote dilution, contribution limits to political candidates, and burdens on the right to vote—the Court has successfully articulated a method of judicial review that relies on bounded, unified standards grounded in empirics. In another—*Shaw v. Reno*<sup>235</sup> challenges under the Fourteenth Amendment—the Court identified a structural harm divorced from electoral consequences. Finally, in the case of partisan gerrymandering challenged under the Fourteenth Amendment, various standards have been identified but the Court has yet to adopt one.

Common to the vote-dilution, contribution-limit, and right-to-vote contexts are several features. First, the Court has opted for rules where possible but has not stood pat where only standards would apply. Second, the Court has relied on indicia from the political arena to determine when an injury has occurred and to connect a right to a remedy. Third, this type of review has been consistently attacked by dissenters as ends-driven and standardless in each setting, but that attack has not commanded a majority of the Court.

Vote dilution in particular is normally thought of as a harm aimed at a discrete segment of voters, thus implicating Ely’s second prong as opposed to his first. But the first prong—channel clearing—is also implicated, particularly where vote dilution operates to systematically thwart the voting clout of a majority.<sup>236</sup> The Court’s experience with vote dilution claims has most frequently

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233. Ely, *supra* note 32, at 609.

234. This Part does not attempt to argue that rights-based approaches would be inferior to structural approaches (to the extent the two differ) in cases with little empirical evidence. Rather, it contends that empirics help to bolster and cabin the structuralist account. Without strong empirics, both camps are left with the remaining building blocks for judicial doctrine-making: text, precedent, the availability of rules as opposed to standards, and judicial capital, among others.

235. 509 U.S. 630 (1993).

236. See *Vieth v. Jubelirer*, 541 U.S. 267, 347 n.2 (2004) (Souter, J., dissenting) (“[A]nytime political gerrymandering has been shown to occur, evidence must at least imply that the defendants

drawn the ire of dissenters, but that experience runs both ways. If the Court is not going to retreat from deciding racial vote dilution claims,<sup>237</sup> there ought to be no bar to deciding partisan gerrymandering claims, or deciding claims that the right to vote has been burdened, where empirics allow a workable and defensible doctrine.<sup>238</sup> If one rejects the position that the Court should not be in this entire area of law at all, the Court's efforts reflect the outlines of a successful structural approach. "The risk of harm to basic democratic principle is serious; identification is possible; and remedies can be found."<sup>239</sup> The Court's experience in these areas demonstrates its ability to rely honestly on empirical indicia in rendering judgments about politics.

#### A. *Unconstitutional Vote Dilution*

Between 1960 and 1982, the Court relied on the Constitution in deciding vote dilution claims. What benchmarks did the Court rely on to adjudicate such claims? The Court applied a multifactor test laid out in *Whitcomb v. Chavis*,<sup>240</sup> *White v. Regester*,<sup>241</sup> and the Fifth Circuit case *Zimmer v. McKeithen*.<sup>242</sup> Those bringing vote dilution suits were required to demonstrate that the "political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."<sup>243</sup> The *Zimmer* factors gave additional content to that comparative test:

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themselves sat down, identified the relevant groups, and set out to *concentrate the vote of one and dilute that of the others*. If a plaintiff has the evidence, a court can figure out what was going on." (emphasis added)); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 87–88 (2008); Gerken, *supra* note 127, at 523 (calling vote dilution "the most natural description of the injury arising from partisan discrimination"); Karlan, *supra* note 12, at 1338 ("[A]lthough Ely did not discuss the emerging jurisprudence of racial vote dilution in *Democracy and Distrust*, the tack the Supreme Court took was entirely consistent with his theory. Indeed, because the racial vote dilution cases arguably rested on all three strands of *Carolene Products* . . . they serve as a particularly powerful example of participation-oriented, representation-reinforcing judicial review.").

237. Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer*, 73 GEO. WASH. L. REV. 1166, 1190 (2005) ("Despite this potential for racial unmanageability, the Court is unlikely to declare such matters nonjusticiable political questions and abandon its oversight of race-conscious redistricting schemes altogether. The Court, then, is obviously willing to abide some indeterminacy to adjudicate matters that it views as sufficiently important.").

238. *Id.* at 1185 ("Because the available rules are either unlikely to be palatable to the Court or unlikely to engender profound change in redistricting practices, the judicial choice can largely be understood as one between standards and no judicial oversight at all.").

239. *Vieth*, 541 U.S. at 367 (Breyer, J., dissenting).

240. 403 U.S. 124 (1971).

241. 412 U.S. 755 (1973).

242. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

243. *White*, 412 U.S. at 766 (citing *Whitcomb*, 403 U.S. at 149–50).

[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors.<sup>244</sup>

These factors—some qualitative, some involving common practices, some quantitative—were used to constrain and define vote dilution, though they were attacked by various Justices over the years.<sup>245</sup> Justice Thomas, for example, declared that

the list of *White* factors provides nothing more than just that: a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction, but a list that cannot provide a rule for deciding a vote dilution claim.<sup>246</sup>

The Court's decision in *City of Mobile v. Bolden*,<sup>247</sup> requiring proof of discriminatory intent and effect to prove vote dilution, temporarily banished the *Zimmer* factors from consideration. But after Congress amended section two of the Voting Rights Act of 1965 with the 1982 Amendments, the Court issued its opinion in *Rogers v. Lodge*,<sup>248</sup> which reclaimed the *Zimmer* factors as proof of intent.<sup>249</sup> Moreover, when the Court interpreted the statutory amendments to section two, the Court took the opportunity to reorient the analytical framework of vote dilution, and did so based on recommendations regarding how to operationalize a vote dilution inquiry in the constitutional setting. In *Thornburg v. Gingles*,<sup>250</sup> the plurality held that the plaintiffs had to demonstrate that their bloc was "sufficiently large and geographically compact to constitute a majority in a single-member district[,] . . . politically cohesive[,] . . . [and] that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."<sup>251</sup> "Vote dilution was now about voting patterns; *Gingles* eliminated the need to delve into the voluminous social and historical factors described in *Rogers* and instead put the focus directly on

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244. *Zimmer*, 485 F.2d at 1305 (footnotes omitted).

245. E.g., *Wise v. Lipscomb*, 437 U.S. 535, 550 (1978) (Rehnquist, J., concurring) (describing *White v. Regester* factors as "highly amorphous").

246. *Holder v. Hall*, 512 U.S. 874, 938 (1994) (Thomas, J., concurring).

247. 446 U.S. 55 (1980) (plurality opinion).

248. 458 U.S. 613 (1982).

249. For a lengthier discussion of the transformation of the Court's constitutional vote dilution jurisprudence into its statutory jurisprudence, see McLoughlin, *supra* note 26, at 51–57, 64–76.

250. 478 U.S. 30 (1986) (plurality opinion).

251. *Gingles*, 478 U.S. at 50–51.

evidence of polarized voting and the size and compactness of the minority bloc.”<sup>252</sup>

Importantly, the test *Gingles* developed provided clear benchmarks that had to be met. The Court relied on population data and voter polarization data to narrow the inquiry and give itself guideposts derived from politics. It fashioned the text of the Voting Rights Act into a three-part threshold test<sup>253</sup> and it allowed political actors to alter their behavior to avoid protracted litigation. *Gingles* itself received strong criticism from Justice O’Connor, who argued in her concurrence that the plurality did not go far enough in incorporating the real-world aspects of political influence and was headed down a slippery slope towards proportional representation.<sup>254</sup> It also was scorned years later by Justice Thomas, who argued that the *Gingles* factors were “nothing but puffery used to fill out an impressive verbal formulation and to create the impression that the outcome in a vote dilution case rests upon a reasoned evaluation of a variety of relevant circumstances.”<sup>255</sup> Thomas also claimed that “[f]ew words would be too strong to describe the dissembling that pervades the application of the ‘totality of circumstances’ test under our interpretation of § 2. It is an empty incantation—a mere conjurer’s trick that serves to hide the drive for proportionality that animates our decisions.”<sup>256</sup> But Thomas’s view consistently failed to win a majority, and Justice O’Connor’s opinion in *Georgia v. Ashcroft*<sup>257</sup> allowed courts—in the retrogression inquiry under section five of the Voting Rights Act—to rely on precisely the type of political indicia she believed would be appropriate in the section two analysis.<sup>258</sup> In short, *more* benchmarks from politics are now likely to be relied upon, not fewer, when courts make judgments about vote dilution and retrogression.

Contrast the Court’s experience with *Gingles* with its *Shaw* jurisprudence and *Shaw*’s public reception. The harm targeted by the majority in *Shaw v. Reno* was not vote dilution. *Shaw* held that a nondilutive map could run afoul of the Fourteenth Amendment due to excessive consideration of race by the line drawers.<sup>259</sup> Though this “expressive harm” may in fact be real, the Court’s ability to identify it and alleviate it is much more open to question than vote dilution.

252. McLoughlin, *supra* note 26, at 69–70. For a discussion of how the *Gingles* development was not conceived of as a break from the pre-*City of Mobile* constitutional standard, see *id.* at 71–72.

253. Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 879 (1995) (“*Gingles* proved tremendously useful in challenges to at-large electoral systems because of the confined nature of the inquiry.”); McLoughlin, *supra* note 26, at 68 (“*Thornburg v. Gingles* is in some ways the most remarkable voting-rights case since *Reynolds v. Sims*, in that it structured an entire generation of vote-dilution cases brought under section 2 and ordered the vote-dilution cases in an intelligible, clear way. The three-part *Gingles* test, which the plurality formed out of the text of section 2, did not invalidate multimember districts altogether. Instead it set up a three-part test to act as a ‘sentry’ at the gates for vote-dilution cases.” (footnotes omitted)).

254. *Gingles*, 478 U.S. at 84–85 (O’Connor, J., concurring).

255. *Holder v. Hall*, 512 U.S. 874, 939 (1994) (Thomas, J., concurring).

256. *Id.* at 943–44.

257. 539 U.S. 461 (2003).

258. *Ashcroft*, 539 U.S. at 480.

259. *Shaw v. Reno*, 509 U.S. 630, 655–58 (1993).

Thus, Professor Hasen is partially right when he attacks *Shaw* as an example of the Court ill-advisedly issuing an opinion grounded in a structural aim (eliminating an “expressive harm”), because the harm is too removed from the hard data on electoral outcomes. However, the flaw was not the Court’s attempt to vindicate a structural aim, but rather its attempt to vindicate one divorced from actual electoral outcomes and evidence of harm. Without a concept of dilutive effect, *Shaw* urges a purely process- or intent-based review of district maps. In his 1998 *Stanford Law Review* article, Ely sought to rely on *Shaw* to stop partisan gerrymanders, seeing *Shaw* as a process-based method of review. And indeed, *Shaw* may provide a map to get at bipartisan gerrymanders, which are far thornier to analyze than a punitive partisan gerrymander. But insofar as it attempts to remedy a more ephemeral injury (an “expressive harm”) than actual dilution of votes at the ballot box, the Court’s authority to reject maps and order re-redistricting was rightly challenged.

*Shaw* is an attempt by the Court to right a representational injury less concrete than vote dilution and farther along the continuum underlying *Democracy and Distrust*. Its weaknesses (both doctrinally and in application) derive directly from the ephemeral nature of the harm targeted. Meanwhile, the Court’s constitutional vote dilution jurisprudence eventually transitioned to a purely statutory regime, and in doing so the prime change—brought about by the *Gingles* decision—was to operationalize an approach that incorporated testable empirics and accounted for institutional realities.<sup>260</sup> As noted, this approach was not without its critics. But those critics never succeeded in putting forward a more compelling vision of how to operationalize the prohibitions in the Constitution and the Voting Rights Act, or how such a method would be more consistent with either document.

#### B. *Burdens on the Right to Vote*

The Court has sought to rely on objective indicia and empirics to cabin judicial discretion in the area of election administration. Over the past forty years, the Court has addressed constitutional challenges to burdens on the right to register to vote and be on the ballot. In these settings, the Court has forthrightly admitted that “the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made.”<sup>261</sup> Those judgments are cabined by and founded upon empirical data from the world of politics.<sup>262</sup>

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260. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (“[N]o violation of § 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters’ respective shares in the voting-age population.”).

261. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

262. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics*:

The “rule” is, of course, not normally a rule—it is more often a standard. “[N]o bright line separates permissible election-related regulation from unconstitutional infringements.”<sup>263</sup> In those cases where a rule is fashioned, it is often announced by the Court only after a series of cases elucidate the difference between acceptable and unacceptable state practices. Laws imposing poll taxes in state elections were categorically invalidated by the Court in *Harper v. Virginia Board of Elections*,<sup>264</sup> but *Harper* was decided two years after the Constitution was amended to bar poll taxes in federal elections. In most cases the Court has engaged in a balancing analysis to determine whether the harm to voters is systemic, only later settling on a rule. Thus, similar to the path the Court took to arriving at the rule of thumb of permitting only ten-percent deviation in the population size of state legislative districts, the Court over a period of years coalesced around a rule permitting fifty-day registration rules but looking more critically at longer periods.<sup>265</sup> This approach—allowing rules to coalesce over time and eschewing strict scrutiny of every law that affects the right to vote<sup>266</sup>—asks the judge to weigh “the character and magnitude of the asserted injury to [voting] rights” with relation to the “precise interests” asserted by the state.<sup>267</sup>

Notably, the Court has done this with reference to widely accepted, measurable criteria. In *Dunn v. Blumstein*,<sup>268</sup> the Court invalidated a one-year durational residence requirement for voting, noting that

[w]hile it would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence requirements, it is worth noting that during the period 1947-1970 an average of approximately 3.3% of the total national population moved interstate each year. (An additional 3.2% of the population moved from one county to another *intrastate* each year.)<sup>269</sup>

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*Explanations and Opportunities*, 156 U. PA. L. REV. 313, 376 (2007) (arguing that “main stem of the *Storer-Burdick* jurisprudence invites the classification of challenged laws as presumptively permissible or presumptively impermissible on the basis of relatively simple, formal inquiries into (1) the type of burden produced, (2) proxies for impact (qualitative, numerical, and legal landscape cutoffs), and, somewhat more equivocally, (3) legislative purposes”).

263. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997)).

264. 383 U.S. 663 (1966).

265. *Marston v. Lewis*, 410 U.S. 679, 681 (1973); see also Elmendorf, *supra* note 262, at 318–19 (surveying history of voting registration cases).

266. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”); see also *Storer*, 415 U.S. at 730 (“It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases . . .”).

267. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

268. 405 U.S. 330 (1972).

269. *Dunn*, 405 U.S. at 335 n.5 (citation omitted).

Justice Breyer would rely on similar data points in his opinion in *Randall*.<sup>270</sup> No leap into subjectivity was required for the Court to determine the character and magnitude of the burden of the residence requirement, the gravity of which would determine the scrutiny level the Court would apply.<sup>271</sup>

In *Crawford v. Marion County Election Board*,<sup>272</sup> the Court was faced with applying this approach in the context of a voter identification law. After taking unified control of the state government for the first time in seventeen years, the Republican-controlled Indiana state legislature passed the strictest voter identification requirement in the nation. In granting and affirming summary judgment for the state and Marion County Election Board, the Southern District of Indiana and the Seventh Circuit deemed the burden not “severe” and, accordingly, not subject to searching review. The Seventh Circuit denied rehearing en banc and the Supreme Court granted certiorari. Petitioners pointed to a host of factors demonstrating a significant burden. They pointed to the numerical size of the population that would not be permitted to vote, a number which was far higher than the one-percent figure adopted by the district court via its own back-of-the-envelope calculation. The number was most likely between four percent and twelve percent of the voting age population.<sup>273</sup> Petitioners also pointed to the distribution of this population, noting that seventy-five percent of those lacking the requisite identification were concentrated in Marion County, one of four Indiana counties (out of ninety-two) to vote for John Kerry in 2004.<sup>274</sup>

These numbers were then put in context and petitioners urged that the Court view them in light of the evident purposes of the passage by the newly ascendant Republican Party. Petitioners pointed to “Indiana’s long-standing history of razor-thin election margins,” noting that in 2006 “the Indiana House switched from a 52-48 Republican majority to a 51-49 Democratic majority” which was “the fifteenth time in the past 35 elections that control of the chamber has switched parties. Three 2006 Indiana House elections were subjected to recounts because only 7, 15, and 27 votes separated the leading candidates.”<sup>275</sup> In

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270. Indeed, some commentators have urged that Breyer’s approach be incorporated into the *Burdick* jurisprudence. *E.g.*, Elmendorf, *supra* note 262, at 392 (“[T]he Court should expressly incorporate the ‘danger signs’ metaphor [from *Randall*] into the electoral mechanics jurisprudence—not as a replacement for *Burdick*’s language of burdens, but as a supplement.”); Recent Cases, 120 HARV. L. REV. 1980, 1982 (2007) (“[C]ourts hearing challenges to voter ID laws should draw on the insights of scholars and judges writing about campaign finance law, an area of election law plagued by similar problems.” (footnote omitted)).

271. *See Burdick*, 504 U.S. at 434 (“[W]hen [First and Fourteenth Amendment] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” (citations omitted) (internal quotation marks omitted)).

272. 472 F.3d 949 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008).

273. Brief for Petitioners at 21–22, *Crawford*, 128 S. Ct. 1610 (Nos. 07-21, 07-25).

274. *Id.*

275. *Id.*

short, the Court was presented with clear criteria (numerical data along with racial, political, and economic breakdowns) and provided with means of comparison to determine what the systemic and structural impacts of the law would be. Petitioners challenged the unsupported conclusion by Judge Posner that “the plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from voting.”<sup>276</sup>

Thus, petitioners urged the Court to rely on objective data, comparative figures, and practical benchmarks from the world of politics to uphold the constitutional challenge to the voter identification law. Notably, the factors urged by petitioners could not end the argument, but these criteria—not questioned at all by the respondents in terms of their appropriateness for rendering the judicial decision—necessarily narrowed the field of disagreement and created a point of departure for the parties and the Justices.<sup>277</sup> The size of the burden imposed, the distribution of its impact across racial, political, and economic lines, the comparative impact in light of narrow margins of victory and the ever-changing control of the legislature, the number of impersonations compared to disenfranchised voters, and the fact of a unified Republican legislature imposing the strictest law in the nation are indicia of a constitutional injury calling for judicial intervention.<sup>278</sup>

When the Court decided the case, it dealt with these indicia but found them too uncertain to invalidate the law entirely. Justice Stevens wrote an opinion joined by Justice Kennedy and the Chief Justice. Justice Scalia wrote a concurrence joined by Justices Thomas and Alito, and would have invalidated the voter identification law on broader grounds. Justices Souter, Ginsburg, and Breyer dissented. Justice Stevens began by declaring that the appropriate test to be applied was not categorical, but required the application of a standard:

Rather than applying any “litmus test” that would neatly separate valid from invalid restrictions, we concluded [in *Anderson v. Celebrezze*, 460 U.S. 780 (1983)] that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its

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<sup>276</sup> *Crawford*, 472 F.3d at 953–54.

<sup>277</sup> These factors are both evident and compelling because voting is an aggregative process. By contrast, the Court has at times declined to view other types of political activity as independent from any sort of larger process. See Posting of Richard Briffault to SCOTUSblog, <http://www.scotusblog.com/wp/wrtl-the-anti-mcconnell/> (June 25, 2007 16:02 EDT) (“At the highest level, [*FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007)] rejects the view that campaign finance restrictions can be justified and sustained as democracy-promoting measures that advance government integrity. Where *McConnell* saw campaign finance jurisprudence as entailing the reconciliation of competing constitutional values – democracy and free speech – Chief Justice Roberts flatly proclaimed that WRTL is ‘about political speech’ only. So much for Justice Breyer’s theory of Active Liberty.”).

<sup>278</sup> Transcript of Oral Argument at 27, *Crawford*, 128 S. Ct. 1610 (Nos. 07-21, 07-25) (Paul M. Smith: “As John Hart Ely said, this is an area where judicial review is the most important, the most legitimate.”); see also Recent Cases, *supra* note 270, at 1985 (“First, [courts] should evaluate the process by which such laws were enacted, reasoning that voter ID laws passed with bipartisan support and serious policy consideration are less likely to reflect self-entrenchment by political majorities and more likely to reflect a reasoned effort at legislation. Second, courts should take a ‘peek’ at the effects of such laws to detect self-entrenchment.” (footnotes omitted)).

rule, and then make the “hard judgment” that our adversary system demands.<sup>279</sup>

In analyzing the burden imposed by the law, Justice Stevens found it impossible to quantify: “[T]he evidence in the record does not provide us with the number of registered voters without photo identification. . . . Much of the argument about the numbers of such voters comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court.”<sup>280</sup> That led Stevens, a Republican from Chicago, to vote to uphold the law, though Justice Souter pointed out that Stevens’s lead opinion “does not insist enough on the hard facts that our standard of review demands.”<sup>281</sup>

Justice Scalia would have taken a different route. First, he broke with Stevens’s interpretation of the Court’s electoral mechanics cases: “Although *Burdick* liberally quoted *Anderson*, *Burdick* forged *Anderson*’s amorphous ‘flexible standard’ into something resembling an administrable rule.”<sup>282</sup> He viewed the “rule” as requiring a description of the burden, followed by a weighing against its justifications.<sup>283</sup> Second, Justice Scalia contended that “our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes,” and asserted that when the Court “began to grapple with the magnitude of burdens, we did so categorically and did not consider the peculiar circumstances of individual voters or candidates.”<sup>284</sup> Finally, he stated that he would essentially immunize all voter identification rules from future challenges: “This is an area where the dos and don’ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation.”<sup>285</sup>

Notably, Justice Kennedy and the Chief Justice did not join Justice Scalia’s more rule-based approach. The Chief Justice had already evinced his view of an approach to facial challenges to electoral laws in a case decided weeks earlier, *Washington State Grange v. Washington State Republican Party*.<sup>286</sup> There, the Chief Justice (joined by Justice Alito) authored a concurring opinion supporting the right of Washington State to allow candidates to declare their party preference on the ballot (even if the party itself disputed the affiliation and wished not to be associated with the candidate).<sup>287</sup> The Chief Justice noted that

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279. *Crawford*, 128 S. Ct. at 1616.

280. *Id.* at 1622.

281. *Id.* at 1628 (Souter, J., dissenting).

282. *Id.* at 1624 (Scalia, J., concurring).

283. *Id.* at 1625.

284. *Crawford*, 128 S. Ct. at 1624–25 (Scalia, J., concurring).

285. *Id.* at 1626.

286. 128 S. Ct. 1184 (2008).

287. *Wash. State Grange*, 128 S. Ct. at 1196–99 (Roberts, C.J., concurring) (“I do think . . . that whether voters *perceive* the candidate and the party to be associated is relevant to the constitutional inquiry. . . . Voter perceptions matter, and if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties’ associational rights are adversely implicated.”).

“because respondents brought this challenge before the State of Washington had printed ballots for use under the new primary regime, we have no idea what those ballots will look like. Petitioners themselves emphasize that the content of the ballots in the pertinent respect is yet to be determined.”<sup>288</sup> He noted that some ballots might be designed to unfairly hamper the First Amendment rights of the political party, while others would not:

If the ballot is designed in such a manner that no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to “prefer,” the . . . primary system would likely pass constitutional muster. . . . On the other hand, if the ballot merely lists the candidates’ preferred parties next to the candidates’ names, or otherwise fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment challenge.<sup>289</sup>

Justice Scalia attacked this view in his dissent, which was joined by Justice Kennedy. “The majority opinion and the Chief Justice’s concurrence . . . endorse a wait-and-see approach on the grounds that it is not yet evident how the law will affect voter perception of the political parties.”<sup>290</sup> Justice Scalia thought that the claimant should not be required to proffer “evidence” of the putative burden, and asserted that “[i]t does not take a study to establish that when statements of party connection are the sole information listed next to candidate names on the ballot, those statements will affect voters’ perceptions of what the candidate stands for, what the party stands for, and whom they should elect.”<sup>291</sup>

Despite Justice Scalia’s preference for categorical approaches and rules-based decision making, he was unable to command a majority in either *Crawford* or *Washington State Grange*. A majority of the Court in both cases preferred to grapple with the evidence of the purported burdens, even if (as in *Crawford*) there was a fundamental disagreement about how to weigh those burdens.

### C. Campaign Finance

As noted, Justice Breyer’s lengthy chapter in *Active Liberty* on campaign finance intersects with his opinion a year later in *Randall*. In *Randall*, the Court faced the question of whether Vermont’s spending and contribution limits were unconstitutional.<sup>292</sup> After invalidating the spending limits as not being aimed to a rationale *Buckley* found appropriate, Justice Breyer set out a five-part test for determining whether contribution limits were too low. He noted that

contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.

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288. *Id.* at 1196–97.

289. *Id.* at 1197.

290. *Id.* at 1201 (Scalia, J., dissenting).

291. *Id.* at 1202.

292. *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (plurality opinion).

Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote. Thus, we see no alternative to the exercise of independent judicial judgment as a statute reaches those outer limits. And, where there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's "tailoring," that is, toward assessing the proportionality of the restrictions.<sup>293</sup>

Justice Breyer's approach was classic standards-based adjudication, and given the Court's campaign finance jurisprudence, what choice other than a standard was there? Surely Breyer could have voted to invalidate all contribution limits, but that was foreclosed by *Buckley*. Justice Breyer instead relied on comparative data to get a picture of whether Vermont's contribution limits were unusual and potentially competition reducing. This required no great lurch into subjectivity—he compared the \$1,000 contribution upheld in *Buckley* for congressional races and noted that adjusted for inflation the contribution limit for Vermont's governorship (\$200 per two year cycle) amounted to \$57 per year in 1976 dollars (the year *Buckley* was decided). This twenty-to-one disparity was not ameliorated by geography—the Vermont population was 621,000 in 2006, whereas Congressional districts were 465,000 in 1976. He also relied on data from other states, finding that "Vermont's contribution limits are the lowest in the Nation. Act 64 limits contributions to candidates for statewide office (including governor) to \$200 per candidate per election. We have found no State that imposes a lower per election limit."<sup>294</sup> Additionally, "Vermont's limit is well below the lowest limit this Court has previously upheld, the limit of \$1,075 per election (adjusted for inflation every two years) for candidates for Missouri state auditor."<sup>295</sup> These comparisons were "danger signs that Act 64's contribution limits may fall outside tolerable First Amendment limits."<sup>296</sup>

Justice Breyer urged a structural approach to election cases.<sup>297</sup> While it used comparative practices to sketch the outlines of "effective campaigns," it tried to grapple with the realities of Vermont's political system and promote competitive elections, as the Court was required to do by *Buckley*. The reliance on "danger signs," while according with Justice Breyer's desire to be candid about the triggers of judicial skepticism of certain limits, meant that no clear rule emerged.

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293. *Id.* at 248–49.

294. *Id.* at 249–50.

295. *Id.* at 251 (citation omitted). Note that this factor subtly shifts away from an actual empirical quantification to the relationship between the Vermont system and previously accepted limits.

296. *Id.* at 253.

297. See Posting by Kevin Russell to SCOTUSblog, <http://www.scotusblog.com/wp/todays-opinion-in-the-vermont-cases/> (June 26, 2006, 11:44 EDT) ("[T]he Court in this decision makes as clear as it has in any constitutional decision involving democratic institutions that the Court views itself as having an essential role to play in preserving the structural integrity of the democratic process" (quoting Professor Richard H. Pildes)).

But this was acceptable under Justice Breyer's method, because his danger signs were based on objective criteria.

Critiques of *Randall* tracked the critiques of *Active Liberty*. Justice Thomas argued that "Neither step of [Justice Breyer's] test can be reduced to a workable inquiry to be performed by States attempting to comply with this Court's jurisprudence."<sup>298</sup> He added:

The plurality recognizes that the burdens which lead it to invalidate Act 64's contribution limits are present under "many, though not all, campaign finance regulations." As a result, the plurality does not purport to offer any single touchstone for evaluating the constitutionality of such laws. Indeed, its discussion offers nothing resembling a rule at all. From all appearances, the plurality simply looked at these limits and said, in its "independent judicial judgment," that they are too low. The atmospherics—whether they vary with inflation, whether they are as high as those in other States or those in *Shrink* and *Buckley*, whether they apply to volunteer activities and parties—no doubt help contribute to the plurality's sentiment. But a feeling does not amount to a workable rule of law.<sup>299</sup>

Professor Elizabeth Garrett pointed out that Justice Breyer's test for unconstitutionally low contribution limits was complex and confusing.<sup>300</sup> She asked,

How many of the danger signs are required to trigger independent judicial assessment of the regulation, rather than judicial deference to legislative judgments? What is the hierarchy of the signs? Are they the only danger signs, or are there others that we will learn about in future cases? We do not know. We have no idea. We do not even know why these were picked as danger signs.<sup>301</sup>

As shown below, these are critiques that apply to any judicially created standard, not just Justice Breyer's standard in *Randall*. The attack on standards is not unique to the contribution limits arena, and while it may score points off of Justice Breyer, it does not succeed in putting forward a winning alternative.

The best critique was the one pressed by Justice Souter. His opinion accepted Justice Breyer's focus on electoral outcomes while making a convincing case that Justice Breyer had misread the import of those indicia. Notably, Justice Kennedy also provided tepid support for Justice Breyer's approach in *Randall*, and eschewed an absolutist approach that would have taken the Court out of the

298. *Randall*, 548 U.S. at 268 (Thomas, J., concurring).

299. *Id.* at 272 (citations omitted).

300. Garrett, *supra* note 142, at 560–61 ("Justice Breyer tends to favor complex tests that can produce unclarity. After *Randall*, not only are lawyers uncertain how to argue these cases, but lawmakers will also be uncertain how to write statutes that will withstand constitutional challenge. Justice Breyer's affinity for multi-pronged standards, with many related qualitative decisions that are hard to apply consistently and with certainty, is a feature of other areas of his jurisprudence.").

301. *Id.* at 561. Professor Rick Hasen also predicted that "there is going to be enough flexibility in the *Randall* plurality's test that judges hearing from competing experts will (albeit subconsciously) hear what they want to hear about how particular campaign contribution limits are likely to affect the competitiveness of close elections." Hasen, *supra* note 225, at 886.

business of reviewing contribution limits entirely. Concurring in the judgment, Justice Kennedy wrote that “[o]n a routine, operational level the present system requires us to explain why \$200 is too restrictive a limit while \$1,500 is not. Our own experience gives us little basis to make these judgments, and certainly no traditional or well-established body of law exists to offer guidance.”<sup>302</sup> Nevertheless, the Court’s responsibility to do so could not be ignored: “Viewed within the legal universe we have ratified and helped create, the result the plurality reaches is correct . . . .”<sup>303</sup> No one can expect that Justice Kennedy (or Chief Justice Roberts) will adhere to Justice Breyer’s formula in future cases. Yet Justice Breyer’s analysis was compelling enough to win five votes in 2006, and his standard is the bulwark against a sweeping invalidation of contribution limits.

D. *Partisan Gerrymandering*

Partisan gerrymandering is at the heart of questions about judicial review and the principled crafting of doctrine. The Court’s experience with partisan gerrymandering claims in *Vieth v. Jubelirer*<sup>304</sup> and in *League of United Latin American Citizens v. Perry*<sup>305</sup> demonstrated that Justice Kennedy had not yet found a partisan gerrymandering standard with which he was comfortable. But it cannot be said to have shown that the Court was not equipped to handle claims of partisan gerrymandering—claims which, in the context of *Vieth* and *LULAC*, were naked attempts by the in-party to penalize the out-party.

As Justin Driver, Guy Charles, and Rick Hasen have written, many of the attacks on the proposed standards in *Vieth* and *LULAC* were attacks on standards simpliciter.<sup>306</sup> All standards are unmanageable to a certain extent—the truly elusive quest is not for rough, objective measurements of partisan fairness (of which there are many) but for a new one-person, one-vote rule.<sup>307</sup> As Justice Powell wrote in *Davis v. Bandemer*,<sup>308</sup>

only a sensitive and searching inquiry can distinguish gerrymandering in the “loose” sense from gerrymandering that amounts to unconstitutional discrimination. Because it is difficult to develop and apply standards that will identify the unconstitutional gerrymander, courts may seek to avoid their responsibility to enforce the Equal

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302. *Randall*, 548 U.S. at 265 (Kennedy, J., concurring).

303. *Id.*

304. 541 U.S. 267 (2004).

305. 548 U.S. 399 (2006).

306. Driver, *supra* note 237, at 1175–76 (“Contrary to Justice Scalia’s intimations, however, none of the proposed standards would afford lower courts untrammelled discretion. To criticize standards for containing ambiguity is rather like criticizing the sun for emitting heat. Put simply, standards by their very nature contain some measure of indeterminacy.”).

307. *See id.* at 1169 (“If meaningful judicial oversight of redistricting is to become a reality—thereby ensuring that the ideals of representative government are not subordinated to sheer partisan power—a majority of the Court must learn to stop worrying about discovering a nonexistent magic rule and learn to love (or at least become comfortable with) relying on standards.”).

308. 478 U.S. 109 (1986).

Protection Clause by finding that a claim of gerrymandering is nonjusticiable. . . . [S]uch a course is mistaken . . . .<sup>309</sup>

Part of the debate over judicially manageable standards in *Vieth* and in *LULAC* was therefore “disingenuous, and the use of the term ‘judicial manageability’ a judicial sleight of hand,”<sup>310</sup> because as used by Justice Kennedy and the *Vieth* plurality, the question of whether the standards would lead to consistent results was an attack on all standards, not standards for partisan gerrymandering. The ability to assuage that concern is dependent upon judicial confidence about the empirical support for a partisan gerrymandering standard and the fact that partisan gerrymandering, even with twenty-first century technology, appears to be self-correcting in a way that minority vote dilution is not. To certain Justices, the “stickiness” of a punitive gerrymander remains a real question.

Some believe that the Court’s cases involving minority vote dilution counsel in favor of adopting only rules to police partisan gerrymandering, such as requirements that legislators not be involved in redistricting at all.<sup>311</sup> But again, the Court is much more likely to settle upon a standard than upon a rule, and its constitutional vote dilution cases from the pre-1982 period provide an important backdrop to this fact.<sup>312</sup> The vote dilution model would allow the Court to adapt an existing model of a democratic harm to another, closely related enterprise.<sup>313</sup> Indeed, each of the three approaches presented by the *Vieth* dissenters involved an account of vote dilution, to varying degrees. Justice Stevens’s sought to rely both on vote dilution and on the *Shaw* line of cases in order to utilize its objective benchmarks for deviation from redistricting norms. This approach has merit insofar as objective benchmarks are concerned, but *Shaw* is the wrong place to begin because *Shaw* violations are not necessarily vote dilutions; overly race-conscious district maps do not necessarily dilute minority voting clout. Justice Breyer’s theory also had vote dilution as a theme, but it also sought to lay out a path toward eradicating bipartisan gerrymanders, which were not at issue and pose thornier problems. Justice Souter’s approach (joined by Justice

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309. *Bandemer*, 478 U.S. at 165 (Powell, J., concurring in part and dissenting in part); see also Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1060 (1985) (“The so-called ‘absence-of-standards’ rationale borders on the disingenuous, because the Supreme Court has never been at a loss to decipher roughly workable standards for the vaguest of constitutional provisions when it so desires.”).

310. Hasen, *supra* note 38, at 637.

311. See Charles, *supra* note 143, at 660, 670–71 (recommending various rules as superior to standards and declaring that the Court’s minority vote dilution cases “failed courts”).

312. Driver, *supra* note 237, at 1191–92 (“If the Court wants to give teeth to judicial review of redistricting schemes and encourage redistricting bodies to internalize criteria that will prevent egregious partisan gerrymanders, it will need to abandon the relative comfort of rules for the uncertainty, ambiguity, and indeterminacy that necessarily accompany standards. Although a more precise legal directive may emerge over time, the Court’s initial step will likely require some flexibility in determining how much partisan consideration amounts to too much.”).

313. See Hasen, *supra* note 38, at 639 (“My own rough-cut judgment about the standards proposed by the *Vieth* plaintiffs and dissenters is that Justice Souter’s standard, with its familiar vote dilution concepts and burden shifting borrowed from employment law cases, would lead to the most consistent results across cases . . . .”).

Ginsburg) did employ a vote dilution analysis, as did the petitioners'.<sup>314</sup> Applying a vote dilution approach would ultimately have put the Court on a parallel track to its minority vote dilution jurisprudence. Notably,

Justice Souter's "extremity of unfairness" is not much different from Justice Breyer's "unjust entrenchment" or even Justice Kennedy's First Amendment "burden:" all of these standards inevitably would lead courts to develop multipart tests for separating permissible from impermissible use of partisan information in districting, parallel to how the Court has articulated tests for judging vote dilution under section 2 of the Voting Rights Act or nonretrogression under section 5 of the Act.<sup>315</sup>

The strength of those tests is ultimately dependent on empirical showings.

In sum, though the partisan gerrymandering battle within the Court remains at a stalemate, the tools at the Court's disposal for policing excessive partisan gerrymanders are clearly evident. Indeed, five members of the Court evinced interest in Gary King's partisan symmetry method, a method more akin to a rule for determining what counts as partisan fairness.<sup>316</sup> As King freely admits, this method does not eradicate judicial subjectivity,<sup>317</sup> but it provides an outcomes-based foothold for the crafting of doctrine. In short, the possibility of an incrementally "better" test for partisan gerrymandering points up the virtues of the existing, proposed tests, and focuses attention on the empirical work needed to persuade the Court that such a doctrine is feasible. Again, two Justices on the

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314. *Vieth v. Jubelirer*, 541 U.S. 267, 286–87 (2004) ("The effects prong of appellants' proposal replaces the *Bandemer* plurality's vague test . . . with criteria that are seemingly more specific. . . . This test is loosely based on our cases applying § 2 of the Voting Rights Act of 1965 to discrimination by race." (citations omitted)); *id.* at 349–50 (Souter, J., dissenting) ("[A] plaintiff would need to present the court with a hypothetical district including his residence, one in which the proportion of the plaintiff's group was lower (in a packing claim) or higher (in a cracking one) and which . . . deviated less from traditional districting principles than the actual district."); *see also* Hasen, *supra* note 38, at 638 ("Although no standard governing election law cases will be as easy and mechanical to apply as the one person, one vote rule—which Justice Stewart declared required no more than knowledge of 'sixth-grade arithmetic'—when there has been a strong majority of Justices committed to doing so, the Court has fared pretty well in crafting election law rules that get more or less evenly applied in the lower courts." (footnote omitted)); Pildes, *supra* note 44, at 70 ("Justice Souter, joined by Justice Ginsburg, viewed partisan gerrymandering through the lens of equal protection models from the race context; he framed partisan gerrymandering as a vote-dilution problem akin to racial vote dilution and remediable through similar doctrines."); *cf.* *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (plurality opinion) (distinguishing unconstitutional vote dilution from natural vote dilution that occurs in geographic areas with multiple racial or cultural groups).

315. Hasen, *supra* note 38, at 638 (footnote omitted).

316. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 *ELECTION L.J.* 2, 2–4 (2007) (outlining reaction to partisan symmetry approach).

317. *See id.* at 21 ("[A]s we have emphasized earlier, while partisan bias can provide the basis of measuring the magnitude of inequality of treatment, the issue of when inequities rise to the level of a constitutional violation is a quite distinct question. In this section we focus on five potential approaches to craft a judicially manageable standard for unconstitutional partisan gerrymandering that build on the concept of partisan bias to identify legal thresholds for *prima facie* evidence of equal protection violations.").

current Court (Scalia and Thomas) believe the entire endeavor not to be worthwhile or desirable and would reverse *Bandemer*. The rejection of that approach by the other seven Justices—their own disagreements notwithstanding—must be taken as an indication of the Court’s ultimate ability to fashion an empirically grounded doctrine for reviewing partisan gerrymanders.

#### CONCLUSION: THE ELYSIAN FOUNDATIONS OF ELECTION LAW

Arguments about the value of empirics run the risk of mistaking consensus about certain facts for facts themselves. And empirics alone cannot explain why certain empirics matter. But this Article has not contended that empirics themselves lead irretrievably to particular conclusions in election law cases. Empirics are not a substitute for the work of applying law to fact; rather, using the best facts possible helps point towards certain outcomes rather than others and lays the groundwork for election law doctrine more broadly. As Professors Grofman and King wrote in the context of partisan gerrymandering,

[E]ven if the Court fully adopts the concept of partisan symmetry as one that is legally relevant and recognizes the potential usefulness of the specific methodology that can be used to measure levels of partisan bias that we discuss . . . it is for the Court to make the critical judgments about what would constitute unconstitutionality or legally actionable thresholds and standards.<sup>318</sup>

Thus, to return to Professor Tribe’s core critique of *Democracy and Distrust*,<sup>319</sup> the best rejoinder is not that process is free of substance, or that empirics prevent judicial decisions from being based on substantive values, but that empirics help narrow the field of disagreement, and allow courts to render decisions regarding the laws of the political process in a way no less justifiable than in any other area of law. As judicial review depends upon the Court’s reservoir of political capital, making visible the continuum that lies within Ely’s approach shows where and when courts can best apply a structural approach without putting an incessant strain on that reservoir.

If in the context of election law the prime attack on structuralist accounts is their purported indeterminacy, the Court’s experience in the areas described above demonstrates that those Justices urging and implementing a structuralist approach have not operationalized it in an indiscriminate or unbounded manner. Indeed, the Court’s experience in its racial vote dilution cases, the partisan gerrymandering cases, the *Randall* decision, and the electoral mechanics jurisprudence reflects the unity and integrity of an approach that takes seriously the doctrinal role related to “policing the process of representation.”<sup>320</sup> That role necessarily requires the crafting of standards-based doctrines that create the danger that judges will rely on personal values in rendering decisions. But to the

318. *Id.* at 5.

319. Tribe, *supra* note 82, at 1071.

320. ELY, *supra* note 3, at 73.

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extent standards are necessary, empirics constrain and narrow the possible outcomes.

The continuum that runs through Ely's work is normally obscured, but the election law field is shot through with the same continuum and its correlating strengths and weaknesses. Ely's argument is compelling, but the more it is asked to extend beyond core electoral concerns, the more vulnerable it becomes. By comparison, the strongest foundations of structuralist theories are readily discernible empirical indicia and the availability of rules or saleable standards. The focus of structural theories should be on empirical benchmarks that show superior alternatives and extremities of unfairness. Empirics can also help clarify whether and when predictions about the types of political and institutional arrangements that would result from different judicial doctrines or decisions are themselves well-founded.

Judicial opinions read better and are more convincing when they account for the outcome-determinative nature of the ground rules of democratic politics and do so with strong empirics, even if judges disagree on the import of the picture that emerges. With that account firmly in hand, courts can enter the political thicket and render workable election law doctrine.