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## ELECTION LAW EXCEPTIONALISM? A BIRD'S EYE VIEW OF THE SYMPOSIUM

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The contributions to this symposium, sponsored by the Association of American Law Schools ("AALS") Section on Federal Courts, offer interesting and cogent analyses of three very different questions arising from the Supreme Court's jurisprudence. Louise Weinberg adds to the growing body of literature devoted to *Bush v. Gore*<sup>1</sup> by proposing a new reason to question the decision—the Court's short-circuiting of the democratic process, which Weinberg argues implicates a special set of constitutional concerns.<sup>2</sup> Pamela Karlan examines the difficulties the Supreme Court has encountered in implementing the *Shaw* doctrine, which prohibits racial gerrymanders, and sketches out potential exit strategies for the Court to remove itself from this thorny part of the political thicket.<sup>3</sup> And Avi Soifer offers a general critique of the Supreme Court's recent jurisprudence, with an eye to showing that *Bush v. Gore* is little different from the other Supreme Court decisions handed down this Term.<sup>4</sup>

One theme unites these diverse contributions to the scholarly literature. Each piece directly or indirectly raises the question of election law exceptionalism<sup>5</sup>—that is, whether constitutional law should be applied

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<sup>1</sup> 531 U.S. 98 (2000).

<sup>2</sup> Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 621 (2002).

<sup>3</sup> Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 673-74 (2002).

<sup>4</sup> Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 700-01 (2002).

<sup>5</sup> This phrase mimics the phrase "electoral exceptionalism" used by Frederick Schauer and Richard Pildes. See Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805 (1999). There is currently a debate about whether we should label the study of the political process "election law" or the "law of democracy." Compare Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1182-83 (1999) (asserting that the latter focuses the inquiry on democracy itself and better reflects the field's ultimate "concern . . . with the structural aspects of constitutional law"), with Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1096 (1999) (using the phrase

wholesale to democracy cases, or whether election law should be understood as a special area of the law requiring its own, unique set of legal paradigms.<sup>6</sup> Here I briefly address how this question relates to the papers in this symposium.

Election law has gotten a lot of attention lately. Even before the 2000 election transfixed the nation, election law had enjoyed increasing prominence as a newly emerging legal discipline. In a recent symposium in the *Loyola Law Review* entitled *Election Law as Its Own Field of Study*,<sup>7</sup> Richard Hasen remarked that no one now “can seriously question whether election law is a subject in its own right, related to but apart from its very different parents, constitutional law and political science.”<sup>8</sup> Two casebooks are now in their second editions, an active internet discussion group has attracted hundreds of subscribers, and the number of articles and symposia on election law topics has increased exponentially since 1990.<sup>9</sup> A number of scholars have made a name writing about election law, and it has attracted the attention of prominent public and private law scholars outside the field.

Moreover, the law of democracy has become an increasingly prominent part of the Supreme Court’s docket, as the Court engages in what Richard Pildes has termed “the constitutionalization of democracy.”<sup>10</sup> Pildes explains that although “constitutional law has regulated certain aspects of democratic politics” since 1962, when the Supreme Court first ventured into the political thicket in *Baker v. Carr*,<sup>11</sup> “over the last decade or so . . . the Court now routinely deploys constitutional law to circumscribe the forms democracy can

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“election law” while noting the “remarkable degree of diversity” of scholarly opinion with respect to the field’s proper name). I use the terms interchangeably and chose the term “election law” for the title only because, like all academics, I cannot resist the temptation for cheesy alliteration.

<sup>6</sup> One of the contributors to this symposium, Pam Karlan, has expressed serious doubts about what she terms the “transsubstantive approach,” but has concluded that she “lost that battle” because “[t]he Court seems to have embraced the idea that . . . there is one equal protection clause.” Pamela Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistributing Cases* 9 (Stanford Public Law and Legal Theory Working Paper Series, Working Paper No. 24, 2001), available at <http://papers.ssrn.com/abstract=282570>.

<sup>7</sup> Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999).

<sup>8</sup> Hasen, *supra* note 5, at 1095.

<sup>9</sup> *Id.* at 1096 & n.5; see also ELECTION LAW: CASES AND MATERIALS (Daniel Hays Lowenstein & Richard L. Hasen eds., 2001); THE LAW OF DEMOCRACY (Samuel Issacharoff et al. eds., 2001).

<sup>10</sup> Richard H. Pildes, *Constitutionalizing Democratic Politics*, in A BADLY FLAWED ELECTION (Ronald Dworkin ed., forthcoming 2002); see also Karlan, *supra* note 3, at 671-72; Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 LOY. L.A. L. REV. 1199, 1201 (1999).

<sup>11</sup> 369 U.S. 186 (1962).

take in situations that bear no relationship at all to those that had originally justified constitutional intervention.”<sup>12</sup>

The contributions to this symposium all touch upon this question: is there something special and distinct about the law of democracy, or is it best understood as applied constitutional law? To borrow Pam Karlan’s phrase, if election law “is becoming a field in its own right . . . [and] leaving constitutional law’s empire,”<sup>13</sup> is that a good thing? On the one hand, the interest election law has generated among the AALS Federal Courts Section, law reviews like the *Boston University Law Review*, and prominent public and private law scholars, serves as a testament to the intellectual excitement election law scholars have engendered and reveals the opportunities for cross-pollination between the law of democracy and other fields. On the other hand, those who write regularly in the field tend to raise a skeptical eyebrow when other scholars venture onto their turf and often criticize the latter for failing to grasp what makes political process claims special. Should we simply dismiss those raised eyebrows and criticisms as “policing the boundaries,” to borrow Laura Kalman’s concept,<sup>14</sup> or should we deem election law unique, a discipline unto itself?

Consider a handful of examples of election law exceptionalism, where the Supreme Court has modified constitutional doctrine to reflect the unique nature of democratic rights and the political process. Richard Pildes and Frederick Schauer have argued that *Arkansas Educational Television Commission v. Forbes*,<sup>15</sup> which rejected a challenge to a state-owned television station’s decision to exclude a congressional candidate from a televised debate because he was unlikely to win, holds that “the First Amendment requires unique treatment of candidate debates because . . . such debates play a special role in democratic politics.”<sup>16</sup> Another example is *Burdick v. Takushi*,<sup>17</sup> where the Supreme Court held that a state could forbid protest votes that took the form of a write-in ballot for Donald Duck to assure a well-run, stable electoral process. Here again, it is difficult to imagine that an activity with such

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<sup>12</sup> Pildes, *supra* note 10.

<sup>13</sup> Pamela S. Karlan, *Constitutional Law, The Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1187 (1999).

<sup>14</sup> Laura Kalman used this concept to describe ongoing disagreements between historians and legal historians, noting that

[w]e history police have patrolled our turf, guarding our disciplinary borders against the encroachment of others. Even our attempts at hospitality have been lame. To borrow from Terrence McDonald, historians have too often reinvented and reinforced the boundaries between history and other disciplines, even as we have pretended to speak across them.

Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 87-88 (1997) (citation omitted).

<sup>15</sup> 523 U.S. 666 (1998).

<sup>16</sup> Schauer & Pildes, *supra* note 5, at 1804.

<sup>17</sup> 504 U.S. 428 (1992).

obviously expressive dimensions would have been so easily dismissed under traditional First Amendment doctrine.

We can also identify examples of election law exceptionalism in the context of equal protection. Ellen Katz, for example, has explained that in *Rice v. Cayetano*<sup>18</sup> the Supreme Court altered its definition of what represents a racial classification to take into account the special constitutive values associated with electoral participation.<sup>19</sup> Furthermore, the Supreme Court's recent *Shaw* jurisprudence seems to allow more leeway for race-conscious decisionmaking in redistricting than it has allowed in other equal protection contexts. Recognizing that racial considerations inevitably play a role in districting decisions, the Court has adopted a "predominant factor" rather than a "motivating factor" test for identifying impermissible racial motive.<sup>20</sup>

One can similarly find instances where the Court has failed to modify conventional constitutional doctrines when adjudicating claims about democratic rights and structures despite calls for it to do so. For instance, Pam Karlan, Lani Guinier, and others have documented the unique role that groups play in the political process and argued that group affiliations should be treated differently in this context than they are under traditional equal protection doctrine.<sup>21</sup> Additionally, those who write about campaign finance have often called for a suspension of traditional First Amendment analysis in the context of electoral regulation.<sup>22</sup> Finally, a number of scholars—including Samuel

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<sup>18</sup> 528 U.S. 495 (2000).

<sup>19</sup> Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491 (2000).

<sup>20</sup> See *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) ("Race must not simply have been a motivation for the drawing of a majority-minority district . . . but the *predominant* factor motivating the legislature's districting decision." (internal quotation marks & citation omitted)); *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995) (stating that the "plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"); see also Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1215 (1996) (claiming that "*Miller* creatively misread the conventional burden-shifting trigger" in equal protection cases); Karlan, *supra* note 3, at 688-91 (noting that the Court modified the traditional trigger for applying strict scrutiny in the *Shaw* cases).

<sup>21</sup> See, e.g., Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (arguing that vote dilution claims cannot be squeezed into the conventional individual-rights framework the Court has chosen); Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994) (emphasizing the inadequacy of existing voting rights jurisprudence for handling claims involving racial groups); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83 (arguing for a reconsideration of "voting-rights remedies to accommodate the claims for representation made by ethnic and racial groups"); Karlan & Levinson, *supra* note 20, at 1204-08 (noting that a fundamental distinction between voting law and equal protection law is that voters are treated as members of groups).

<sup>22</sup> See Schauer & Pildes, *supra* note 5, at 1805-08 & nn.6-8 (cataloguing examples of academics who have written along these lines).

Issacharoff, Richard Pildes, and Daniel Ortiz—have urged the Court to think about the law of democracy in structural rather than rights-based terms.<sup>23</sup>

The three articles in this symposium shed additional light on the call for election law exceptionalism. They all suggest the important connections between constitutional analysis and the law of democracy. In addition, they reveal some of the problems that arise when we ignore the differences between claims about democracy and conventional constitutional analysis.

To begin, these articles suggest some of the benefits that can be derived from cross-pollination between election law and constitutional law.<sup>24</sup> By showing the many ways in which the law of democracy is *not* different, these articles may help temper any impulse to “police the boundaries” of the discipline. For example, Pam Karlan, someone who has argued elsewhere that “voting is different,”<sup>25</sup> nonetheless finds that traditional constitutional law offers a treasure trove of “exit strategies” that might help the Court find its way out of the political thicket, or at least the brambly part of the underbrush we call the *Shaw* doctrine. Her article suggests that the Court often finds itself in an intellectual dead-end or tied to an unadministrable doctrine in constitutional law. Karlan’s essay thus offers a fascinating counterpoint to the justiciability debates surrounding *Baker v. Carr* regarding whether the Court would ever discern manageable judicial standards in the context of malapportionment. Her

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<sup>23</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (urging courts to think of voting claims in structural terms); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (noting that the development of election law scholarship “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”). For a contribution to the debate over whether it is appropriate for courts to adopt a structural approach to voting cases, compare Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1590 (1999) (claiming 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”), with Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999) (urging a structural approach because “[t]he way to sustain the constitutional values of American democracy is . . . through . . . ensuring appropriately competitive interorganizational conditions”). To be sure, the Supreme Court often employs structural analysis in constitutional law, but we generally do not see the Court self-consciously adopting an explicitly structural approach when resolving civil rights claims, which is how most voting-rights claims are typically cast. See Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 159-60, 170-72 (1999) (explaining that the Supreme Court usually eschews structural analysis when deciding civil rights and equal protection claims).

<sup>24</sup> See Karlan, *supra* note 13, at 1188 (“[I]t would be unfortunate for everyone concerned if legal regulation of the political process were to hive off completely from constitutional law and the two bodies were to evolve separately to the point where there is little possibility of continued cross-fertilization.”).

<sup>25</sup> Karlan & Levinson, *supra* note 20, at 1202-03.

article demonstrates that the quest for manageable standards is not confined to voting cases, but permeates much of constitutional law.

Similarly, Avi Soifer adeptly argues that *Bush v. Gore* is best understood as a continuation of the Court's worst jurisprudential habits.<sup>26</sup> I found his contribution particularly fascinating because I have recently written that in *Bush v. Gore* the Court was "simply reverting to one of its bad habits in voting cases" and argued that *Bush* is emblematic of the difficulties courts encounter in adjudicating claims about democratic rights in particular.<sup>27</sup> Soifer, in contrast, infers no connection between the nature of voting claims and the weaknesses of the Supreme Court's opinion in *Bush v. Gore*. Instead, he attributes *Bush*'s flaws to the Court's "New Formalism" and its disregard for "judicial craftsmanship."<sup>28</sup> Though Soifer does not discuss whether the Court was right to enter the political thicket in *Baker*, it seems fair to infer that he might conclude that the weaknesses in the Supreme Court's voting-rights jurisprudence should be fixed not by withdrawal from the political thicket, but by getting a better map.

Interestingly enough, the sole article to make an explicit argument for election law exceptionalism in this symposium, written by Louise Weinberg, seems equally to reveal the relevance of traditional constitutional analysis to voting claims. Weinberg ably argues that the real flaw in *Bush* was the Court's decision to short-circuit the democratic process and asserts that such a decision raises a unique set of constitutional concerns.<sup>29</sup> It is hard to discern, however, precisely why the harm in this case is any different from the injury that would result whenever the Court fails to adhere to one of the traditional doctrines cabining its discretion. After all, Weinberg's real quarrel is with the remedy the Court adopted, its failure to remand the case.<sup>30</sup> That mistake, however, seems to have little to do with democracy itself; it instead reflects a poor remedial decision that one could have as easily condemned had the Court short-circuited some other decisionmaking process. To be sure, had the Court failed to remand a case to an administrative agency vested with the sole authority to make the decision or resolved a question that the United States Congress alone is empowered to answer, we might have invoked a different set

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<sup>26</sup> Soifer, *supra* note 4, at 701 (claiming that "the march of [this] increasingly Imperial Court" has not been "bound by constitutional text, precedent, prudential restraint, or the votes of the populace").

<sup>27</sup> Heather K. Gerken, *Old Wine in New Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on Bush v. Gore*, 54 FLA. L. REV. 407, 408 (2002).

<sup>28</sup> Soifer, *supra* note 4, at 701, 708 (likening what he calls the Court's "New Formalism" to last century's judicial activism in the name of liberty of contract).

<sup>29</sup> See Weinberg, *supra* note 2, at 627-39 (claiming that by halting the 2000 presidential election, the Court violated "fundamental constitutional understandings" by displacing the electorate and deciding the election itself).

<sup>30</sup> See *id.* at 631 (asserting that any offense to the Constitution in *Bush v. Gore* occurred as a result of the "administration and remediation" of the case).

of “general understandings”<sup>31</sup> than Weinberg deploys. At bottom, however, our complaint would be the same: in each case, the Court failed to follow basic remedial principles designed to cabin its power. Weinberg’s argument, then, seems to support Soifer’s view that *Bush v. Gore* is just another example of the Supreme Court’s disregard for what Soifer terms “judicial craftsmanship.”<sup>32</sup>

Weinberg’s article reveals another interesting facet of the controversy surrounding the Court’s entry into the political thicket. Like Karlan, Weinberg explicitly addresses the *Baker* debate and offers a spirited defense of judicial intervention.<sup>33</sup> Interestingly, she does so in part by invoking traditional values in constitutional analysis such as standing, individual rights, and justiciability.<sup>34</sup> For instance, she argues that the Court was right to intervene in *Bush v. Gore* because “[a] presidential candidate with a certified state election in his favor is surely an individual with rights and standing to assert them.”<sup>35</sup> This is the same strategy the *Baker* majority adopted to defend against the dissenters’ argument that political rights were nonjusticiable; it cast the claim as implicating a traditional equal protection harm raised by individuals who had been concretely injured, thereby fending off arguments that the harm in question was inherently structural in nature.<sup>36</sup> Weinberg’s strategy suggests that we are most comfortable when voting claims are cast as conventional constitutional harms.

This possibility returns us to the same puzzle. The *Baker* debate centered around the question of election law exceptionalism—whether malapportionment claims are inherently structural or whether they can be cast as conventional individual harms.<sup>37</sup> Some have argued that the mistake made in *Baker* was trying to squeeze an inherently structural claim into the conventional, individual-rights approach the Supreme Court was accustomed to deploying in constitutional cases.<sup>38</sup> To the extent one thinks that at least some voting claims are inherently structural and thus should not be cast in conventional individual-rights terms,<sup>39</sup> the question is whether the flaw in the

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<sup>31</sup> *Id.* at 637-38.

<sup>32</sup> Soifer, *supra* note 4, at 701.

<sup>33</sup> Weinberg, *supra* note 2, at 621-27 (arguing that the judiciary’s ability and even *duty* to adjudicate election controversies has been well established since *Baker v. Carr*).

<sup>34</sup> *Id.* at 622-24 (analyzing George Bush’s standing, and analogizing his situation to the one presented to the Court in *Marbury v. Madison*); see also Heather K. Gerken, *The Costs and Causes of Minimalism: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. (forthcoming 2002) (arguing that standing and other rights-based doctrine are closely associated with an individualist approach).

<sup>35</sup> See Weinberg, *supra* note 2, at 622-23.

<sup>36</sup> See Gerken, *supra* note 34.

<sup>37</sup> *Id.*

<sup>38</sup> See *id.*; Michael McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. & PUB. POL’Y 103, 103-17 (2000).

<sup>39</sup> See *supra* note 23 and accompanying text (cataloguing authors who have made this argument).

Court's voting-rights jurisprudence is that it too often casts voting claims in the terms that dominate its constitutional law jurisprudence,<sup>40</sup> a view that might lead to calls for election law exceptionalism? Or, as Laurence Tribe has argued,<sup>41</sup> is the problem that the Court tends to cast *all* equal protection claims in conventional individualist terms despite their structural underpinnings, so election law merely exhibits the problems endemic to constitutional law generally?

Though these articles underline the importance of constitutional analysis to questions of democracy, they also reveal some of the dangers involved in importing constitutional frameworks wholesale into the field of election law. Consider Soifer's discussion of the Supreme Court's decision in *Easley v. Cromartie*,<sup>42</sup> the latest iteration of *Shaw v. Reno*.<sup>43</sup> In *Easley*, the Supreme Court held that a congressional district's bizarre shape was best explained by a partisan motive than by a racial one. In doing so, the Court overturned the lower court in part because it relied on "evidence of voting registration, not voting behavior,"<sup>44</sup> noting that Southern whites who are registered as Democrats often vote Republican, whereas African-American voters tend to vote consistently for Democrats.<sup>45</sup> Soifer finds it "startling that the Supreme Court overturn[ed] the lower court decision based on what [John Hart] Ely decries as a racial stereotype of its own."<sup>46</sup>

Soifer is correct that in conventional constitutional analysis, basing state redistricting decisions upon generalizations about group preferences raises constitutional concerns even when those generalizations are accurate.<sup>47</sup> We

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<sup>40</sup> See Gerken, *supra* note 34.

<sup>41</sup> See Tribe, *supra* note 23, at 158-72 (explaining that the Court usually eschews structural analysis for civil rights and equal protection claims).

<sup>42</sup> 532 U.S. 234 (2001). At oral argument and when originally published in the Supreme Court Reporter, the name of this case was *Hunt v. Cromartie*. See *Hunt v. Cromartie*, 121 S. Ct. 1452 (2001). Governor Michael F. Easley was subsequently substituted as a party to the case for former Governor James B. Hunt, Jr. pursuant to the Supreme Court's Rule 35.3. See *Easley*, 532 U.S. at 234. For Soifer's discussion of this case, see Soifer, *supra* note 4, at 723-25.

<sup>43</sup> 509 U.S. 630 (1993).

<sup>44</sup> *Easley*, 532 U.S. at 244.

<sup>45</sup> *Id.* at 245-47 (analyzing the percentages of white and African-American voters who vote for Republicans and Democrats, respectively); see also Soifer, *supra* note 4, at 724-25.

<sup>46</sup> Soifer, *supra* note 4, at 724.

<sup>47</sup> Under § 2 of the Voting Rights Act, vote dilution claims are governed by an effects-based standard that requires states to draw majority-minority districts like the one challenged in *Easley* only when voting is racially polarized—that is, when whites and racial minorities in fact prefer different candidates at the polls. See 42 U.S.C. § 1973(a) (1994) (stating that "[n]o voting qualification . . . or procedure shall be imposed . . . which results in a denial or abridgement of the right . . . to vote on account of race or color" (emphasis added)). For further analysis of vote dilution claims and the statutory requirement of racial polarization, see Gerken, *supra* note 21, at 1671-74.



should be cautious, however, about applying conventional constitutional approaches to racial classifications and intent in the context of voting. That is because intent is a slippery concept in the context of election law.<sup>48</sup> What makes the voting-rights cases distinct is that they take place in the context of the political process. Because of the way that process works, groups—and the political structures through which their preferences are aggregated—matter. An individual's best chance of making her voice heard is by aggregating her vote with like-minded voters, and people often voluntarily align along racial lines when casting their votes.<sup>49</sup> Any framework that ignores these concerns misses a significant part of the story.<sup>50</sup>

As a result, voting-rights claims often present an unusual paradox for constitutional law: the best reason for forbidding differential treatment—differences in voting patterns—is also the best reason for allowing it. What distinguishes redistricting cases from most traditional equal protection claims is that differences in group preferences can represent a legitimate basis for state action. Indeed, one of the main purposes of redistricting is to facilitate effective vote aggregation by grouping individuals together on the basis of shared interests,<sup>51</sup> whether individuals self-identify along racial, socio-economic, or geographic lines.<sup>52</sup>

Because of these special attributes of districting, traditional equal protection rules—which are preoccupied with the use of racial classifications and intentional efforts to distinguish among individuals—have little purchase in

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<sup>48</sup> I have made this argument in more detailed form in *The Costs and Causes of Minimalism*. See Gerken, *supra* note 34.

<sup>49</sup> See, e.g., Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 887 (1995) (arguing that under the Court's interpretation of the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30 (1986), "the definition of group status was self-generated by the voting patterns of those claiming statutory protection"); Karlan & Levinson, *supra* note 20, at 1217 (arguing that "[i]n the electoral context . . . race is first and foremost an *internal* identification, generated through the political positions taken by members of a discrete, demographically-identifiable group," and that the "*voluntariness* of racial and ethnic group affiliation in the political process requires that these groups be recognized as expressing legitimate interests"); see generally LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002) (proposing that race be understood as a political category that allows for self-identification and self-definition).

<sup>50</sup> For a similar conclusion and a historical analysis of the relevance of groups to the Fifteenth Amendment, see Vikram D. Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 923 (1998) (suggesting that "an adequate constitutional model [of voting and other political rights] must recognize both [individualistic and group-oriented] aspects of the dual nature of political rights").

<sup>51</sup> Gerken, *supra* note 21, at 1677-79 (exploring these issues in greater depth); see *id.* at 1677 n.46 (collecting numerous sources).

<sup>52</sup> See Karlan & Levinson, *supra* note 20, at 1216-20 (discussing the ways in which voters align themselves, and arguing that race represents an appropriate category of political alignment that may be recognized by the state).

this context. If the use of a classification is deemed a proxy for intentional discrimination, many traditional districting values must be jettisoned.<sup>53</sup> Further, whenever a state intentionally groups certain voters to facilitate adequate representation, it necessarily undermines the political power of another group of voters. For all of these reasons, conventional notions of “intent” and “racial stereotype” employed elsewhere in constitutional law may not function as effectively in the context of voting claims.<sup>54</sup>

The special nature of democracy claims also raises questions about Louise Weinberg’s effort to draw a clear distinction between “judicial determination of an election’s *outcome*” and “judicial *regulation* of the electoral *process*.”<sup>55</sup> In the context of election law, most judgments about what seem like conventional civil rights claims—that is, equal protection claims about what is “fair” or “equal”—require a preliminary judgment about how the political process should be structured.<sup>56</sup> A court cannot decide whether someone’s vote is “equal” without having a theory for how votes should be counted and aggregated. Similarly, a court cannot decide whether an individual is “equally” able to participate in the democratic process or is “equally” represented without a theory about what democratic participation or representation means. When adjudicating many voting claims, then, judges must make judgments about what political outcome should obtain in a “fair” political process, whether or not they acknowledge this fact.

It is thus hard to agree with Weinberg’s view that courts rarely determine electoral outcomes unless one defines “electoral outcome” in an extremely narrow, formalist sense. Consider, for example, judicial efforts to prevent minority vote dilution where voting is racially polarized. Judges routinely invalidate at-large schemes that prevent racial minorities from electing a candidate of choice and force states to draw majority-minority districts to remedy the problem. Although judges are usually careful to describe these actions simply as strategies aimed at ensuring a fair “process,” the entire effort

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<sup>53</sup> In the words of two scholars, “If ‘[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals,’ then redistricting stabs at the heart of the Fourteenth Amendment every time.” Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998) (citation omitted). For further evidence of this claim, consider the difficulties the Court has encountered in identifying which “communities of interest” may be recognized in the *Shaw* line of cases. *Compare, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 908 (1995) (adopting a narrow view of racial community), *with* *Lawyer v. Dept. of Justice*, 521 U.S. 567, 581 (1997) (offering a broader view of racial community).

<sup>54</sup> As Pam Karlan has argued elsewhere, however, intent may also be a slippery concept in some types of constitutional cases. She has analogized affirmative action in higher education to the districting process and suggested that developments in the *Shaw* line of cases shed light on how strict scrutiny ought to be applied to affirmative action claims. *See* Karlan, *supra* note 6.

<sup>55</sup> Weinberg, *supra* note 2, at 620.

<sup>56</sup> Gerken, *supra* note 34.

is designed to alter electoral outcomes because the outcomes were precisely the source of the problem. As Judge Leval has candidly admitted, “where plaintiffs allege that they are unable to elect representatives of their choice, their complaint . . . is that the outcome is unfavorable to them.”<sup>57</sup> Thus, Judge Leval concludes, courts must recognize that, at least in vote-dilution cases, they are “polic[ing] electoral outcomes.”<sup>58</sup> In short, judges often make substantive judgments about which outcomes are “fair,” whether or not they frame their decisions in those terms.<sup>59</sup> And the practical import of their decisions is to decide election outcomes. They may not pick the candidate who ultimately wins, but they dramatically affect who that candidate is likely to be.

*Bush v. Gore* strikes me as little different in that respect. Whatever its practical import, the Supreme Court did not hand down a decision that “George Bush shall be President.” Instead, it invalidated the process of hand-counting that might have displaced the results of the prior process, under which Bush was named the winner of the Florida election. While this process-based ruling about what constituted a “fair” recount surely affected the outcome—after all, it restored the results of the original process—the same could be said of many election law decisions.<sup>60</sup> Thus, at least when viewed from the perspective of

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<sup>57</sup> *Goosby v. Town Board of Hempstead*, 180 F.3d 476, 502 n.4 (2d Cir. 1999).

<sup>58</sup> *Id.*

<sup>59</sup> Further, as I have written elsewhere, these process-based justifications for dilution doctrine tend to water down or ignore the complex role that groups play within the political process and offer a fairly anemic view of the democratic process. See Gerken, *supra* note 21, at 1730-32.

<sup>60</sup> Though Weinberg concedes that “[i]n regulating elections courts can—and occasionally do—declare a winner,” she asserts that “they do so by counting, not by refusing to count, votes; by consulting, not displacing, the electorate; by utilizing, not aborting, the process prescribed for resolving the contest.” Weinberg, *supra* note 2, at 631. Once we agree to accept the Court’s interpretation of Florida law, as Weinberg suggests we may, *id.* at 633 (“Let us even assume—although the assumption is unwarranted in this case—that the Court was right about Florida law.”), it is not clear to me why there was “no valid completed election.” *Id.* at 620. The Court, to be sure, shut down the recount process in *Bush*. However, it justified its decision to do so on the grounds that Florida’s election process required a decision, an end to recounting, by the safe harbor date regardless of the flaws identified in the initial count. I hardly wish to defend the Supreme Court’s decision to resolve this question instead of allowing the Florida Supreme Court to address it explicitly. As Weinberg demonstrates, the Court was wrong to do so. See *id.* at 627-635 (identifying numerous flaws in the Court’s decision-making process). Nonetheless, her claim that the Supreme Court was deciding the election’s outcome, which she argues is unconstitutional, rather than regulating the electoral process, which she deems permissible, boils down to an assertion that the Court misread Florida law. If this is the case, then, as I have suggested above, Weinberg may not be sketching out a theory about election law exceptionalism or demonstrating that a remand was “constitutionally required,” *id.* at 641, but may simply be taking issue with what Soifer terms the Court’s penchant for “overrul[ing] the rules” of legal reasoning. Soifer, *supra* note 4, at 702. In other words, Weinberg may be offering a story

election law, the Court's actions—though legally flawed—do not seem constitutionally extraordinary.

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In sum, the three articles in this symposium offer an interesting and a diverse set of views on the Supreme Court and its election law jurisprudence. They reveal the many benefits that can come from increased dialogue between constitutional scholars and academics who specialize in election law. Each contribution is important, then, not only for the insights it offers into the specific legal issues the authors have chosen to address, but because they all shed light on the ongoing debate about election law exceptionalism.

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that could be told in any constitutional context where the Supreme Court ignores basic rules of constitutional analysis, not just in cases concerning the adjudication of election law disputes, and it is not clear why we need to invoke “democratic/republican understandings,” Weinberg, *supra* note 2, at 621, to make that point.