

LAW, POLITICS, AND JUDICIAL REVIEW: A COMMENT ON HASEN

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I. INTRODUCTION

It has been over forty years since the Supreme Court entered the political thicket with the landmark reapportionment case *Baker v. Carr*. The Court's decision in *Baker* ushered in an era of unparalleled judicial involvement in democratic politics. Forty years after *Baker*, scholars of law and politics are engaged in a vigorous evaluation of the merits and limits of judicial review of democratic politics. Into the throes of this debate enter Richard L. Hasen and his book, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*.¹

Professor Hasen is a leader in the burgeoning field of law and politics. He is a co-author of one of the leading casebooks in the field,² a co-editor of the field's leading journal,³ and a co-manager of the field's listserv.⁴ Professor Hasen is also an extremely prolific and engaging scholar.⁵ Thus, it should not come as a surprise that Professor Hasen offers the first book and the first coherent account from election law scholars assessing the last forty years of judicial supervision of the democratic process.

The Supreme Court and Election Law is an easy read. Professor Hasen is a superb and lucid writer. The core of Professor Hasen's claims is advanced in the first three chapters of his five chapter book. Each chapter is relatively short and self-contained.

Professor Hasen offers many important contributions in his book, but his central point is that the fundamental role of the Supreme Court—and presumably of the federal courts more generally—is to protect what he calls “core political equality rights.”⁶ Professor Hasen identifies his core political equality rights from his “view of the few basic rights essential to a contemporary democracy as well as from [his] observation of social consensus” in the United States today.⁷ Professor Hasen recognizes that this formulation is disputable, but that is exactly the point. His aim is to start “a dialogue about

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1. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM Baker v. Carr TO Bush v. Gore* (2003).

2. DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* (2d ed. 2001).

3. Professor Hasen is a co-editor, along with Professor Lowenstein, of the *ELECTION LAW JOURNAL*.

4. See *Information about Election-Law_GL*, at http://majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL/ (last visited on Oct. 5, 2004).

5. In addition to his recent book, Hasen is also the author of over 35 articles.

6. HASEN, *supra* note 1, at 7.

7. *Id.* at 81.

which political equality principles belong in the core.”⁸

Professor Hasen defines his core political equality rights by dividing them into three categories: the essential political rights principle;⁹ the antiplutocracy principle;¹⁰ and the collective action principle.¹¹ The essential political rights principle guarantees basic political rights including the right to vote, the right to associate, and the right to have one’s vote counted.¹² The antiplutocracy principle prevents the government from limiting “the ability to participate fundamentally in the electoral process on wealth or the payment of money.”¹³ The collective action principle precludes the government from imposing “unreasonable impediments on individuals who wish to organize into groups to engage in collective action for political purposes.”¹⁴

Professor Hasen distinguishes what he terms “contested political rights”¹⁵ from the concept of core political equality rights. Contested political rights are defined in contradistinction to core political rights. That is, they are not “minimal requirements for democratic government” or they have not acquired sufficient support from a majority of the people.¹⁶ He contends that whereas the Court’s role in supervising the democratic process is to protect core political equality rights, the Court should leave the protection of contested political rights to the political branches as the Court concentrates on protecting core political equality rights.¹⁷ Recognizing that the Court cannot be so limited,¹⁸ Professor Hasen argues that if the Court must adjudicate contested political rights, the Court should promulgate “unmanageable standards... that leave wiggle room for future Court majorities to modify.”¹⁹

While there is much to admire about *The Supreme Court and Election Law*, Professor Hasen advances a number of claims that are at the very least contestable and in some limited circumstances perhaps even unconvincing. As a point of departure, one wonders whether the distinction between contested and core political equality is sound. Similarly, one must question whether there is content to the concept of judicial unmanageability. In the remainder of this short Review Essay, I explore Professor Hasen’s book in greater detail. Part I of the Essay examines areas where Professor Hasen and I agree. This part argues in favor of Professor Hasen’s contentions that election law

8. *Id.*

9. *Id.* at 82.

10. *Id.* at 11–12, 75.

11. *Id.* at 75.

12. Hasen explains the essential political rights principle as follows:

Each person has basic formal political rights, including the right to speak on political issues, to organize for political action, and to petition the government. The government may not deny the right to vote on the basis of gender, literacy, national origin, race, religion, sexual orientation, or any other basis absent compelling justification. Voters have the right to have their votes counted and weighed roughly equally to the votes of other voters.

HASEN, *supra* note 1, at 82.

13. *Id.* at 86.

14. *Id.* at 88.

15. *Id.* at 7.

16. *Id.* (“Contested political equality rights are neither a minimal requirement for democratic government . . . nor the product of social consensus.”).

17. *Id.* at 78.

18. HASEN, *supra* note 2, at 9.

needs a substantive theory of democratic politics and that political process theory is an insufficient guide. Part II lays out some areas where I disagree with the application of Professor Hasen's framework. In particular, while Part II agrees with Professor Hasen's conceptual distinction between core and contested political equality rights, it also argues that Professor Hasen has provided insufficient guidance for determining whether a political right is core or contested.

II. THE IMPORTANCE OF SUBSTANTIVE THEORY AND THE LIMITATIONS OF POLITICAL PROCESS THEORY

Professor Hasen posits two significant contentions that are relatively unassailable. First, Professor Hasen criticizes the dominant theory in election law—process theory²⁰—on the grounds that the theory has failed to constrain judicial intervention of democratic politics;²¹ the theory pretends to be a theory about the proper functioning of democratic processes, but in fact reflects substantive democratic commitments;²² and, notwithstanding its substantive dimensions, process theory cannot substantively guide the Court as it supervises the democratic process.²³

Professor Hasen is certainly right that process theory has failed to constrain courts. Although admittedly, it is a bit unfair to criticize process theory on that ground as no theory can be expected to constrain judicial action.²⁴ But Professor Hasen's more fundamental point—that the Court needs a substantive theory to help it navigate through democratic politics, and process theory, though helpful as a point of departure, is not sufficient to accomplish that task—is certainly right. While couched as a criticism of process theory, Professor Hasen's argument—and one that has been embraced by most

20. Process theory is most closely associated with the late John Hart Ely and his landmark book *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Drawing from a footnote by Justice Stone in *United States v. Carolene Products Co.*, 304 U.S. 144, 153–54 n.4 (1938), Professor Ely argued that the purpose of judicial review is to guard against malfunctioning in the political process and to remove obstacles in the democratic process when there is a malfunction. ELY, *supra* note 20, at 103, 117. The political process malfunctions when a political majority systematically disadvantages a political minority “out of simple hostility or prejudic[e]. . . .” *Id.* at 103. Malfunction also occurs when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out. . . .” *Id.* Thus, more specifically, the role of courts is to protect those who have suffered and continue to suffer discrimination in the political process. Courts must also worry about legislative entrenchment as an end unto itself. *Id.* at 117–25.

21. HASEN, *supra* note 1, at 5.

22. *Id.* at 5–6.

23. *Id.* at 6.

24. I have become increasingly skeptical of the argument that the purpose of normative theories of election law is to constrain courts. It seems to me that the most convincing justification for normative theories in election law—more convincing even than the argument that theories provide courts with guidance—is to provide scholars and court-watchers a basis for evaluating the role and performance of courts in election law. A useful example here is *Bush v. Gore*. 531 U.S. 98 (2000). Part of the problem with the varied post-hoc scholarly deconstruction of the Court's decision to intervene in the 2000 Presidential elections was the absence of a framework for understanding the purpose of the Court in supervising democratic politics and appraising its performance of that task. It is therefore not surprising that many scholars of law and politics have focused their work, since 2000, on providing just such a framework. For insight on this issue, see Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411,

election law scholars,²⁵ with one notable exception²⁶—is that the Court needs to focus on the value choices that it makes when dealing with election law issues.

As Professor Hasen rightly notes, when the Court intervened in *Baker v. Carr*,²⁷ the Court made a substantive value choice.²⁸ At the very least, the Court's intervention was designed to vindicate the principle that the electoral process must be responsive to the electoral preferences of a majority of voters. The principle of responsiveness and the principle of majoritarianism are substantive value choices that must and can be defended on their own terms.

Second, Professor Hasen maintains, correctly, that the Court should protect what he terms core political equality rights, or what Ely called essential democratic rights,²⁹ or what I have called democratic principles.³⁰ While one can disagree with the content of these categories,³¹ Professor Hasen's crucial point—that the protection of the fundamental principles of democracy cannot be left to the vagaries of the democratic process—is unassailable.

Thus Professor Hasen solidifies two principles that are becoming canonical in the field of law and politics. First, while process theory—that is, the contention that courts should be deferential to the political process when it is functioning properly—serves as a convincing point of departure, it is, at least the Elyan version, not adequate to the task. Second, process theory must be supplemented by a substantive theory that guides judicial review. Professor Hasen usefully offers the essential political rights principle as a conceptual framework, which properly modified ought to become a mainstay in the field.

II. SEARCHING FOR THE CORE OF THE CONTESTED AND ESSENTIAL POLITICAL RIGHTS PRINCIPLES

While Professor Hasen's concept of essential political rights is convincing and coherent, his concept of contested political rights—which he defines in contradistinction to essential political rights—is much less so. Recall here Professor Hasen's argument:

25. See, e.g., Luis Fuentes-Rohwer, Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis Into the Judicial Role, 78 NOTRE DAME L. REV. 527 (2003); Guy-Uriel E. Charles, Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of *Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

26. Daniel H. Lowenstein, The Supreme Court has no Theory of Politics—And Be Thankful for Small Favors, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 285 (David K. Ryden ed., 2d ed. 2002).

27. 369 U.S. 186 (1962).

28. HASEN, *supra* note 1, at 5.

29. ELY, *supra* note 20, at 117.

30. Charles, *supra* note 25, at 1140.

31. Under the rubric of quibbling, I would collapse Hasen's three categories, the essential political rights principle, the antiplutocracy principle, and the collective action principle, into one category, the essential political rights principle. The latter two categories—antiplutocracy and collective action—do not appear to have much content. If the only purpose of the antiplutocracy principle is to prevent the state from imposing a wealth qualification on the right to vote, that purpose can be easily achieved by the essential political rights principle. Similarly, the collective action principle is superfluous if its only purpose is to prevent the state from precluding individuals from associating for political purposes. As redefined, the essential political rights principle would preclude the state from denying to citizens essential political rights, including the right to vote, the right to have one's vote counted (and counted on a roughly equivalent basis), the right to associate,

Courts should not protect contested political rights, which are defined essentially either as rights that are not necessary to political equality or as rights that a majority of the electorate and political elites have not (yet) recognized as essential to political equality.

Professor Hasen's first misstep is to create a category in contradistinction to the essential political rights category. Though elegant in its symmetry, the problem is that contested political rights, as a theoretical construct, cannot be operationalized to guide judicial review of the political process. I shall focus on two immediate concerns.

First, Professor Hasen does not tell us why certain rights fit into one category as opposed to another. At first blush, the concept of contested political equality appears to have two prongs: essentiality and consensus. One would expect Professor Hasen to explain why some rights are essential to democratic governance. At the very least, one would expect guidance for determining why certain rights are essential and others are not. The best that we get from Professor Hasen is that there are just certain rights that constitute "minimal requirements of democratic governance" and that the "Court simply must accept a few of these core rights."³² Moreover, the Court "should protect these core political equality rights regardless of current social views."³³

While these statements may be true—there are certain rights that are essential to democratic governance and ought to be protected regardless of prevailing public opinion—we need a method for identifying those rights and defending them on their own terms. For example, it would seem to me that an essential political right would be the right to vote, directly, for one's national chief executive. One could spin out some justifications for such a right primarily based upon political theory. If that is so, the Electoral College would be unconstitutional. But as *Bush v. Gore* made clear, there is no such right.³⁴ At best, one has the right to an advisory vote.

Is the right to vote directly for President and Vice-President of the United States an essential political right? If so, why? If not, why not? Professor Hasen does not provide us with any parameters that would help us evaluate when a political right, such as the right to vote for President, is an essential political right that is basic to the legitimacy of democratic politics and when it is not. Thus, the construct of essential and contested political rights, which at first appeared quite promising, turns out to be less useful upon closer inspection.

Second, to the extent that the essentiality prong is severely limited in its ability to help us distinguish core from contested political rights, reliance upon the social consensus prong renders judicial supervision superfluous. Indeed, upon deeper examination, it becomes apparent that most of the work of defining contested political equality as a distinct category is being done by the social consensus prong. Thus, Professor Hasen explains:

32. HASEN, *supra* note 1, at 7; see also *id.* at 79 ("A few basic political equality rights are absolutely essential for any government to function as a democracy. These include the right to speak on political issues and nondiscrimination on the basis of race or ethnicity in the right to vote.")

33. *Id.*

34. *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide

Most core political equality rights, however, are *socially constructed*. Even the idea of nondiscrimination in voting on the basis of race or ethnicity is socially constructed. . . . Much of what constitutes the core of political equality rights depends upon a social consensus or near-consensus about the ground rules for contemporary democratic governments to function.³⁵

Professor Hasen instructs the Court that in order “[t]o identify the socially constructed core, the Court must examine contemporary attitudes about practices alleged to infringe upon political equality rights.”³⁶ Professor Hasen illustrates this application in his discussion of whether a state campaign finance measure, a congressional statute striking down literacy tests, and a state redistricting plan that divided a religious community constitute contested political rights or core political rights.³⁷ Professor Hasen concluded that those provisions were contested political rights because there was no social consensus on the importance of any of the provisions at issue.³⁸ Professor Hasen did not rely at all on the essentiality prong.

The problem here is that the focus on social consensus introduces a majoritarian influence that renders judicial supervision unnecessary, except perhaps to rein in jurisdictions that are outliers.³⁹ Social consensus seems to mean that if a majority or even supermajority of people regard a political right as essential, then it is essential. To demonstrate this point, compare Professor Hasen’s treatment of racial discrimination in voting with his treatment of proportional representation, which serves as his poster child for illustrating the concept of a contested political right.

Professor Hasen argues that proportional representation is not a core political right because it is not the product of social consensus.⁴⁰ He notes that there does not appear today to be any consensus that rough proportionality among interest groups (or, more narrowly, among racial and ethnic groups) is required as a condition of political equality.⁴¹ Consider here Professor Hasen’s treatment of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, (“UJO”), the case in which the State of New York split a politically, ethnically, and religiously cohesive Hasidic community in order to purportedly comply with the Voting Rights Act.⁴² Professor Hasen maintains that “the Hasidim likely should not be successful in challenging a districting plan that diluted the Hasidim’s voting strength . . . [because] [t]here is no core political equality right to proportional interest representation.”⁴³

35. HASEN, *supra* note 1, at 80.

36. *Id.*

37. *Id.* at 101.

38. *Id.*

39. As Professor Fuentes-Rohwer devotes part of his contribution to this symposium to the argument that Professor Hasen does not provide us with any guidance for divining the existence of a social consensus on any particular issue, I will not address that point in this Essay.

40. *See, e.g., id.* at 7 (stating that “many democratic governments do not use proportional representation”).

41. *Id.* at 91.

42. 430 U.S. 144 (1977) [hereinafter *UJO*].

43. *Id.* at 101.

Compare now Professor Hasen's puzzling criticism of *Giles v. Harris*.⁴⁴ In *Giles*, the Court refused to intervene to prevent Alabama from disenfranchising its African American citizens at the turn of the twentieth century.⁴⁵ Professor Hasen criticized the case on the ground that the Court failed to enforce the core essential rights principle against racial discrimination in the electoral process.⁴⁶ But this criticism is puzzling on two grounds.

First, it is not clear how one can criticize the Court's refusal to grant relief to African American voters in *Giles* without similarly criticizing the Court's refusal to grant relief to the Hasidim in *UJO*. Granted, one could argue that Alabama completely disenfranchised African Americans, whereas in *UJO* the Hasidim were not deprived of their right to vote. But this argument would only be persuasive if the contention were that the Court should only intervene when the state completely disenfranchises an individual or a group. But that is not the lesson of cases such as *Gomillion v. Lightfoot*,⁴⁷ *Baker v. Carr*,⁴⁸ *Reynolds v. Sims*,⁴⁹ or *White v. Regester*.⁵⁰ These cases show that deprivation of political power, akin to what happened to the Hasidim in *UJO*, is unconstitutional.

Second, it would seem that *Giles* is the perfect application of a contested political equality principle. Notwithstanding the Reconstruction Amendments, many southern states insisted on the disenfranchisement of African American citizens. One could hardly say that there was a consensus at the turn of the twentieth century that an essential element of political equality precluded racial discrimination in political process. Racial discrimination in the political process as well as in other aspects of life was the norm and not the exception. If such a consensus existed in fact, one would hardly need the Voting Rights Act sixty years later. Thus, under Professor Hasen's framework, both *Giles* and *UJO* were correctly decided because, at the time that these cases were decided, there was no social consensus that African Americans and the Hasidim ought to be protected from majoritarian deprivations of political power. One cannot plausibly have it both ways: either both *Giles* and *UJO* were wrongly decided or they were both rightly decided.

If both *Giles* and *UJO* were rightly decided, one wonders of what use is judicial review? In this case, the Court's sole purpose is to reinforce majoritarian norms. Judicial review vindicates no values and protects nothing. Moreover, to the extent that there is a social consensus, it is likely that the political process will protect the right in question. For example, it is highly doubtful that a state or the federal government would pass a law that deprives African Americans, Latinos, Jews, or Arab Americans of the right to vote. The fact that there is a social consensus that voters cannot be denied the right to vote on the basis of race or ethnicity means that the Court need not worry about having to enforce that right. Judicial supervision is necessary where the political process and social consensus fail to vindicate political rights.

44. 189 U.S. 475 (1903).

45. *Id.* at 488.

46. HASEN, *supra* note 1, at 83.

47. 364 U.S. 339 (1960).

48. 369 U.S. 186 (1962).

49. 377 U.S. 533 (1964).

50. 412 U.S. 755 (1972).

It seems then that Professor Hasen's theory fails at exactly the point where judicial supervision of politics would be useful. Consider the case of felon disenfranchisement. How ought the Court address the continued disenfranchisement of individuals who have committed a felony, but have completed their sentence? While Professor Hasen admits that the Court's analysis in *Richardson v. Ramirez*⁵¹ is dubious,⁵² he nevertheless concludes that the case was decided correctly because felons "had traditionally been excluded from voting, and societal views on felon voting [when *Richardson* was decided] had not progressed to the point that there was a social consensus that felons constitute competent members of the community who should be entitled to vote."⁵³

One would think that to the extent judicial review serves any function, it would be precisely in those domains in which political rights are being denied to an unfavored political or ascertainable minority group. But it is precisely in those contexts that Professor Hasen calls for the Court to stay its hand. Again, if the purpose of judicial review of laws that affect the fundamental nature of democratic politics is to simply reinforce and ratify majoritarian norms, of what use is it?

III. CONCLUSION

Undoubtedly, Professor Hasen is a judicial minimalist. He would like to see the Court play as little of a role as possible. But one ought not be a minimalist for the sake of minimalism. *Bush v. Gore* notwithstanding, judicial involvement in politics is often beneficial precisely where the Court takes issue with majoritarian norms. The recognition of this principle is the genius of process theory. Political rights sometimes will be under-enforced by the political process. Because the political process is flawed, courts are necessary to vindicate political rights that will not be vindicated—and in some cases affirmatively trampled—by the political process. One should regard warily a theory that would limit that useful role.

The Supreme Court and Election Law has staked out a position. As one would expect, Richard Hasen has defended that position in a manner that is both elegant and persuasive. His admitted aim in this book was to start a conversation on the proper role of judicial review in American democratic politics. Without question, he has started this conversation with this provocative, compelling, and thought-provoking book.

51. 418 U.S. 24 (1974) (upholding California's felon disenfranchisement law).

52. HASEN, *supra* note 1, at 84.

53. *Id.*