

## BACK TO THE BEGINNING: AN ESSAY ON THE COURT, THE LAW OF DEMOCRACY, AND TRUST

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*The law of democracy is in a state of incoherence. The experiment begun by Baker v. Carr showed great promise yet soon gave way to disappointment. The promise was one of modest review and respect for political choices made elsewhere. A presumption was still against judicial involvement: absent self-entrenchment or distrust of political outcomes, the Court would stay its hand. But, the reality has been far from that. The presumption has now clearly shifted, and the Court intervenes in politically-charged controversies as a matter of course. This raises a question at the heart of the law of democracy: can we trust the Court to carry out its important yet delicate work in the field of politics? The evidence is not promising. The Court throws its weight around the thicket at will, arbitrarily and irrespective of doctrine, precedent, or history. To the argument that the Court must intervene when the political process is “undeserving of trust,” the question is why we should trust the Court in its stead.*

*My own sense . . . is that the current Court is deeply distrustful of the political branches and ambitious for its own power. And so, it will plunge even further into the political thicket, ever more encroaching on the power of the political branches. Like Macbeth, it will find it impossible to wade no more.<sup>1</sup>*

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1. 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, 698 (2002); see also Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1366 (2001) [hereinafter Karlan, *Nothing Personal*] (“Once again, as it did in the *Shaw* cases, the Court intervened [in *Bush v. Gore*] to short circuit the

*The Court will continue to play the role of the omniscient and strive toward omnipotence. And the law reviews will continue to play the game of evaluating the Court's work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship.*<sup>2</sup>

In modern times, the U.S. Supreme Court is firmly entrenched as “king of the hill”;<sup>3</sup> its role in our constitutional universe is both robust and supreme. From affirmative action<sup>4</sup> and congressional powers<sup>5</sup> to antisodomy statutes,<sup>6</sup> particular instances of the war on terror<sup>7</sup> and presidential elections,<sup>8</sup> the Court exercises its constitutional prerogative assertively, without “compunction.”<sup>9</sup> The Court handles most questions of public policy both confidently and assertively.

Scholarly accounts of judicial review are consistent with this view of the Court as a muscular institution. These include Larry Kramer's portrayal of the Court's modern posture as “judicial sovereignty”;<sup>10</sup> Aviam Soifer's critique of the Court's anarchic posture;<sup>11</sup> Robert Post and Reva Siegel's analysis of the Court's modern Section 5 jurisprudence;<sup>12</sup> and L.A. Powe's reflections about

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normal, albeit potentially contentious and messy, process of self-government. The Court's decision left in its wake weakened institutions.”)

2. Philip B. Kurland, *Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 175 (1964).

3. Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 129 (2001).

4. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

5. *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000). *But see* Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003). This area of the law is controlled, as are many others, by Justice O'Connor's vote.

6. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

7. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

8. Bush v. Gore, 531 U.S. 98 (2000).

9. Charles Lane, *Civil Liberties Were Term's Big Winner: Supreme Court's Moderate Rulings a Surprise*, WASH. POST, June 29, 2003, at A1, A18 (“They go out and decide these great national questions and don't feel compunction about it . . . . It's the same mindset that lets them do *Bush v. Gore*. They see it as their duty.” (quoting Professor John C. Yoo)).

10. Kramer, *supra* note 3, at 130.

11. Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 701 (2002) (“Neither the usual constraints of judicial craftsmanship nor the messy processes of democracy act as significant barriers before the march of an increasingly Imperial Court.”).

12. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal*

the politics of the Rehnquist Court.<sup>13</sup> They also include Mark Tushnet's call to "Take the Constitution Away from the Court," a project that self-consciously reacts to a strong view of judicial supremacy,<sup>14</sup> as well as the many efforts to defend or criticize the practice.<sup>15</sup> With few exceptions,<sup>16</sup> the leading understanding of the modern Supreme Court portrays the Court as the supreme, exclusive interpreter of the Constitution.

This description of the Court is particularly fitting for the law of democracy, often recognized as the quintessential site for judicial supervision of the pathologies of American politics.<sup>17</sup> The redistricting cases offer an apt example; this is an area of the law that the Court had refused to regulate for many years, yet now firmly controls.<sup>18</sup> Whether under equal protection,<sup>19</sup> statutory vote

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*Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

13. L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 731 (2003) ("The Rehnquist majority has a strong aversion to disorder in the political realm and included within that concept is the (abhorrent) idea that others could appropriately and successfully interpret the Constitution.").

14. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

15. See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 890 (2003) ("Much of the recent attack on judicial review is really an effort to undermine judicial supremacy."). For leading examples of the debate, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045 (2004).

16. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

17. See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 54 (2004) [hereinafter Pildes, *Constitutionalization*] ("[C]ourts have a distinct calling, recognized already on occasion, to address the structural problem of self-entrenching laws that govern the political domain.").

18. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2d ed. 2001); Richard H. Pildes, *Constitutionalizing Democratic Politics*, in *A BADLY FLAWED ELECTION* 155 (Ronald Dworkin ed., 2002).

19. See *Shaw v. Reno*, 509 U.S. 630 (1993); *Reynolds v. Sims*, 377 U.S. 533 (1964).

dilution,<sup>20</sup> or retrogression principles,<sup>21</sup> redistricters must pay close attention to what the Court says and does, no matter how confusing or contradictory these principles may be.<sup>22</sup> Such is the state of our constitutional system and the Court's view of its own power.

The leading account is easy to sketch. Judicial intervention is warranted when the political process is "undeserving of trust."<sup>23</sup> In its now classic formulation, such moments arise when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."<sup>24</sup> Hence John Ely's title for his tour de force, *Democracy and Distrust*.<sup>25</sup> This theory of judicial review has much to commend it, especially as applied to the particular problems that plague the law of democracy. It is inevitable that a democracy will have systemic wrinkles and flaws, and judicial review should only be directed at ironing these wrinkles out.<sup>26</sup> The Court must choose its battles carefully, with an eye towards improving the political process, rather than thwarting it.

This argument ultimately assumes too much and invites a reconsideration of our accepted assumptions. Recall that the theory informs only those moments "when the process is undeserving of trust."<sup>27</sup> Only then should the courts play their "heroic" role.<sup>28</sup> Yet

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20. See *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

21. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Beer v. United States*, 425 U.S. 130 (1976).

22. For criticisms of the Court's forays in this area, see Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45 (1995); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

23. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) [hereinafter ELY, *DISTRUST*]

24. *Id.*; see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

25. ELY, *DISTRUST*, *supra* note 24.

26. For a further elucidation and defense of this position, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991). For the critics, see, for example, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

27. ELY, *DISTRUST*, *supra* note 23, at 103.

28. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 2 (1996) (referring to the traditional yet erroneous view of the Court as protector of defenseless minorities as the "heroic countermajoritarian function"). For normative accounts of the traditional view of the Court as protector of powerless minorities, see Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1059 (1974) (offering "some of the theoretical footings for a conception of the judiciary as a protector of minorities in a government oriented to majority decision"); Robert M. Cover,

this argument takes for granted the one premise it must defend: assuming that the political branches cannot be trusted, can the courts be trusted in their stead? To be fair, some accounts often turn to the courts only as a last resort.<sup>29</sup> As Rick Pildes explains however, “absent other institutions to play this role in the United States, courts will continue to be called upon to be the primary external agency for overseeing democratic politics.”<sup>30</sup> The courts are clearly in charge of our politics, and so long as they remain there, we must examine whether they can be trusted with this important and delicate role.

This Essay concludes that our trust in the Court is unwarranted. The experiment begun by *Baker v. Carr* had great promise and the best of intentions.<sup>31</sup> The Court in *Baker* offered a limited reading of its role in the political realm, a reading cognizant of the many difficulties inherent to the field of politics and couched in much-needed humility. The Court recognized that its role in the political thicket must be cautious and deferential. Yet all too soon, the Court ignored both the reasons that led it to enter this political minefield and the complexities that made the law of democracy particularly difficult to adjudicate. Worse yet, it is now clear that Justice Frankfurter’s worst fears have come to pass, as the Court throws its weight in the political thicket at will, arbitrarily and irrespective of doctrine, precedent, or history. The Court now passes for yet another actor in the political process. This should be a cause for concern on multiple grounds, especially for persons of color. The Supreme Court’s performance across time has not been receptive to the interests of colored communities.<sup>32</sup>

In light of these criticisms, the one question left for scholars of the law of democracy is a question of judicial posture: how aggressively should the federal judiciary regulate the apparent pathologies of our democracy? This is no longer a question scholars bother to ask; in the wake of *Baker* and the Supreme Court’s

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*The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982) (tracing the judicial protection of minorities to Justice Stone’s famous footnote four and offering a concomitant defense for such judicial behavior in a society committed to democratic values).

29. See Pildes, *Constitutionalization*, *supra* note 17, at 44.

30. Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999) [hereinafter Pildes, *Theory*].

31. See Luis Fuentes-Rohwer, *Baker’s Promise, Equal Protection, and the Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353 (2002).

32. See GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

triumphant entry into the political thicket, the question today is not whether the courts should intervene *vel non*, but rather, how aggressively must the courts intervene in the name of individual rights,<sup>33</sup> competitive elections,<sup>34</sup> antidomination,<sup>35</sup> or myriad other values.<sup>36</sup> Everybody has a theory and a role for the Court to play in our politics, and anyone who argues otherwise must overcome a heavy burden of persuasion.<sup>37</sup>

This Essay defends its own theory of judicial intervention. This is an old theory, which looks back to the Court's point-of-entry into the realm of political questions in *Baker v. Carr*. Part I discusses the special nature of political questions and the reasons why the law of democracy presents the Court with unique challenges. These challenges counsel for a deferential judicial posture. This Part underscores how the Court understood and applied these lessons in *Baker v. Carr*, only to discard them in a moment's notice. This decision proved to be a crucial moment in the Court's handling of political questions. The *Baker* Court recognized the difficulties that inhere in this important area and offered a modest approach to the problem.

Yet *Reynolds v. Sims*,<sup>38</sup> decided two years later after *Baker* discussed in Part II, marked a radical shift in the Court's posture. Once the Court betrayed the promise of *Baker* and exalted the equipopulation principle as the standard of choice, it soon took on the role of philosopher king, willing to regulate the law of democracy in accordance with its own views about the needs of the political process and its own diagnoses about the constitutional values at stake.

Part III takes this argument to its logical resting place: the fall of the political-question doctrine. In order to appreciate this argument, refer back to the days when the political-question doctrine played an important role in our constitutional universe.

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33. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003); Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589 (1999).

34. See Issacharoff & Pildes, *supra* note 24.

35. See Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008).

36. See 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); Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601 (2007).

37. See Pildes, *Constitutionalization*, *supra* note 17, at 42 ("Whatever the merits of taking the Constitution away from the courts in other areas, constitutional law will continue to be necessary in this arena.")

38. 377 U.S. 533 (1964).

This was a time when the Court would choose to avoid controversies that might compromise its legitimacy.<sup>39</sup> The moniker “political question” was thus a conclusion attached to any issue the Court wished to avoid.<sup>40</sup> The Court no longer worries about such matters and takes on any and all cases irrespective of any perceived political fallout. *Bush v. Gore*<sup>41</sup> is the obvious exemplar of this modern posture. The Court is clearly in charge of our politics, unabashed and unafraid.

This is an awesome responsibility. Yet, as Part IV contends, the Court has fallen far short of this promise. The setting for my discussion is the gerrymandering doctrine. These cases offer a sober example of a Court that picks its way through the thicket at will and is only as aggressive and supreme as it wishes to be. This should be disconcerting to us all as a normative matter, especially in light of the concerns inherent to the field of democracy. We must give Justice Frankfurter his due. More troubling for constitutional theory—and process theory in particular—is how the enterprise fails precisely where it is needed the most. The Court has it exactly backwards: it is aggressive in the racial gerrymandering cases, where the process worked as expected,<sup>42</sup> yet humble in the political gerrymandering cases, where many accounts depict a broken political market.<sup>43</sup> This is nothing short of a “rootless muddle.”<sup>44</sup>

Part V concludes that the Court must return to the promise of *Baker v. Carr*. Rather than press for our preferred theories of choice, American democracy would be much better served by a Court that is respectful of policy agreements decided elsewhere. Rather than trust the Court, in other words, we would be much better off trusting democracy.

#### I. A PROLEGOMENON: THE COURT COMES TO THE THICKET

*It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial*

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39. See generally Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899 (2006) [hereinafter Fuentes-Rohwer, *Reconsidering*].

40. See *Baker v. Carr*, 369 U.S. 186, 297 (1962) (complaining that “[t]he present case . . . is, in effect, a Guarantee Clause claim masquerading under a different label”) (Frankfurter, J., dissenting).

41. 531 U.S. 98 (2000).

42. See Karlan, *Nothing Personal*, *supra* note 1; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 527–28 (1997).

43. See Issacharoff & Pildes, *supra* note 24.

44. Burt Neuborne, *Response to Professor Gardner: Is There a Theory in this Class?*, 35 CONN. L. REV. 1519, 1520 (2003).

*intervention in an essentially political contest be dressed up in the abstract phrases of the law.*<sup>45</sup>

This story begins with the towering figure of Justice Frankfurter and his reasons for refusing to enlist the Court in the hard work of regulating democratic institutions. The setting is the redistricting landscape in the middle of the twentieth century, a patchwork grounded in gross population inequalities and the explicit refusal by state actors to redraw their districting plans. The question for the federal courts was disarmingly simple: whether to play a role in resolving this problem at all. The First Section presents Justice Frankfurter's arguments against judicial intervention in this area. The Second Section looks to the Court's point-of-entry in *Baker v. Carr* and examines how the Court ultimately addressed the concerns central to the law of democracy. At the heart of this Section stands the question of why it should be left for the court to do anything in this volatile and complex area.

A. *On the Special Nature of Political Questions*

"Some claims of unconstitutionality, however much they may be wrapped in the form of a conventional litigation," wrote Justice Frankfurter in 1934, "the Court will never adjudicate."<sup>46</sup> These were the notorious political questions, outcasts in a legal universe where courts decide all matters, great and small, brought to their attention. Judges would decide these questions at their own peril, Justice Frankfurter explained, for they are "not suited for settlement by the training and technique and the body of judicial experience which guide a court."<sup>47</sup> These questions were unwieldy, imprecise, and best left alone, to be handled and resolved by the political process. As for how to define the boundaries of such questions, Justice Frankfurter left open a small window, as "the wisdom of the Court defines its boundaries."<sup>48</sup>

It is now commonplace to document the demise of the Frankfurterian view of political questions as a central component of our constitutional law orthodoxy.<sup>49</sup> But change did not come easy.

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45. *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946).

46. Felix Frankfurter, *The Supreme Court of the United States*, 14 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 424 (1934), reprinted in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913–1938*, at 26 (Archibald MacLeish & E.F. Pritchard, Jr. eds., 1962).

47. *Id.*

48. *Id.*

49. See, e.g., 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, 501–02 (2002) ("By 1986, however, such alarms had generally been consigned to the dustbin of history: to

Justice Frankfurter had a very compelling set of arguments and did not go down without a fight. And so while his understanding of political questions was squarely repudiated in *Baker v. Carr*, his shadow looms large over the law of democracy.<sup>50</sup> Three features of the law of democracy counsel for a judicial posture couched in humility and restraint.

1. *Stalking Horses and the Question of Power*

The first feature dates at least as far back as Justice Frankfurter's forceful admonition in *Colegrove v. Green*:<sup>51</sup> the Court must be particularly careful in this arena, lest it be confused with another actor in the process. To his mind, complainants are essentially asking the Court to intervene in party contests while dressing up their prior defeat in the political process "in the abstract phrases of the law."<sup>52</sup> Put another way, the law of democracy must, of necessity, take sides in politically charged controversies, and invoking judicial doctrines and constitutional clauses does nothing to alter that fact. Robert Dixon made a similar point soon after the Court's explicit entry into the realm of politics in *Baker v. Carr*, when he complained that the case was "an invitation to courts to sit in judgment on the structure of political power; even to effect a judicial transfer of political power."<sup>53</sup>

This point has not been lost on indefatigable plaintiffs wishing to challenge the electoral outcome of their choice. To lose in the political process is to return to fight another day in the courts, under a dizzying array of available doctrinal tools, from Article I and the First or Fourteenth Amendments to the Voting Rights Act, campaign finance law, and/or state law principles.<sup>54</sup>

These challenges are known as "stalking horse" cases, and the

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take only the most relevant comparison, the combination of *Baker v. Carr* and *Reynolds v. Sims* was conventionally counted among the Court's greatest successes, strengthening rather than weakening its institutional position.").

50. See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 529 (2004) ("One might be tempted to call this Frankfurter's revenge. When one considers the lengths to which Stevens must go to make the case for adjudicating partisan gerrymander cases within an individual-rights framework, Frankfurter's opinion in *Colegrove* and his dissent in *Baker* look quite prescient.").

51. 328 U.S. 549 (1946).

52. *Id.* at 554.

53. Robert G. Dixon, Jr., *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 368 (1963). After all, "politics involves, at its core, material questions concerning the organization of power." Pildes, *supra* note 17, at 40.

54. See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 542 (2004).

litigants are often defeated candidates or political parties themselves looking for any chance to upset settled political outcomes.<sup>55</sup> In turn, much of the effort within the law of democracy is focused not on the vindication of individual rights by aggrieved litigants, but on the use of the courts as a means to secure a second chance to win public office. *Bush v. Gore* was one such case, yet it hardly stands alone.<sup>56</sup> The incentives created by the law of elections guarantee as much.

## 2. *The Political Question in Context: Power Meets Fear*

The second feature also finds expression in the reapportionment debates. These were arguments for which the political question doctrine did much of the heavy lifting. The classical strand of the doctrine made a fleeting appearance in the early cases, as the Court intimated that this was an exclusive area for Congress to regulate.<sup>57</sup> But the Court soon discarded this argument. More important was the prudential strand and the notion that the Court must traverse this terrain carefully. The question was not whether the Court had the power to handle these questions, for the Court clearly did.<sup>58</sup>

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55. See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 297 n.60 (1996); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1733–35 (1993) (describing the strategic use by interested partisans of the equipopulation rule and the Voting Rights Act); Pildes, *Theory*, *supra* note 30, at 1608 (discussing the *Karcher* opinion and complaining that “[t]he ‘right’ claimed here, as often in political cases, was obviously a stalking horse for other interests”).

56. Edward Blum, plaintiff in *Bush v. Vera*, 515 U.S. 1172 (1995), was an unsuccessful Republican candidate for Congress in one of the challenged districts. MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1994, at 1252 (1993). George L. DeLoach, plaintiff in *Miller v. Johnson*, 515 U.S. 900 (1995), was another unsuccessful candidate, but in the Eleventh District Democratic primary. *Id.* at 358.

57. See *Colegrove v. Green*, 328 U.S. 549, 554 (1946). For a contrary view, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 190–91 (2d ed. 1986) (disagreeing that *Colegrove* stands for the view that the Constitution leaves to Congress exclusive authority to monitor congressional elections, as both the Fourteenth and Fifteenth Amendment may be said to so authorize the Court to play a role in this area). See also Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 713 (1963) (“That such a claim is within the subject matter committed to the Court seems beyond dispute.”).

58. See *Baker v. Carr*, 369 U.S. 186, 277 (1962) (Frankfurter, J., dissenting) (“Both opinions joining the result in *Colegrove v. Green* agreed that considerations were controlling which dictated denial of jurisdiction though not

Rather, the question was whether the Court “ought . . . enter this political thicket.”<sup>59</sup> This was the nub of the argument, as Congress may ultimately reject the Court’s work.<sup>60</sup> Entering the thicket thus involved grave risks, not the least of which was the erosion of the Court’s considerable yet fragile legitimacy and public standing.

This feature of the law of democracy formed the long-standing basis for the political question doctrine. This concern dates back to Chief Justice Marshall’s discussion of political questions in *Marbury v. Madison*<sup>61</sup> and Chief Justice Taney’s admonition in *Luther v. Borden* about the Court’s duty “to examine very carefully its own powers before it undertakes to exercise jurisdiction.”<sup>62</sup> This is a healthy concern, for it recognizes that the Court does not operate within a cultural and political vacuum. There are times in our constitutional world when prudence must carry the day.<sup>63</sup>

### 3. *Taking Sides: On the Art of Discretion*

The third feature harkens back to Justice Frankfurter’s reasons for refusing to enlist the Court in the hard work of regulating democratic institutions. Justice Frankfurter’s complaint boiled down to the fact that these were political conflicts of the highest order, a “clash of political forces in political settlements.”<sup>64</sup> And he was undoubtedly right about that. The question under review in *Baker* was a classic question of politics, a matter that entailed “accommodating the incommensurable factors of policy that underlie these mathematical puzzles.”<sup>65</sup> Among these, Frankfurter included the following:

Considerations of geography, demography, electoral convenience, economic and social cohesions of divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect

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in the strict sense of want of power.”).

59. *Colegrove*, 328 U.S. at 556. *But see* Charles L. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13, 14 (1963) (“[*Colegrove*] can satisfy only if one starts with the postulate that judicial wisdom . . . always consists in judicial self-restraint, and that the reasons proffered for such restraint are . . . always to pass for well-founded, if stated in the set terms of art.”).

60. *Colegrove*, 328 U.S. at 552–53.

61. 5 U.S. 137 (1803); *see also* ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25 (3d ed. 2000).

62. 48 U.S. 1, 39 (1849).

63. *See* BICKEL, *supra* note 57, at 184.

64. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

65. *Id.* at 268 (Frankfurter, J., dissenting).

for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.<sup>66</sup>

Redistricting plans reflect innumerable values, none of which is inherently deserving of constitutional protection. Should legislators represent people or interests, groups or regions? To ask this question is to beg another: which institution must be entrusted with this crucial public function?

The traditional answer, of course, is the state legislatures, a fact the Court never tires to remind us.<sup>67</sup> But this is not to say that the Court should play no role at all. According to Alexander Bickel, *Colegrove* certainly did not say that nor did the Court say that this is an area reserved by the Constitution to Congress.<sup>68</sup> Rather, *Colegrove* is a political question case, so the issue is whether this is “a matter of the sort for which we have no rules, and as to which we ‘believe that the job is better done without rules.’”<sup>69</sup> Discretion is crucial here, for the goal is that of crafting representative institutions, with everything that such a difficult task entails.<sup>70</sup> How should a legislature do so? After all,

[i]t remains in large part, perhaps unfortunately, a task of pragmatic trial and error to construct representative deliberative institutions that are responsive to the views, the interests, and the aspirations of heterogeneous total constituencies, and that are yet not so fragmented or finely balanced as to be incapable of decisive action.<sup>71</sup>

This is not an easy task. The question was thus a question of

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66. *Id.* at 323–24 (Frankfurter, J., dissenting).

67. *See* *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006); *see also* *Grove v. Emison*, 507 U.S. 25, 34 (1993) (contending that Article I of the U.S. Constitution “leaves with the States primary responsibility for apportionment of their federal congressional . . . districts”); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (“[The District Court] correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”).

68. BICKEL, *supra* note 57, at 190–91.

69. *Id.* at 191.

70. *See, e.g.*, HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1966).

71. BICKEL, *supra* note 57, at 192.

process: once a legislature makes the requisite determinations, whatever these may be, how should a court respond? It must respond by recognizing that the judiciary must play a secondary role, a prudential role, a lessened role. The Court in *Colegrove* was only recognizing that fact.

This point brings Justice Frankfurter's criticism into sharper focus. As a descriptive matter, courts could not accommodate the "incommensurable factors of policy that underlie these mathematical puzzles," and assigning them the task is sheer folly and would "attribute, however flatteringly, omnicompetence to judges."<sup>72</sup> To enter this terrain is to decide questions of policy and ultimately take sides in political battles of the highest order. In turn, it is to offer those who lose in the political process a second chance to see their preferred policy preferences enacted into law.

As a normative matter, the question is: why place the courts in this role at all? This question lies at the heart of Justice Frankfurter's charge of "judicial omnicompetence."<sup>73</sup> The real question for judicial intervention in this area becomes not only whether the political process can be trusted to function properly, for this is only half the question. The other half is why the courts should be trusted in their stead.

#### B. *The Need for Judicial Intervention—Baker v. Carr*

The *Baker* majority was not deterred by these complexities, due in great measure to the *sui generis* nature of the facts at issue. Tennessee presented a case of political process failure, with extreme population disparities borne of legislative inaction and no recourse for popular majorities to effect change.<sup>74</sup> The Tennessee legislature had last redistricted in 1901, and so by 1960 the districting map looked nothing short of a "crazy quilt."<sup>75</sup> The numbers did not make any sense at all; they were not supported by any particular state policy nor could they be explained on any legitimate state ground.<sup>76</sup> They offered a classic case of arbitrary and capricious state action.

Helpful facts were only half the story; the other half—the legal obstacles facing the Court—seemed daunting, as the critics forcefully pointed out. The critics first took issue with the Court's

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72. *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting).

73. *Id.*

74. This argument was made forcefully by Anthony Lewis five years before *Baker*. See Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1057–58 (1957).

75. *Baker*, 369 U.S. at 254 (Clark, J., concurring).

76. See *id.* at 257 (Clark, J., concurring).

use of precedent.<sup>77</sup> After all, was *Colegrove v. Green* not authority for the proposition that the federal courts must stay out of this “thicket,” as understood by the lower court?<sup>78</sup> Did the political question doctrine not bar review?<sup>79</sup> Further, why turn to the equal protection clause for support when the claim would find a more hospitable constitutional home under the guarantee clause?<sup>80</sup>

The *Baker* majority turned away these questions with a simplicity that spoke volumes about the Court as an institution and its need to enter this long neglected terrain. On the question of *Colegrove* as precedent, the Court counted votes and concluded that four of the seven voting Justices upheld a grant of jurisdiction over the subject matter.<sup>81</sup> Even Frankfurter’s controlling opinion appeared “questionable” on this issue.<sup>82</sup> After a lengthy discussion, the Court also dismissed the political-question argument. The Court took the guarantee clause head on and concluded that the inquiry here was “primarily a function of the separation of powers.”<sup>83</sup> The question was thus whether the Constitution committed the matter under review to another branch of government or whether the actions exceed the grant of authority as exercised by the proper branch. And *that* question belonged to the Court “as ultimate interpreter of the Constitution.”<sup>84</sup> Put in simple terms: this was a case, *ergo* the Court may decide it.<sup>85</sup> On *Baker’s* logic, one may even

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77. See Kurland, *supra* note 2, at 149 (“It is impossible to believe that the Court was as artless as it represented itself to be; it is difficult to believe that the Court thought it could find an audience ingenuous enough to accept the assertion [that *Baker* did not conflict with precedents].”).

78. See *Baker v. Carr*, 179 F. Supp. 824, 826 (M.D. Tenn. 1959). *But see Baker*, 369 U.S. at 277 (Frankfurter, J., dissenting) (acknowledging that *Colegrove’s* refusal to hear the case on the merits was “not in the strict sense of want of power”); Lucas, *supra* note 57, at 713 (“That such a claim is within the subject matter committed to the Court seems beyond dispute.”); Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 656–57 (1963).

79. For criticism of the Court’s discussion of the political question doctrine, see, for example, Robert G. Dixon, Jr., *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROBS. 329 (1962).

80. See Arthur Earl Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245, 257–59 (1962); Arthur Earl Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study of Constitutional Desuetude*, 46 MINN. L. REV. 513, 570–72 (1962); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 106–07 (2000).

81. *Baker*, 369 U.S. at 202.

82. *Id.*

83. *Id.* at 210.

84. *Id.* at 211.

85. As Mark Tushnet explained, “in a world where the Court is comfortable

conclude that the Court had an “unsought responsibility” to so act.<sup>86</sup>

To the critics, the Court’s answer fell far short, for the opinion offered neither a workable, manageable standard for examining redistricting plans<sup>87</sup> nor, assuming an equal protection violation, did the opinion explain what remedies a court was authorized to grant.<sup>88</sup>

To the Court, however, these questions were the stock-in-trade of traditional judicial review. The lower courts would simply determine whether the plans under review violated the equal protection clause by turning to the “well developed and familiar” equal protection standards.<sup>89</sup> As the Court explained, somewhat hastily and opaquely, “it has been opened to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.”<sup>90</sup> As for the question of remedies, the Court offered the following: “we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found.”<sup>91</sup>

The critics were far from impressed.<sup>92</sup>

It is in this vein that *Baker* essentially overruled the political question doctrine in principle, if not in name. To be sure, the Court wrote a very doctrinal opinion while careful to sidestep—not overrule—existing precedents. It is a very shallow opinion, as the

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with interpreting the Constitution and uncomfortable with allowing anyone else to do so, once it is conceded that a provision means something, the ‘textually demonstrable commitment’ element simply falls away.” Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1211 (2002).

86. *Bush v. Gore*, 531 U.S. 98 (2000).

87. See Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 108 (1962) (“Nowhere does the Court indicate, by dictum or otherwise, what standards might be used in determining the validity of an apportionment scheme which creates such inequalities.”); Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 62–64 (1962).

88. See Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 262 (“The issue, of course, was not what remedy would be ‘most appropriate’ but whether any remedy at all lay within the power of a federal court of equity acting within its discretion, an issue which it could hardly have been ‘improper’ to consider in advance of trial.”).

89. *Baker*, 369 U.S. at 226.

90. *Id.*

91. *Id.* at 198.

92. See Neal, *supra* note 88, at 262 (“For the Court to remove that issue from the case, if that was its meaning, by asserting that it had ‘no cause . . . to doubt’ was little less than an expression of contempt for the views of numerous other responsible judges.”).

Court said precious little about the underlying theories of political representation and offered instead a rationality test.<sup>93</sup> *Baker* may also be read as a narrow decision, as the Court limited itself to the facts in front of it.<sup>94</sup> So long as its holding applied to other cases, it was only “to the extent that one decision necessarily bears on other cases.”<sup>95</sup> *Baker* was a prototypical minimalist decision.

More importantly, *Baker* marks the moment in the Court’s history when fear and prudence gave way to the constitutionalization of our politics. Once the Court took on the reapportionment problem then plaguing the nation, and did so to rousing success, there was nary a political issue, big or small, that the Court could not handle. Put another way, “*Baker v. Carr* made it natural to reject political question arguments by noting that only an ordinary question of constitutional interpretation of the sort courts routinely answer was at stake.”<sup>96</sup> Once fear was out, it became natural for the Court to handle any issue it wished to decide, irrespective of complexity or whether the political process demanded—much less justified—judicial involvement. This was true even for presidential elections.

Therefore, the first lesson of the reapportionment revolution should be clear: questions of politics are no different from questions of constitutional law writ large.<sup>97</sup> Seen this way, the distance between Justice Frankfurter and the *Baker* majority was simply a disagreement grounded in principle—not law—about how to handle these questions. To Justice Frankfurter, these cases should not be brought within the constitutional law orthodoxy. In *Baker*, a majority of the Court resoundingly thought otherwise.

## II. FIRST PRINCIPLES: TRUST AND THE LAW OF DEMOCRACY

*If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on*

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93. See Fuentes-Rohwer, *supra* note 31, at 1365–72; cf. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20 (1996) (“In a parallel process, judges may adopt a standard in the form of a ‘reasonableness’ test instead of deciding on the appropriate rule.”).

94. See Abner Mikva, *What Justice Brennan Gave Us to Keep*, 32 LOY. L.A. L. REV. 655, 656–57 (1999) (“[A]lthough Justice Brennan had votes to burn for his opinion, he still kept the language of *Baker v. Carr* narrow.”).

95. Sunstein, *supra* note 93, at 15.

96. Tushnet, *supra* note 85, at 1208.

97. See, on this point, Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 372 (2004) (“But I do not think that electoral law can be cut free from constitutional law more generally, which requires the Court to continue playing an active role in defining basic norms.”).

*government would be necessary.*<sup>98</sup>

The facts in *Baker v. Carr* offered the Court easy entry into the realm of politics. The Court could not have scripted a better scenario within which to make its triumphant entry: after decades of neglect and outright refusal to reapportion the state, the resulting districting lines bore no semblance of rationality, and there was nothing that the electorate—no matter how “civically militant”<sup>99</sup>—could do to remedy the problem. This was a classic case of political self-entrenchment, a “constantly looming pathology of democratic systems”<sup>100</sup> that courts have a “distinct calling” to address.<sup>101</sup> On these facts, the Court could put its considerable prestige and legitimacy to work in furthering democratic values, rather than working against them.

This is an arresting argument. It is also incomplete and ultimately unsatisfactory, for normative, descriptive, and doctrinal reasons. To begin with the normative: the real question for judicial intervention in this area is not only whether the political process can be trusted to function properly, for this is only half the question. The other half is why the courts should be trusted in its stead. This is a question that scholars rarely bother to ask. According to Rick Pildes, for example, “courts have a distinct calling, recognized already on occasion, to address the structural problem of self-entrenching laws that govern the political domain.”<sup>102</sup> Why the courts? His argument on this point is worth quoting at length:

[T]he vitality of democracy depends upon external institutions that can contain this disease. These institutions need not be courts; viable alternatives, such as independent electoral commissions, exist in many democracies. But the American system generally lacks these intermediate institutions, and constitutional law, almost by default, has come to fill this role.<sup>103</sup>

For an argument grounded on the strength of the Court as an institution, this cannot be enough. What we need is an argument for why the courts are the institution to play this crucial role. What is needed, in other words, is an answer to Justice Frankfurter’s charge of “judicial omnicompetence.”<sup>104</sup> He argued that to charge the

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98. THE FEDERALIST NO. 51, at 323 (Alexander Hamilton or James Madison) (Benjamin Fletcher Wright ed., 1961).

99. *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

100. Pildes, *Constitutionalization*, *supra* note 17, at 44.

101. *Id.* at 54; *see* Issacharoff & Pildes, *supra* note 24.

102. Pildes, *Constitutionalization*, *supra* note 17, at 54.

103. *Id.* at 44.

104. *Baker*, 369 U.S. at 268 (Frankfurter, J., dissenting).

courts with this role is to empower them “to devise what should constitute the proper composition of the legislatures of the fifty States.”<sup>105</sup> It might even vest upon judges the mantra of philosopher kings,<sup>106</sup> for it allows them to decide these difficult questions of policy in accordance with their views about political philosophy—in fairness, much of what goes for scholarly commentary and models of judicial review must be situated precisely within this criticism. John Ely never gave us an answer to Justice Frankfurter’s important question,<sup>107</sup> and neither have his contemporaries.

The descriptive answer merges with the doctrinal in the post-*Baker* litigation. An answer to Justice Frankfurter’s caustic critique must begin with a posture of judicial deference and recognition that the Court does not hold answers to all questions, large or small. This argument understands the *Baker* case as *sui generis* and the Court as a cautious institution. This argument also takes seriously the charge that the Court must intervene only when the process malfunctions. But as the remainder of this Part explains, the Court is now far removed from the promise of *Baker v. Carr*. Almost as soon as the Court entered the political terrain, its cautious approach gave way to a far more aggressive posture and the question of “process malfunction” became a term of art.

The case was *Reynolds v. Sims*.<sup>108</sup> In *Reynolds*, the Court moved ahead with its standard of choice for evaluating redistricting plans, the now familiar equipopulation principle. As it explained, “[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.”<sup>109</sup> This meant, more specifically, that “[p]opulation [was], of necessity, the starting point for consideration and the controlling criterion”<sup>110</sup> for judging districting plans.

This conclusion was neither surprising nor radical in light of the egregious population disparities then in existence. The simplicity of the standard is undeniable, particularly under its traditional moniker of “one person, one vote.”<sup>111</sup> It bespeaks of common sense, traditional democratic values, and majority rule, all qualities that

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105. *Id.* at 269 (Frankfurter, J., dissenting).

106. *See* *Holder v. Hall*, 512 U.S. 874, 892–93 (1994) (Thomas, J., concurring).

107. *See* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 403–05 (1984).

108. 377 U.S. 533 (1964).

109. *Id.* at 565.

110. *Id.* at 567.

111. *Id.* at 562–63.

help explain why the public embraced the Court's intervention.<sup>112</sup> After all, who could disagree with a constitutional rule that demands that each vote count as much as another?

Unsurprisingly, members of Congress could disagree, and some of them fought hard to reverse the Court's decision or blunt its impact.<sup>113</sup> Part of this response was undoubtedly self-interested. Yet it is worth remembering that the equality principle at the heart of the Fourteenth Amendment offered the Court multiple doctrinal paths and could find expression in innumerable judicial standards. Put another way, the equipopulation standard was not demanded by constitutional precedent, text, or history, as Justice Frankfurter forcefully argued in his *Baker* dissent. The standard was certainly simple to administer, but as John Ely explains, the harder task was in explaining what else it had to recommend it.<sup>114</sup> This was not like the issue in *Brown v. Board of Education*, where the equality principle offered the Court a self-evident path to equality.<sup>115</sup> No such path existed in *Reynolds*, and in a telling passage, the Court recognized as much. The Court was "told," "advised," "admonished," and "cautioned" that reapportionment was a complex and even dangerous area, and thus its handling of these questions must be cautious and respectful of policy choices made elsewhere.<sup>116</sup> This was the crux of the matter, and the Court appeared ready to tackle it head on. How was this for an answer? "[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."<sup>117</sup> I cannot pretend to know what this means. This was not an adequate response to Justice Frankfurter's charge.

And so the *Reynolds* opinion must be understood for what it was: a moment in the Court's history when the justices drew a line in the sand and carved a doctrinal niche from among competing rationales. The Court chose a line and committed to it, requiring only courage and conviction. As for the second lesson of the reapportionment revolution: we should not forget, particularly in light of the Court's hesitations in *Vieth v. Jubelirer* and its professed inability to locate a standard to govern political gerrymandering

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112. Robert McCloskey attributed this overwhelming reaction to a "latent consensus." See McCloskey, *supra* note 87, at 58–59.

113. See Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 231–38 (1964).

114. See ELY, *DISTRUST*, *supra* note 23, at 121.

115. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95 (1954).

116. See *Reynolds v. Sims*, 377 U.S. 533, 566–67 (1964).

117. *Id.* at 566.

controversies,<sup>118</sup> that the Court in *Reynolds* pulled its standard of choice essentially out of a hat.<sup>119</sup>

I take from *Reynolds* and its companion cases a cautionary note about the Court and its power in contemporary politics. Unlike *Baker*, these were not cases where the political process was “undeserving of trust.” Rather, these were cases where the Court simply disagreed with the redistricting outcomes from most of the state legislatures. In fact, there is no good way to defend *Reynolds* other than as a case where the Court implemented its political theory of choice. This is acceptable, so long as one agrees with the Court’s particular choices. But those who accept *Reynolds* as a legitimate exercise of the Court’s newfound power must be careful what they wish for. Once the Court domesticated the political question doctrine, its reach into the realm of politics was boundless.

This conclusion raises what I take to be the central question for those who write about the law of democracy. Recall that *Baker* was a minimalist decision, both narrow and shallow. In contrast, *Reynolds* was an example of a maximalist Court—the decision was both deep and wide. *Reynolds* was a deep opinion because the Court spent a great deal of time on first principles and theoretical abstractions, in particular its discussion of “one person, one vote” and the concept of political representation.<sup>120</sup> The opinion was also wide because the Court did not confine itself to the facts as then existing in Alabama, but instead applied the case broadly, to many and all cases into the future. The effects of *Reynolds* at the state level bespeak the opinion’s maximalist approach. In implementing the equipopulation standard, the Court accepted no argument but its own, and in so doing it rearranged state governments in the process. As Justice Stewart asserted in the companion *Lucas* case, “[t]he Court’s draconian pronouncement . . . makes unconstitutional the legislatures of most of the 50 States.”<sup>121</sup> Or in the words of a

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118. See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (“As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.”).

119. For a discussion on this point, see Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J.L. & PUB. POLY 423, 435 (2005) [hereinafter Fuentes-Rohwer, *Domesticating*]. Additionally, see Pildes, *Theory*, *supra* note 30, at 1613 (“That the Court quickly embraced one-vote, one-person . . . is a statement about the Court’s subsequent choices, not about anything inherent in the nature of doctrines that would have been sufficient to strike down gross malapportionment.”).

120. *Reynolds*, 377 U.S. at 558.

121. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 746 (1964)

recent account of the reapportionment revolution and its aftermath: “every state legislature would have to redraw districts and rewrite its apportionment laws in line with the new doctrine of one person, one vote.”<sup>122</sup>

How can this shift in the Court’s posture towards redistricting questions be explained? I offer some tentative answers to this important question in the last Part. For the moment, I only note that this question exerts a tremendous amount of critical pressure on those who offer their own theories and roles the Court should play in the field of democracy. I confess surprise on this score; the Court’s confused and erratic behavior towards questions of politics within the last generation should be reason for advocating less aggressive review, not more.

III. ON THE DEMISE OF POLITICAL QUESTIONS; OR, HOW THE SPIRIT OF *REYNOLDS* TOOK OVER THE LAW OF ELECTIONS

*Once loosed, the idea of Equality is not easily cabined.*<sup>123</sup>

*Baker* and *Reynolds* tell an important story about the Court and its power in contemporary American politics. Taken together, they make clear that the Court’s power extends as far as the justices demand that it does, cabined only by pragmatic considerations. Recall in this vein Robert Dixon’s prescient analysis; to his mind, *Baker* was “an invitation to courts to sit in judgment on the structure of political power; even to effect a judicial transfer of political power.”<sup>124</sup> This is an important point in two ways. Note first that *Baker* was only an invitation to courts, not a requirement that they intervene. This is clearly right, and the reason why *Baker* must be understood as contra distinct from *Reynolds* and the equipopulation revolution. *Baker* allows for intrusion into politics yet clearly stops short of aggressive judicial intervention.<sup>125</sup> Yet the Court pushed this invitation to its limits, leading Professor Dixon to remark soon after the Court’s decision in *Reynolds* and its companion cases<sup>126</sup> that the “[c]ourts not only have entered the

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(Stewart, J., dissenting).

122. STEPHEN ANSOLABEHERE & JAMES M. SNYDER, JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* 178 (2008).

123. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

124. See *supra* notes 53–54 and accompanying text.

125. See Fuentes-Rohwer, *supra* note 31; see also BICKEL, *supra* note 57, at 196 (“The point decided was not what function the Court is to perform in legislative apportionment, and certainly not whether it is to take over full management, but whether it can play any role at all.”).

126. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Davis v. Mann*, 377 U.S. 678

thicket, they occupy it.”<sup>127</sup> The second point underscores how prescient Dixon’s sentiment was and how close it came to describing the controversy surrounding the aftermath of the 2000 presidential election in *Bush v. Gore*.<sup>128</sup>

This Section does not retell this oft-told story, nor does it offer any new insights about the Court’s handling of what is easily the most politically charged case in recent memory.<sup>129</sup> Instead, it makes two modest claims. The first claim looks back to *Baker* and the reasons that thrust the Court into the realm of politics. The similarities between *Baker* and *Bush v. Gore* are striking,<sup>130</sup> and *Bush* is nothing but a logical extension of *Reynolds v. Sims*.<sup>131</sup> Justice Frankfurter must get his due, as his concerns have come to pass and the Court has become another political actor, taking sides in politically charged controversies.<sup>132</sup>

A distinct difference, of course, lies in the normative reasons for

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(1964); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Roman v. Sincok*, 377 U.S. 695 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); see also Robert G. Dixon, Jr., *The Court, the People, and “One Man, One Vote,”* in REAPPORTIONMENT IN THE 1970S 11 (Nelson W. Polsby ed. 1971).

127. Dixon, *supra* note 113, at 210; see *Reynolds*, 377 U.S. at 589 (Harlan, J., dissenting) (“These decisions, with *Wesberry v. Sanders*, involving congressional districting by the States, and *Gray v. Sanders*, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary.”); see also Pildes, *Theory*, *supra* note 30, at 1606 (“In the relatively short time since [*Baker*], the United States Supreme Court has not only entered the ‘political thicket,’ but with remarkable speed has found conflicts of democratic politics coming to dominate its docket.”).

128. 531 U.S. 98 (2000).

129. See David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1427 (2006) (“Few cases in the Supreme Court’s 200-plus year history have more deeply tested its institutional legitimacy than *Bush v. Gore*.”).

130. Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 390 (2001) (“*Bush* is *Baker v. Carr* in conservative garb.”).

131. See Richard L. Hasen, A “Tincture of Justice”: Judge Posner’s Failed Rehabilitation of *Bush v. Gore*, 80 TEX. L. REV. 137, 154 (2001) (book review) (“*Reynolds v. Sims*, whether it is good or bad politics, begets *Bush v. Gore*.”); Tushnet, *supra* note 85, at 1208 (“If ordinary constitutional interpretation produces a quite rigid one-person, one-vote rule, what if anything lies outside the domain of ordinary constitutional interpretation?”).

132. See *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946); see also Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 932–33 (2001) (“The pointillism of their decision aimed to avoid entanglement in future political thickets, even as they emerged badly bloodied from the thorns of *Bush v. Gore* itself. Somewhere, Justice Frankfurter is chuckling.”).

the Court to take the initial step of “deciding to decide.”<sup>133</sup> The Court in *Baker* had impeccable reasons, grounded in what was a clear failure of the political process. It is difficult to offer a similar defense of the Court’s intervention in *Bush*, though some commentators have certainly tried.<sup>134</sup> If anything, the political process appeared to be working too well. The lessons of the case are both clear and uncontroversial: the Court is mired in our politics, willing and ready to strike a blow for our constitutional democracy. The Court cannot help itself.<sup>135</sup>

The second claim situates *Bush* within our political question tradition and agrees that the case raised a political question. By this I do not mean a political question in the crude sense of day-to-day politics, of the world inhabited by Republicans and Democrats; of course *Bush v. Gore* is *that*. Rather, I mean it in the doctrinal sense, which places the case in distinguished company, with *Luther v. Borden*<sup>136</sup> and *Pacific States Telephone & Telegraph Co. v. Oregon*.<sup>137</sup> To be sure, many commentators have situated *Bush v. Gore* within this tradition,<sup>138</sup> but the crucial insight of the political question doctrine cannot be understated and often goes unnoticed. It is not that particular questions are textually committed to the political branches rather than the courts. This aspect of the political

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133. The phrase is from H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

134. See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001); Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002).

135. See Toby Harnden, *Justice Antonin Scalia: Al Gore to Blame for 2000 US Election Mess*, TELEGRAPH, June 27, 2008, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/2200495/Justice-Antonin-Scalia-Al-Gore-to-blame-for-2000-US-election-mess.html> (“But I don’t know how we could have avoided it. Could we have declined to accept the case on the basis that it wasn’t important enough?[]” (quoting Justice Scalia)).

136. 48 U.S. 1 (1849).

137. 223 U.S. 118 (1912).

138. See Steven G. Calabresi, *A Political Question*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 129, 129–41 (Bruce Ackerman ed., 2002); Samuel Issacharoff, *Political Judgments*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 55, 71–73 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism*, in *BUSH V. GORE*, *supra*, at 145–62; Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1105–09 (2001); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 578–85 (2001); Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 592–607 (2002).

question doctrine—known as its classical strand—has ceased to do any work for quite some time.<sup>139</sup> Instead, the real bite of the doctrine lies in its prudential strand: courts choose to intervene in or abstain from deciding particular controversies for pragmatic reasons, often out of a real concern that its edicts will go underenforced.<sup>140</sup> Such was the case in *Colegrove v. Green* and *Luther v. Borden*, and there is very little reason to think that this should not have been the case in *Bush v. Gore*.

Let me be clear: in *Bush v. Gore*, the per curiam opinion professed an inability to decline to hear the case. The language here was of an “unsought responsibility,”<sup>141</sup> which is clearly misleading. The Court could have declined to hear this case, and in fact, if the prudential political question doctrine retained any vitality whatsoever, the Court would have been wise to let the political process run its course. Yet the Court plunged ahead and essentially stopped the Florida recount,<sup>142</sup> confident that its edict would not go unenforced. The real insight of *Bush v. Gore* lies precisely here: public perceptions about judicial supremacy are so strong, and the Court’s legitimacy so secure, that the justices no longer need to hide behind platitudes such as “political questions” and “judicially manageable standards.” The political question doctrine is dead, and the Court is clearly in charge of our politics, ready to act and unafraid of any negative repercussions.

In saying this, I do not mean to criticize the Court’s handling of the litigation in *Bush*. If anything, this case offered a much-needed corrective to the classical view of the Court as detached from politics. Candor about the Court and its work is important and often lacking in popular accounts of the Court. What I take from *Bush* is the Court’s insistence to treat these politically charged questions as run-of-the-mill constitutional questions. Political questions are no longer a special breed of case. Questions of judicial power and standards no longer offer any practical resistance.

#### IV. YOU CAN TRUST THIS? A DISSENT

*We increasingly see the images of democratic politics that underlie the Court’s decisions as simply ad hoc—different views of*

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139. See Fuentes-Rohwer, *Reconsidering*, *supra* note 39, at 1912.

140. See *id.* at 1913–15.

141. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (“When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.”).

142. See Powe, Jr., *supra* note 13, at 730–31 (“[T]he claim in *Bush v. Gore* that deciding the election was an ‘unsought responsibility’ rings hollow. The Court could have avoided the responsibility by denying certiorari.”).

*the point of politics emerge almost at random as the Court confronts questions that range from patronage to redistricting to restructurings of the political process through voter initiatives.*<sup>143</sup>

*Bush v. Gore* is not an isolated example of the Court's aggressive handling of questions of politics. It is standard fare across the law of democracy. This is true even in areas where moderation would appear to present a better approach. Consider first the wrongful districting cases, the source of much controversy and disarray.<sup>144</sup> To begin, take a legislature during a redistricting session. Assuming partisan control of all necessary posts, one would expect legislative outcomes to reflect the partisan attitudes and desires of their authors. Throw into the mix controlling federal law, particularly pre-clearance and vote dilution requirements under the Voting Rights Act,<sup>145</sup> and the legislative handiwork immediately increases in complexity. In this scenario, the controlling party could give up hope and relent to the federal pressures not of its own making while stretching its partisan gains as much as possible, or it could attempt to comply yet hold onto previous gains.

The North Carolina legislature found itself in this unenviable position during the fall of 1991. Soon after submitting its newly crafted redistricting plan in order to comply with its pre-clearance requirement, the Department of Justice refused to pre-clear it, on the view that one majority minority district would not be enough to comply with Section 5.<sup>146</sup> The legislature then called a special session in January 1992 and drafted a plan that sought to comply with DOJ's request while holding onto its previous political gains.<sup>147</sup> This balancing act required great artistry, and to some North Carolinians, the legislature could not legitimately pull it off.

This is a nutshell account of the political process leading up to

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143. Issacharoff & Pildes, *supra* note 24, at 646.

144. See ISSACHAROFF ET AL., *supra* note 18, at 906–07.

145. Voting Rights Act, 42 U.S.C. § 1971 (2000). The vote dilution requirement of the Act is codified in Section 2. *Id.* § 1973. It essentially proscribes, under a totality of circumstances inquiry, whether “members of a class of citizens protected by [the statute] . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* The non-retrogression requirement is codified in Section 5 of the Act. *Id.* § 1973c. Under this requirement, the Department of Justice may not allow changes in jurisdictions covered by the Voting Rights Act if these changes “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976).

146. See *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992).

147. See *id.* at 394–95.

*Shaw v. Reno* and its progeny.<sup>148</sup> At first blush, the facts pointed clearly in the direction of partisan shenanigans, and the plaintiffs so understood them, grounding their initial claim on the Court's partisan gerrymandering doctrine. The lower court did not buy it, and neither did the Supreme Court.<sup>149</sup> Undeterred, the plaintiffs tried again, this time on a racial gerrymandering claim. Their evidence consisted of maps, DOJ's insistence on a second majority black district, and the fact that a black legislator had won the contested seat.

On these facts, it takes some effort to conclude that the redistricting plan must be subject to strict scrutiny review. To be sure, racial factors played a role during the deliberations, as they must in order for the state to comply with the Voting Rights Act. If that is all it would take to subject any districting plan to the Court's most exacting review, then it would make far more sense to stage a frontal assault on the Act rather than encourage piecemeal litigation. The Court held that the constitutional infirmity stemmed from the use of race in the manner in which North Carolina used it, as part of a plan "so irrational on its face that it can be understood only as an effort to segregate voters into separate districts because of their race."<sup>150</sup>

This type of harm came to be known as an "expressive harm."<sup>151</sup> Or, in the Court's oft-cited words:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin . . . reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls.<sup>152</sup>

While the Court conceded that this was a claim "analytically distinct"<sup>153</sup> from prior race cases, there was nothing new here, for, as the Court stated, "[w]e have rejected such perceptions elsewhere as impermissible racial stereotypes."<sup>154</sup>

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148. *Shaw v. Reno*, 509 U.S. 630 (1993); see TINSLEY E. YARBROUGH, RACE AND REDISTRICTING: THE *SHAW-CROMARTIE* CASES (2002).

149. See *supra* note 146 and accompanying text.

150. *Shaw*, 509 U.S. at 658.

151. See generally Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH L. REV. 483 (1993).

152. *Shaw*, 509 U.S. at 647.

153. *Id.* at 652.

154. *Id.* at 647.

This case has a clear explanation. The Court understood the map in *Shaw* as an example of “uber-race consciousness,”<sup>155</sup> as flashing the message “RACE, RACE, RACE” in big, bold letters for the entire world to see.<sup>156</sup> More perniciously, one may interpret it as conveying a message of extreme race consciousness in the pursuit of districting goals. As John Hart Ely eloquently put it, the message is “in your face,” and may lead one to conclude: “Is there no length to which they won’t go to help black people?”<sup>157</sup> For the Court, the facts in *Shaw* offer an “ostentatious display of race consciousness run amok,” instances of “in-your-face visual representations of racial interest as raw political power.”<sup>158</sup> The Court sees race, the Court does not like race, and so the Court applies strict scrutiny. How the Court can get all this information from the map and the factual setting, of course, is in itself a difficult and troubling question.<sup>159</sup> Not surprisingly, the Court ultimately struck down the districting plan.<sup>160</sup>

None of this should be terribly surprising. As in *Bush v. Gore*, we have come to expect this is the kind of aggressive posture from the Court. Politics may be nasty, brutish, and short, unbounded in either risks or complexities, yet the justices hardly worry as they once did. Aggressive review is the order of the day, irrespective of risk or complexity.

The Court’s approach to political gerrymandering questions stands in sharp contrast. The setting in these cases should be familiar: a rogue legislature, hell-bent on enacting the partisan plan of its choice, total partisan control of the redistricting process, and a forgiving—perhaps non-existent—doctrinal canvas. The one absent player in this setting is the Department of Justice, and that makes all the difference in the world. Without an institutional push to imbue race into the process, the outrage is restrained and altogether different; the Court responds accordingly.

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155. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 241 (2001).

156. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 610 (1993).

157. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 615 (1998) [hereinafter Ely, *Gerrymanders*].

158. Charles & Fuentes-Rohwer, *supra* note 155, at 240–41.

159. See MARK MONMONIER, BUSHMANDERS AND BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS (2001); Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997).

160. See *Shaw v. Hunt*, 517 U.S. 899 (1996).

The doctrine in this area is replete with half-steps, missteps, and even non-steps. The Court's struggle began soon after *Baker*, when it refused to explicitly adjudicate these questions.<sup>161</sup> Many justices remained uncomfortable with the practice and sought to regulate political gerrymandering questions through related, yet indirect means. *Karcher v. Daggett*<sup>162</sup> epitomized this approach, a case where the Court applied the equipopulation standard with unrelenting rigor in striking down a blatant Democratic gerrymander in New Jersey.<sup>163</sup>

The Court ultimately relented to the force of its own reasoning and concluded that political gerrymandering questions were justiciable under the Equal Protection Clause.<sup>164</sup> However, this effort led to great disappointment. In the deeply fractured *Davis v. Bandemer*<sup>165</sup> case, the Court struggled to provide a standard to guide the doctrine and instead offered a confused and ultimately meaningless constitutional test. The recent *Vieth v. Jubelirer*<sup>166</sup> followed this hesitant and erratic script. According to the plurality in *Vieth*, the Constitution lacks judicially manageable standards for deciding these cases, while four justices offered various standards of choice.<sup>167</sup> Justice Kennedy remained uncertain, yet unwilling for the Court to abdicate the field just yet.<sup>168</sup> Finally, *League of United Latin American Citizens v. Perry*—as blatant a political gerrymander as we are likely to see—did not improve matters, as Justice Kennedy decided the case on alternate grounds.<sup>169</sup>

This posture should strike us as odd and misconceived. Having

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161. See *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (declining to decide the constitutionality of a multi-member districting plan that operates “to minimize or cancel out the voting strength of racial or political elements of the voting population”).

162. 462 U.S. 725 (1983); see also *Cox v. Larios*, 542 U.S. 947, 949–50 (2004) (Stevens, J., concurring) (“After our recent decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.”).

163. Clearly, this would not be enough. See Samuel Issacharoff & Richard H. Pildes, *Not by “Election Law” Alone*, 32 LOY. L.A. L. REV. 1173, 1180 (1999) (“But in [turning to the “individual rights-compelling state interest standard”], the Warren Court locked into place conceptual tools that soon proved insufficient for the next generation of cases.”).

164. See *Davis v. Bandemer*, 478 U.S. 109 (1986).

165. *Id.*

166. 541 U.S. 267 (2004).

167. *Id.* at 368 (Breyer, J., dissenting) (“[T]he mere fact that these four dissenters come up with three different standards . . . goes a long way to establishing that there is no constitutionally discernible standard.”).

168. *Id.* at 311, 313–17 (Kennedy, J., concurring).

169. 548 U.S. 399 (2006).

swept the question of power aside generations ago, it is too late in the day to argue that standards are lacking or power unavailing. The Court has power to do anything it wants, and myriad standards exist, coming practically from all corners of the academy. More troubling still, political gerrymandering claims are the one area of the law of democracy where judicial intervention appears normatively warranted. Where is there more need for judicial supervision than in the very process whereby the people in power are also entrusted with the duty to draw district lines?<sup>170</sup>

The facts seem uncomplicated: this is one area where the political market appears to have failed, as the ins have choked off all avenues of political change in order to remain in power.<sup>171</sup> If electoral competition is the *sine qua non* of politics, then clearly our political process is one place where judicial intervention is decidedly justified.<sup>172</sup>

The contrast between the racial and the political gerrymandering cases is perverse for a number of reasons. In an earlier case, Justice O'Connor warned that the Court's

reflexive application of precedent ignores the maxim that '[p]articularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.'<sup>173</sup>

"In cases such as this one," Justice O'Connor continued, "it is not enough to cite precedent: we should examine it for possible limits, and if they are lacking, for possible flaws."<sup>174</sup> This is a remarkable assertion, particularly in light of *Shaw*, where the Court deployed any and all available precedents in pursuit of its

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170. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

171. See ELY, *DISTRUST*, *supra* note 23, at 103 (A political malfunction deserving of judicial correction "occurs when the *process* is undeserving of trust, when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."); Jeffrey Toobin, *The Great Election Grab: When Does Gerrymandering Become a Threat to Democracy?*, NEW YORKER, Dec. 8, 2003, at 65 ("Voters no longer choose members of the House [of Representatives]; the people who draw the [district] lines do." (quoting Samuel Issacharoff)).

172. See Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006).

173. *Davis v. Bandemer*, 478 U.S. 109, 145–46 (1986) (O'Connor, J., concurring) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343–44 (1960)).

174. *Davis*, 478 U.S. at 146 (O'Connor, J., concurring).

questionable conclusion, while distinguishing unhelpful cases.<sup>175</sup> *Shaw* was as reflexive an application of precedent as we will ever see, even while, paradoxically, the Court carved a new cause of action out of this worn and misguided cloth. But *Shaw* involved race, of course, not politics. And therein lies the difference.

Ironies abound. The Justice O'Connor of the political gerrymandering cases worries about inviting the losing side in every reapportionment to fight its battles anew in the federal courts<sup>176</sup> and about opening the doors of the federal courts to "pervasive and unwarranted judicial superintendence of the legislative task of apportionment";<sup>177</sup> besides, the framers of the Fourteenth Amendment never intended to create a group right to representational equality.<sup>178</sup> Yet curiously, these same worries do not give the Court much pause in the racial gerrymandering context. The use of race is condemned across the board, yet the imbuelement of politics is treated delicately, if at all. All the while, the justices' personal discomfort with the map in question did most of the work. Ely captured this point with characteristic wit: "this district has got to be unconstitutional, so somebody, anybody, must have standing to raise the claim."<sup>179</sup>

The justices display a similar approach across the law of democracy. In *Shaw*, the Court deferred to no one, concerned that these black districts "may balkanize us into competing racial factions."<sup>180</sup> Yet in *Kiryas Joel*, a case examining the creation of a Jewish school district in New York City, Justice Scalia (in a dissenting opinion joined by Justice Thomas and the Chief Justice) saw the district as part of the quintessential American "story of groups of people sharing a common religious and cultural heritage striking out to form their own communities."<sup>181</sup> One opinion derides the use of race in politics, even while conceding its inevitability; yet the other exalts the use of religion in crafting district lines, in clear tension with the text and spirit of the First Amendment.<sup>182</sup> These are curious positions to take simultaneously and difficult to

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175. See *Shaw v. Reno*, 509 U.S. 630 (distinguishing *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977)).

176. *Davis*, 478 U.S. at 147 (O'Connor, J., concurring).

177. *Id.*

178. See *id.*

179. John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 579-80 (1997).

180. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

181. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 735 (1994) (Scalia, J., dissenting).

182. See *Shaw*, 509 U.S. 630. But see *Miller v. Johnson*, 515 U.S. 900 (1995).

explain.<sup>183</sup>

Similarly, in *Rutan v. Republican Party of Illinois*,<sup>184</sup> the Court struck down patronage practices in employment on First Amendment grounds. Justice Scalia dissented, as he concluded that a constitutional ban on patronage “reflects a naïve vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of politically powerless groups.”<sup>185</sup> He complained that this ban on patronage practices has weakened the parties and has in turn led to the rise of interest groups.<sup>186</sup> Yet, in *California Democratic Party v. Jones*,<sup>187</sup> the Court struck down a blanket primary system, a system under which “[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate’s political affiliation.”<sup>188</sup> While *Jones* upholds the worth of party autonomy, the patronage decisions take a contrary view.

But the ironies hardly end there. For Justice Scalia, patronage practices are a way to fulfill “the social and political integration of excluded groups”;<sup>189</sup> their abolition, he complains, “prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.”<sup>190</sup> Yet, and quite perversely, blacks better not attempt to put this newfound power to use, in the form of social goods and preferential policies, as the Court, including Justice Scalia, stands ready to strike them down as examples of racial spoils and racial politics.<sup>191</sup>

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183. See Pamela S. Karlan, *Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?*, 83 IND. L.J. 1, 17 (2008).

184. *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

185. *Id.* at 103–04 (Scalia, J., dissenting). For criticism of this view, and in particular Justice Scalia’s contention that patronage practices in fact helped disadvantaged groups, see Cynthia Grant Bowman, “*We Don’t Want Anybody Sent*”: *The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 77 (1991) (“[T]he more a machine was able to consolidate its power by use of patronage, the less likely it was to fulfill the function of broadening the number of groups involved in the political process.”).

186. See *Rutan*, 497 U.S. at 107 (Scalia, J., dissenting).

187. 530 U.S. 567 (2000).

188. *Id.* at 570.

189. *Rutan*, 497 U.S. at 108 (Scalia, J., dissenting).

190. *Id.*

191. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226–37 (1995); *Shaw v. Reno*, 509 U.S. 630, 657–58 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–94, 499, 505 (1989); Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT. 133, 146–47, 162

For Justice O'Connor, the state may not discriminate on political grounds when awarding contracts to haul trash or tow cars;<sup>192</sup> but similar discrimination in the crafting of districting lines does not even raise a justiciable question.<sup>193</sup> For the dissenting faction in *Shaw*, the Court should stay out of this political minefield; yet the Court must step in and cure the political distortions created by excessive political gerrymandering.<sup>194</sup>

These arguments exemplify the justices' confused approach to questions of politics. The justices are driven by their issue preferences, by their idiosyncratic views and assumptions about the political world and the uses to which political power can be legitimately put, and much less so by doctrine. This is true across the board, from the gerrymandering and patronage cases to campaign finance law.<sup>195</sup> This is not a new insight. According to Pam Karlan, for example, "[t]he Supreme Court as an institution seems increasingly confused, or indifferent, about what politics is for and when courts need to regulate the process."<sup>196</sup> Rick Pildes similarly writes that "judicial application of constitutional law to issues of democratic political organization has been tentative, hesitant, erratic, and lacking in sustained commitment or conviction."<sup>197</sup> In other words, incoherence and disarray lay at the heart of the field.

This is an arresting indictment of the Court and its regulation of our political culture. As stated earlier, the field of democracy presents the Court with myriad difficulties and complexities. The Court must tread this terrain humbly and deferentially. Yet the truth has been far from that. *Baker v. Carr* made sense as a moment in the history of our politics when democratic outcomes were "undeserving of trust."<sup>198</sup> But that moment has long passed,

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(2004).

192. See *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

193. See *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O'Connor, J., concurring).

194. For example, compare *Shaw*, 509 U.S. at 661 (White, J., dissenting) with *Vieth*, 541 U.S. at 344–46 (Souter, J., dissenting).

195. See, e.g., Bradley A. Smith, *McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. 345, 350 (2004) ("Ideology, not a careful consideration of facts, theory, or the real-world effects of legislation, appears to drive the majority to repeatedly fashion its opinion in such categorical terms").

196. Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 290 (1997).

197. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 319 (2000).

198. ELY, *DISTRUST*, *supra* note 23, at 103.

and the better question for today is whether the Court can be trusted any longer with the responsibility to regulate our political process.

The Court of today has a much different agenda. Again, Rick Pildes: “[w]here other judges have seen competitive practices that ensure a robust and vital democratic system, the current Court has seen threats to orderly democratic processes.”<sup>199</sup> The Court sees chaos, in other words, which explains its willingness to step in and set the political structures on their proper course. Such is the true measure of a philosopher king.

#### VI. BACK TO THE PROMISE OF *BAKER*

*The Constitution recognizes numerous distinct spheres of interaction, each governed by its own logic of norms that defines the kinds of reasons for which government can appropriately act. Constitutional adjudication . . . is primarily about defining the normative structure of these different spheres.*<sup>200</sup>

A philosopher king revels in determining when the use of race predominates in a redistricting plan;<sup>201</sup> when burdens on the ballot are severe and must be “narrowly tailored and advance a compelling state interest,”<sup>202</sup> or less severe and justified by “the State’s important regulatory interests”;<sup>203</sup> or when campaign finance laws prevent corruption or the appearance of corruption.<sup>204</sup> These are difficult inquiries, to be sure, inquiries that only a philosopher king would dare undertake.

The Court regularly plays the part of philosopher king in contemporary American law. Yet note the nature and complexity of the enterprise, particularly in reference to the law of democracy. What could corruption possibly mean in the context of campaign

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199. Pildes, *supra* note 18, at 182.

200. Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994) [hereinafter Pildes, *Avoiding*].

201. See *Shaw v. Hunt*, 517 U.S. 899 (1996).

202. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). As an example of such an extreme burden, the Court has offered the following: “Of course, what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot.” *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974).

203. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

204. See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976); see also *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–98 (1985); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298–99 (1981).

finance?<sup>205</sup> The Court provides little guidance on this score, treating the term as an *ipse dixit*.<sup>206</sup> When are burdens on the ballot severe or less so? The Court offers myriad admonitions about the case-by-case nature of this inquiry,<sup>207</sup> while conceding that the proof is in the application.<sup>208</sup> And when exactly does race “predominate” during the redistricting process?<sup>209</sup> The Court’s answer is wholly unsatisfying.<sup>210</sup>

Make no mistake: the challenges posed by the law of democracy are difficult and complex, and I do not wish to suggest otherwise. However, as noted previously, the Court’s performance as democratic engineer is not worthy of much confidence. It is confused and incoherent. Assertiveness in one area is closely followed by passivity in another, and justifications for some actions are rejected as insufficient in others.

This final Part argues that the Court should turn back to the promise of *Baker v. Carr*, a promise grounded in rationality review and the pursuit of legitimate state interests. Section V.A defends my reading of rationality in redistricting. Section V.B makes sense of the Court’s shift from deferential review in *Baker* to aggressive review in *Reynolds*. The shift from *Baker* to *Reynolds* is the central moment in the history of judicial involvement in politics and demands careful analysis. For it is *Reynolds*—not *Baker*—that lies at the heart of the Court’s modern posture. This Section criticizes this move.

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205. See generally Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997).

206. See Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENT. 97, 103 (1986) (“The phrase—corruption and the appearance of corruption—has a ring that most Americans will like. But its apparent clarity is deceptive, and its origin is at best clouded. Worst of all, it is irrelevant to the issues of contemporary campaign finance.”).

207. E.g., *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“The rule is not self-executing and is no substitute for the hard judgments that must be made.”); see *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 234 (1986) (Scalia, J., dissenting) (“Our cases make it clear that accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case.”).

208. See, e.g., *Celebrezze*, 460 U.S. at 789 (“The results of this evaluation will not be automatic.”); *Storer*, 415 U.S. at 730 (“What the result of this process will be in any specific case may be very difficult to predict with great assurance.”).

209. See Ely, *Gerrymanders*, *supra* note 157, at 611–12.

210. Compare *Easley v. Cromartie*, 532 US 234, 243–44 (2001) (rejecting the claim that race, not politics, explains the district lines), with *Shaw v. Hunt*, 517 U.S. 899, 905–06 (1996) (holding race was the predominant factor in drawing of district lines).

A. *The Promise: Deference, Rationality, and Exclusionary Reasons*

In an important early work, Rick Pildes describes the challenges faced by liberal republicanism in sustaining social and political order in the face of fragmentation and disunity.<sup>211</sup> A harmonious and consensual social order relied on a view of authority as both vertical—from the top down—and horizontal—across domains.<sup>212</sup> Values applied across all spheres. The erosion of this unified social order demanded a response. And according to Pildes, “[t]he most important element of this response was the adoption of strategies of differentiation between different spheres of authority—the drawing of boundaries to redefine the nature of authority and carve it up into separate spheres.”<sup>213</sup> No longer would values apply across spheres and domains; rather, the new order embraced fragmentation. Its newfound insight was precisely here: justifications for action became context-specific, and what the government could do in some areas would not be permitted in others. At the heart of it all lay the concept of “excluded reasons” and a reconsideration of our traditional understanding of individual rights.<sup>214</sup> Again, Pildes: “rights are the tools the American legal system has created for judicially policing the reasons excluded from being legitimate justifications for state action in different spheres.”<sup>215</sup> On this view, rights are not trumps deployed against governmental authority across the board, but the means by which courts differentiate between spheres of authority. This model alleviates the pressures inherent to balancing tests, yet creates pressures of its own. Most pressingly for my purposes, one difficulty stands above all others: how to define what constitutes a legitimate reason in some areas but not others.

Pildes offers his own field of study—voting rights—as an example of this approach to judicial decision-making.<sup>216</sup> In *Lassiter v. Northampton County Board of Elections*,<sup>217</sup> the Supreme Court upheld literacy tests as a legitimate exercise of state power, yet seven years later, in *Harper v. Virginia State Board of Elections*,<sup>218</sup> the Court struck down a state poll tax. The cases appear inconsistent on their face and are understood to reflect a change of heart on the part of the Court. Yet the cases are easily reconcilable

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211. See Pildes, *Avoiding*, *supra* note 200.

212. See *id.* at 719.

213. *Id.* at 720.

214. *Id.* at 722.

215. *Id.* at 724.

216. See *id.* at 741–44.

217. 360 U.S. 45, 53–54 (1959).

218. 383 U.S. 663, 666 (1966).

once we look to their particular context—voting—and the justifications proffered in defense of the state actions. The question is how far the state could go in defining its political community. As the Court explained in *Lassiter*, the “ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot.”<sup>219</sup> In contrast, “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”<sup>220</sup> While a state could choose to define its political community on grounds of literacy, it could not do so on grounds of wealth.

This was *Baker v. Carr*. The Court in *Baker* only decided the question of whether to play a role in redistricting at all.<sup>221</sup> The Court did little else, as exemplified by its adoption of a rationality standard, a standard that might be said to lead nowhere, “for most apportionments can be deemed irrational only if the legislature is *a priori* foreclosed from pursuing certain purposes, such as overrepresentation of some or of all rural areas.”<sup>222</sup> The state of Tennessee proved to be that extreme case, as the legislature failed to redistrict for many years, thus rendering a finding of irrationality quite easy.<sup>223</sup> The Court did not demand equality of population nor did it push for any other conception of democracy. Rather, the Court inquired about the reasons for the districts in question.<sup>224</sup> That is, the Court applied its rights rhetoric “to constrain *the kind of reasons* that the government can act on when it seeks to regulate or intervene in some sphere[s] of activity.”<sup>225</sup>

The state could proffer no defense for its plan, the explicit furtherance of no discernible interests. In this way, the Court in *Baker* only prodded the political process into action and went no further. To Alexander Bickel, the Court had simply “opened a colloquy, posing to the political institutions of Tennessee the

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219. *Lassiter*, 360 U.S. at 51.

220. *Harper*, 383 U.S. at 668.

221. BICKEL, *supra* note 57, at 196 (“The point decided was not what function the Court is to perform in legislative apportionment, and certainly not whether it is to take over full management, but whether it can play any role at all.”).

222. *Id.*

223. *Id.* (explaining that the situation in Tennessee was the result “not of a deliberate if imperfect present judgment of the political institutions, but merely of inertia and oligarchic entrenchment”).

224. See Fuentes-Rohwer, *supra* note 31, at 1369–70.

225. Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political “Rights,”* 34 HOUS. L. REV. 323, 325 (1997); see Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994).

question of apportionment, not answering it for them.”<sup>226</sup> As soon as the legislature passed a new statute, “curing the situation in some degree,” the need for judicial intervention would end.<sup>227</sup>

This is the proper posture for the law of democracy writ large. The Court must approach questions in the field with a measure of respect for the choices made by the political branches. Minimalism is particularly important in this area, for the Court is ultimately taking sides in politically charged controversies and elevating one policy preference over another. We must give Justice Frankfurter his due. This is true as an abstract proposition, yet more so in light of the incoherence prevalent in the field. The Court must only demand, as in *Baker*, a showing that the challenged statute pursues legitimate state interests. This is a standard of heightened rationality, or “rationality with bite.”<sup>228</sup> This is the posture adopted by the Supreme Court in *Baker* and by the lower court in the recent *Larios v. Cox*,<sup>229</sup> which the Court summarily affirmed. This is the proper standard for the law of democracy.

*B. From Baker to Reynolds: On Manageability?*

The conclusion that rationality review stands at the heart of the field returns us to the puzzle discussed earlier: how to explain the shift from rationality in *Baker* to the equipopulation principle in *Reynolds*. *Baker* is commonly understood as reserving the question of standards for another day. In this view, *Baker* casts the lower courts adrift without much guidance. *Reynolds v. Sims* plays an important and necessary role in this story, for it finally offers the constitutional standard that *Baker* fails to provide.

This account is clearly wrong, or, at best, incomplete. I don't think there is any question that *Baker* offered a standard for lower

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226. See BICKEL, *supra* note 57, at 196–97; Nicholas DeB. Katzenbach, *Some Reflections on Baker v. Carr*, 15 VAND. L. REV. 829, 832 (1962) (“The Supreme Court has not attempted to define what are the inequities of representation or to prescribe remedies. It has issued merely a call for action.”). Phil Neal strongly disagrees with the Court's approach as interpreted by Katzenbach, calling the preceding quote “the most devastating comment on *Baker v. Carr*.” Neal, *supra* note 88, at 327 n.211.

227. See BICKEL, *supra* note 57, at 196–97 (“Once a new apportionment statute has been passed, curing the situation in some degree, there will be little more that the judicial process can or should do.”).

228. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972) (contending that the Burger Court was “prepared to use the [equal protection] clause as an interventionist tool without resorting to the strict scrutiny language of the new equal protection” and labeling this approach “equal protection bite without ‘strict scrutiny’”).

229. See *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

courts to apply: heightened rationality and substantial equality. The justices looked for an explanation for the challenged Tennessee plan—any explanation—yet received none. Counsel for Tennessee conceded that if an explanation existed for the lines as then crafted, they did not know what it was. And so *Baker* demanded only a justification for the lines under review. The Court was not weighing justifications, nor was it terribly exacting in its review of the challenged plan. It only demanded a legitimate reason. And according to the majority, counsel for the state could not provide one.<sup>230</sup>

Two years later, *Reynolds* provided an exacting standard for reviewing districting plans—one person, one vote. But this need not be understood to mean that *Baker* did not offer a standard of its own. Instead, it is clear that the Court changed its mind and decided to police the famed thicket far more aggressively than *Baker* allows. This is the pivotal moment in the Court's historical handling of political questions, for it is *Reynolds* that ultimately leads to *Bush v. Gore* and the constitutionalization of American politics. Thus the most important question in the law of democracy: what led to this change?

An easy answer counts to five and the tenuous nature of the *Baker* majority.<sup>231</sup> The case was argued once and set for reargument while the votes of Justices Clark and Stewart hang in the balance. Four Justices—Douglas, Brennan, Black, and Chief Justice Warren—were fully prepared to interject the Court into the redistricting arena. Two Justices—Frankfurter and Harlan—wished for the Court to side with *Colegrove's* prudential approach. Justice Whittaker was prepared to side with Justice Brennan and the Chief Justice, but was not willing to cast the fifth vote. This leaves two justices in the middle—Stewart and Clark. One reading of *Baker* looks to these justices in the middle and explains the Court's apparent diffidence as a way to either attract Stewart and/or Clark to the majority, or keep them there.<sup>232</sup>

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230. See Fuentes-Rohwer, *Domesticating*, *supra* note 119, at 431–32.

231. A related answer argues that the Court had tapped a latent consensus among the public, which helped explain Baker's overwhelming reception. See McCloskey, *supra* note 87. Rick Hasen also looks to the notion of social consensus, yet concedes that barely any social consensus had evolved by 1964, a scant two years after *Baker*. See HASEN, *supra* note 33, at 81.

232. See Mikva, *supra* note 94, at 658 (“In *Baker v. Carr*, Justice Brennan refused to go beyond the jurisdiction question because he brought Justice Stewart along to the majority with that limitation. And even after Justice Clark surprisingly joined in the decision, Justice Brennan stayed to the narrow result and ended up with six votes rather than five.”); Neal, *supra* note 88, at 267.

More counting does not get us any closer to a conclusive answer. Among the Justices, Justices Clark, Harlan, Frankfurter, and Stewart do not interpret the equal protection clause as requiring population equality. In turn, Justice Douglas appears to be in the equipopulation camp but would allow some room for weighting.<sup>233</sup> Justice Black also appears to be in this camp,<sup>234</sup> while the Chief Justice and Justice Brennan are silent on this issue.<sup>235</sup> By the time *Reynolds* is decided, Justices Frankfurter and Whittaker have left the Court, replaced by Justices Goldberg and White. This new composition leads the Court to *Reynolds*. But what exactly does *Reynolds* lead to?

It is conventional wisdom that *Reynolds* offers a strong and assertive application of “one person, one vote.”<sup>236</sup> This is a story where the Court asserts itself in the face of chaos and uncertainty. The *Baker* approach is uncertain, perhaps even devoid of manageability, and places great trust and discretion in the hands of the lower courts. *Reynolds* responds to this reality and in so doing demonstrates the Court’s unwillingness to trust the judicial process. Case-by-case adjudication appears to be a thing of the past.

The Court’s own words get in the way of this story, however. *Reynolds* speaks the language of “substantial equality”<sup>237</sup> and refers to the use of population only as “the starting point,”<sup>238</sup> while lending assurances that “mathematical nicety is not a constitutional requisite.”<sup>239</sup> On its face, then, *Reynolds* does not lead to a hardened and unforgiving equipopulation principle. The Court is very clear on this point: “[f]or the present, we deem it expedient not to attempt to spell out any precise constitutional tests.”<sup>240</sup> The Court even embraces case-by-case adjudication.<sup>241</sup>

A better answer connects *Baker* to *Reynolds* through the prism of exclusionary reasons. In *Baker*, the Court implies that population equality is the “starting point” for evaluating districting plans.<sup>242</sup> Hence the prominent use of various population charts in the

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233. See *Baker v. Carr*, 369 U.S. 186, 244–45 (1962) (Douglas, J., concurring) (“Universal equality is not the test; there is room for weighting.”).

234. See, for example, his dissenting opinion in *Colegrove v. Green*, 328 U.S. 549 (1946) (Black, J., dissenting).

235. For a discussion of these positions, see Lucas, *supra* note 57, at 773 n.247.

236. See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

237. *Id.* at 568.

238. *Id.* at 567.

239. *Id.* at 569.

240. *Id.* at 578.

241. *Id.*

242. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

litigation and during deliberations. The Court in *Reynolds* makes this point explicitly. But the Court goes much farther than that, using language that should strike readers as curious and misplaced. For example, the Court explains that “[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race . . . or economic status.”<sup>243</sup>

If the analogy holds, equating residential dilution with race discrimination should lead to strict scrutiny. Instead, the Court takes a decidedly different path: “[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.”<sup>244</sup> Similarly, “[a] state may legitimately desire to maintain the integrity of various political subdivisions,<sup>245</sup> but “history alone,” or “economic or other sorts of group interests, are [not] permissible factors in attempting to justify” population divergences.<sup>246</sup> “Considerations of area alone” also fall short as justifications.<sup>247</sup> The punch line could not be any clearer: a state may diverge from strict population equality “[s]o long as the divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy.”<sup>248</sup>

*Reynolds* essentially promises to be a more explicit remake of the *Baker* opinion, if the Court’s language can be believed. But the aftermath of the reapportionment revolution gets in the way of this story. Unwilling to regulate the law of democracy at the margins, the Court soon expanded the scope of its intervention into the world of politics. The domestication of the political-question doctrine led to the internalization of any and all questions of politics as part and parcel of traditional judicial review. *Reynolds* is an important aspect of this story because it demonstrates how easily and simplistically the Court could come to dominate a difficult area. Once the Court could implement a standard such as “one person, one vote,” there was little the Court could not do. This was Hercules, on steroids.<sup>249</sup>

Even within the population morass begun by *Reynolds*, the Court took its teachings to an extreme, yet questionable, resting

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243. *Id.* at 566.

244. *Id.* at 567.

245. *Id.* at 578.

246. *Id.* at 579–80.

247. *Id.* at 580.

248. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

249. The reference is to RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977).

place.<sup>250</sup> In so doing, it brings to mind Professor Henkin's prescient comment: "Judgment consists in drawing lines, not in staying put, nor in following blindly where the inertia of motion leads. But a doctrinal line must have a reason: that a line has to be drawn somewhere does not mean that it may be drawn anywhere."<sup>251</sup> In due course, the Court settled on a two-tiered equipopulation track.<sup>252</sup> For congressional plans, the Court applies the "one person, one vote" principle with a vengeance. Under Article I, Section 2, the Court concludes that any deviation from equality must be "unavoidable despite a good-faith effort to achieve absolute equality,"<sup>253</sup> or else it must be justified. In turn, state plans are subject to far more flexible scrutiny under equal protection principles. For plans enacted by state legislative bodies, the Court devises an "under 10%" *de minimis* line, an apparent safe haven that affords the plan in question a prima facie grant of constitutionality.<sup>254</sup> Larger deviations must be justified by the reasonable pursuit of a rational state policy.<sup>255</sup> Yet court-ordered plans are subject to stricter standards. Deviations from population equality are not protected by the ten-percent standard.<sup>256</sup> Rather, they must be "little more than *de minimis*" and must be rationally supported by important and significant state interests.<sup>257</sup>

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250. See Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy Grail of "One Man–One Vote,"* 1969 SUP. CT. REV. 219, 227 ("After an auspicious beginning in *Baker v. Carr*, the Court has proceeded logically and inexorably from a defective major premise to a questionable conclusion concerning the population role in districting and apportionment.")

251. Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 63 (1968).

252. While this distinction has been criticized for its artificiality, (see, for example, Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993)), some have argued that the Court may play a better role in regulating congressional elections than state elections. See, e.g., Charles L. Black, Jr., *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13 (1962).

253. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); see *Karcher v. Daggett*, 462 U.S. 725, 729 (1983); *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969).

254. See *Gaffney v. Cummings*, 412 U.S. 735 (1973). But see *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004) (affirming lower court opinion that strikes down state plan within ten percent safe haven).

255. See *Mahan v. Howell*, 410 U.S. 315 (1973).

256. See *Chapman v. Meier*, 420 U.S. 1, 26 (1975) ("A court-ordered plan . . . must be held to higher standards than a State's own plan."); *Connor v. Finch*, 431 U.S. 407, 414 (1977) ("We have made clear [in *Chapman*] that . . . a court will be held to stricter standards in accomplishing its task than will a state legislature.")

257. *Chapman*, 420 U.S. at 27.

The Court must get its due: a legislature could not have done it any better. This is a manageable and administrable mess, to be sure, but the much harder question, as Professor Ely dryly remarked, is “what else it has to recommend it.”<sup>258</sup> This is an important point for those who exhort the Court’s aggressive posture within the law of democracy, as they must contend with evidence of ad hoc theorizing and arbitrary line-drawing. Rather than postulate our theories of choice, we must first reconsider the Court’s involvement in the law of democracy.

#### CONCLUSION

*Indeed, the recent Supreme Court dissents make me feel as if I’ve entered Mondo Bizarro when the Justices defend against a charge of racial gerrymandering by responding that it was actually politics . . . .*<sup>259</sup>

Four decades have elapsed since the Court entered the political thicket in *Baker v. Carr*. And unfortunately, the evidence of the Court’s success in this arena is decidedly mixed. The early days of the reapportionment revolution brought about needed change within the stagnant legislative processes across the nation. But as the Court gained confidence in its handling of political questions, its posture became increasingly aggressive. This is a selective aggressiveness, inconsistent across the field.

We could go on making the arguments we do and behaving as if it all makes sense. Unfortunately, the Court has made clear that it cannot be trusted in its self-appointed role as regulator of our politics. For my part, I would rather see the Court pay heed to the lessons of *Baker*. The law of democracy, and American democracy as a whole, would be better served with a Court far more humble and deferential to policy decisions made elsewhere. This was the promise of *Baker v. Carr*.

Over the course of four decades, the Court has had its chance to regulate the field of democracy. The evidence is in, and not very flattering: the doctrine is confused, incoherent, and driven by judicial attitudes and the justices’ notions of good public policy. The Court assertively makes its way through the famed thicket while guided not by established doctrine, but by the infamous “judicial hunch.” Professor Karlan makes this point characteristically well: “[h]aving embarked on the course of resolving political questions into judicial ones, it is notable how many of these judicial questions the Court fails to resolve, or to resolve in a doctrinally coherent and

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258. ELY, *DISTRUST*, *supra* note 23, at 121.

259. Ely, *Gerrymanders*, *supra* note 157, at 620.

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stable way.”<sup>260</sup> In this vein, *Bush v. Gore* is not altogether mysterious, or appalling, or even shocking; rather, it is the traditional way the Court has come to navigate the field.

In the meantime, scholars continue to press for their preferred theories for reviewing the law of democracy. This is another way of saying that the scholarly community has embraced the role of the Court as philosopher king. But the Court has proven unequal to the task. It is time for the Court to go back to its roots and the promise of *Baker v. Carr*.

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260. Karlan, *supra* note 196, at 292.