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Constitutional Pluralism and Democractic Politics: Reflections on the Interpretive Approach of Baker v. Carr

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CONSTITUTIONAL PLURALISM AND DEMOCRATIC POLITICS: REFLECTIONS ON THE INTERPRETIVE APPROACH OF *BAKER v. CARR*

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Baker v. Carr *is one of the Supreme Court's most important opinions, not least because its advent signaled the constitutionalization of democracy. Unfortunately, as is typical of the Court's numerous forays into democratic politics, the decision is not accompanied by an apparent vision of the relationship among democratic practice, constitutional law, and democratic theory. In this Article, Professor Charles revisits* Baker *and provides several democratic principles that he argues justifies the Court's decision to engage the democratic process. He examines the decision from the perspective of one of its chief contemporary critics, Justice Frankfurter. He sketches an approach, described as constitutional pluralism, for thinking about* Baker *and other cases involving judicial supervision of democratic politics. Using constitutional pluralism as an interpretive tool, he argues that the aim of judicial involvement in democratic politics ought to be to vindicate specific democratic principles. To the extent that a challenged democratic practice serves multiple and legitimate democratic ends, the federal courts should respect the judgment of democratic actors.*

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INTRODUCTION

If *Baker v. Carr*[1] was ever controversial, it is no longer so.[2] The decision has not only enjoyed near-universal acceptance, it is also recognized as one of the Court's finest moments.[3] *Baker* is widely hailed for at least two reasons. First, the decision has had a remarkable effect on the political landscape. As one commentator has noted, *Baker* "brought about massive, nationwide political reform where before prospects for change had been hopeless."[4] Second, *Baker* represents the constitutionalization of democratic politics, and opened the door to judicial regulation of democracy.[5] Following *Baker*, the Court has decided cases involving the regulation of political parties,[6] access to ballots,[7] racial redistricting,[8] the role of

1. 369 U.S. 186 (1962).

2. John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 577 n.7 (1997) (stating that *Baker* is "now conventionally recognized ... as among the Court's more legitimate and successful interventions").

3. Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683, 685.

4. *Id.*

5. Rick Pildes defines the constitutionalization of democracy as the process of subjecting the "fundamental structure of democratic processes and institutions to constitutional constraint." *See* Richard H. Pildes, *Constitutionalizing Democratic Politics*, *in* A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY 1 (Ronald Dworkin ed., forthcoming 2002).

6. Cal. Democratic Party v. Jones, 530 U.S. 567, 569–86 (2000) (holding that California's blanket primary system violates a political party's First Amendment right of

partisanship in the political process,[9] and campaign finance reform[10]—to name some of the more prominent categories.

Notwithstanding the importance of *Baker*, one of the opinion's glaring weaknesses is the Court's failure to defend its decision to supervise the political process. Most pertinently, the Court essentially disregarded Justice Frankfurter's remonstrations that the Constitution did not provide any guidance to the federal courts to justify judicial supervision of the political process.[11] The essence of Frankfurter's dissent in *Baker* was a contention that the Constitution's text, history, and structure do not dictate any particular theory.[12] From this observation, Frankfurter reasoned that in the absence of constitutional guidance, no neutral principle exists for picking such a political theory.[13] Consequently, courts have no legitimate warrant for doing so and the lack of such legitimacy would cause compliance problems.

The Court's only response on this score was the retort that "judicial standards under the Equal Protection Clause are well-developed and familiar."[14] As a consequence of the Court's failure to defend judicial supervision of the political process, the Court ignored a number of important questions that continue to beset judicial

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association); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 216 (1989) (rejecting several statutory restrictions on the organization and activities of political parties as non-compelling violations of the party's First Amendment rights).

7. *See* Burdick v. Takushi, 504 U.S. 428, 430 (1992) (holding Hawaii's prohibition on write-in votes constitutional); Lubin v. Panish, 415 U.S. 709, 710 (1974) (holding unconstitutional a California statute requiring a filing fee to be paid by an indigent candidate wishing to be placed on the ballot).

8. *See* Easley v. Cromartie, 532 U.S. 234, 257 (2001) (rejecting as clearly erroneous the district court's finding that racial considerations predominated in the drawing of North Carolina's twelfth congressional district); Shaw v. Reno, 503 U.S. 630, 642 (1993) (holding that appellants had stated an equal protection claim alleging an impermissible use of race in redistricting).

9. *See* Davis v. Bandemer, 478 U.S. 109, 113 (1986) (finding political gerrymandering to be a justiciable issue); Gaffney v. Cummings, 412 U.S. 735, 736 (1973) (considering an equal protection challenge to a Connecticut reapportionment plan).

10. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978) (holding statutory limitations on corporate expenditures for political issues unconstitutional); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (upholding individual political contribution limits).

11. *See* Baker v. Carr, 369 U.S. 186, 289–97 (1962) (Frankfurter, J., dissenting).

12. *See id.* (Frankfurter, J., dissenting).

13. *See id.* at 295–97 (Frankfurter, J., dissenting).

14. *Id.* at 226. Professor Fuentes-Rohwer's important contribution to this Symposium argues that judicial standards were in fact available under the Equal Protection Clause and that lower courts were able to resolve apportionment disputes post-*Baker*. *See* Luis Fuentes-Rohwer, Baker's *Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV 1353, 1366–68 (2002).

supervision of democratic politics. For example, when and why should federal courts intervene in the political process?[15] What role can and should the courts play in resolving political disputes? And perhaps more importantly, do the federal courts have a constitutional or political theory to guide their path through this political thicket?[16] These are the challenges that confronted the *Baker* majority and continue to confront the Court today.

This Article argues that *Baker v. Carr* is best understood as a case that attempts to limit, through judicial supervision of the political process, the excesses of democratic politics. I term this approach "constitutional pluralism." My point of departure is that judicial review of democratic politics must be evaluated from a multidimensional continuum. Constitutionalization of democratic politics—and consequently judicial supervision of the political process—finds its strongest justification when democratic practices do not serve any legitimate democratic ends and violate multiple democratic principles. Conversely, judicial supervision of the political process is least justified (if at all) where democratic practices serve democratic ends and judicial review does not vindicate any democratic principles. Some of the principles that I identify in this Article are majoritarianism, responsiveness, substantial equality, and interest representation.[17] Assuming that the case for judicial abstention from democratic politics is unpersuasive on practical or institutional grounds, the issue becomes which principles guide the

15. 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, 1345 (2001).

16. Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 716 (1998) (concluding that the Court's theory is "unsophisticated and underdeveloped").

17. Of course this is not an exhaustive list, nor is it meant to be. I have written elsewhere on the importance of political association as a democratic value. *See* Guy-Uriel E. Charles, Race, Political Participation & the Right of Political Association: The First Amendment Implications of the Court's Racial Districting Doctrine (Apr. 12, 2002) (unpublished manuscript, on file with The North Carolina Law Review). Alternatively, one may argue, as have Professors Issacharoff and Pildes, that political competition is a core democratic value. *See, e.g.*, Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y, 91, 100 (2000) (drawing a partial comparison between "competitive political processes" and "the competitive search for efficiency . . . in other markets"); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 312–13 (2001) (noting that "the modern political party is the engine of democratic participation and competition"); Issacharoff & Pildes, *supra* note 16, at 715–16 (noting that political parties are a core part of democracy); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999) ("The way to sustain the constitutional values of American democracy is often through the more indirect strategy of ensuring appropriately competitive interorganizational conditions.").

Court as it interprets the Constitution to regulate democratic politics.[18] The argument presented here is that the Court should utilize democratic principles to direct its interpretation of the Constitution. Thus, judicial review would be warranted only where politics fail to give effect to core democratic principles.[19]

A necessary implication of this approach is that democratic theory is an indispensable guide in the judicial supervision of democratic politics.[20] Put differently, federal courts, in particular the Supreme Court, should not disturb the democratic process unless the Court can identify at least one fundamental democratic principle that would be vindicated by judicial review. This Article advocates that the Court explicitly reads democratic principles, primarily drawn from political theory, as a method of regulating law and politics and interpreting the Constitution. Constitutional pluralism is an interpretive approach that mines democratic theory to ascertain the aims and purposes of democratic politics and to bridge the gap between the constitutional text and democratic practice.[21] I suppose

18. History is certainly helpful in some contexts, but in the context of law and politics, history is more often than not a poor shepherd.

19. Constitutional pluralism may be related to the expressive harms approach popularized by Professor Pildes, with at least one important conceptual difference. *See* 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, 506–07 (1996) (arguing that public policies can violate the Constitution if they do not reflect the proper respect for public values). Whereas the expressive harms approach is concerned with the meaning of governmental action, constitutional pluralism is concerned with the concrete and actual costs that result when democratic principles are abandoned. Additionally, the expressive harms approach asks the Court to interpret the social meaning of state action and to incorporate social meaning into constitutional interpretation. *See id.* at 508–09. In contrast, constitutional pluralism expects the Court to recognize the principles that make democratic politics possible and to incorporate those principles into its constitutional interpretation. Finally, an expressive harm is triggered when the State abandons other values in favor of a single one. *Id.* at 509. Constitutional pluralism may be triggered where the State ignores an important democratic value, even though other democratic values are minimally reflected in representative structures.

20. For arguments on the importance of democratic theory to judicial supervision of politics, see Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407 (forthcoming 2002), *available at* http://www.law.fsu.edu/journals/lawreview/downloads/292/Gerken.pdf; Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83 (1997). *But see* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 50 (2001) ("My basic suggestion is that people can often agree on constitutional *practices*, and even on constitutional rights, when they cannot agree on constitutional *theories*. In other words, well-functioning constitutional orders try to solve problems, including problems of deliberative trouble, through reaching *incompletely theorized agreements*.").

21. As some leading commentators have explained, "American courts facing contemporary questions of democratic principles today often have to construct a

the incorporation of those principles into the constitutional structure as a matter of interpretive necessity, though they are not admittedly part of the constitutional text.[22]

Part I of this Article reviews Justice Frankfurter's arguments in both *Colegrove v. Green* and *Baker*. Frankfurter's objections are worth exploring in detail both because they present a forceful articulation of the stakes of judicial involvement in democratic politics and because they are perennial objections to judicial supervision of the democratic process. Part II addresses Frankfurter's concerns and argues that *Baker* is best understood as a case that legitimates judicial interference with the political process when state actors abandon core democratic principles, even in the single-minded pursuit of an otherwise legitimate democratic purpose. Part II describes this interpretive approach as constitutional pluralism and explores four core principles of democratic politics that were violated by Tennessee's apportionment scheme in *Baker*.[23]

I. FRANKFURTER'S OBJECTIONS

Baker was not the Court's first encounter with the problem of malapportionment. Though many suits were filed challenging gross population disparities in various states, the Court refused to adjudicate these disputes on their merits.[24] Most of the cases were disposed of by per curiam opinions that relied upon *Colegrove v. Green*,[25] one of the Court's earliest pronouncements on the justiciability of malapportionment.

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conception of democracy with less textual and historical foundation than in some other areas of constitutional law." SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 20 (2d ed. 2001).

22. Those principles must necessarily be incorporated into the constitutional structure, otherwise democratic politics, particularly the American brand—liberal, republican, and constitutional—is impossible to sustain. My approach is simply honest and explicit with respect to this incorporation.

23. I ignore for the time being some important details. For example, I leave for later exploration the implications of constitutional pluralism for other disputes, such as whether *Reynolds v. Sims* was correctly decided or whether the political and racial gerrymandering cases were correctly decided.

24. *See, e.g.*, Matthews v. Handley, 361 U.S. 127 (1959); Hartsfield v. Sloan, 357 U.S. 916 (1958); Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Cox v. Peters, 342 U.S. 936 (1952); Remmey v. Smith, 342 U.S. 916 (1952); Tedesco v. Bd. of Supervisors, 339 U.S. 940 (1950); South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Barrett, 330 U.S. 804 (1946); Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Green, 328 U.S. 549 (1946); Wood v. Broom, 287 U.S. 1 (1932).

25. 328 U.S. at 549.

In *Colegrove*, Justice Frankfurter articulated a defense of the Court's refusal to adjudicate reapportionment disputes. Justice Frankfurter's apologia in *Colegrove*, which is revisited in his *Baker* dissent, is fundamentally an argument about the proper role of the judiciary in the political process. Frankfurter's arguments fall into four different, though related, categories: institutional boundaries; institutional impotence; institutional competence; and judicial legitimacy. These concerns led Frankfurter to the Hobbesian conclusion that citizens have no judicial recourse against the ills of population inequality, but rather must rely upon their representatives to provide relief against malapportionment.[26]

Examining Frankfurter's concerns in *Colegrove* is important in part because doing so helps us better understand *Baker*. Understanding Frankfurter's objections to *Baker* is also important because his protestations to the constitutionalization of democratic politics reflect recurring concerns in constitutional law regarding the role of the judiciary in the democratic process. Of his four objections to judicial supervision of the democratic process, Frankfurter was most worried about judicial legitimacy; his concern was that judicial supervision of democratic politics would undermine the Court's authority and the faith that political actors and the electorate place in the Court. If the Court's legitimacy is undermined, both the electorate and political elites will be less likely to abide by the Court's decisions. Consequently, the Court will be less able to fulfill its institutional tasks.[27] To better appreciate these concerns, let us look carefully at Frankfurter's conception of the role of the judiciary.

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26. *Compare* THOMAS HOBBES, LEVIATHAN 217–22 (C.B. Macpherson ed., 1988) (1651) ("From hence it followeth, that when the Actor maketh a Covenant by Authority, he bindeth thereby the Author, no lesse than if he had made it himselfe; and no lesse subjecteth him to all the consequences of the same."), *and* Hanna Pitkin, *Hobbes's Concept of Representation—I*, 58 AM. POL. SCI. REV. 328, 329 (1964) (concluding that Hobbes's concept of representation "comes to be a way of establishing the unlimited authority of the sovereign, and his subjects' unlimited obligation to obey."), *with* Colegrove v. Green, 328 U.S. 549, 554 (1946) ("Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress."), *and* Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting) ("In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.").

27. As I argue in Part II.A, the concern that *Baker* would undermine the Court's legitimacy, interestingly, turns out to be the worry that has been vindicated the least by history, *Bush v. Gore* notwithstanding. Remarkably, the Court continued (and continues) to decide deeply political issues without significantly leveraging its authority. *See generally* John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 778–81, 791 (2001) (arguing that the Court will survive *Bush v. Gore* with its reputation relatively unharmed). Further, with the exception of Frankfurter's argument that the judiciary is

A. *Institutional Boundaries*

Frankfurter's leading salvo against judicial supervision of the democratic process is the argument that regulating politics takes the Court outside of its constitutionally prescribed institutional boundaries.[28] His argument is that were the Court to adjudicate political disputes it would invade the institutional domains of the political branches. Thus, in *Colegrove*, Frankfurter maintained that it "is hostile to a democratic system to involve the judiciary in the politics of the people."[29]

This institutional boundaries argument is advanced on three major fronts. Frankfurter looked to the text, to the structure, and practices of the Constitution to support his contention that the courts should not adjudicate political disputes.

1. The Text

Frankfurter concluded that the Court should stay its hand in reapportionment cases in part because reapportionment is a matter clearly committed to other branches by the Constitution and from which the Court "has been excluded by the clear intention of the Constitution."[30] Though he acknowledges that malapportioned congressional districts are "evils" under a proper interpretation of the Constitution,[31] these are not the types of evils that the Constitution empowers the federal courts to remedy.[32] As he notes in *Colegrove*, the "short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination [of] whether States have fulfilled their responsibilities."[33]

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incompetent to adequately supervise the democratic process, Frankfurter's predictions of doom have not materialized. For a similar argument by Professor Schuck, see Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1377–84 (1987).

28. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

29. *Colegrove*, 328 U.S. at 553–54; *see also Baker*, 369 U.S. at 287 (Frankfurter, J., dissenting) ("The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade.").

30. *Colegrove*, 328 U.S. at 554.

31. *Id.*

32. *Id.* ("The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction.").

33. *Id.*

In *Baker*, Frankfurter contrasted the "cases involving Negro disfranchisement" as examples of the Court fulfilling the role designated for it by the Constitution.[34] Unlike the reapportionment cases, the cases in which the Court facilitated the right of African Americans to participate in the political process—for example the White Primary Cases—were adjudicated pursuant to an "explicit and clear constitutional imperative."[35] A "compelling motive of the Civil Rights Amendments," Frankfurter assured us, was to usher an "end of discrimination against" African Americans.[36] Consequently, those cases cannot serve as persuasive precedent sufficient to compel a broad argument in favor of judicial review of the political process.

2. Constitutional Practices and Structure

Frankfurter's attempt to determine the "inherent limits" of the Court's power is not grounded solely in the text of the Constitution. Frankfurter employed two additional methods of interpretation to support the textual argument. He examined past and extant practices and drew inferences from the structure of the Constitution.

For example in *Colegrove*, Frankfurter maintained that federal courts may not enter the political thicket even when "Congress may have been in default in exacting from states obedience to its mandate" to apportion or when Congress itself "has at times been heedless ... and not apportioned according to the requirements of the Census."[37] As he argued, whether or not Congress has mandated population equality, as it had done from time to time, and whether or not the states have complied, as they seldom did, it "never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion" or to exact obedience from the states to its mandate.[38] No one has ever thought to complain to the Court to compel Congress to perform even though "[t]hroughout our history, whatever may have been the controlling Apportionment Act, the most glaring disparities have prevailed as to the contours and the population of districts."[39] From the evidence of these "glaring disparities," Frankfurter concluded that to "sustain this action would cut very deep into the very being of Congress."[40]

34. *Baker*, 369 U.S. at 285 (Frankfurter, J., dissenting).
35. *Id.* (Frankfurter, J., dissenting).
36. *Id.* at 285–86 (Frankfurter, J., dissenting).
37. *Colegrove*, 328 U.S. at 554–55.
38. *Id.* at 555.
39. *Id.*
40. *Id.* at 555–56.

But evidence of contemporary practices does not tell us why this is an area in which congressional supremacy is unlimited and complete. To appreciate the nature of congressional power, and concomitantly, the proper role of federal courts, we have to understand the structure of the Constitution. "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."[41] These self-enforcing mechanisms include the constitutional requirement that states remit fugitives from sister states,[42] violation of the command that laws are to be faithfully executed,[43] and of course, the "great guaranty of a republican form of government."[44] Thus, Frankfurter was able to conclude that the structure of the Constitution "has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."[45] In his view, the Court did not have a role to play.

Frankfurter's reliance on constitutional structure and practice as a method of interpretation is most prominently articulated in his dissent in *Baker*. Responding to the argument that malapportionment violates the Equal Protection Clause, Frankfurter relied first on the textual argument that the Constitution does not expressly authorize federal courts to guarantee population equality in apportionment.[46] In support of that textual argument, he reasoned from past and contemporary practices as well as from the structure of the Constitution.

His assumption is that the Fourteenth Amendment is a "historical product"[47] that can be interpreted in light of past and present practices. To the extent past and present practices support the contention that substantial equality in apportionment is a fundamental prerequisite to representative democracy, these practices provide some clues to the federal courts regarding their proper role in the political process. Frankfurter's inquiry is whether:

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41. *Id.* at 556.

42. *Id.* (citing U.S. CONST. art. IV, § 2, cl. 2).

43. *Id.* (citing Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866)).

44. *Id.* (citing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1911)).

45. *Id.*

46. Baker v. Carr, 369 U.S. 186, 285–86 (1961) (Frankfurter, J., dissenting); *see supra* text accompanying notes 30–33.

47. *Baker*, 369 U.S. at 302 (Frankfurter, J., dissenting) (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).

> [R]epresentation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of political equality preserved by the Fourteenth Amendment—that it is . . . "the basic principle of representative government . . . ."[48]

Of course, Frankfurter concluded that past and contemporary practices do not support the contention that population equality is necessary to representative government. As he notes:

> [Population equality] was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of the adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today.[49]

In so far as past and present practices are probative of the importance of population equality, they do not support the majority's proposition.[50]

Frankfurter is not content to leave the point there. Past and present practices do not simply undermine the contention that substantial population equality is a necessary precondition in a constitutional democracy, they also demonstrate that "there is not—as there has never been—a standard by which the place of equality as a factor in apportionment can be measured."[51] This absence of standards links adjudication of democratic politics under the Fourteenth Amendment to the Guarantee Clause—the constitutional boogeyman. For Frankfurter, cases arising out of the Guarantee Clause challenge the very structure of representative institutions.[52] As he stated in *Colegrove*, the basis for these types of suits is that the polity suffers a wrong *qua* polity.[53] Indeed, the problem with these

48. *Id.* at 301 (Frankfurter, J., dissenting).

49. *Id.* (Frankfurter, J., dissenting); *see also id.* at 301–23 (Frankfurter, J., dissenting).

50. *See, e.g., id.* at 319–24 (Frankfurter, J., dissenting) (providing contemporary examples of American apportionment schemes).

51. *Id.* at 322–23 (Frankfurter, J., dissenting).

52. *Id.* at 295 (Frankfurter, J., dissenting) ("In determining . . . [Guarantee Clause issues] non-justiciable, the Court was sensitive to the same considerations to which its later decisions have given the varied applications already discussed. It adverted to the delicacy of judicial intervention into the very structure of government.").

53. Colegrove v. Green, 328 U.S. 549, 552 (1945) ("This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity.").

types of suits is that they do not provide clear standards for effective judicial supervision of the political process.[54]

Frankfurter argued that reapportionment cases under the Fourteenth Amendment are eerily similar to Guarantee Clause cases because both challenge the form and structure of government.[55] Given that adjudication under the Equal Protection Clause would be demonstrably indistinguishable from the Guarantee Clause, the Court should not rely on the Equal Protection Clause to provide constitutional content and restraint on democratic politics.[56] Once

54. *Baker*'s rejection of Frankfurter's conception of the Court's role in *Colegrove* perhaps represents an important paradigm shift. Frankfurter in *Colegrove* conceived of the Court's role as limited to providing individual relief in cases in which individual rights, narrowly construed, were violated. Frankfurter distinguished individual rights cases from cases that challenge the structural framework of the political process. Frankfurter's draws this distinction—individual rights versus structural rights—from Justice Holmes's opinion in *Giles v. Harris*, 189 U.S. 475 (1903). In *Giles*, Justice Holmes, writing for the majority, rejected an equitable claim by Black plaintiffs challenging the State of Alabama's refusal to allow them to vote. Justice Holmes concluded, "relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the United States." *Giles*, 189 U.S. at 488. One can hear in Justice Frankfurter's distinction in *Colegrove* between private wrongs and political wrongs echoes of Holmes's similar distinction in *Giles*. As Professor Issacharoff notes, *Giles* "introduced an immediate division between claims concerning malfunctioning of the political process and claims of narrowly focused individual rights." Samuel Issacharoff, *The Structures of Democratic Politics*, 100 COLUM. L. REV. 593, 595 (2000). For a wonderful overview of the *Giles* litigation, see generally Richard Pildes, *Democracy, Anti-Democracy, and the Cannon*, 17 CONST. COMMENT. 295 (2000). In *Baker*, Justice Brennan treats Justice Frankfurter's distinction between private and structural wrongs as a standing issue and rejects the implication that the judicial power is limited to resolving private disputes. *See Baker*, 369 U.S. at 206–07 & n.27. As I argue in this Article, this structural move makes it possible to understand *Baker* and justify the Court's increased supervision of democratic politics in teleological terms. Unfortunately, as Professor Issacharoff notes, following *Baker*, "the Warren Court sought to outfit the emerging federal constitutional oversight of the political process in the unbecoming garb of individual rights of individual rights of participation." Issacharoff, *supra*, at 595. However, as Professor Karlan has demonstrated recently, the Court has been unable to escape the structural justifications for regulating democratic politics. *See* Karlan, *supra* note 15, at 1346 ("The Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted.").

55. *Baker*, 369 U.S. at 297 (Frankfuter, J., dissenting) ("The present case . . . is, in effect, a Guarantee Clause claim masquerading under a different label.").

56. Frankfurter goes on to make the persuasive argument that the Court cannot interpret the Equal Protection Clause without first coming to terms with the meaning of the Guarantee Clause. He maintains, "a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal–protection purposes will depend upon what frame of government, basically, is allowed. To divorce 'equal protection' from 'Republican Form' is to talk about half a question." *Baker*, 369 U.S. at 301 (Frankfuter, J., dissenting); *see also* Stanley

again, Frankfurter combines evidence from past and present practices with a structural argument to strengthen the contention that regulating the political process is not a role delegated to the federal courts by the Constitution.

B. Institutional Impotence

The next arrow in Frankfurter's quiver is aimed right at the heart of the judiciary as an institution. With this argument, Frankfurter warned of the "futility of judicial intervention."[57] Here, Frankfurter reminded the judiciary of its precarious place in the constitutional structure due to its lack of stature and power. The "Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[58]

1. State Actors as Necessary Constitutional Partners

What happens if the Court orders the states to apportion according to some standard of substantial political equality and the states refuse to comply? For Frankfurter, state actors are necessary partners in the enterprise of constitutionalism; the Court depends upon them to carry out its orders.

Though this point is semi-interred in the various opinions in *Colegrove* and *Baker*, one wonders to what extent various Justices were concerned with the possibility that some states may have refused to comply with a judicially imposed remedy.[59] Consider Justice Rutledge's concurrence in *Colegrove* as a point of departure. Justice Rutledge explained that were it not for the Court's decision in *Smiley*

H. Friedelbaum, Baker v. Carr: *The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 CHI. L. REV. 673, 692 (1962) (accord). Frankfurter was thus keenly aware that *Baker* fundamentally compelled the Court to think about the structural composition of representative institutions. The Court is obligated to inquire "into the theoretic base of representation in an acceptably republican state." *Baker*, 369 U.S. at 301 (Frankfuter, J., dissenting).

57. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

58. *Id.* (Frankfurter, J., dissenting).

59. *See, e.g.*, Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64 (1962). Emerson writes:

> The greatest danger facing the courts in dealing with the question of remedies has been that legislative or executive officials would refuse to comply with remedial decrees. The spectre of open conflict between the courts, "possessed neither of the purse nor the sword," and officials of other branches, fired with partisan zeal and threatened in their very political existence, has continually haunted the judiciary.

Id. at 75–76.

v. Holm,[60] which he considered binding in *Colegrove*, he would find that the issues presented in *Colegrove* were non-justiciable. He continues:

> [W]e have but recently been admonished again that it is the very essence of our duty to avoid decision upon grave constitutional questions, especially when this may bring our function into clash with the political departments of the Government, if any tenable alternative ground for disposing of the controversy is presented.[61]

Though he was unable to find a tenable alternative in *Smiley*, one was purportedly apparent in *Colegrove*.[62] The "gravity of the constitutional questions raised [by *Colegrove* is] so great, together with the possibilities for collision" that federal courts should decline to exercise their jurisdiction in a "cause of so delicate a character."[63]

But what is it that made this cause "so delicate a character?" And what did he mean by the "possibilities for collision?" Justice Rutledge provided some clues in the subsequent paragraphs of his concurrence. The relief sought "pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily ...."[64] Perhaps more importantly, Justice Rutledge remarked the "shortness of the time remaining makes it doubtful whether action could, or *would*, be taken in time to secure for petitioners the effective relief they seek."[65]

Consider also Frankfurter's *Colegrove* opinion, in which he expresses a similar concern, if only slightly less subtly. Frankfurter explains why the Court is unable to provide a remedy for malapportionment. In his opinion, federal courts cannot redistrict the whole state, for that would be out of the question.[66] The best that the Court could do would be to provide injunctive relief and declare the existing apportionment unconstitutional.[67] "The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket."[68] The problem with this

60. 285 U.S. 355 (1932).
61. Colegrove v. Green, 328 U.S. 549, 564 (1945) (Rutledge, J., concurring).
62. *Id.* (Rutledge, J., concurring).
63. *Id.* at 564–65 (Rutledge, J., concurring).
64. *Id.* at 565 (Rutledge, J., concurring).
65. *Id.* (Rutledge, J., concurring) (emphasis added).
66. *Id.* at 553.
67. *Id.*
68. *Id.*

remedy is that "[a]ssuming acquiescence on the part of the authorities of Illinois in the selection of its Representatives by a mode that defies the direction of Congress for selection by districts, the House of Representatives may not acquiesce."[69]

This concern with the acquiescence of the political branches to a judicially imposed remedy for malapportionment leads one to ask whether the Court had reason to believe that state and federal officials might not acquiesce to an order purporting to compel a reapportionment. The available evidence supports the contention that the Court did have a reason to think about the possibility of non-compliance.[70] Writing soon after the Court decided *Baker*, C. Herman Pritchett, then-president of the American Political Science Association, maintained that "Justice Harlan's [and Justice Frankfurter's] reservations about judicial leadership have some relevance ... [because] [c]ourts cannot lead unless some one will follow."[71] He went on to remark that the "Supreme Court, needing legislative support, must anticipate the possibility that this support may be less than complete."[72] Moreover, as he noted:

> Many proposals for constitutional amendments have been put forward to modify in one respect or another the impact of the Supreme Court decisions on state legislatures. The principal proposal, backed by the Republican Party platform in 1964 and the Republican leadership in Congress, would accept the position that one house must be based on population, but would allow representation in the second house to take into account factors other than population if the people of the state approved in a referendum vote.[73]

69. *Id.* ("In the exercise of its power to judge the qualifications of its own members, the House may reject a delegation of Representatives-at-large.").

70. RICHARD C. CORTNER, THE APPORTIONMENT CASES 146 (1970) ("The Court was entering a field where ... the possibilities of resistance, if not defiance, from state legislators were great."); ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 75 (1965) (stating that Frankfurter "feared that any decision in this area would be unenforceable because unpopular"); Emerson, *supra* note 59, at 75–76 ("The greatest danger facing the courts in dealing with the question of remedies has been that legislative or executive officials would refuse to comply with remedial decrees.").

71. C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 875 (1964).

72. *Id.*

73. *Id.*

2. Historical Context

As Justices Rutledge and Frankfurter intimated, state legislators, who have the most to lose from the Court's involvement in this area, had an incentive to resist any orders from the federal courts that were contrary to their vested interests. Also, as a matter of historical context, the Court decided *Baker* less than ten years after its extremely divisive decision in *Brown v. Board of Education*,[74] which established the principle that state-sponsored racial segregation violates the Fourteenth Amendment.[75] As many commentators have noted, *Brown* generated a considerable amount of resistance and backlash.[76] Without question *Brown* was one of the Court's most controversial decisions.[77] Some members of the Court were concerned with the possibility of non-compliance with a reapportionment order in light of the unpopularity of the Court's desegregation orders and attendant rampant disobedience from state actors.[78]

Notwithstanding the controversiality of the school desegregation cases, one must also account for the Court's subsequent need to defend its authority, in *Cooper v. Aaron*,[79] to compel compliance with *Brown's* equality principle.[80] *Cooper* came before the Supreme Court after state officials in Arkansas refused to comply with *Brown*.[81] The *Cooper* Court understood the refusal to abide by *Brown* as an

74. 347 U.S. 483 (1954).

75. *Id.* at 493–95.

76. *See also* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 19 (1995) (stating that "within fifteen years the controversy became nationwide"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959) (discussing some of the problems with the Supreme Court's legal reasoning in *Brown*); *see generally* LUCAS A. POWE, JR., THE WARREN COURT & AMERICAN POLITICS 37–39 (2000) (discussing the South's opposition to the *Brown* decision); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 74–93 (1995) (discussing the political hostility toward the Court after *Brown*).

77. *See* sources cited *supra* note 76.

78. *See* 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, 1231–32 (2002); *see also* sources cited *supra* note 70.

79. 358 U.S. 1 (1958).

80. It is worth noting the proximity between the two decisions. *Baker* was first argued four terms after the Court handed down the decision in *Cooper* and decided one term after that.

81. *Cooper*, 358 U.S. at 4; *see also* Daniel A. Farber, *The Supreme Court and the Rule of Law*: Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 390–96 (discussing the events leading to the Court's decision in *Cooper*).

important and institution-defining challenge to its power. The Court stated:

> As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution.... We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts.[82]

In an opinion signed by all of the Justices,[83] the Court emphatically rejected the State's argument, holding unequivocally that *Brown* governed state officials in Arkansas.

Cooper is useful for two reasons. First, the opinion is not simply a reaffirmation of *Brown*, but also an ardent reaffirmation of federal, and by definition, judicial supremacy. In a portion of the opinion that could arguably be classified as dictum, the Court felt the need to "recall some basic constitutional propositions which are settled doctrine."[84] The Court explained,

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on

82. *Cooper*, 358 U.S. at 4.

83. *Id.* Justice Frankfurter wrote a concurring opinion filed approximately a week later. *See Cooper*, 358 U.S. at 20 (Frankfurter, J., concurring); *see also* Farber, *supra* note 81, at 401 ("Although Justice Frankfurter had wanted to write a separate opinion, he was dissuaded from announcing it the same day as the main opinion.").

84. *Cooper*, 358 U.S. at 17.

> the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." ... No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.[85]

These assertions of judicial supremacy—"supreme," "permanent," and "indispensable"—have been profoundly criticized.[86] Irrespective of the merits of the criticisms, the fact that the Court felt the need to assert its supremacy in such strident terms reflects the intractability and recalcitrance of the challenge faced by the Court: the absolute refusal by certain state officials to abide by the Court's opinions.[87]

Cooper is instructive for a second reason—the fact that it was Frankfurter who felt the need to pen a separate concurrence. Due to the importance of the issue presented—a challenge to the rule of law and the Court's supremacy—Chief Justice Warren wanted a unanimous opinion signed by all of the Justices.[88] Justice Frankfurter, however, insisted on writing a concurrence, a fact that provoked some consternation with the other Justices, particularly Justices Brennan and Black.[89] Justice Frankfurter ultimately decided to write his concurrence, but delay its announcement.

Professor Farber describes Justice Frankfurter's concurrence "as an appeal to 'Southern lawyers and law professors.' "[90] Frankfurter may have understood the need to appeal to state and local officials in the South because he saw them as the enforcement arm of the Court.[91] The indispensability of state and local officials and elites in the South to the Court's authority is revealed toward the end in his separate opinion. As Frankfurter notes:

> [t]hat the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially

85. *Cooper*, 358 U.S. at 18 (citations omitted).

86. Farber, *supra* note 81, at 388–89, 403 (listing criticisms of assertions of judicial supremacy).

87. *Id.* at 400–01.

88. *Id.*

89. *Id.* at 401.

90. *Id.* (quoting Letter from Justice Frankfurter to C.C. Burlingham (Nov. 12, 1958), *reprinted in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 84 (1979)).

91. Farber, *supra* note 81, at 401.

> discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.[92]

Thus, for Frankfurter, state and local officials (in addition to federal officials) are necessary partners in the establishment and enforcement of the rule of law as well as in the maintenance of the Court's supremacy. As the history of that era reveals, the Court's authority was being challenged by many institutional players—by Congress, by the States, by local officials, and by academics—dissatisfied with the Court's decisions on school desegregation and individual rights. With *Baker*, the Court was on the cusp of creating more controversy, which raised the specter of additional rebellion by state and local officials who had the most to lose from reapportionment. Consequently, it is understandable that the Court would be concerned—a concern best articulated by Frankfurter and Harlan—that state legislatures and Congress might not comply with an order from the Court purporting to compel a reapportionment.

One could argue, as did Justice Douglas in his concurrence in *Baker*, that the Court need not worry about the refusal of states to comply with a judicial command of substantial population equality because states will comply if the Court shows that it is serious about supervising the political process.[93] But Frankfurter saves perhaps his most vituperative reprove for this line of reasoning. "This is not only a euphoric hope," he exclaims:

> It implies a sorry confession of judicial impotence in place of a frank acknowledgement that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethoughts refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a

92. *Cooper*, 358 U.S. at 26 (Frankfurter, J., concurring).

93. *See* Baker v. Carr, 369 U.S. 186, 248, 250 & n.5 (1962) (Douglas, J., concurring).

> democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.[94]

From Frankfurter's perspective, the Court is too enamored by the "judicial Power."[95] The Court needs to appreciate that it cannot resolve every evil, no matter how grave.[96] Moreover, if the Court does not come to terms with its institutional impotence in certain matters and attempts to resolve every conflict, it "may well impair . . . [its] position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce."[97] In other words, because the Court cannot do everything, it must prioritize—by adjudicating cases that are at the core of its *raison d'être*—and choose its battles carefully.[98]

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94. *Id.* at 269–70 (Frankfurter, J., dissenting).

95. *Id.* at 267 (Frankfurter, J., dissenting).

96. *See* Colegrove v. Green, 328 U.S. 549, 554 (1946) (explaining that the judiciary cannot correct all "grave evils").

97. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

98. As it turned out the relationship between *Brown*—school desegregation—and *Baker*—reapportionment—was not as surmised by the Court. In contrast to *Brown* and the desegregation cases, *Baker* and the Court's reapportionment cases were enormously popular with the electorate. No less a critic of the post-*Baker* line of reapportionment cases than Alexander Bickel conceded as much. *See* ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 196 (1965) [hereinafter BICKEL, POLITICS] ("The Court's rulings on apportionment have been popular."); *see also* Schuck, *supra* note 27, at 1380 ("Perhaps nowhere has the Court's political success been more complete than in the area of legislative reapportionment."); MCKAY, *supra* note 70, at 75–6, 218–20 (1965). In addition, the reapportionment cases did not suffer from the types of enforcement problems that accompanied the segregation cases. *See id.* at 219–20 ("Not merely was judicial and legislative foot-dragging conspicuously not the typical reaction; significantly, a number of the courts and legislatures showed remarkable good faith in calling for compliance both more prompt and more complete than the Supreme Court would necessarily have required.").

Discovering why *Baker* and its progeny were successful and why *Brown* and its progeny were met with limited success if at all is well beyond the scope of this Article. One can argue, as did Professor Bickel, that in the reapportionment cases the Court could appeal both to populist impulse and the unassailable goal of promoting greater democracy. Bickel explains:

> [The reapportionment cases] seem—and emerge from newspaper reports—simple, straightforward, obviously just. They favor majority control, and there is hardly a strain of opinion in American political life which does not think that it represents or can represent a majority. Hence the Court's rulings seem to offer large promises of success to everyone, urban Democrats and suburban

C. *Institutional Incompetence*

Related to Frankfurter's concern with judicial impotence—that the Court cannot resolve every political and constitutional wrong because the Court depends upon federal and state officials as well as the goodwill of the populace to comply with its decrees—is a concern with judicial incompetence. Though the federal courts may properly adjudicate a matter and the courts' resolution may compel the obeisance of the populace, the courts may not be able to devise a proper solution. Deciding whether federal courts are to be involved in the political process is not simply a matter of determining whether the matter has been committed to the courts by the text and/or practice of the Constitution, or whether the electorate and political actors will comply with a judicial decree. The decision also entails a conclusion that the federal courts have the institutional competence to provide a remedy prescribed by the Constitution.

This concern with institutional competence underlies Frankfurter's concern with standards. Frankfurter's contention is that federal courts should not supervise the political process—even to correct admittedly egregious instances of malapportionment—because "standards meet for judicial judgment are lacking."[99]

Frankfurter's criticism of *Baker* on the grounds that judicially manageable standards are unavailable has received perhaps more attention than his other criticisms of the majority's decision. Some

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> Republicans, supporters of medicare and opponents of open housing, and so forth and so on. It is as if the Court had pronounced a piety no more controversial than the common appeal to bring out the vote on election day.

BICKEL, POLITICS, *supra*, at 196. Moreover, as Professor Kurland notes, by the time of *Baker v. Carr*, state legislatures had become relatively irrelevant—if costly—parts of American government. PHILIP B. KURLAND, POLITICS THE CONSTITUTION AND THE WARREN COURT 83–84 (1970). One can also argue, as does Professor Schuck, that in *Baker* and its progeny the Court challenged the self-interest of politicians. See Schuck, *supra* note 27, at 1331. At least in *Brown*, state actors who disagreed with the Court's desegregation decisions could appeal to their constituents by utilizing counter-principles: state's rights to name one prominent example. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 98 (1994) ("Brown converted race into the decisive focus of southern politics, and massive resistance became its dominant theme."). In *Baker*, they had nothing to appeal to. Finally, one could argue, as does Professor Klarman that judicial decisions do not stray far from public opinion. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 883 (1998) ("That the Court's constitutional interpretations reflect broad shifts in public opinion seems difficult to deny."); *see also* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996). In *Baker*, the Court tapped into a strong national sentiment. In *Brown* however, the Court tapped into an emergent national sentiment. I am grateful to Phil Frickey for helping me to think about the relationship between *Brown* and *Baker* as it applies to my project in this Article.

99. *Baker*, 369 U.S. at 289 (Frankfurter, J., dissenting).

commentators have concluded that the primary dispute between Frankfurter and the majority in *Baker* and between the respective majorities in *Colegrove* and *Baker* "largely boiled down to a dispute over the *manageability* of a constitutional standard for evaluating apportionment systems."[100] On this reading, Frankfurter's complaint is that manageable standards are completely absent.

The absence of manageability is one way to understand Frankfurter's concern with standards. However, such an understanding raises some interesting and puzzling questions. After all, manageable standards were in fact available. As Professor Fuentes-Rohwer has argued in his contribution to this Symposium, substantial equality is a standard.[101] Moreover, as he shows convincingly, lower courts were able to apply standards in the wake of the Court's decision in *Baker*.[102] Finally, the standard of "one person, one vote" and the concept of absolute equality did not spring *ex nihilo* in *Wesberry v. Sanders*[103] and *Reynolds v. Sims*.[104] Thus, the one-person, one-vote standard was available and it was administrable.[105]

While Frankfurter's criticism with respect to the availability of manageable standards is his most perceptive criticism of *Baker* and justifiably worthy of attention, there is a different manner of thinking about Frankfurter's concern with standards. First, it is important to locate Frankfurter's complaint with the availability of manageable standards within the context of his greater argument regarding the

100. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 159 (emphasis added).

101. Fuentes-Rohwer, *supra* note 14, at 1366–68.

102. *Id.* at 1360 ("[I]t is clear lower courts were able to decide redistricting questions effectively after *Baker*, thus suggesting that future redistricting cases could be decided in a manner that preserves court review while limiting court interference to the most serious cases.").

103. 376 U.S. 1 (1964).

104. 377 U.S. 533 (1964).

105. JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW 120–21 (1980). As Professor Ely stated:

> Justice Frankfurter used to say that reapportionment was a "political thicket" that the courts should avoid. The critics love to quote him, but in truth the meaning of the point is blurred. Sometimes it has meant that there can be no administrable standard for determining the legality of apportionments. At least in the present context of this dispute, however, that is nothing short of silly. For the very standard the Court chose in the landmark *Reynolds v. Sims* (the very standard that was anathema to Frankfurter and his successor in criticism here, Justice Harlan)—the "one person, one vote" standard—is certainly administrable. In fact administrability is its long suit, and the more troublesome question is what else it has to recommend it.

Id.

proper role of the judiciary. Recall that Frankfurter's basic and fundamental contention is that the federal courts should not involve themselves in "the politics of the people," unless they are doing so pursuant to a specific constitutional mandate.[106] Second, it is important to note that Frankfurter is not simply concerned with the availability of standards to evaluate apportionment systems, but "standards meet for judicial judgment."[107] As a point of departure, I understand this phrase to mean that standards are available, though they may not be "meet for judicial judgment."

The question then must be what Frankfurter means by the phrase "meet for judicial judgment." For Frankfurter, reapportionment is not "meet for judicial judgment" because of the inherent political nature of reapportionment disputes. One can begin to get some purchase on this question by returning to Frankfurter's political question objection. Frankfurter's chief complaint with respect to judicial involvement in democratic politics is that democratic politics is inherently political. In *Colegrove*, Frankfurter provides:

> We are of the opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.[108]

This quote from Frankfurter in *Colegrove* provides an important clue; issues that are political in nature are not "meet for judicial determination."

Frankfurter provides a further clue in *Baker*. He maintains:

> [Federal courts] do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however, flatteringly, omnicompetence to judges.[109]

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106. *See* Baker v. Carr, 369 U.S. 186, 289 (1962) (Frankfurter, J., dissenting).
107. *Id.* (Frankfurter, J., dissenting).
108. Colegrove v. Green, 328 U.S. 549, 552 (1946).
109. *Baker*, 369 U.S. at 268 (Frankfurter, J., dissenting).

The question was not whether judicially manageable standards were available; they were.[110] Instead, the question was whether the Court could defend, on doctrinal grounds, a choice between those standards—no equality, substantial equality, and absolute equality in reapportionment—given other legitimate factors.[111] For Frankfurter, federal courts are to decide cases on the basis of "judicial standards for judgment" as opposed to "policy making" or "legislative determinations."[112] Judicial standards for judgment are judicial outcomes that are determined by the constitutional text and structure. Policy or legislative determinations are judicial outcomes that cannot be traced to the text or structure of the Constitution.[113]

Thus, reapportionment does not provide standards meet for judicial judgment because the issues presented in reapportionment cases are inherently political.[114] So far, so good, but additional questions remain. For example, why should courts not adjudicate political disputes? What is it about political disputes that renders them unfit for judicial determination? Frankfurter provides some interesting answers.

The first answer is that we cannot trust the judiciary to be impartial when it adjudicates political contests. Frankfurter initially tips his hand when he pens in *Baker* that the judiciary should not be adjudicating these cases, "*[e]ven assuming* the indispensable intellectual disinterestedness on the part of judges in such matters ...."[115] Frankfurter's citation of an excerpt from a House

110. ELY, *supra* note 105, at 121.

111. Frankfurter maintains:

> From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies....
>
> ... A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged.

Baker, 369 U.S. at 280, 282 (Frankfurter, J., dissenting).

112. *Id.* at 277 (Frankfurter, J., dissenting).

113. This criticism became particularly relevant when the Court moved from the substantial equality standard of *Baker* to the absolute equality standard of *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969); *see also* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1649–51 (1993).

114. Colegrove v. Green, 328 U.S. 549, 553–54 (1946) ("It is hostile to a democratic system to involve the judiciary in the politics of the people.").

115. *Baker*, 369 U.S. at 268 (Frankfurter, J., dissenting) (emphasis added).

subcommittee hearing on reapportionment elucidates his apprehension of judicial impartiality. This passage is quoted in support of the proposition that "[a]pportionment battles are overwhelmingly party or intra-party contests. It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them."[116] In support of these propositions, he quotes:

> Mr. Kasem. You do not think that [a provision embodying the language: "in as compact form as practicable"] might result in a decision depending upon the political inclinations of the judge?
>
> Mr. Celler. Are you impugning the integrity of our Federal judiciary?
>
> Mr. Kasem. No; I just recognize their human frailties.[117]

Frankfurter also provides a second and related answer. Though federal courts in fact may be impartial, they may be *perceived* as being partial. The perception of partiality is particularly acute in this context because reapportionment battles determine clear political winners and losers. Were the Court to involve itself in these battles, federal judges and not the political process would be picking the winners and losers. As Frankfurter states, "[n]othing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests."[118] He concludes:

> Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution—views which in all honesty cannot but give the appearance, if not reflect the reality, of involvement in the business of partisan politics so inescapably a part of apportionment controversies—the Fourteenth Amendment ... provides no guide for judicial oversight of the representation problem.[119]

The problem for Frankfurter was not the unavailability of standards "that might be used in determining the validity of an apportionment scheme,"[120] but that the federal courts can only be guided in their

116. *Id.* at 324 (Frankfurter, J., dissenting).

117. *Id.* at 325–26 & n.148 (Frankfurter, J., dissenting).

118. *Colegrove*, 328 U.S. at 549; *id.* at 554 ("The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests.").

119. *Baker*, 369 U.S. at 301–02 (Frankfurter, J., dissenting).

120. Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of* Baker v. Carr, 61 MICH. L. REV. 107, 108 (1962).

choice of evaluative standards—given that the Constitution did not provide any guidance—on the basis of their political preferences and political philosophies.[121] When the Constitution does not provide any guidance for discriminating between one standard or another, "courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade."[122]

Moreover, for Frankfurter, federal courts could not make these choices unless they were willing to choose one political theory over another.[123] "What is actually asked of the Court in this case," he exclaims, "is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union."[124] Given the stakes of judicial determination, clashing views about political theory are themselves a crucial part of politics.[125] As he emphasized in *Baker*, "tradition had long entrusted questions" regarding the very structure or form of government "to non-judicial processes."[126] Frankfurter underscores the point that deciding reapportionment disputes is tantamount to dictating political influence and political power among competing groups on the basis of the judge's political theory.[127] For example, consider the choice between at-large elections as opposed to districted elections. The decision between the two "is a matter of sweeping political judgment having enormous political implications."[128] Again, the problem is that the Constitution does not dictate the outcome in these cases; there

121. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106 (2000) ("At the time of *Baker*, the Equal Protection Clause had never been applied to the districting question, and *there were any number of possible interpretations, with no judicially manageable means of choosing among them.*") (emphasis added).

122. *Baker*, 369 U.S. at 287 (Frankfurter, J., dissenting).

123. For a contemporary version of this argument, see *Holder v. Hall*, 512 U.S. 874, 891, 901–02 (1994) (Thomas, J., concurring) ("The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law. As such, they are not readily subjected to any judicially manageable standards.").

124. *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting).

125. *See also Holder*, 512 U.S. at 903 (Thomas, J., concurring) (intimating that questions of political theory are political matters that are part of politics not adjudication).

126. *Baker*, 369 U.S. at 295 (Frankfurter, J., dissenting). I thank Dan Farber for pointing out this observation.

127. *Id.* at 299 (Frankfurter, J., dissenting) ("No shift of power but works as a corresponding shift in political influence among the groups composing a society.").

128. *Id.* at 328 (Frankfurter, J., dissenting).

are not any standards meet for judicial judgment.[129] The results can only be explained by reference to the federal courts' partisanship, political philosophy, or preference for certain political groups.

D. Judicial Legitimacy

From this vantage point, we can begin to appreciate what is really at stake for Frankfurter in this debate. What happens if the federal courts, in the absence of adequate constitutional guidance, endeavor to decide political disputes on the basis of whims, individual preferences, partisanship, and political theory? The inevitable consequence of such decisionmaking is that the electorate and political elites—whose cooperation is necessary to carry out the Court's commands—will have less faith in the judicial decisionmaking process. Therein lies Frankfurter's real concern.

For Frankfurter, judicial legitimacy is achieved by deciding cases in accordance with the constitutional text. However, judicial legitimacy is not an end in and of itself. Judicial legitimacy is instrumental to facilitating the core function of the judiciary.[130] As Professor Schotland eloquently maintains, "if judicial review of districting suffers standardless subjectivity, there is danger that subjectivity degenerates to partisan preference; and if the courts are in fact or are justifiably seen as partisan, then their ability to perform their highest role is endangered."[131] Professor Schotland's observation finds much support in the following statement from Frankfurter in *Baker*:

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129. This is precisely how Alexander Bickel understood and justified the Court's refusal to intervene in *Colgrove*. Bickel explained:

> Colegrove is not a standing case, and it does not hold on principle that, like recognition of foreign governments, legislative apportionment must be unprincipled. Nor was the decisive factor the difficulty or uncertainty that might attend enforcement of a decree .... The point of Colgrove is that even aside from such exceptions as are fixed by the constitutional scheme itself, the political institutions have consistently found it necessary to modify the principle of equality of representation, which is the goal established under the fifteenth and fourteenth amendments. It has been found necessary to represent not only people, but interests. The Court felt unable to deny this necessity, or—without probing motives—to construct a principle that might accommodate it.

Alexander M. Bickel, *The Supreme Court 1960 Term Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 78 (1961).

130. Yoo, *supra* note 27, at 782 ("In other words, only by acting in a manner that suggests that its decisions are the product of law rather than politics can the Court maintain its legitimacy.").

131. Roy A. Schotland, *The Limits of Being "Present at the Creation,"* 80 N.C. L. Rev. 1505, 1515 (2002).

> Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that the vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[132]

One cannot help but wonder whether Frankfurter was reminding the Court of its then-recent experience in the school desegregation or

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132. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting). Frankfurter's argument has a contemporary analogue in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion). Given the similarities, it is worth quoting the passage at length:

> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

Casey, 505 U.S. at 865–66 (plurality opinion); *see also* Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 67 (1962) ("If the public should ever become convinced that the Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the Court's future as a constitutional tribunal would be cast in grave doubt.").

civil liberties cases.[133] Perhaps Frankfurter was of the opinion, as were many social scientists in his day, that compliance with the decisions of the Supreme Court depended in part upon one's belief that the Court's pronouncements represented the supreme law of the land. As Professor Farber explains, though they disagreed with the decision, many southern moderates were prepared to abide by *Brown* on the grounds that *Brown* was law, which implies the necessary predicate that the Supreme Court has the power to declare the law.[134]

Thus, Frankfurter cannot be faulted for arguing that inasmuch as the Court must continually decide necessarily controversial cases that are at the core of its purpose, and to the extent that the Court depends upon the cooperation of others to carry out its pronouncements, the Court cannot afford to be partial or be perceived as being partial. The Court's decisions must follow from the Constitution's text, history, or structure. The Court cannot afford to squander its legitimacy.

II. CONSTITUTIONAL PLURALISM: A THEORY OF INTERPRETATION

A. Theoretical Exposition

For Frankfurter, the confluence of these concerns—institutional boundaries, institutional impotence, institutional competence, and judicial legitimacy—led to the conclusion that the Court should make use of its avoidance theories and refrain from involving itself in the supervision of democratic politics. These are powerful arguments and they necessitate a response. Of his four concerns, Frankfurter displayed a notable lack of prescience in predicting that judicial involvement in the political process would undermine judicial legitimacy.[135] In addition, as indicated by the response of state

133. Tushnet, *supra* note 78, at 1231 (explaining that Frankfurter's admonitions against judicial involvement in *Baker* were premised upon Frankfurter's worry that judicial involvement might jeopardize the Court's ability to bring about racial justice).

134. Farber, *supra* note 81, at 390–96 ("Influential persons supported desegregation even though they disagreed with it, precisely because they believed in the 'fictions of *Marbury*.' ").

135. ELY, *supra* note 105, at 121; Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 991 (1967) ("At least some of us who shook our heads over *Baker v. Carr* are prepared to admit that it has not been futile, that it has not impaired, indeed that is has enhanced, the prestige of the Court."). Thus, Justice Clark proved prophetic when he stated that "[n]ational respect for the courts is more enhanced through the forthright enforcement of [constitutional] rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court." *Baker*, 369 U.S. at 262 (Clark, J., concurring).

officials to *Baker*, Frankfurter was unnecessarily troubled that state actors might refuse to comply with an order from the Court requiring apportionment.[136] Frankfurter's most perceptive criticism of *Baker* and its inevitable progeny was that the federal courts would be at sea in distinguishing between consequential policy determinations because the Constitution does not provide any guidance to the courts as they attempt to adjudicate disputes generated by the "clash of political forces in political settlements."[137]

Though one may grant the validity of this concern, it does not follow that judicial regulation of the democratic process is unwarranted. While the Court's involvement in the democratic process is not always welcome, most agree that it is necessary.[138] In any event, though we continue to question judicial review of matters political,[139] we no longer question judicial involvement in the political process simply as a matter of principle.[140] There is too much at stake in democratic politics to completely trust the discretion of state actors, political majorities, or political minorities.[141]

Baker provides a prime example of the need for judicial supervision of politics. The extent of the malapportionment at issue in *Baker* violated some of our most basic understandings of representative democracy. As a consequence of Tennessee's failure to reapportion for approximately sixty years, a minority of its citizens controlled access to the political process. Moreover, Tennessee's elected officials, to the extent that they were responsive and accountable, were only accountable and responsive to the needs of a minority of Tennessee voters. Given the significance of the issues at stake, it is unsurprising that talismanic and formalistic incantations of justiciability ultimately gave way to substantial questions of democratic legitimacy.

Thus, while Justice Frankfurter may have been correct on some grounds—in particular on his insistence that the Constitution does not provide the judiciary with sufficient guidance to enable the Court to meaningfully and predictably supervise the political process—he was certainly wrong when he argued that the judiciary should blind

136. POWE, *supra* note 76, at 203.

137. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

138. *See, e.g.*, Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 925 (2001) (stating that "judicial review of politics seems a necessity").

139. *Bush v. Gore*, 531 U.S. 98 (2000), is a prime example here.

140. Dorf & Issacharoff, *supra* note 138, at 933 (stating that *Bush v. Gore* should not "prompt a reconsideration" of judicial involvement in politics).

141. Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 653–54 (2001).

itself to the multitudinous inequalities present in the political process. The structure of governmental institutions is not so complex and political as to be well beyond the ken of the judiciary. Consequently, the *Baker* majority was correct to engage the political process though the Court's engagement was not guided by an apparent constitutional or political theory.

Nevertheless, even if one concedes the necessity for judicial involvement in politics, Justices Frankfurter and Harlan were certainly right to demand a justification for judicial supervision of electoral politics. As Justice Douglas acknowledged in his *Baker* concurrence, federal courts are at a distinct disadvantage in adjudicating democratic rights because the constitutional text is for the most part unhelpful. As he noted, "[s]o far as voting rights are concerned, there are large gaps in the Constitution."[142] Given these gaps, it is unclear what one should conclude from textual silences.[143] One can reason, as Justice Frankfurter urged, that textual silences mean that the Constitution does not address the problem at hand and concomitantly, the Court does not have a role to play.[144]

Furthermore, when the text is not silent, it is often vague.[145] For example, the Court has pervasively regulated democratic politics in near-absolute reliance on the Equal Protection Clause. Yet, the meaning of the phrase "equal protection of the laws" remains uncertain in the context of democratic politics. Does it truly provide a basis for addressing the problem of unequally weighted votes?

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142. *Baker*, 369 U.S. at 242 (Douglas, J., concurring).

143. *See* Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393, 2418–23 (2001) (arguing that text without another means of interpretation is useless); *see also* Boris I. Bitker, *Interpreting the Constitution*, 19 HARV. J.L. & PUB. POL'Y, 9, 42 (1995) (discussing the historical invocation of the noninterpretist approach by Supreme Court Justices); R. Randall Kelso, *Styles of Constitutional Interpretation*, 29 VAL. U. L. REV. 121, 138–49 (1994) (discussing the validity of noninterpretive methods of approaching constitutional law).

144. *See* McGreal, *supra* note 143. In this vein, note the structure of Justice Douglas's concurrence in *Baker*. Though he concedes that the Constitution is silent on most questions of democratic rights, he points out that the Constitution speaks to some issues regarding the availability of the franchise. The "right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution." *Baker*, 369 U.S. at 242 (Douglas, J., concurring). In addition, though "the States may specify the qualifications for voters" per Article I, Section 2, Clause I, the Constitution places specific limits on the states including race and sex discrimination in voting. *Id.* at 243–44 (Douglas, J., concurring). Finally, and perhaps more importantly, there "is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment . . . ." *Id.* at 244 (Douglas, J., concurring). Consequently, malapportionment is an issue that is addressed by the Constitution, if only implicitly.

145. Issacharoff & Pildes, *supra* note 16, at 651–52 (noting the shortcomings of the constitutional text).

What about hanging chads, butterfly ballots, or voting machines? Similarly, consider special interest legislation: Do they violate notions of constitutional equality?

In addition, as the debate spawned by *Bush v. Gore* has demonstrated, though the Constitution may speak to a particular question, it is sometimes uncertain whether the Court has a role to play in resolving the dispute.[146] This inquiry can morph into various formulations, most of which fall under the categories of standing, justiciability, and political questions: Is there a dispute? What is the nature of the harm? Can the Court provide relief?[147] Are there compelling reasons for judicial abstention on prudential grounds? How explicit is the constitutional text? Has the matter been committed by the text to another branch?

Given the necessity for at least some judicial supervision even in the face of an unhelpful constitutional text, the fundamental question is whether the Court can walk the tightrope between suitable regulation of democratic politics and unjustified interference with the legitimate outcomes of a properly functioning democratic process.[148] This inquiry presupposes that the Court is able to distinguish between proper and improper functions of the democratic process. The inquiry also presupposes that is it possible to differentiate *ex ante* between judicial involvement in the political process that one would approve *ex post* from judicial involvement that one would find intolerable. Whether there are ascertainable limitations to judicial involvement in democratic politics depends in part on whether we can distinguish a properly functioning democratic process from an improperly functioning one.

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146. The Article II, Twelfth Amendment arguments in *Bush v. Gore* are prime examples. *See* Tushnet, *supra* note 78, at 1226 ("Much in the argument for the proposition that the Article II issue presented a political question turns on what I call the atmospherics of the Twelfth Amendment. Reading the Amendment, one certainly gets the general impression that Congress was supposed to play a large, and perhaps the only, role in resolving contested presidential elections. Certainly nothing in the Amendment refers directly to a judicial role in resolving such elections.").

147. *See id.*

148. The struggle to find a satisfactory approach to judicial review of democratic politics has its analogue in the field of statutory interpretation. For excellent overviews of recent debates, see generally Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (advocating the use of legislative history when construing statutes); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (exploring the methods of statutory interpretation in the ten years after the adoption of the Constitution).

Frankfurter was right that the Constitution provides very little guidance to the courts as they attempt to regulate democratic politics. But he arrived at the wrong conclusion—that courts must abstain from interfering with the political process in the absence of precise constitutional guidance. The Court and the Constitution cannot be agnostic regarding the aims and purposes of democratic politics. Judicial involvement in the political process is sometimes necessary, Frankfurter's admonitions notwithstanding, in order to vindicate the important values that make possible democratic politics. Irrespective of the necessity of judicial involvement, Frankfurter was correct that the Court needs a theory that would guide its determination of when to involve itself in the political process. Willy-nilly judicial interference in the political process undermines the proper functioning of democratic politics and fails to recognize when the political process is responding to legitimate democratic values.[149]

One of Frankfurter's fundamental objections to the Court's involvement in the political process is that the Constitution does not provide any guidance to courts in resolving political disputes.[150] Indeed, as I have already mentioned and as some commentators have noted, the Constitution is notably silent with respect to most aspects of democratic politics.[151] Additionally, as Frankfurter was keen to point out, when the Constitution does address the content of representative institutions in certain passages, those passages do not seem to be directed at courts. They are open-textured and do not contain any specific commands.[152] They appear to be instructions to

149. Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 77, 80–81 (Cass Sunstein & Richard Epstein eds., 2001).

150. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) ("The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.").

151. As the authors of one of the leading casebooks in this area remark:

> [Though] [t]he text does speak in quite general terms about the terms of federal elected officials and even more generally about qualifications .... the Constitution ... does not explicitly address most other important issues regarding elections—from how ballots are to be cast, to the electoral system for all public offices save the president and the Senate, to issues of how elections are to be run and financed, and so forth.

ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 17; *see also* Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, The Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 879, 915 (forthcoming 2002) ("Our contemporary understanding of democracy and the right to vote has indubitably progressed beyond that of colonial times."), *available at* http://www.law.fsu.edu/journals/lawreview/downloads/292/FRCharles.pdf; Issacharoff & Pildes, *supra* note 16, at 712–16.

152. For Frankfurter, an apt contrast is state court constitutions. He maintains:

other branches, the states, state legislatures, and Congress.[153] Consider as a prime example the Guarantee Clause, which provides in part that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[154] Federal courts cannot entertain challenges that a state government is not republican in form.[155] As Frankfurter maintained, the "Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."[156]

Moreover, those aspects of democratic politics that are addressed by the Constitution often reflect a different, if not anachronistic, conception of democracy.[157] As Professor Levinson explains, the Founders' vision of democracy reflected a world that

> included elaborate theories of the male's duty to protect vulnerable females or the ubiquity of public officials sufficiently virtuous as to be wholly unmotivated by such

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> Decisions of state courts which have entertained apportionment cases under their respective state constitutions do not, of course, involve the very considerations relevant to federal judicial intervention.... [S]tate constitutions generally speak with a specificity totally lacking in attempted utilization of the generalities of the Fourteenth Amendment to apportionment matters. Some expressly commit apportionment to state judicial review, *see, e.g.*, N.Y. CONST. of 1938, art. III, § 5, and even where they do not, they do precisely fix the criteria for judicial judgment respecting the allocation of representative strength within the electorate.

Baker v. Carr, 369 U.S. 186, 327 & n.150 (1962) (Frankfurter, J., dissenting).

153. Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving The Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1199 (2002).

154. U.S. CONST. art. IV, § 4.

155. *Colegrove*, 328 U.S. at 556 (stating that "the fulfillment of this duty cannot be judicially enforced"). For an argument that the Guarantee Clause should be justiciable, see McConnell, *supra* note 121, at 106–07 ("[I]f the Court were inclined to develop judicially manageable standards under the Equal Protection Clause, it could do so equally well under the Republican Form of Government Clause."); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 822–27 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) ("[A]lthough the Supreme Court has held claims based on the guarantee clause nonjusticiable, the interpretation of the clause outlined [here] should be fully enforceable in the courts.").

156. *Colegrove*, 328 U.S. at 556.

157. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 17–19 ("With respect to democratic politics, ... the American Constitution is a curious amalgam of textual silences, archaic assumptions that subsequent developments quickly undermined, and a small number of narrowly targeted more recent amendments that reflect more modern conceptions of politics."); Issacharoff & Pildes, *supra* note 16, at 713, 714 (noting that "the original Constitution reflected a particularly elite conception of democratic politics").

> crass interests as paying sufficient attention to the interests of actual voters as would allow the officials to be returned to office in the next election.[158]

The Court's attempt to reconcile the Founders' archaic and crabbed understanding of political participation as enshrined in the constitutional text with our contemporary and more progressive vision results in two notions that are fundamentally at odds with one another, but which are both well supported by the Court's voting rights jurisprudence. First, voting is a fundamental right of democratic citizenship,[159] and second, voting in presidential elections is only available when that right is provided by the states.[160]

Thus, Frankfurter is clearly correct that the Constitution is unhelpful in resolving most issues of democratic politics. The text provides so little guidance in part because it is silent on most issues of democratic politics and in part because its commands do not appear to be directed to the federal courts. Moreover, to the extent that the Constitution addresses the structure and content of democratic institutions, the text often contradicts modern understandings. Thus, the text more or less hinders the type of expansive and progressive vision of political participation that the Court attempts to effect with its reapportionment revolution.

The inutility of the text presents the federal courts with a conundrum. Because the text is often unhelpful in resolving democratic disputes, the temptation is for the courts to blind themselves to fundamental problems in the democratic process.[161] As a further complication, once courts decide to enter the political thicket, they are hard pressed to discover a guiding theory. This conundrum presents a number of interesting inquiries. First, is there a criterion for distinguishing between legitimate and illegitimate regulations of democratic politics? Put differently, can the Court develop a theory, grounded in a substantive vision of what democracy

158. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1291 (2002); *see also* ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 17 ("The failure of the Constitution to offer much specific guidance also reflects the premodern world of democratic practice and the long-since rejected assumptions of that world on which the Constitution rests.").

159. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

160. Bush v. Gore, 531 U.S. 98, 103 (2000); Fuentes-Rohwer & Charles, *supra* note 151, at 922.

161. *See generally* Pushaw, *supra* note 153. (arguing for a return to the Federalist theory of "rebuttable presumption," which would reign in judicial review of cases involving political questions).

requires and tied to the constitutional text or structure, to guide its supervision of the democratic process? Presumably, the purpose of this theory would enable the Court to discriminate among legitimate state policies that affect political rights from illegitimate ones. Ideally, this theory would combine the constitutional text, with its silences, and its vagueness—"Equal Protection," "Due Process," "Republican Form of Government," etc.—in addition to substantive principles of democratic theory to address the ills or excesses of democratic politics.

An additional query is whether *Baker* provides any answers to this conundrum. Does the opinion reflect a theoretical justification for the Court's holding that malapportioned districts are justiciable? Moreover, can the Court's justification be generalized to cover most instances of judicial review of democratic politics?

Baker can be understood as a case that circumscribes judicial involvement in democratic politics to instances in which state actors frustrate the purposes of democratic governance by abandoning any one of the principles that provide legitimacy to the political process. I term this approach constitutional pluralism.[162] Constitutional pluralism is a theory regarding the application of constitutional democratic principles to the function, purpose, and process of democratic politics. These principles are derived from the vague textual guidance provided by various passages in the Constitution and from the dictates of democratic theory.[163] My contention is not that the Court self-consciously applied the theory of constitutional pluralism as an interpretive guide in *Baker*. Rather, I contend that constitutional pluralism provides a coherent framework for making

162. Constitutional pluralism can be classified as, in Professor Gerken's terms, a "intermediary theory," which she defines as a mid-level theory, the purpose of which is to "give shape and content" to abstract constitutional principles such as equality. *See* Heather Gerken, *The Costs and Causes of Minimalism:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1414 (2002). Constitutional pluralism can also be understood as an intermediate premise, in Professor Jaffe's terms. *See* Jaffe, *supra* note 135, at 988–91. Again, the function is similar; constitutional pluralism is a theory that mediates between the open-textured provisions of the Constitution and the questions of democratic politics that the Court must address.

163. My argument is not without a textual basis. I can claim both the Equal Protection and Guarantee Clauses as providing the textual bases for the democratic principles articulated in this Article. Consequently, I concede to Justice Frankfurter that the Guarantee Clause is implicated when the judiciary reviews structural composition of democratic institutions and agree with Professor McConnell, who advances a similar point. *See* McConnell, *supra* note 121, at 105–06 (arguing that Guarantee Clause claims should be justiciable).

sense of *Baker* and for understanding the Court's role in democratic politics.

Constitutional pluralism is neither absolutely distinct from nor absolutely congruent with political process theory as articulated by Justice Stone in footnote four of *United States v. Carolene Products Co.*,[164] and popularized by Professor Ely in *Democracy & Distrust*.[165] In the second paragraph of footnote 4 of *Carolene Products*, Justice Stone intimated that more stringent judicial review might be warranted of "legislation which restricts those political processes which can ordinarily be expected to bring about real of undesirably legislation."[166] Justice Stone also suggested, in the third paragraph of footnote four, that "more exacting" judicial scrutiny might be warranted towards state action that is directed against "discrete and insular minorities" because such action "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[167]

Building on *Carolene Products* in *Democracy & Distrust*,[168] Professor Ely advances two arguments in favor of judicial regulation of democratic politics. First, he argues, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."[169] Second, Professor Ely explains judicial review can also be justified if employed in the protection of "those who can't protect themselves politically" as a consequence of unjustified prejudice.[170] With respect to malapportioned districts, Professor Ely notes that they are problems worthy of the Court's attention because "they involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have obvious nested interest in the status quo."[171]

Similarly, Professors Issacharoff and Pildes argue that judicial supervision of democratic politics is warranted to prevent political

164. 304 U.S. 144, 152–53 & n.4 (1938).

165. *See* ELY, *supra* note 105.

166. *Carolene Products*, 304 U.S. at 152 & n.4.

167. *Id.* at 153 & n.4.

168. *See supra* note 105.

169. ELY, *supra* note 105, at 117 & ch. 5; *see also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 784 (1991) (accord).

170. ELY, *supra* note 105, at 152–53; Klarman, *supra* note 169, at 784 (accord).

171. ELY, *supra* note 105, at 117; *see also id.* at 120 ("We cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (and there will be) it had better be a very convincing one.").

actors from locking-up political institutions "to forestall competition."[172] They argue that:

> [D]emocratic politics [should be viewed] as akin in important respects to a robustly competitive market—a market whose vitality depends on clear rules of engagement and on the ritual cleansing born of competition. Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens. But politics shares with all markets a vulnerability to anticompetitive behavior. In political markets, anticompetitive entities alter the rules of engagement to protected established powers from the risk of successful challenge. This market analogy may be pushed one step further if we view elected officials and dominant parties as a managerial class, imperfectly accountable through periodic review to a diffuse body of equity holders known as the electorate.[173]

They "propose that a self-conscious judiciary should destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more responsive representation."[174]

I agree with Professors Ely, Issacharoff, and Pildes that the Court's role in supervising the democratic process is to reinforce fundamental principles of democratic politics. Consequently, the approach outlined in this Article is consistent with and follows from process theory. I also agree that an important principle of democratic politics is to facilitate responsiveness by elected officials.[175] The approach outlined in this Article, however, moves the debate into three distinctive directions. First, it is insufficient to agree that the aim of judicial supervision of democratic politics is to reinforce fundamental democratic principles or identify state action "which restricts those political processes."[176] Judicial supervision of democratic politics can only be fully justified by concretely identifying the specific aims and purposes of democratic politics that are frustrated by political actors but vindicated by judicial review. Responsiveness as a justification for judicial review, as explained by Professor Ely and convincingly defended by Professors Issacharoff and Pildes, is but one of many aims of democratic politics. While I

172. Issacharoff & Pildes, *supra* note 16, at 646.
173. *Id.*
174. *Id.* at 649.
175. I discuss this point *infra* notes 207–23.
176. United States v. Carolene Products Co., 304 U.S. 144, 152 & n.4 (1938).

discuss several others in this Article, still others, such as political association, can be identified.

The second distinctive contribution is related to the prejudice prong of political process theory. The prejudice prong of process theory, articulated in paragraph three of *Carolene Products* footnote four, has served as a fundamental rationale for judicial review.[177] The problem is that this rationale is increasingly untenable. As Professor Karlan in particular has argued, the "Supreme Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through the operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted."[178] Moreover, the Court "re-enlists equal protection in the service of less, rather than greater, equality and democracy."[179] Thus, citizens of color cannot count upon the courts to provide them with greater political equality. Additionally, citizens of color may be better off by relying upon their political power in the political process. As Professor Spann has powerfully remarked, citizens of color are better off in a pluralist word than they are in a world in which they are dependent upon the judiciary.[180] Similarly, Professor Klarman has suggested, convincingly, that "complete black enfranchisement, enforced energetically at all levels of government would alleviate the need" for particular judicial consideration for African Americans.[181] Moreover, one may persuasively argue that the Supreme Court itself has explicitly rejected *Carolene Products*' contention that judicial review should reflect special solicitude for discrete and insular groups, particularly people of color.[182]

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177. *See* ELY, *supra* note 105, at 105; *see also* Samuel Issacharoff, *Groups and the Right to Vote*, 44 Emory L.J. 869, 872 (1995) ("The rationale of *Carolene Products* . . . suggests that a claim for judicial reform of the political process requires a showing both of group disadvantage and of the group's historic inability to redress that disadvantage through the normal working of the political process.").

178. Karlan, *supra* note 15, at 1345.

179. *Id.*; *see also* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1971 (1990) ("The present Supreme Court has been noticeably unreceptive to legal claims asserted by racial minorities.").

180. Spann, *supra* note 179, at 1995–2000.

181. Klarman, *supra* note 169, at 788–89.

182. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution, there can be no such thing as either a creditor or a debtor race .... In the eyes of government, we are just one race here. It is American."); Shaw v. Reno, 509 U.S. 630, 651 (1993) ("Indeed racial classifications receive close scrutiny even when they may be said to burden the races equally."). One can view the Court's ultimate rejection of the prejudice prong as

Given these observations, judicial review of democratic politics cannot be justified on the grounds that the Court bears a special responsibility to shield citizens of color from the vagaries of the political process. How then should the Court respond when a particular group is adversely impacted in the political process? This is where constitutional pluralism's descriptive orientation comes into play. The inquiry under constitutional pluralism's descriptive orientation is whether the legislative act at issue is the product of group conflict and accommodation of group interests or whether the legislative act is a product of a closed and biased political process. Where the political process is infected by systemic biases against the group in question, the Court is justified in intervening in order to facilitate a more open process. However, where the challenged legislative act is the product of group conflict and group compromise, judicial interference cannot be justified. Judicial review cannot be justified where the effect of the Court's involvement is to deprive a political group of its hard fought gains where those gains are the product of political struggle and compromise.

Third, constitutional pluralism departs from political process theory to the extent that constitutional pluralism accepts the limited role that substantive values must play in the regulation of democratic politics. Value choices are inevitable. Consequently, the debate ought not be about whether substantive values must be enforced, but rather what sorts of values are necessary to sustain a well-functioning democratic process.

B. Constitutional Pluralism: Application to Baker

Representative democracy presupposes the existence of underlying structures of representation and representative institutions that are not at odds with the principles or aims of democratic politics. State actors must give effect to these principles of democratic politics through the design, structure, and implementation of democratic politics. Key principles include: majority rule, political participation, accountability, responsiveness, substantial equality, and interest representation.[183] These are concepts that are foundational to democratic politics because they facilitate the process of self-

formulated in *Carolene Products* as an attempt to reconcile the tension that inheres between paragraphs two and three of footnote four.

183. This is obviously not meant to be an exhaustive list. Moreover, some items that could be included in such a list might be highly contestable. But that is precisely the point. In order to better understand the functions of democratic politics, we need to discover the values that make possible the ends and purposes of democracy.

government and legitimate democratic decisionmaking. Though state actors can determine how to take these principles into account in the design of democratic institutions, judicial review, through the application of constitutional pluralism, is triggered when institutional structures of representation do not reflect these core democratic values or when the state has abandoned some democratic principles in the pursuit of a single, though legitimate, democratic goal.

While *Baker* is widely celebrated as one of the Court's best moments, the opinion is remarkably short on constitutional theory. The question least directly answered by *Baker* is whether the Court's interference with Tennessee's representative structure, and with the representative structures of almost all states, can be justified. Justice Brennan devoted a majority of the opinion to explaining why reapportionment disputes are justiciable but never explained how the plaintiffs' malapportionment claim states a cause of action under the Fourteenth Amendment.

The best explanation Justice Brennan gave in *Baker* was to state "it has been open 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."[184] Justice Clark picked up the same refrain with his assertion that "Tennessee's apportionment is a crazy quilt without rational basis."[185] But as Justices Frankfurter and Harlan countered, the state was pursuing a rational policy, that of interest representation.[186] Tennessee chose to overrepresent rural interests as against urban interests.[187] Perhaps Justice Clark was correct that the policy was not perfectly implemented, but surely it was a rational pursuit.[188] Even assuming that one agrees with Justice Clark that Tennessee's apportionment scheme contained too many deviations such that it could not be explained on interest representation grounds, could it not still be rationally defended as mere incumbency protection?[189]

184. Baker v. Carr, 369 U.S. 186, 226 (1962).

185. *Id.* at 254 (Clark, J., concurring); *id.* at 258 (Clark, J., concurring).

186. *Id.* at 334 (Frankfurter, J., dissenting) ("A State's choice to distribute electoral strength among geographical units, rather than according to a census of population, is certainly no less a rational decision of policy than would be its choice to levy a tax on property rather than a tax on income.").

187. *Id.* (Frankfurter, J., dissenting).

188. ELY, *supra* note 105, at 121–22.

189. *Baker*, 369 U.S. at 336 (Frankfurter, J., dissenting) ("Surely it lies within the province of a state legislature to conclude that . . . in the interest of stability of government it would be best to defer for some further time the redistribution of seats in the state legislature.").

As Alexander Bickel argued in one of his many comments on the Court's reapportionment revolution,[190] applying a rationality standard to the problem of apportionment "is very nearly meaningless."[191] Bickel did not reject entirely equality of representation or majoritarianism as a principle[192] nor did he reject the Court's intervention in *Baker*.[193] What he rejected was the proposition that

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190. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 189–98 (2d ed. 1986) [hereinafter BICKEL, LEAST DANGEROUS BRANCH]; ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 34–42, 151–81 (2d ed. 1978) [hereinafter BICKEL, THE IDEA OF PROGRESS]; BICKEL, POLITICS, *supra* note 98, at 175–98.

191. BICKEL, POLITICS, *supra* note 98, at 180; *see also id.* at 181 (stating that "it seems plain that the conventional test of rationality cannot lead anywhere in this field"). Bickel understands the Court's rationality test to be susceptible to two different interpretations. First, government action can fail the rationality test where, though the government has broad discretion to act, there is not a rational relationship between the means and the ends. *Id.* at 177–78 ("But it may not follow that because the federal government is empowered to regulate 'commerce among the several states' is it empowered also to establish a uniform law of divorce. At least we should have to know more about the relation of divorces to the operation of a national economy before we could call this connection rational."). Second, "[i]n exercising any of its powers, government, state or federal, will be permitted to make only those choices which rest on an intelligible and plausible view of reality." *Id.* at 178. Thus, it would be rational for the government to conclude that "a man who is an active member of the Communist party at the very least does not look with disfavor upon a violent overthrow of existing American institutions." *Id.* at 179. But under this second reading of rationality, it would be irrational for the government to declare that "once a man is a Communist he will always remain one, no matter what present disclaimers he may enter." *Id.* Neither applications of the rationality test helps resolve the constitutionality of malapportionment. As Bickel noted:

> Applying the first branch of the test obviously leads nowhere. It is conceded all around that the power to apportion, to create constituencies, and otherwise to regulate the manner in which public officials and legislators are elected is a legitimate function of government. The question then comes whether this or that apportionment, restricting the electorate in this or that faction, or favoring this or that portion of it with more or less influence is rational—or rather, whether it is *ir*rational; the question, as always, is not whether reason compels the legislative choice but whether reason is repelled by it. Now most, if not all, malapportionments favor rural interests of one sort or another over urban and suburban, allocate more strength proportionately to sparsely populated areas than to densely populated ones, and make similar discriminations. Who can say that this is irrational? Undesirable, perhaps; but irrational?

Id. at 180.

192. *See* BICKEL, THE IDEA OF PROGRESS, *supra* note 190, at 174.

193. Bickel, *supra* note 129, at 78. Bickel's strongest objection was to the Court's strict one person, one vote principle. *See, e.g.*, BICKEL, POLITICS, *supra* note 98, at 196–98; BICKEL, THE IDEA OF PROGRESS, *supra* note 190, at 151–81. It is accurate to recognize that Bickel's understanding of *Baker* and his evaluation of the Court's reapportionment revolution evolved somewhat over time. Writing soon after *Baker*, Bickel explained *Baker*:

> [A]s holding no more than that, Tennessee having last been malapportioned sixty years ago, the situation there is the result, not of a deliberate if imperfect present

majoritarianism is the only value that must be reflected in the apportionment process. "The issue . . . is one of the distribution of access and power among various groups, and the answer requires normative choices and prophetic judgments—much as does the solution of other problems of social policy."[194] For Bickel, a rationality test is engaged in the wrong inquiry. The question is not whether the state's action is rational—because it is clearly so—but "rather, what principles restrict otherwise rational choices that a legislature might make?"[195] "This is the question that the Court not only left unanswered in *Baker v. Carr*, but rather went out of its way to obscure."[196]

If *Baker* cannot be explained on the grounds that Tennessee's reapportionment scheme was irrational, does constitutional pluralism provide some interpretive insight? The object here is to identify the presuppositions of democratic theory that are violated by Tennessee's reapportionment scheme. Tennessee's apportionment scheme violated four core assumptions of democratic theory: majoritarianism, responsiveness, substantial political equality, and interest representation. Although the Court may not have self-consciously referenced these principles, a concern with the essence of

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> judgment of the political institutions, but merely of inertial and oligarchic entrenchment. In the face of so faint an assertion, if any, by the political institutions of their own function, the principled goal of equal representation had enough vitality to enable the Court to prod the Tennessee political institutions into action.

BICKEL, LEAST DANGEROUS BRANCH, *supra* note 190, at 196. On this reading, Bickel found the result in *Baker* "unexceptional." BICKEL, POLITICS, *supra* note 98, at 176. As the Court and lower courts became more involved with apportionment, Bickel concluded that "the Court has intervened unwisely, beyond the limits of effective legal action, into the necessary work of politics." *Id.* at xi. Bickel concluded that the proper remedy for malapportionment "lies with the majoritarian executive, whom we can influence, and whose own bargaining power can very properly be heightened by federal judicial holdings striking down obsolete apportionments and requiring legislature to act affirmatively." *Id.* at 190. Perhaps his most charitable evaluation of the Court's reapportionment handiwork is contained in BICKEL, THE IDEA OF PROGRESS, *supra* note 190, at 173–81, in which he predicted that the Court's reapportionment project was heading toward obsolescence and abandonment because the Court as an institution is incapable of forming lasting social policy because social problems are complex, fast-moving, and unpredictable.

194. BICKEL, THE IDEA OF PROGRESS, *supra* note 190, at 35.

195. BICKEL, POLITICS, *supra* note 98, at 181; *see also* BICKEL, LEAST DANGEROUS BRANCH, *supra* note 190, at 196 ("The question is, should [pursuit of] such purposes [as over-representation of some or of all rural areas] be foreclosed, should they be foreclosed in all circumstances, and why? What is the dominant principle?").

196. BICKEL, POLITICS, *supra* note 98, at 182; *id.* at 188 ("It remains to ask whether we have evolved or can see emerging some other operative principle—other than equal representation—which is capable of general application.").

each of these democratic values is reflected, in some cases overwhelmingly so, in the multiple opinions in *Baker*.

1. Majoritarianism

By almost all conceptions of democracy, any polity that fancies itself democratic must at least be responsive[197] to majoritarian interests, commonly referred to as majority rule.[198] As concerned as he was with majoritarian tyranny, Madison nevertheless understood that a democratic polity's legitimacy depended upon some form of majoritarian influence. Majority rule was implicit in the form of government he favored. Thus, he defined a republic as a "government which derives all of its powers directly or indirectly from the great body of the people."[199] In one of the rare expressed concerns with minority rule, Madison continued:

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197. Just to be clear, I am simply concerned here with majoritarianism; responsiveness is addressed, *infra* notes 207–23. On the relationship between responsiveness and majoritarianism, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millenium*: Hunt v. Cromartie *As a Case Study*, 58 WASH. & LEE L. REV. 227, 289–90 (2000).

198. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34–62 (1956); GIOVANNI SARTORI, DEMOCRATIC THEORY 19 (1962); GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 24, 31 (1987) [hereinafter SARTORI, THEORY OF DEMOCRACY]; *see also* DAHL, *supra*, at 34 ("Running through the whole history of democratic theories is the identification of 'democracy' with political equality, popular sovereignty, and rule by majorities.").

To be clear, I use majority rule here not in the sense of absolute majority rule, but in the sense used by Professor Sartori—majority rule as a "shorthand formula for limited majority rule, for a restrained majority rule that respects minority rights," or limited majority rule. SARTORI, THEORY OF DEMOCRACY, *supra*, at 34. As Professor Guinier has reminded us:

> [D]emocracy as majority rule is not self-defining. It could mean control of issue outcomes, voting aggregations to maximize satisfaction, determining the preponderance of opinion, or simply decisionmaking by electorally accountable officials. Indeed, there is an ongoing debate over the existence and possibility of majority rule generally. Some also question directly the presumptive faith in majority rule as quintessentially democratic. Others argue that institutionalizing minority rights is a necessary constraint on the processes of majoritarian democracy.

LANI GUINIER, TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 78 (1994). Moreover, as she has illuminated with peerless pellucidity, unqualified majoritarianism also raises questions of fundamental fairness and legitimacy. *See id.* Professor Guinier and I differ only to the extent that she questions the "presumptive faith in majority rule as quintessentially democratic," whereas I find that some minimum level of majoritarianism is necessary before a state can be deemed democratic. *Id.* at 78. Thus, for example, Dahl, who argues that majorities need not in fact rule, notes however that there must some consensus on the ground rules of democratic engagement. DAHL, *supra*; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4 (1980).

199. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

> It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic.[200]

Consequently, as Madison and other democratic theorists have remarked, a state cannot define itself as democratic if it does not at the very least respond to the preferences of at least a majority of its citizens.[201]

One explanation for the Court's involvement in the political process in *Baker* was to assure compliance with this core requirement of democracy.[202] Justice Clark's concurrence in *Baker* was the first to justify the Court's involvement as a remedy for minority rule. Justice Clark believed that as a consequence of minority rule the "majority of the voters [in Tennessee] have been caught up in a legislative strait jacket."[203] Justice Stewart, who joined the majority in *Baker* but dissented in a number of post-*Baker* decisions, also explained the Court's decision to enter the political thicket on the importance of restoring majority rule. Justice Stewart states:

> I think that the Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First it demands that, in the light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State.[204]

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200. *Id.*

201. *See generally* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 205 (1989) (offering a critique of what he terms "consent theory"). Again, democratic theory has also been concerned with unmitigated majoritarian power and I do not mean to minimize that concern. *See* Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 125–26 (1994). Acknowledging majoritarianism as a core democratic value simply reflects the plain contention that as a theoretical proposition, majority rule is better than minority rule.

202. *See, e.g.*, James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment*, 34 HASTINGS L.J. 1, 5–17 (1982). As a consequence of extreme malapportionment, Tennessee's representative institutions, including both its upper and lower chambers, were not representative of the majority's interests. *Id.*

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

204. Lucas v. Colo. Gen. Assembly, 377 U.S. 713, 753–54 (1963) (Stewart, J., dissenting); *see also id.* at 754 ("I think it is apparent that any plan of legislative apportionment which could be shown to reflect no policy, but simply arbitrary and

Justice Stewart then explained that his interpretation of the Equal Protection Clause is consistent with the Court's decision in *Baker*:

> In *Baker v. Carr*, it was alleged that a substantial numerical majority had an effective voice in neither legislative house of Tennessee. Failure to reapportion for 60 years in flagrant violation of the Tennessee Constitution and in the face of intervening population growth and movement had created enormous disparities among legislative districts—even among districts seemingly identical in composition, which, it was alleged, perpetuated minority rule and could not be justified on any rational basis.[205]

Similarly, as a consequence of this frustration of the majority rule, Justice Clark opined:

> Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination."[206]

Thus, the Court's involvement in reapportionment can be justified on the democratic theory ground that minority rule is inimical to a democratic process. To the extent that ours is a constitutional democracy or a republic, minority rule cannot be justified.

2. Responsiveness

There is a second aspect of extreme malapportionment that violates another core democratic value; acute malapportionment effectuates a lack of responsiveness in institutional representative structures.[207] Responsiveness, which is a related though separate concept from majoritarianism, describes the relationship between the electorate—its views and preferences—and representative

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capricious action or inaction, and that any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards.").

205. *Id.* at 754 & n.13.

206. *Baker*, 369 U.S. at 258–59 (Clark, J., concurring).

207. Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999) (referring to responsiveness as a "central democratic value").

institutions.[208] Responsiveness conveys how well democratic institutions track the substantive preferences of the electorate. The more democratic institutions react antiphonally to the expressed preferences of the electorate the more they can be classified as responsive.

Responsiveness is the linchpin of democratic governance and the *sine qua non* of a representative democracy.[209] Republican government, the Madisonian solution to preserving liberty in large polities, is absolutely dependent upon the concept of representation.[210] As Hannah Pitkin has shown, self-government through representative institutions is possible only when representatives are responsive to the needs of the electorate.[211] Pitkin argues:

> It seems to me that we show a government to be representative not by demonstrating its control over its subjects but just the reverse, by demonstrating that its subjects have control over what it does. Every government's actions are attributed to its subjects formally, legally. But in a representative government this attribution has substantive content: the people really do act through their government, and are not merely passive recipients of its actions. A representative government must not merely be in control,

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208. Paul D. Schumaker & Russell W. Getter, *Responsiveness Bias in 51 American Communities*, 21 AM. J. POL. SCI. 247, 248 (1977). Professors Schumaker and Russell define responsiveness as follows:

> Responsiveness refers to a stimulus-response relationship. Responsiveness occurs when actors react positively to an external stimulus. Unresponsiveness occurs when actors fail to react contrary to the way desired by those providing the stimulus. Thus, the concept of responsiveness is concerned with the degree of linkage or congruence between stimulus variables and response variables.

Id.

209. HERZOG, *supra* note 201, at 205 ("Given the conditions of modern society . . . any plausible account of legitimacy and obligation must center on whether the state is for the most part responsive to the people."); *see also id.* at 208 ("One can imagine (just barely) a society happy to live under the rule of an unresponsive state. I'd call them happy slaves; no matter how happy they were, we couldn't, in my view, invoke the consent of the governed in describing their situation."); SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 300 (1972) ("Responsiveness is what democracy is supposed to be about . . . .").

210. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (stating that in a republic one can "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations").

211. HANNAH PITKIN, THE CONCEPT OF REPRESENTATION 209 (1967) ("[R]epresenting ... means acting in the interest of the represented, in a manner responsive to them.").

> not merely promote the public interest, but must also be responsive to the people.[212]

There may be multiple ways of demonstrating the responsiveness, or lack thereof, of representative institutions. Governments can adopt policies that are congruent with citizen preferences;[213] governments can distribute goods in a manner that is consistent with the distributional preferences of citizens; or governments can otherwise behave in a manner that reflects the value predilections of citizens.

Irrespective of one's preferred method for identifying responsiveness, any list must include elections and the availability of the franchise as a mechanism for ensuring and measuring responsiveness.[214] As Pitkin notes, a "representative government requires that there be machinery for the expression of the wishes of the represented, and the government respond to these wishes."[215] An election system fulfills that function; it is an important and necessary mechanism through which the electorate exercises control over its representatives.[216] The argument here is not that elections necessarily

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212. *Id.* at 232. Professor Herzog is also particularly insightful on this point. He maintains:

> [R]esponsiveness can serve as the core of a theory of legitimacy, obligation, and disobedience. It is also . . . at the core of the consent of the governed; it's what people are most deeply gesturing toward when they invoke that phrase. It's not that "responsiveness" itself explicates the concept of consent; it doesn't. After all, one can always coherently ask if people have consented to live under a responsive state. Rather it's that if we draw up a list of regimes that we intuitively want to say rest on the consent of the governed, another list of those that don't, the states on the first list turn out to be the responsive ones. Consent here is just the opposite of repression, of policies being imposed with no regard for the people's wishes.

HERZOG, *supra* note 201, at 207.

213. VERBA & NIE, *supra* note 209, at 300.

214. *See* HERZOG, *supra* note 201, at 213 (noting that though voting is not the "only mechanism that ensures responsiveness . . . it's the obvious leading contender"); *see also* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS 25 (2001) ("If the election mechanism is at the heart of any democracy, then the right to vote in elections is a central democratic right and the act of voting is the most elemental form of democratic participation.").

215. PITKIN, *supra* note 211, at 232.

216. DAHL, *supra* note 198, at 131. To be clear, I focus on elections here not because they are the only method of political participation, but because elections are foundational in a representative democracy. Elections are a distinctive and important type of political participation and, of course, they are clearly relevant to *Baker* and the apportionment cases. *See* HERZOG, *supra* note 201, at 213, 219; JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 25 (1991); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 6 (1991). *But cf.* GUINIER, *supra* note 198, at 66–69 (explaining why electoral responsiveness may not facilitate self-government work in the context of racial representation).

indicate substantive majoritarian preferences;[217] in fact Dahl argues that they do not.[218] Rather, the argument is that elections facilitate self-government by selecting leaders whose responsibility is to act in the interest of the people and who can be held accountable if they behave in a manner that is inimical to the interests of those they represent.

Justice Clark's concurring opinion in *Baker* provides the most insight on this issue. As he noted, in Tennessee, a minority of the State's population elected the majority of its representatives, resulting in minority rule.[219] Moreover, the state could not provide a rational basis for minority rule. Justice Clark rejects the justification preferred by Justices Frankfurter and Harlan—that Tennessee's reapportionment scheme reflected an attempt to divide political power between rural and urban counties—on the grounds that "discrimination is present among counties of like population."[220]

But interestingly, Justice Clark would not invalidate Tennessee's apportionment scheme on the formalistic grounds that the counties are of unequal population, resulting in minority rule. As he explains, "Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee."[221] The problem identified by Justice Clark is the absence of responsiveness. Tennessee suffered from a failure of

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217. SARTORI, THEORY OF DEMOCRACY, *supra* note 198, at 139; *see also id.* at 108 ("Succinctly stated, elections do not enact policies; elections establish, rather, who will enact them. Elections do not decide issues; they decide, rather, who will decide issues."). *But cf.* GUINIER, *supra* note 198, at 66–69 (explaining why electoral responsiveness may not facilitate self-government work in the context of racial representation).

218. DAHL, *supra* note 198, at 125–31.

219. Baker v. Carr, 369 U.S. 186, 253 (1962) (Clark, J., concurring).

220. *Id.* at 256 (Clark, J., concurring) ("It discriminates horizontally creating gross disparities between rural areas themselves as well as between urban areas themselves, still maintaining the wide vertical disparity already pointed out between rural and urban.").

221. *Baker*, 369 U.S. at 258–59 (Clark, J., concurring). Justice Clark further explained:

> But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. I have searched diligently for other "practical opportunities" present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative strait jacket. Tennessee has an "informed, civically militant electorate" and "an aroused popular conscience," but it does not sear "the conscience of the people's representatives." This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented.

Id.

representation. Though a majority of Tennesseans was opposed to Tennessee's apportionment scheme, they could not convince their representatives to act upon their preferences.

Additionally, Tennessee's extant apportionment implicated other substantive interests of Tennesseeans. Commentators have argued that as a consequence of extreme malapportionment, urban voters could not get state legislators to pay attention to their unique interests.[222] State legislators could and did effectively ignore the preferences of urban voters, who constituted the majority of voters in many states.

If the ideal of self-government is to be at all meaningful, victims of such blatant violations must find recourse in the courts. The majority and concurring Justices were clearly persuaded that judicial supervision was warranted in *Baker* in order to restore effective representation.[223] Thus, *Baker* can be understood as a vindication of responsiveness as a core democratic value.

3. Substantial Political Equality

If elections are to serve such lofty goals and protect individual liberty and equality, they must be governed by certain parameters. For example, they must be free; that is, individuals should not be coerced. Relatedly, individuals must have genuine choices.[224] Additionally, the election process must not be substantially affected by fraud or deceit.[225] Other such examples may be multiplied; the point is simply that under any base understanding of democratic theory, the simple fact that a polity holds elections does not indicate, *ipso facto*, that the electorate is self-governing. Thus, these and other parameters are important and worthy of further reflection.

Political equality in the structures of representation is an additional consideration, one that is most relevant and fundamental

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222. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1058 (1958). As Lewis states:

> It is evident that one of our major national failures since World War II has been the failure to meet the problems of rapid urbanization. The decay of the center city, disorderly suburban growth, and crises in education, housing, and transportation have become familiar facts in every metropolitan area. A fundamental reason that these problems have not been adequately met is urban political weakness, stemming in large part from the underrepresentation of urban areas in the state and national legislatures.

Id.; *see also id.* at 1064 (noting the rural bias of malapportionment).

223. *See Baker*, 369 U.S. at 259–60.

224. *See* HERZOG, *supra* note 201, at 199.

225. United States v. Mosley, 238 U.S. 383, 385–89 (1962); United States v. Saylor, 322 U.S. 385, 389 (1944).

to *Baker* and the apportionment cases.[226] Political equality is unquestionably one of the conceptual pillars of democratic theory.[227] Indeed, political equality is important in a democratic state for numerous reasons including facilitating self-government, enabling individuals to acquire their fair share of goodies, and communicating standing in the community.[228]

Knowing that political equality is important does not tell us how to define or identify political equality in structures of representation. The concept raises a host of thorny issues. As Jonathan Still has remarked:

> Does [political equality] mean that in any election each person casts one and only one vote? Does it mean that each person has the same chance of casting a vote which determines the outcome? Or does it mean that it does not matter who holds which preference, so that if preferences are interchanged among the voters the result of the election remains unchanged?[229]

Understanding political equality is vital because the existence, *vel non*, of political equality is not often an "either-or" proposition. In other words, political equality is best understood as existing along a continuum. On one end of the continuum lies a position of no equality and on the other end resides absolute equality. The conclusion that an electoral system satisfies the requirement of political equality necessitates identifying the point on the continuum that one believes provides meaningful political equality. As Justice Frankfurter stated in *Baker*,

> Talk of "debasement" or [vote] "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order

226. As Jonathan Still has noted, political equality has many different components: the relationship between economic factors and politics; the relationship between sociological factors and politics; and the relationship between structural institutions and politics, in particular voting. In this Article, I am only concerned with the institutional component of political equality. *See* Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 377 (1981).

227. JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 233 (1980).

228. The reasons mentioned above as well as others that can be generated fall into one of two categories: instrumental and expressive. Political equality is important because it preserves other rights and is a distinctive marker of citizenship.

229. Still, *supra* note 226, at 375.

> to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.[230]

Frankfurter is certainly right that talk of debasement and dilution are circular unless the standard of reference is first defined.[231] Talking about political equality in the abstract does not help us to understand where we are on the continuum and what is at stake among competing notions of political equality. Let us first spell out some possible meanings for the phrase political equality, before we try to get some leverage on the Court's conception of political equality in *Baker*.

Political equality can be understood as referring to any of the following presuppositions.[232] The first is universal equal suffrage: everyone must have a vote and they must have an equal number of votes.[233] Second, everyone's vote must count.[234] Third, all votes must count equally.[235] Fourth, everyone must have an equal chance of affecting the outcome of the election.[236] Fifth, voters must have equal power to affect legislative outcomes.[237] Sixth, legislators must have equal power in proportion to the population represented.[238]

With these conceptions of political equality in mind, we can now turn to *Baker* and try to determine which of these conceptions best explain the Court's decision. Recall that one of the points of dispute

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230. Baker v. Carr, 369 U.S. 182, 300 (1962) (Frankfurter, J., dissenting).

231. For example, see Justice Thomas's concurrence in *Holder v. Hall*, 512 U.S. 874, 899 (1994) ("Such conclusions, of course, depend upon a certain theory of the 'effective' vote, a theory that is not inherent in the concept of representative democracy itself."). Justice Thomas's views are particularly relevant in this context; if one were to follow the logical implications of his concurrence in *Holder*, one would have to conclude that the Court must overrule *Baker*. For a reply to Justice Thomas, see Guinier, *supra* note 201.

232. Of course these presuppositions are not all-inclusive. I have selected the more relevant and common presuppositions.

233. *See* Still, *supra* note 226, at 377–78.

234. *See* HERZOG, *supra* note 201, at 199.

235. *See* Ronald Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS, 395, 399 (1981); Still, *supra* note 226, at 378–80.

236. *See* Rogowski, *supra* note 235, at 399; Still, *supra* note 226, at 380–82.

237. *See generally* Guinier, *supra* note 201, at 137 (proposing that "courts embrace the concept of group representation as a universal remedial principle of democratic accountability and legitimacy"); *see also* Bernard Grofman, *Fair and Equal Representation*, 91 ETHICS 477, 477–78 & n.1 (1981); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–20 (1993) (stating that political equality includes the right to cast a ballot, the right to a cast a ballot that counts, and the right to cast a ballot that embodies a fair chance to influence legislative policy-making).

238. *See* Grofman, *supra* note 237, at 477–78 & n.1.

among the various Justices was whether the availability of universal suffrage is sufficient to satisfy the requirement of political equality.

Once again, Frankfurter's discursion on this matter will serve as an invaluable repartee and point of departure. He states:

> What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied.[239]

It is essential to note here that Frankfurter is mistaken to the extent that he implies that the majority's conclusion in *Baker* impermissibly and necessarily relies upon notions of democratic theory, whereas his conclusion eschews such reliance. By Frankfurter's own terms, satisfying political equality requires a baseline understanding of what political equality requires. Moreover, Frankfurter also relies upon notions of democratic theory to the extent that he argues that judicial involvement in democratic politics is anti-democratic.[240] Consequently, as Frankfurter unwittingly demonstrates, repair to democratic theory is unavoidable when thinking about the relationship between the Constitution and the democratic process.

What, then, is Frankfurter's baseline? For Frankfurter, the fact that the plaintiffs were able to vote and to have their vote counted is sufficient to satisfy his standard for political equality.[241] Having powerful representatives, however, is not a core requirement of political equality. We can conclude that Frankfurter believes political equality is satisfied once the second presupposition is met. It is not sufficient that individuals have the ability to vote; their votes must also count. But as long as their votes count, Frankfurter's required baseline is satisfied.

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239. Baker v. Carr, 369 U.S. 186, 299–300 (1962) (Frankfurter, J., dissenting) (footnote omitted).

240. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 553–54 (1946) ("It is hostile to a democratic system to involve the judiciary in the politics of the people.").

241. *See also Baker*, 368 U.S. at 300 (Frankfurter, J., dissenting) ("This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote.").

What of the majority? What is its understanding of political equality? The *Baker* majority reasoned that individuals have a right under the Fourteenth Amendment not to have their votes debased, diluted, or rendered otherwise less effective as a consequence of population inequality.[242] Similarly, Justices Douglas and Clark, in their respective concurrences, also expressed their concerns with the consequences of population inequality.[243] For both Justices Douglas and Clark, political equality is concerned with the extent to which "a State [may] weight the vote of one county or one district more heavily than it weights the vote in another."[244] Political equality is implicated when "a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County."

Where then can we place the majority and concurrences on our political equality continuum? For the majority, though an individual may be able to vote and have her vote count, political equality is not satisfied if the votes of other citizens count for more. Likewise, for Justices Douglas and Clark, political equality is satisfied only when all votes count the same.

Of course this begs an obvious question: What does it mean that all votes count the same? Perhaps we can answer this question by trying to understand what "counting the same" does not mean. If the concurring Justices' understanding of *Baker* is to be credited, counting the same does not mean absolute equality. I believe this is what Justice Douglas meant when he asserted that "[u]niversal equality is not the test; there is room for weighting."[245] Correspondingly, Justice Clark maintained that "[n]o one ... contends that mathematical equality among voters is required by the Equal Protection Clause."[246]

Baker's substantial equality requirement gives rise to two important observations. First, the Court in *Baker* set the floor for equality but not the ceiling. Presumably, by setting the floor, the Court permitted state actors to provide greater political equality, as many conceptions of political equality undoubtedly exist. The

242. *Baker*, 369 U.S. at 187–88, 194, 207–08.

243. *Id.* at 244–45 (Douglas, J., concurring); *id.* at 251–62 (Clark, J., concurring).

244. *Id.* at 244 (Douglas, J., concurring); *id.* at 254 (Clark, J., concurring) (noting and cataloguing the "wide disparity of voting strength" in Tennessee).

245. *Id.* at 244–45 (Douglas, J., concurring).

246. *Id.* at 258 (Clark, J., concurring); *see also id.* at 260 (Clark, J., concurring) ("Moreover, there is no requirement that any plan have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both magnitude and frequency can it be said that there is present an invidious discrimination.").

Court's decision to choose substantial equality over absolute equality bespeaks the Court's role in this interpretive enterprise.

Second, equality is only one of many interests that must be satisfied by representative structures. Though equality in voting is important, it need not be maximized to comport with the Constitution. Maximization is accompanied by costs and trade-offs; to the extent that political actors are forced to maximize one value, it comes at the expense of another.[247] Given the multiplicity of values that must be taken into account by political actors, no one value can be effectively maximized unless other worthy values are sacrificed.[248]

4. Pluralism and Interest Representation

A fourth core conceptual pillar of modern democratic theory is pluralism. Democratic politics is best understood as a struggle among various groups for political power.[249] The best account of the role

247. *See* Fuentes-Rhower & Charles, *supra* note 197, at 292–94 (discussing the trade-off hypothesis).

248. An apt point of comparison here is the Court's approach to judicial regulation of the political process in the *Shaw* line of cases. In sharp contrast to *Baker*, the Court in *Shaw* and its progeny, threatened to enforce an absolute standard of political equality—colorblindness. As most observers have remarked, this attempt has utterly failed. Relatedly, the Court's subsequent attempt in the redistricting context to enforce an absolute norm of political equality has also been regarded as a failure. *Baker*'s approach to judicial review of the political process provides an important lesson to the Court's continuing struggle with the proper method of promulgating and enforcing a norm of political equality.

249. ANTHONY H. BIRCH, THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY 55 (1993) (concluding that "conflict between group pressures is a central characteristic of American politics"). Given that political pluralism is important to my approach, it is necessary to address two potential concerns. First, I recognize that pluralism has lost its appeal in the world of legal academia. *See, e.g.*, Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 603 (1995) ("The pluralist vision, once dominant among political theorists and legal scholars, no longer maintains its intellectual monopoly."). *But see* Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 6–7 (1996) (advocating "egalitarian pluralism" both as a positive theory of how the world of politics works and as a normative theory of political equality). Nevertheless, the core insight of political pluralism continues to maintain its vitality. Second, my reliance on political pluralism does not mean that other approaches, in particular public choice theory, neo-republicanism, or deliberative democracy do not have anything to contribute to constitutional pluralism as a method of interpretation. For example, some commentators have criticized direct democracy devices such as initiatives and referenda on the grounds that they inhibit the dialogic process envisioned by adherents of deliberative democracy. *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1525–56 (1990) (noting the heightened importance of judicial review of direct democracy initiatives due to the removal of the legislative process, which normally acts as a "filter" of majority preferences); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the*

that groups play in democratic society is pluralism.[250] It is based upon the contention that there are different conceptions of the good and it incorporates classical liberalism's respect of the right of others to pursue their vision of the good.[251] As Alexander Hamilton intimated, in a democracy one expects different groups—with different interests and competing versions of the good—to vie for political power.[252] This process is inevitable. The role of the Court is to demarcate the boundary within which this struggle is to take place. The object here is not to minimize power, but to recognize its deployment and its effect on various groups within the democratic polity, and to limit its scope.[253]

Privatization of the Public Sphere, 34 WILLAMETTE L. REV. 421, 429 (1998) ("The decline of the deliberative ideal in the modern era has paralleled the revival of direct democracy."); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 414 (1999) ("[C]omplex issues are presented to the voters on a yes or no basis without the benefits of deliberation and without the check of representatives having to be accountable to the interests of others."). Similarly, much can be learned from Professor Chantal Mouffe's insight on the relationship between conflict and politics. As she states:

> A well-functioning democracy calls for a vibrant clash of democratic political positions. If this is missing there is the danger that this democratic confrontation will be replaced by a confrontation among other forms of collective identification, as is the case with identity politics. Too much emphasis on consensus and the refusal of confrontation lead to apathy and disaffection with political participation.

CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 104 (2000).

250. James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 105 (2000); Guinier, *supra* note 201, at 125–26. It is important here for me to point out that even though I use the term "pluralism" to provide a thick normative orientation for judicial supervision of democratic politics, I also mean for it to provide a descriptive and thin orientation for judicial supervision of democratic politics. In addition to the normative orientation, pluralism is a useful word because it implies that the Court must take into account multiple values in regulating law and politics. More often than not, the Court is inclined to seize upon one value—for example, one person, one vote—and attempt to enforce that value to the exclusion of all others. *See, e.g.*, Issacharoff, *supra* note 113, at 1650 (remarking that "the instrumental aspect of the equipopulation rule lost its vitality as the one person, one vote rule became increasingly reified as the functional definition of what it meant for an electoral process to be politically fair").

251. JOHN RAWLS, POLITICAL LIBERALISM, at xvii (1993) (noting the "fact" of pluralism); *see also* Chantal Mouffe, *Democracy, Power, and the "Political,"* in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 246 (Seyla Benhabib ed., 1996) (explaining that the fact of pluralism implies the "legitimation of conflict and division, the emergence of individual liberty, and the assertion of equal liberty for all").

252. THE FEDERALIST NO. 61 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

253. As Professor Mouffe remarks, to deny power "is to ignore the limits imposed on the extension of the sphere of rights by the fact that some existing rights have been constructed on the very exclusion or subordination of others." MOUFFE, *supra* note 249, at 20.

Since there are many versions of pluralism, let me be clear with respect to the version that I prefer here. I am particularly interested with the conception of pluralism as interest group politics.[254] Classical pluralism theorized that society is composed of individuals with different interests and preferences. "When individuals find they have interests in common that can be advanced through collective action, they are stimulated to form groups, which then serve as vehicles for the transmission of interests into the political system."[255] This grouping is a natural occurrence, the consequence of individuals recognizing a mutual commonality of interests.[256] The basic theory of classical pluralism is that politics or public policy is in great part the result of conflict and accommodation of various interest groups.[257] The purpose of the struggle is to persuade government officials to direct public policy in favor of organized interests as these interests attempt to pursue their self-defined goals.[258]

Classical pluralists not only assumed that in a democratic regime individuals would group together naturally to protect and advance their interests by pressuring the government; they also suggested that interests would be manifold and diverse. This conclusion of diversity and multiplicity of interests rested upon two suppositions. First, the classical pluralists argued that though resources are not equally distributed, they are sufficiently available to enable any interest group with strong preferences to pressure government officials.[259] Second, they also maintained that the pressure system is sufficiently open to welcome a diversity of interests and capable of handling multiple interests. As a consequence of this diversity and multiplicity of interests, no single interest group can dictate policy outcomes. As Dahl concluded, "it is a rarity for any coalition to carry out its policies without having to bargain, negotiate, and compromise with its

254. *See* Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 735 (1983).

255. Terry M. Moe, *Toward a Broader View of Interest Groups*, 43 J. POL. 531, 532 (1981).

256. *But see* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 2 (1965) (positing that "even if all of the individuals in a large group are rational and self-interested, . . . they will still not voluntarily act to achieve their common or group interest").

257. DAVID HELD, MODELS OF DEMOCRACY 203 (1996); Darryl Baskin, *American Pluralism: Theory, Practice, and Ideology*, 32 J. POL. 71, 73 (1970) ("Group or pluralist theory attempts to explain the formulation of public policy and the maintenance of public order in terms of the interplay among the contention group forces of society."); Gardner, *supra* note 250, at 104.

258. Baskin, *supra* note 257, at 73.

259. John F. Manley, *Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II*, 77 AM. POL. SCI. REV. 368, 368–69 (1983).

opponents; often, indeed, it wins a victory in one institution only to suffer defeat in another."[260]

The attractiveness of classical pluralism is its tantalizing promise that representative democracy is capable of responding to all interests. This promise is particularly alluring because interest representation is a central function of representative democracy; it is the primary mechanism through which self-government is actualized. Given the importance of interest representation to self-government, representative institutions and structures assist in facilitating the goal of self-government when they are open to entertaining the multiplicity of interests present in the electorate at large. In short, representatives respond to these interests. Though democratic theorists have long debated how interests are to be represented—objective versus subjective representation or private versus public—there is widespread agreement that it is interests that are to be represented.[261] The promise of pluralism is that individual liberty is best protected from encroachment—not by the Constitution or by the government, but through group-based politics.

This standard account of pluralism has been criticized on many fronts. However, its basic tenets—particularly as reformulated by the neo-pluralists—continue to describe a basic truth of American politics: representation and responsiveness in our representative democracy are secured through participation in the political process by various groups and the interests that they represent. This fact as revealed by pluralism gives rise to at least one important implication. Representative institutions must be open to all interests. What representative institutions must not do is represent certain interests to the exclusion of all others.[262] When such biases exist—and particularly when they are systematic and predictable—interest representation simply becomes a device for undermining self-government. Indeed, when used in this fashion, it will inevitably

260. ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 326–27 (1967).

261. PITKIN, *supra* note 211, at 113 (stating that representation is "an acting for others, an activity in behalf of, in the interest of, as the agent of, someone else"); Charles E. Gilbert, *Operative Doctrines of Representation*, 57 AM. POL. SCI. REV. 604, 604, 616 (1963).

262. This is the basis for E.E. Schattschneider's well-known criticism of pluralism; the groups that affect public policy are not reflective of the interests of the electorate at large. As he notes, the "system is skewed, loaded, and unbalanced in favor of a fraction of a minority." E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 35 (1960); *see also id.* ("The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably 90 per cent of the people cannot get into the pressure system.").

serve as a mechanism for replicating and furthering existing inequalities.[263] The role of the Court then is to assure that representative institutions are open to group interests. Thus, judicial supervision is warranted where the Court intervenes not necessarily to ensure responsiveness but to assure openness.

This bias in the representative structure is exactly what was at issue in *Baker*. As some commentators have noted, state legislatures generally, not just Tennessee's, were not at all open to urban interests.[264] Justice Douglas underscored the consequence of this lack of openness in his concurrence. As he stated:

> The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administrators.
>
> Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable under-representation of cities in the legislatures of most states.[265]

Justice Harlan replied in dissent:

> I would hardly think it unconstitutional if a state legislature's expressed reason for establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests

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263. Professor Guinier advances a variant of this argument against the creation of majority-minority districts as the primary method of representing the interests of African Americans. *See* GUINIER, *supra* note 198, at 65.

264. As Andrew Hacker recounted:

> The public soon began to notice that state legislatures were not responding to the new concentrations of population. Rural and small-town lawmakers continued to maintain majorities in the legislatures, and they displayed a marked indifference to the needs of both cities and suburbs. Urban and suburban citizens were cheerfully taxed, but their demands for legislation and appropriations were virtually ignored.

ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 20 (1963); MCKAY, *supra* note 70, at 36–40; POWE, *supra* note 76, at 200 ("[R]ural control of mid-century state legislatures was a political fact of life."); *see also id.* at 203 ("*Baker* would signal the end of rural domination of state legislatures and the beginning of states dealing with the problems of urban majorities.").

265. Baker v. Carr, 369 U.S. 186, 248–49 n.4 (1962) (Douglas J., concurring) (quoting the amicus brief filed by the National Institute of Municipal Law Officers).

> from the sheer weight of numbers of those residing in its cities. A State may, after all, take account of the interests of its rural population in the distribution of tax burdens . . . and recognition of the special problems of agricultural interests has repeatedly been reflected legislation . . . .[266]

For Justice Harlan, the State could overrepresent, by malapportionment, some interests at the expense of others.

But the problem was not simply one of overrepresentation; it was one of openness and ultimately of representation. The representative system was structured in such a way as to be predictably and systematically open and ultimately responsive to agricultural interests to the exclusion of urban interests. The State's failure to be open to the interests of the majority of its citizens left those citizens without representation.[267] It is this absence of representation that motivated the Court in *Baker*. As Justice Clark eloquently concluded in his concurrence, "to be fully conformable to the principle of right, the form of government must be representative."[268] He also could have added that a truly representative form of government must also be capable of being influenced by various interests. Otherwise, the system suffers a failure of representation, at least as to those groups that are not represented.

CONCLUSION

As Frankfurter perceptively recognized, judicial supervision of democratic politics presents a problem. Though the problems of democracy often cry out for judicial intervention, the Constitution is often a poor guide. Frankfurter disregarded the utility of democratic theory as a guide because "matters of political theory are beyond the ordinary sphere of judges."[269]

However, as I have argued in this Article, judges can—and must—utilize democratic theory to direct their interpretation of the Constitution. I described this approach as constitutional pluralism. It is the contention that politics must reflect core democratic principles.

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266. *Id.* at 336 (Harlan, J., dissenting).

267. HERZOG, *supra* note 201, at 213 (noting that "what's special about democracy is responsiveness"); *see also id.* at 205 ("I suggest, any plausible account of legitimacy and obligation must center on whether the state is for the most part responsive to the people.").

268. The full quote reads, "[The Court's] decision today supports the proposition for which our forebears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative." *Baker*, 369 U.S. at 261 (Clark, J., concurring).

269. Holder v. Hall, 512 U.S. 874, 891, 901 (1994) (Thomas, J., concurring).

Judicial review is legitimate when the Court interferes with the democratic process to enforce a core democratic principle. I have articulated some examples of core democratic principles and have traced those to the Court's opinion in *Baker*. *Baker* provides a necessary blueprint and is rightly celebrated as an important moment in the law of democracy.