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# Leaving the Thicket at Last?

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# LEAVING THE THICKET AT LAST?

*Luis Fuentes-Rohwer\** & *Laura Jane Durfee\*\**

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## ABSTRACT

Across the spectrum of ideas debated within the law of democracy, the view is nearly unanimous that the Justices must lead the way toward a better democracy. And yet, as we argue in this Essay, the Court’s handling of the problems since its initial intervention in *Baker v. Carr* has been nothing short of a mess. Debates in this area offer modern instances of a Court that cares little about doctrinal consistency and judicial craftsmanship, of Justic-

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es that care less about compromise and common ground and more about expressing their deeply held views about politics, democracy, and the law. In response, we look back to the debate between Justices Brennan and Frankfurter over the wisdom of judicial intervention. And to our minds, this is a debate with a clear winner: to this day, Justice Frankfurter's forceful argument has gone both unheeded and unanswered. The evidence is in, and so, after forty years of judicial review in the realm of politics, the question for the future should be whether judicial intervention in the realm of politics is worth the cost.

"This Court seems incapable of admitting that some matters—any matters—are none of its business."<sup>1</sup>

#### INTRODUCTION

"If democracy consisted only in the desire of people to express what is on their minds and the willingness of their leaders to respond to those desires," writes Alan Wolfe, "American democracy today would be a cause for celebration."<sup>2</sup> Yet democracy is far more complicated than that, and Wolfe makes clear that the quality of democracy, as practiced in the United States, is seriously wanting.<sup>3</sup> The data is plentiful. At the micro-level, citizens are apathetic and disengaged and voters know very little about politics. At the macro-level, accountability from elected officials is lacking, mediating institutions such as political parties and interest groups are viewed with distrust, and neutral bodies such as the media and administrative agencies are no longer driven by the public good but in accordance with the preferences of the party in power.<sup>4</sup>

The fashionable way out of this condition—arguably the only way—points to the U.S. Supreme Court. Across the spectrum of ideas debated within the law of democracy, the view is nearly unanimous that the Justices must lead the way toward a better democracy. Consider in this vein the debate at the heart of the law of democracy, between advocates of judicial intervention in defense of individual rights (the "individualists") and those who advocate for judicial intervention as a corrective measure for structural flaws (the "structuralists"). Both sides find common ground in their view that the Court must play an important role in this area. Curiously, they also agree that the opposing camp is misguided and ultimately expects too much from the Court. According to Rick Hasen, a leading individualist, the structuralists "evinced judicial hubris, a belief that judges appropriately should be

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1. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment).

2. ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? 12 (2006).

3. *See id.* at 14.

4. *See id.*

cast in the role of supreme political regulators.”<sup>5</sup> In contrast, Rick Pildes, a leading structuralist, worries that a turn to rights in this area might “Lochnerize the very design of democratic institutions.”<sup>6</sup> Both camps thus aim to provide a space for the Court to intervene in politics, while simultaneously minimizing its effects.

These are legitimate concerns. Take any issue, from partisan gerrymandering and minority vote dilution to campaign finance or the Voting Rights Act. Each of these debates offers modern instances of a Court that cares little about doctrinal consistency, judicial craftsmanship, and compromise or common ground. Instead, the Justices seem to care more about expressing their deeply held views about politics, democracy, and the law. The opinions in these cases are so confused and confusing that scholars can hardly make sense of them; or, as Heather Gerken explained in the wake of *LULAC*,<sup>7</sup> the Texas gerrymandering case, “The authors’ interpretations of *LULAC* are so different that at times one wonders whether they were reading the same opinion.”<sup>8</sup> But do not take our word for it. According to Pam Karlan:

Sixty years after Justice Frankfurter warned his colleagues “not to enter this political thicket,” the Court is embroiled in the thicket more than ever. Part of the reasons for the current inconsistency in the doctrine are the very real tensions that any jurisprudence of politics must navigate: among stability, robust competition, and protection of minority groups; between protecting individual rights and promoting institutional arrangements that fairly reflect group interests; and between anti-entrenchment and anti-discrimination models of judicial intervention. As long as money and race remain salient in American politics—and it’s hard to imagine either fading away any time soon—judicial intervention will remain both necessary, and necessarily dicey.<sup>9</sup>

Unquestionably, the law of democracy is messy and contested. A much better question is whether this is an inevitable consequence of judicial review in this volatile area, or whether the Court is up to something else. Is the cure worse than the disease itself? Or, is judicial intervention, no matter how divided and inconsistent, a necessary component of American-style democracy?

One answer suggests that all these questions—and the Court’s apparent incoherence—can be summarily explained as an institutional strategy to

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5. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 13 (2003).

6. Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 48 (2004).

7. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

8. Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. 1213, 1214 (2007) [hereinafter Gerken, *Rashomon*].

9. Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 766 (2007).

hold the doctrine in place until the Court finds a coherent way out of the muddle. As elegantly and forcefully argued by Professor Gerken, the Court is in a holding pattern—essentially “treading water” before a new coalition emerges to infuse a much needed coherence into the law of democracy.<sup>10</sup> She labels the current state of the law “a doctrinal interregnum” and explains it as follows: “The Court seems to sense the imminence of a paradigm shift, but it is not sure where the next analytic road will lead. It is thus content with going through the motions, patching the holes in the existing foundation, holding the doctrinal edifice together a little while longer.”<sup>11</sup> Aware that its existing paradigm is no longer useful and has reached “an intellectual dead end,”<sup>12</sup> the Court is “staying put” while it waits for a cohesive majority to emerge.

This is an intriguing account of the present state of the law of democracy. And who knows, it may well be the case that this doctrinal incoherence is part of a larger strategy on the part of the Court. To our minds, however, the law of democracy and the Court’s role in shaping it have changed very little from the moment the Court began to regulate these questions in *Baker v. Carr*.<sup>13</sup> What we see today is not very different from what we saw thirty years ago. Consider, for example, Justice Harlan’s words in his separate opinion in *Whitcomb v. Chavis*, decided in 1971:

The suggestion implicit in the Court’s opinion that [plaintiffs] may ultimately prevail if they can make their record in these and other like respects should be recognized for what it is: a manifestation of frustration by a Court that has become trapped in the “political thicket” and is looking for the way out.

This case is nothing short of a complete vindication of Mr. Justice Frankfurter’s warning nine years ago “of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants) into which this Court today catapults the lower courts of the country.” With all respect, it also bears witness to the morass into which the Court has gotten itself by departing from sound constitutional principle in the electoral field.<sup>14</sup>

As the Court continues to struggle with its handling of questions of democracy, we ask the one question missing from modern debates about the Court and its role in regulating our politics: is it time to reconsider the Court’s return to the political question regime of old, where the Court

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10. Gerken, *Rashomon*, *supra* note 8, at 1213 (noting that the “doctrinal interregnum continues” with the Roberts Court); see Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 PA. L. REV. 503, 504, 515-16 (2004) [hereinafter Gerken, *Lost*] (noting that the Court is “in a doctrinal holding pattern, unsure of where to go next”).

11. Gerken, *Lost*, *supra* note 10, at 516-17.

12. *Id.* at 505.

13. 369 U.S. 186 (1962).

14. 403 U.S. 124, 170 (1971) (Harlan, J., concurring) (quoting *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting)) (internal citation omitted).

played no role in reigning in the excesses of politics? As the leading camps within the law of democracy jostle for supremacy while simultaneously deriding their critics as advocates of judicial activism, it might be well worth remembering that a third option once existed. Even if one is ambivalent—as we are—about returning the Court to the world pre-1961, it might be time to at least consider a third option.

This Essay develops this argument in the course of three Parts. Part I sketches the modern debate over the role of the Court in our constitutional universe. One model focuses on the question of who should have the ultimate authority to interpret the Constitution. The claim here, as recently examined by Larry Kramer, argues that the Rehnquist Court embraced the notion of judicial supremacy. This is a view of the Court as aggressive, muscular, and supreme. A second model looks to the question of when the Court should intervene in difficult social and political controversies. The argument here is based on Alexander Bickel's notion of the "passive virtues," and presents a view of the Court as prudential, pragmatic, and attuned to social and political realities. Finally, a third model largely focuses on how the Court should decide cases once it accepts them for review. This model is associated with Cass Sunstein's concept of "judicial minimalism." A minimalist court must issue narrow and shallow opinions in order to allow the disagreeing parties enough room for reaching consensus.

Part II argues that the Court's modern performance is in line with its traditional behavior in the field. There is nothing new here. This Part uses the short history of the minority vote dilution cases as a case study. We choose this area of the law for an important reason. As the Supreme Court continues to demonstrate deep ambivalence about the constitutionality of the Voting Rights Act, there may come a time in the near future when these cases will once again return to prominence. Our discussion highlights their importance in the development of the law while foreshadowing their likely resurgence.

Finally, Part III asks the obvious question: is the Court's intervention in our politics worth the cost? Or is it time to advocate for the Court's exit from the famed political thicket? In 1961, Justices Brennan and Frankfurter could only debate hypothetically the issues at the heart of the Court's choice to enter the field of politics. Close to half a century later, and evidence in hand, we look back to that important debate. Again, while it is clear to us that Justice Frankfurter has won the argument by a wide margin, we do not think that the Court must overturn *Baker v. Carr*. But at the very least, we must take the argument seriously. The Court's incoherent regulation of our democracy demands no less.

## I. THREE FACES OF JUDICIAL REVIEW: A CONTINUUM

An institution faced with a difficult question may first choose to act; or, instead, it may choose to do nothing. Once it chooses to act, it may choose to do so assertively or cautiously, depending upon the circumstances in question. These choices may be set as part of a continuum, with action and inaction being polar extremes.

Accounts of the judicial function may be set along a similar continuum. This Part briefly catalogues three leading accounts, as initially developed by prominent constitutional theorists in the prestigious Supreme Court Forewords to the *Harvard Law Review*.<sup>15</sup> One end finds a strong version of judicial supremacy, of a Court that acts with much confidence, perhaps hubris. Many scholars posit the Court precisely here, willing and able to aggrandize its own power vis-à-vis the political branches.<sup>16</sup> Strands of this argument place the demise of the political questions doctrine at the heart of the Court's newfound posture, though its reach is seen across myriad doctrinal arenas. The opposite end finds calls for judicial inaction grounded in prudence and the "passive virtues."

Recent calls for a jurisprudence of "judicial minimalism" fall between these two extremes.<sup>17</sup> This is a view of the Court as restrained, its rulings narrow and shallow, going no farther than necessary. In particular, some influential accounts posit the Rehnquist Court circa 2004 as a minimalist Court.<sup>18</sup>

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15. See Larry D. Kramer, *The Supreme Court, 2000 Term – Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Cass R. Sunstein, *The Supreme Court 1995, Term – Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *Leaving Things*]; Alexander M. Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

16. See, e.g., Kramer, *supra* note 15; Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

17. See Cass R. Sunstein, *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, at WK9 [hereinafter Sunstein, *Smallest Court*]. See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, ONE CASE]. This characterization intends to encompass both Sunstein's position and that of the "original minimalist manifesto." Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1457 (2000). 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, 1233 (2002) (labeling Sunstein "Bickel's jurisprudential heir"). Peters includes Michael Dorf, Richard Fallon, Robert Burt, Neal Katyal, and Neal Devins within the "minimalist" school. See Peters, *supra*, at 1466-74. Dorf, for one, disputes the characterization. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 887 n.36 (2003).

18. See Sunstein, *Leaving Things*, *supra* note 15, at 6; cf. Bickel, *supra* note 15, at 40, 51 ("It happens that a number of this Term's most celebrated cases were as significant for

## A. Judicial Hubris: A “Muscular” Supremacy, Turning to Sovereignty

In his recent *Harvard Law Review Foreword*, Larry Kramer placed the notion of judicial supremacy at the heart of his contribution. His thesis examined the widespread acceptance of judicial supremacy by all relevant political and constitutional actors.<sup>19</sup> As he wrote, “in the years since *Cooper v. Aaron*, the idea of judicial supremacy—the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone—has finally found widespread approbation.”<sup>20</sup> Even among scholars who criticize and disapprove of this role, Kramer concluded, “the Court remains the preeminent institution in establishing constitutional meaning.”<sup>21</sup>

The argument here is that the Rehnquist Court anointed itself as preeminent constitutional interpreter, the last word on matters of constitutional interpretation.<sup>22</sup> The quintessential buck stops right at the steps of the Supreme Court building. All other relevant actors, from the President to Congress to the states, must play a secondary role.<sup>23</sup>

Placed in historical context, this argument often begins with Chief Justice Marshall’s claim in *Marbury* that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>24</sup> It also includes *Cooper*’s axiom that the Court is “supreme in the exposition of the law of the Constitution.”<sup>25</sup> Modern examples of this position are many, and Kramer offers his share. The obvious ones are *City of Boerne v. Flores*,<sup>26</sup> where the Court rejected congressional attempts to overrule a recent Court deci-

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having brought into focus the uses and nonuses of techniques of withholding ultimate constitutional adjudication, as for having wrought changes in substantive law.”).

19. Kramer, *supra*, note 15. Kramer is not alone in making this observation, as noted above. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697 (2003).

20. Kramer, *supra* note 15, at 6.

21. *Id.* at 8.

22. See also Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

23. This Part implies neither agreement with nor universal acceptance of Kramer’s claims. As to the latter, scholars have obviously challenged some of the views described here. See, e.g., Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405 (2003); Marci A. Hamilton, *Nine Shibboleths of the New Federalism*, 47 WAYNE L. REV. 931 (2001).

24. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

25. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

26. 521 U.S. 507 (1997); see also Michael W. McConnell, *Comment, Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 163 (1997) (contending that the Court in *Boerne* “adopted the most judge-centered view of constitutional law since *Cooper v. Aaron*”).



sion under its Section 5 power; *United States v. Lopez*,<sup>27</sup> where the Court struck down a congressional enactment on Commerce Clause grounds;<sup>28</sup> the various Commerce Clause cases of the 1990s, which, Kramer argues, essentially foreclose the judgment of Congress in this area;<sup>29</sup> and the mother of all judicial supremacy cases, *Bush v. Gore*.<sup>30</sup>

Kramer offers brief, yet choice words for *Bush*. Readers likely recall the Court's seemingly apologetic words about intervening in the election:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.<sup>31</sup>

Kramer has very little patience for this passage: "These sentiments, coming as they do immediately after the Court's brute exercise of authority to halt the recount, have a 'they doth protest too much, methinks' quality about them. Unsought responsibility?! Forced to confront?!"<sup>32</sup> The initial question was one of institutional responsibility, of locating the proper forum to decide this electoral question. To Kramer, the answer was simple: "Nothing kept the Justices from ruling that the Supreme Court was not the proper forum in which to decide a presidential election. Nothing in the law, that is."<sup>33</sup>

Under procedures and doctrines then in effect, and once it decided to see the case to its conclusion, the Court had two options at its disposal. On the question of Florida law, the Court should have returned the case to the Florida Supreme Court. But the Court had no intention of doing any such thing. "Having determined to prevent [returning the case to the Florida Supreme Court] at all costs, the Justices in the majority had no choice but to lie, fabricating a transparently phony claim to be following the lead of the Florida Supreme Court."<sup>34</sup> Ultimately, a second option might have included

27. 514 U.S. 549 (1995).

28. See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 151 & n.193 (1988) (observing that the Court consistently—absent one case, *National League of Cities v. Usery*, 426 U.S. 833 (1976)—deferred to Congress under the Commerce Clause from 1937 to 1995).

29. See Kramer, *supra* note 15, at 145.

30. 531 U.S. 98 (2000).

31. *Id.* at 111.

32. Kramer, *supra* note 15, at 156.

33. *Id.*; see also HASEN, *supra* note 5, at 9 ("The lament was disingenuous because the Court could have declined to hear the case not once but twice."); Powe, *supra* note 19, at 731 ("The responsibility, far from being unsought, was one the justices had been demanding for a decade by their imperialism in displacing and disparaging other constitutional interpreters.").

34. Kramer, *supra* note 15, at 155-56.

a larger role for Congress.<sup>35</sup> Yet, Kramer writes, “[n]othing jumps off the pages of the opinion quite so starkly as the majority’s evident determination to call a halt to things before Congress could get its hands on the problem.”<sup>36</sup>

After *Bush v. Gore*, scholars contend that very little remains of the political question doctrine. Or so it appears. If the facts in this case do not warrant that the Court step aside, it is hard to see what facts might so warrant. This is another way of saying that a tension exists between the political question doctrine, which demands judicial humility and passivity, and the Court’s modern view of its power and its place in our constitutional world as supreme interpreter. These two positions cannot co-exist. And according to some commentators, they no longer do. “It is hardly surprising,” Rachel Barkow writes, “that the Court has opted for the course that aggrandizes its own power.”<sup>37</sup> Kramer poses a similar issue in closing his provocative Article: “The Supreme Court has made its grab for power. The question is: will we let them get away with it?”<sup>38</sup>

In sum, this judicial posture is strong, muscular, and supreme. It is the posture of a Court not worried about minor details, but committed to asserting its authority across spheres and boundaries. It is the posture of a confident Court, sure of its place in the constitutional cosmos and unafraid to flex its considerable muscle. This posture, according to Kramer, is far more than judicial supremacy; it is “judicial sovereignty.”<sup>39</sup>

## B. Judicial Humility: Of Prudence, the “Passive Virtues” and Political Questions

But the Court was not always so confident and assertive. Writing in the wake of the Warren Court’s *Brown* revolution, and during a lull prior to the judicial tempest of the mid-1960s, Alexander Bickel’s own *Foreword* tells a story far different from Kramer’s account. In fairness, his concerns

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35. See Guido Calabresi, *In Partial (but not Partisan) Praise of Principle*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 67, 68 (Bruce Ackerman ed., 2002) (contending that one approach to *Bush v. Gore* would have been to “[l]et the House and Senate do their job”); Elizabeth Garrett, *Leaving the Decision to Congress*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 38, 48-54 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Laurence H. Tribe, Comment, *EROG v. HSUB and its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 *HARV. L. REV.* 170, 277-78 (2001) (“There is a powerful case indeed for the Court playing no role other than to protect Congress’s decisionmaking function—that is, for treating the matter as a political question textually committed to Congress under the Twelfth Amendment, rather than a legal question properly resolved by a court. The requisite textual commitment to a political branch could hardly be clearer.”).

36. Kramer, *supra* note 15, at 154.

37. Barkow, *supra* note 16, at 242.

38. Kramer, *supra* note 15, at 169.

39. *Id.* at 158.

were unlike those faced by constitutional theorists today. Bickel had seen *Brown* first-hand and had played a direct role in its outcome. He also witnessed the Southern response and the Court's own rejoinder in *Cooper v. Aaron*.<sup>40</sup> These experiences raised a different set of concerns for Bickel. Rather than worry about the Court's undemocratic pedigree, Bickel worried about the Court's power and the reception its rulings would receive at the hands of a recalcitrant public.<sup>41</sup> This meant that the Court could not issue its rulings in a vacuum, irrespective of contrary public opinion and localized opposition. Instead, the Court must know when to act and when to stay its hand. In so doing, it must be mindful of political considerations when deciding cases. In his own words, "the techniques and allied devices for staying the Court's hand . . . mark the point at which the Court gives the electoral institutions their head and itself stays out of politics, and there is nothing paradoxical in finding that here the Court is most a political animal."<sup>42</sup>

This is an account of a cautious Court, a Court that cannot assume acquiescence to its rulings. This is not a weak Court, by any means, but rather a Court that, while grounded in principle, was cognizant of the political realities of its day. The Supreme Court's handling of the Virginia miscegenation case soon after *Brown*, *Naim v. Naim*,<sup>43</sup> afforded Bickel a clear example of his thesis. The infamous edict in *Brown II*, exhorting compliance with *Brown I* at "all deliberate speed," provided him another, and Bickel spent many pages in *The Least Dangerous Branch* making precisely this claim.<sup>44</sup> In both instances, the Court retreats in the face of rabid Southern opposition.<sup>45</sup> And yet, according to Bickel, what choice did the Court really have? As he wrote:

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40. 358 U.S. 1, 18 (1958) (proclaiming that the Court is "supreme in the exposition of the law of the Constitution").

41. See Tushnet, *supra* note 17, at 1229.

42. Bickel, *supra* note 15, at 51.

43. 350 U.S. 891 (1955) (per curiam), *vacating and remanding* 87 S.E.2d 749, *on remand*, 90 S.E.2d 849; 350 U.S. 891 (1955) (per curiam), *motion to recall mandate denied per curiam*, 350 U.S. 985 (1956).

44. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 247-54 (2d ed. 1986).

45. In *Naim*, the Court faced a constitutional challenge to a Virginia anti-miscegenation statute. This was, according to Michael Klarman, "the last case the justices wished to see on their docket in 1955." MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 321 (2004) ("Many southern whites had charged that the real goal of the NAACP's school desegregation campaign was 'to open the bedroom doors of our white women to the Negro men' and 'to mongrelize the white race.' To strike down antimiscegenation laws so soon after *Brown* risked appearing to validate those suspicions. Moreover, opinion polls in the 1950s revealed that over 90 percent of whites, even outside of the South, opposed interracial marriage."). And so five Justices "swallowed their collective pride and voted to dismiss the appeal on the ground that the Virginia court's response 'leaves the case devoid of a properly presented federal question.'" *Id.* at 323. Klarman concluded that "[a] majority of the justices apparently pre-

[W]ould it have been wise, at a time when the Court had just pronounced its new integration principle, when it was subject to scurrilous attack by men who predicted that integration of the schools would lead directly to “mongrelization of the race” and that this was the result the Court had really willed, would it have been wise, just then, in the first case of its sort, on an issue that the Negro community as a whole can hardly be said to be pressing hard at the moment, to declare that the states may not prohibit racial marriage?<sup>46</sup>

Of course not, he argued. To some, this signaled a Court caving in to public pressure and political considerations altogether foreign to constitutional law. To Bickel, the Court ignores these social realities at its peril. The Court must be prudential, principled, pragmatic, but not blind to social and political realities.<sup>47</sup>

It was in this important sense that Bickel referred to the “passive virtues.” These were jurisdictional devices, “certain techniques of the mediating middle way,”<sup>48</sup> that allow the Court to stay its hand when prudence demands that it do so. These were the traditional requirements of standing, case and controversy, ripeness, and the political question doctrine. Bickel’s main contribution focused on these doctrinal tools; when “imaginatively utilized,”<sup>49</sup> they would allow the Court to enter into a Socratic dialogue with the political branches and with society as a whole. This meant for Bickel that the Court must not pursue principle at any and all costs, but rather, it must walk the thin line between principle and expediency. In his mind, this was “the unique function of constitutional adjudication in the American system.”<sup>50</sup>

The political question doctrine played a central role for Bickel. For him, “[a]ny progression of instances when the final, constitutional judgment of the Supreme Court has been or should be withheld culminates naturally in the nebulous neighborhood of the doctrine of political questions.”<sup>51</sup> If the neighborhood was nebulous in the early 1960s, the passage of time has done little to improve matters.<sup>52</sup> For example, commentators debate whether such

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ferred to be humiliated at the hands of truculent state jurists rather than to stoke further the fires of racial controversy” ignited by *Brown*. *Id.* See also Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 60–66 (1979).

46. BICKEL, *supra* note 44, at 174.

47. For a defense of Bickel on some of these points, see Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985). For a well-known critique, see Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

48. Bickel, *supra* note 15, at 41.

49. *Id.*

50. *Id.* at 50.

51. *Id.* at 74.

52. See Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1031 (1985) (“The doctrine has always proven to be an enigma to commentators.”).

a doctrine actually exists.<sup>53</sup> And even if it does, some argue that the doctrine is “anemic,”<sup>54</sup> or should “play no role whatsoever.”<sup>55</sup> Commentators also disagree whether, as Bickel remarked, the doctrine “resists being domesticated.”<sup>56</sup> Finally, some commentators focus on what is known as the “classical” strand of the doctrine, and whether the “Constitution has committed to another agency of government [rather than the courts] the . . . determination of the issue.”<sup>57</sup> Others, such as Bickel, focus on what has been labeled the “prudential” strand.<sup>58</sup> Be that as it may, it should be clear why the political question doctrine, as Bickel understood it, played a central role in his judicial schema. A mere glance at the factors he offered as the basis for the doctrine should make this point amply clear:

[T]he Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that judicial judgment will be ignored, as that perhaps it should be, but will not be; (d) finally and in sum (“in a mature democracy”), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.<sup>59</sup>

Two reactions jump out immediately. First, and in line with the previous discussion, Bickel envisioned a Court able and willing to sidestep controversies as necessary. These factors clearly address the concern that the Court will overreach at times. Second, this is a description of an anxious, vulnerable institution, not a self-assured and “muscular” one. This description of the Court is no longer accurate,<sup>60</sup> as these were the early

53. Compare Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 600 (1976) (suggesting that there is no political question doctrine), with Barkow, *supra* note 16, at 242 (suggesting there is a political question doctrine), and Redish, *supra* note 52, at 1032 (“[A] political question doctrine does in fact exist.”), and Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 441-42 (2004) (“[T]he political question doctrine is as central to modern constitutional adjudication as it was to the outcome in *Marbury* at the beginning of our constitutional history.”).

54. Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 966 (2004).

55. Redish, *supra* note 52, at 1033.

56. BICKEL, *supra* note 44, at 125; compare Seidman, *supra* note 53, at 442 (“My argument, then, is that the Court has never—and never can—develop constitutional rules that control the political judgments, as so understood, that it regularly makes.”), with Tushnet, *supra* note 17, at 1204 (disagreeing with the view that the political question doctrine “could not be reduced to rules, criteria, or even standards”).

57. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

58. For a description and concomitant critique of the prudential strand, see Redish, *supra* note 52, at 1043-55.

59. BICKEL, *supra* note 44, at 184.

60. See Tushnet, *supra* note 17, at 1229-34.

1960s and the Court was still feeling the direct effects of the *Brown* decision. Context made all the difference in the world.

These factors (or “misgivings,” according to Bickel) are intended to guide the Court whether to intervene in a given controversy. Of course these are not absolutes, but questions of degree. And ultimately they add up to this: sometimes, questions are deemed political on the principled ground that the area should be governed without rules. Or, according to Bickel, political questions involve “discretionary functions of the political institutions, which are unprincipled on principle, because we think ‘that the job is better done without rules,’ and there is no reason why their legitimacy as such should not be affirmed by the Court.”<sup>61</sup> His examples include, among others, whether the government recognizes foreign governments and unilateral abrogation of treaties.

Alexander Bickel’s account of judicial review offers a cautious, prudential Court that is aware of its limitations and the need to understand the context in which its rulings must be carried out. Under Kramer’s descriptive account, the Court does not fear anyone, and it knows it does not have to. Bickel’s account is far different, for here the Court is willing to postpone difficult issues for a better day. Prudence demands no other way.

### C. A Middle Ground? Judicial Minimalism and the “Constructive Uses of Silence”

In contrast to Kramer’s account of the Rehnquist Court and Bickel’s purportedly prudential account, Cass Sunstein’s *Foreword* offered a middle ground between a view of the Court as exclusive interpreter and a Court cognizant of its own limitations and its place in our constitutional universe.<sup>62</sup> This is an account of a Court whose doctrines “serve to ensure against outcomes reached without sufficient accountability and reflecting factional power instead of reason-giving in the public domain.”<sup>63</sup> Put a different way, the approach described here is “democracy-forcing,” in that it leaves issues open for democratic deliberation and promotes reason-giving. Tellingly, Sunstein “*describe[s] the phenomenon . . . as ‘decisional minimalism.’*”<sup>64</sup> This approach is particularly sensible when the Court deals with highly complex issues or issues that divide the public.<sup>65</sup>

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61. Bickel, *supra* note 15, at 76.

62. See Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1993 (1999) (reviewing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999)) (“Sunstein’s call for narrow and shallow decisionmaking may prove a critical (if incomplete) bridge between the ‘passive virtues’ and active judicial review.”).

63. Sunstein, *Leaving Things*, *supra*, note 15, at 8.

64. *Id.* at 6-7 (emphasis added). For extensive analysis of judicial minimalism, see Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297 (2001)

In line with these justifications, a minimalist judge eschews broad rules and theoretical abstractions, focusing instead only on the necessities of the case under consideration. Like Bickel's judge, a minimalist judge is a cautious judge, a strategic judge, and a pragmatic judge.<sup>66</sup> It is a judge who sticks closely to precedents, a judge who deals in closely related hypothetical scenarios, a judge who acknowledges the unaccountable nature of her office and the primacy of the legislature, and a judge who looks for "grounds on which people can converge from diverse theoretical positions."<sup>67</sup> It is a judge who says only as much as necessary to justify a decision, and not a word more.

These values translate into actual decisions in two central ways. First, minimalism demands narrow, as opposed to wide, opinions. This means simply that judges decide the case in front of them and do not attempt to decide other cases into the future. They do not lay down broad rules. Sunstein offers *Romer v. Evans*<sup>68</sup> and *United States v. Lopez*<sup>69</sup> as examples of narrow opinions. Second, minimalist judges try not to tackle issues of basic principle head-on, but instead try to reach "*incompletely theorized agreements*."<sup>70</sup> This does not mean that minimalist judges avoid giving reasons; instead, they offer "[r]easoned but theoretically unambitious accounts"<sup>71</sup> and do not discuss first principles. It is in this way that minimalist decisions are shallow, not deep. In so doing, such decisions allow a disagreeing public to unite behind outcomes when they disagree about abstractions, or to agree about abstractions when agreement on outcomes is impossible. They also allow the Justices to put their own disagreements to the side and agree on an outcome and a modest rationale in defense of their position. Sunstein also catalogues *Romer* and *Lopez* under the "shallow" rubric.

Thus, judicial minimalism finds a middle ground between aggressive review and judicial passivity. While a minimalist court *acts*, it does so in shallow and narrow ways. It is in this way that Sunstein's account diverges

(reviewing CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999)); Peters, *supra*, note 17.

65. Bradley Canon refers to these as "politico-moral disputes." Bradley C. Canon, *The Supreme Court as a Cheerleader in Politico-Moral Disputes*, 54 J. POL. 637 (1992). He defines these as issues for which the public perceives a right or wrong answer.

66. See Sunstein, *Leaving Things*, *supra* note 15, at 9 & n.8.

67. *Id.* at 15.

68. 517 U.S. 620 (1996).

69. 514 U.S. 549 (1995). *But see* Stephen M. Griffin, *Has the Hour of Democracy Come Around at Last? The New Critique of Judicial Review*, 17 CONST. COMMENT. 683, 690-91 (2000) (contending that *Lopez* is not a minimalist decision; or at the very least, Sunstein does not make the case that it is); *see also* Gelman, *supra* note 64, at 2321 (criticizing Sunstein's discussion of *Lopez*, because "[i]t misses *Lopez's* significance by focusing narrowly on formal aspects of the opinion, ignoring what seems apparent to everyone else").

70. Sunstein, *Leaving Things*, *supra* note 15, at 20.

71. *Id.* at 21.

from Bickel's. Yet, Sunstein acknowledges, the two projects are "easily linked."<sup>72</sup> For example, in specific reference to the debate over the political question doctrine, Sunstein might argue that the doctrine reduces the costs of decision while allowing the properly democratic actors the room needed to make their preferred choices. It is in this way that Sunstein suggests that the "passive virtues" are best analyzed if seen as minimalist tools. A minimalist judge may choose not to act as well.

## II. A BRIEF HISTORY OF MINORITY VOTE DILUTION

These models of judicial intervention help tell the story of the development of the law of democracy. Within the space of a few years, the Court moved from non-intervention on prudential grounds (what we refer to as the *Colegrove* Era) to careful intervention (the *Baker* Era) to complete and aggressive control of the field (the post-*Reynolds* Era). The Court is now in charge of our politics, unabashed and unafraid.

This is not a particularly newsworthy insight, yet no less important. Standing alone, the fact that the Court is now in control of our politics can be a good thing, particularly if one feels—as many do—that the political process often malfunctions and the Court must stand ready to strike a blow in defense of democratic values.<sup>73</sup> But this insight does not stand alone; rather, it presses against the fact that the law of democracy is an incoherent mess, and that the Court is directly at fault in mishandling its regulation of the democratic process.

It is as a way out of this quandary that Professor Gerken offered her theory of an interregnum, which posits the Court in a holding pattern, patiently waiting for a new majority to emerge before moving forward.<sup>74</sup> The problem with this view is that the Court's treatment of modern election law controversies is anything but "unique;" in fact, it might even be predictable. The Court has functioned in a disjointed manner since it first entered the political thicket. Often, the doctrine is more confusing after the Court has "spoken."<sup>75</sup> We do not think that the Court is biding its time for a new majority to emerge; instead, individual Justices are struggling to deal with the difficult issues that inhere in this area, the same as they always have.

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72. *Id.* at 51.

73. See Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

74. Gerken, *Rashomon*, *supra* note 8, at 1213 (noting that the "doctrinal interregnum continues" with the Roberts Court); Gerken, *Lost*, *supra* note 10, at 504 (asserting that the Court is "in a doctrinal holding pattern, unsure of where to go next").

75. See, e.g., *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1071 (S.D. Ala. 1982) (showing that the district court found the Supreme Court's opinion unclear as to whether to apply the effect or purpose test when considering the 1975 Amendment to § 2 of the Voting Rights Act).



For support, we could offer myriad doctrinal niches, from political and racial gerrymandering to pre-clearance under Section 5 of the Voting Rights Act to campaign finance law. This Part focuses on the Court's treatment of minority vote dilution. We conclude that the case law in this area is unclear and incoherent, no different from what we see in other areas of the law of democracy. "Sloppy" opinions by Justices offering their individual notions on politics, democracy, and the law are the norm. We further show that minority vote dilution was never "resolved" by the Court, despite the fact that the Court had numerous opportunities to put an end to the confusion. To this day, the doctrine remains in flux, as exemplified by the recent *LULAC* and *Bartlett* cases.

The dilution question arose squarely in the 1960s, once the Court decided—in *Reynolds v. Sims*—that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."<sup>76</sup> In so holding, the Court must then determine what *mechanisms* a state could—or could not—use to dilute the force of minority voters. The question became particularly acute upon passage of the Voting Rights Act of 1965,<sup>77</sup> when eligible black voters began to register in significant numbers.<sup>78</sup> This increase in black registration resulted in, *inter alia*, the emergence of multi-member districts, devices that served to cancel out minority voting strength.<sup>79</sup> Interestingly, these devices were permitted—even encouraged—by the Court's "one person, one vote" equal protection decisions of the 1960s. These at-large elections and multi-member districts allowed states to satisfy the constitutional requirements of "one person, one vote" while "blunting the effects of rising black voting strength."<sup>80</sup> It would only be a matter of time

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76. *Reynolds v. Sims*, 377 U.S. 533, 555 (1965).

77. 42 U.S.C. § 1973 (1965).

78. Stanley A. Halpin, Jr., *Beyond Vote Dilution: An Essay on Fair and Effective Representation in the American Democratic System*, 22 S.U. L. REV. 99, 108 (1994).

79. *Id.* at 108. The establishment of at-large election districts dates back to the late nineteenth century and the Progressive Era. It also coincides, specifically in the South, with what Davidson and Korbel label the "peak of racial reaction." Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, in *MINORITY VOTE DILUTION* 65, 67-68 (Chandler Davidson ed., 1984). In this vein, multi-member districts must be placed alongside poll taxes, literacy tests, grandfather clauses, and white primaries as mechanisms by which to disenfranchise specific segments of the voting public. This characterization requires little support, in light of the practical advantages of these districts for anyone wishing to submerge a minority group within a larger population. Clearly, and more specifically, multi-member districts automatically render minority groups within a larger political subdivision hopeless and helpless in the face of a majority that seldom betrays their intra-group political affections. Their history lends much support to this position. *Id.* at 69-71. The abolition of districts and the establishment of an at-large system was an easy way to neutralize a growing political minority. In the South, it happened all too often.

80. Halpin, *supra* note 78, at 108.

before the Court examined the constitutionality of these attempts to dilute the black vote.<sup>81</sup>

#### A. The Early Cases: Struggling to Apply *Reynolds* to Multi-Member Districts

The Court first addressed the validity of at-large elections in *Fortson v. Dorsey*,<sup>82</sup> albeit in a vague and unclear manner. The issue in *Fortson* was narrowly framed as an equal protection issue—whether “county-wide voting in the seven multi-district counties results in denying the residents therein a vote ‘approximately equal in weight to that of’ voters resident in the single-member constituencies.”<sup>83</sup> The Court answered this question in the negative. As it wrote, “[t]here is clearly no mathematical disparity.”<sup>84</sup> This was not a remarkable conclusion; only a year earlier, the Court stated in *Reynolds* that single-member districts were not constitutionally required by the Equal Protection Clause.<sup>85</sup> However, this was not to say that the claim was foreclosed from constitutional review. As the Court further explained, “our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause.”<sup>86</sup> There might be times, the Court proceeded, that “designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”<sup>87</sup> When the case comes before it, the Court concluded in *Fortson* that the question would be considered. *Fortson* was not such a case.

This was a question that did not have to wait long to be answered. In *Whitcomb v. Chavis*, the Court faced a challenge to a multi-member district in Marion County, Indiana, alleged to have the “force and effect” of diluting the vote of residents of certain segments within the county.<sup>88</sup> In light of multi-member districts in general, the claim was rather simple. The residents of the neighborhood in question—termed the “ghetto area”—were poor, and approximately two-thirds of them were black (Center Town-

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81. *Id.* at 108-09 (detailing how at-large elections in Louisiana were operated to dilute black voting strength).

82. 379 U.S. 433 (1965).

83. *Id.* at 436-37.

84. *Id.* at 437.

85. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (“One body could be composed of single-member districts while the other could have at least some multimember districts.”).

86. *Fortson*, 379 U.S. at 439.

87. *Id.*

88. 403 U.S. 124, 128 (1971).

ship).<sup>89</sup> The three-judge court first compared their political interests and found them quite distinct from those of wealthy whites and middle class blacks (Washington Township), groups found in two neighboring districts. More troubling, the numbers stacked squarely against them. Looking at the five general assemblies elected from 1960 to 1968, the disparities were clear. The court then compared the populations between districts, and the “ghetto area” once again came short; while its population was large enough to select two representatives and one senator under a single-member districting system, it had been represented only once in the senate and three times in the house. In contrast, the wealthier districts had been able to select representatives disproportionate to their overall population; even tract 220, with only 0.66% of the county’s population, had selected more representatives than the “ghetto area.”<sup>90</sup> On these facts, the lower court concluded that the multi-member district violated the Fourteenth Amendment.

The Supreme Court was not impressed. In an opinion authored by Justice White, the Court began its analysis by repeating its dictum in *Fortson* about the possibility of a successful challenge to a multi-member districting plan, given the proper facts. The Court also added, somewhat ominously, that “[w]e have not yet sustained such an attack.”<sup>91</sup> *Whitcomb* would not be the first case to do so, for two reasons. First, the Court echoed earlier warnings in explaining that only purposeful districting plans, either as conceived or as carried out, violate the Fourteenth Amendment. On the facts here, the evidence did not support such a conclusion.

Second, the Court turned to the population disparities and the argument that such disparities, standing alone, reflect the requisite discriminatory purpose.<sup>92</sup> The argument here was that the numbers speak for themselves, for, as the Court explained in *Fortson*, the multi-member plan operated to minimize and even cancel out the voting power of blacks.<sup>93</sup> The Court did not accept this argument.<sup>94</sup> To begin, it required specific evidence demonstrating that ghetto residents had in fact less opportunities to participate and elect representatives of their choice.<sup>95</sup> In the Court’s view, none had been put forth:

We have discovered nothing in the record or in the court’s findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly ex-

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89. *Id.* at 131.

90. *Id.* at 133.

91. *Id.* at 144.

92. *Whitcomb*, 403 U.S. at 149-50.

93. *Id.*

94. *Id.*

95. *Id.*

cluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.<sup>96</sup>

Instead, according to the Court, this case was not about race but politics. Ghetto residents did not elect one of their own mainly because they generally identify more strongly with the Democratic Party; yet, Republicans had won four of the last five elections.<sup>97</sup> The Court concluded that the argument that the voting power of the residents of the Ghetto had been cancelled out, “seems a mere euphemism for political defeat at the polls.”<sup>98</sup>

Dissenting in part and concurring in the result in part, Justice Douglas, joined by Justices Brennan and Marshall, offered a different view of the constitutional standard in multi-member districting cases. More specifically, he argued that a showing of racial motivation was not required in these cases; instead, the evidence on the record must only reflect an invidious effect.<sup>99</sup> Yet, it is not entirely clear how an “effects” inquiry would be carried out in the redistricting context short of enacting a proportional representation system. Advocates of this test must provide an answer to this question. Justice Douglas does. In partial agreement with the majority, Justice Douglas implied that this would be a fact-specific inquiry.<sup>100</sup> For example, in *Whitcomb*, he agreed that the requisite invidious effect had been established on the strength of four findings:

(1) the showing of an identifiable voting group living in Center Township, (2) the severe discrepancies of residency of elected members of the general assembly between Center and Washington Townships, . . . (3) the finding of pervasive influence of the county organizations of the political parties, and (4) the finding that legislators from the county maintain ‘common, undifferentiated’ positions on political issues.<sup>101</sup>

This was another way of saying that numbers alone will not be enough. In order to prove the unconstitutionality of multi-member districts, more evidence than just mere disproportionate impact would be needed.

The reach of *Whitcomb* was less than clear. Did the Court really mean that multi-member districts *could* operate to dilute minority voting strength? The Court’s ominous statement that “[w]e have not yet sustained such an attack”<sup>102</sup> might suggest otherwise. And what were lower courts to make of the Court’s focus on access to the political process? If minorities were “allowed to register [and] vote, to choose the political party they desired to support, to participate in [governmental] affairs [and] to be equally

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96. *Id.* at 149-50 (citation omitted).

97. *Whitcomb*, 403 U.S. at 152.

98. *Id.* at 153.

99. *Id.* at 177 (Douglas, J., dissenting in part and concurring in the result in part).

100. *Id.* at 179.

101. *Id.*

102. *Id.* at 144.

represented on those occasions when legislative candidates were chosen,”<sup>103</sup> would a challenge fail? And what did “allow,” “participate,” and “be equally represented” mean? This confusion is seen in lower court opinions after *Whitcomb*.

For example, in *Kelly v. Bumpers*,<sup>104</sup> the lower court focused on the language in *Whitcomb* that indicated that access to the political process was all that was protected. In the court’s words:

The holding of the Supreme Court was that where minority groups are permitted to participate freely in the overall political process, they do not suffer unconstitutional discrimination simply because they may not be able to elect members of their own groups to the Legislature as they would be able to do if they were voting in a single member district or in single member districts. To put it another way, the Court held that the Constitution does not assure minorities, whether racial or political, proportional representation or “safe seats” in the Legislature.<sup>105</sup>

For this court, the focus was on the ability of minorities to participate, which it understood only as the formal act of voting.

In contrast, the lower court in *Howell v. Mahan*,<sup>106</sup> a case decided less than a month after *Whitcomb*, hardly discussed *Whitcomb* when it ruled on the constitutionality of a reapportionment plan adopted by the Virginia assembly—a plan that included multi-member districts.<sup>107</sup> To this court, it appeared that the issue was resolved in *Whitcomb*: multi-member districts were acceptable, as long as they were not “too ‘large.’”<sup>108</sup> The court’s only discussion of *Whitcomb* was a recitation that multi-member districts are not unconstitutional.<sup>109</sup> Judge Lewis, concurring in *Howell*, noted that the objections to large multi-member districts were “disposed of in the Indiana case.”<sup>110</sup> He noted that it “hardly follows that a fifteen-member delegation is constitutionally permissible in Indiana and an eleven-member delegation is constitutionally impermissible in Virginia.”<sup>111</sup> However, location might have everything to do with the permissibility of multi-member districts—at least in the early 1970s.

Understandably, the Supreme Court returned to this issue soon after the *Whitcomb* decision. The case was *White v. Regester*.<sup>112</sup> In *White*, the

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103. *Whitcomb*, 403 U.S. at 149 (citation omitted).

104. 340 F. Supp. 568 (E.D. Ark. 1972).

105. *Id.* at 583 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 148-160 (1971)).

106. 330 F. Supp. 1138 (E.D. Va. 1971), *aff’d in part, rev’d in part*, 410 U.S. 315 (1973).

107. *Id.* at 1139.

108. *Id.* at 1146 (citing *Connor v. Johnson*, 402 U.S. 690, 692 (1971)).

109. *Howell*, 330 F. Supp. at 1146 (noting that multi-member districts are “not per se unconstitutional”); *id.* at 1147 (finding multi-member districts in such cases are not unconstitutional.).

110. *Id.* at 1148.

111. *Id.*

112. 412 U.S. 755 (1973).

Court was again presented with multi-member districts alleged to dilute minority voting strength, this time in south Texas.<sup>113</sup> The Court changed course again, holding these multi-member districts invalid under the Constitution.<sup>114</sup> The *White* Court found that the district court properly relied on the “totality of the circumstances,”<sup>115</sup> including the history of discrimination of Mexican-Americans in Bexar County (San Antonio, Texas) and blacks in Dallas County (Dallas, Texas)—the two multi-member districts at issue in the case—in reaching the determination that the multi-member districts violated the Constitution.<sup>116</sup> The Court seemed to put great weight into two findings, which applied to both counties.

First, the Court looked at Texas’ racial history and specifically its history of de jure racial discrimination.<sup>117</sup> This is a history, the Court explained, that was often reflected in electoral arenas.<sup>118</sup> Second, the Court looked to specific electoral practices and—in the case of Dallas County—concluded that few blacks had been elected for state political office in Texas, that the parties did very little to gain blacks’ general political support, and that representatives did not even attempt to further the interests of the black community.<sup>119</sup> The crucial distinction between *White* and *Whitcomb* is thus the backdrop upon which their respective multi-member systems are reflected. In this way, it seemed as though the South, with its Jim Crow legacy, provided much more fertile ground for these kinds of lawsuits.

One lower court read *White* in this way, finding that the “complexion”<sup>120</sup> of North Dakota was such that the multi-member districts at issue did “not present any showing of unrepresented minorities or unresponsive representatives.”<sup>121</sup> However, the Texas district court—addressing *White* on remand—noted that “[p]olitical access is not a vapid phrase confined within a rigid formula, but is frequently perpetuated by mores, folkways, and customs.”<sup>122</sup> It went on to look at many political and historical factors to determine what multi-member districts were (or were not) constitutionally permissible.<sup>123</sup>

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113. *Id.* at 756.

114. *Id.* at 765.

115. *Id.* at 768-69.

116. *Id.* at 769.

117. *White*, 412 U.S. at 766-69.

118. *Id.*

119. *Id.*

120. *Chapman v. Meier*, 372 F. Supp. 371, 377 (D.N.D. 1974).

121. *Id.*

122. *Graves v. Barnes*, 378 F. Supp. 640, 643 (W.D. Tex. 1974).

123. *Id.*

Because the doctrinal standard of dilution was “vague,”<sup>124</sup> courts struggled to interpret just how to go about determining what actions constituted impermissible vote dilution. In response to this uncertainty, the Fifth Circuit, sitting en banc, developed a list of non-exclusive factors—the “Zimmer factors”—that should typically be considered when determining whether an at-large election scheme has a racially discriminatory purpose or effect.<sup>125</sup> According to the Fifth Circuit:

[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. . . . [A]ll these factors need not be proved in order to obtain relief.<sup>126</sup>

When the *Zimmer* opinion came before the Supreme Court in *East Carroll Parish School Board v. Marshall*, the Court avoided the constitutional issue presented in the case and affirmed the Fifth Circuit’s decision on a narrow ground: that the district court’s equitable remedy of an at-large election was inappropriate.<sup>127</sup> The Court held that the district court should employ single-member districts “absent unusual circumstances.”<sup>128</sup> The Court thus avoided ruling on whether a discriminatory effect was permissible, and whether the *Zimmer* factors were appropriately considered in determining the discriminatory effect. This state of uncertainty is reflected in lower court decisions.

Between *Whitcomb* and *City of Mobile v. Bolden*<sup>129</sup>—a case where the Court drastically changed course with respect to its dilution jurisprudence—forty-six district court cases addressed the constitutionality of multi-member districts and at-large elections.<sup>130</sup> The first case to find a multi-member dis-

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124. See *Equal Protection of the Laws—Reapportionment—Multimember Districting of County Governing Bodies May Work Unconstitutional Dilution of Minority Voting Strength—Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), petition for cert. filed sub nom. *East Carroll Parish School Bd. v. Marshall*, 42 U.S.L.W. 3374 (U.S. Dec. 3, 1973) (No. 861), 87 HARV. L. REV. 1851, 1856 (1974); *id.* at 1859 (“The decision of the Supreme Court in *Regester* to review the effectiveness of minority representation under [multi-member] schemes may ultimately be judged a prudent one only if subsequent cases apply an effectiveness test in some more predictable manner.”).

125. *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (listing factors).

126. *Id.* (citation omitted).

127. 424 U.S. 636 (1976).

128. *Id.* at 639.

129. 446 U.S. 55 (1980).

130. These cases were found by running the following search in Westlaw: “403 U.S. 124” or “412 U.S. 755.” This search produced ninety-eight district court cases during the

trict constitutionally invalid was the district court decision in *White v. Register*.<sup>131</sup> Sixteen cases found multi-member districts or at-large elections invalid under the Federal Constitution, and twenty-one upheld the constitutionality of the districts.<sup>132</sup> All of the cases invalidating multi-member districts were cases in the South—specifically, Alabama,<sup>133</sup> Georgia,<sup>134</sup> Louisiana,<sup>135</sup> Mississippi,<sup>136</sup> and Texas.<sup>137</sup> Before *Zimmer* was decided, district courts relied on a variety of factors and rationales to determine the validity of multi-member districts. For instance, some cases focused the inquiry on access to the political process,<sup>138</sup> another found it dispositive that the plan—adopted by the court—was not designed to dilute minority votes,<sup>139</sup> and another found it important that the multi-member district was not “too ‘large.’”<sup>140</sup> After *Zimmer* was decided, the lower courts consistently relied on the Fifth Circuit’s *Zimmer* factors for guidance,<sup>141</sup> despite the fact that the Court refused to rule on the validity of these factors in *East Carroll Parish School Board*.<sup>142</sup> *Zimmer* offered some much-needed guidance to lower courts, not the Supreme Court.

The Court’s failure to provide any coherence in this area is not due to a lack of opportunity. Only one year after the Court refused to offer guidance on the relevant factors for dilution cases in *East Carroll Parish School Board*, the Court had another chance to lend clarity in *United Jewish Or-*

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applicable time period, 1970 until April 22, 1980, the day *Bolden* was decided. However, only forty-six of those cases dealt with the constitutionality of multi-member districts.

131. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972), *aff’d in part, rev’d in part sub nom. White v. Register*, 412 U.S. 755 (1973).

132. One case upheld *some* of the multi-member districts it ruled on, but invalidated others. *Graves v. Barnes*, 378 F. Supp. 640 (W.D. Tex. 1974), *vacated sub nom. White v. Register*, 422 U.S. 935 (1975).

133. *Hendrix v. McKinney*, 460 F. Supp. 626 (M.D. Ala. 1978); *Brown v. Moore*, 428 F. Supp. 1123 (S.D. Ala. 1976); *Bolden v. City of Mobile*, 423 F. Supp. 384 (S.D. Ala. 1976); *Yelverton v. Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974).

134. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977); *Paige v. Gray*, 399 F. Supp. 459 (M.D. Ga. 1975); *Pitts v. Busbee*, 395 F. Supp. 35 (N.D. Ga. 1975).

135. *Ausberry v. City of Monroe*, 456 F. Supp. 460 (W.D. La. 1978); *Parnell v. Rapides Parish Sch. Bd.*, 425 F. Supp. 399 (W.D. La. 1976); *Blacks United for Lasting Leadership v. City of Shreveport*, 71 F.R.D. 623 (W.D. La. 1976); *Wallace v. House*, 377 F. Supp. 1192 (W.D. La. 1974); *Beer v. United States*, 374 F. Supp. 363 (D.D.C. 1974) (adjudicating a case out of New Orleans, Louisiana).

136. *Stewart v. Waller*, 404 F. Supp. 206 (N.D. Miss. 1975).

137. *Lipscomb v. Wise*, 399 F. Supp. 782 (N.D. Tex. 1975); *Graves v. Barnes*, 378 F. Supp. 640 (W.D. Tex. 1974); *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972).

138. *See, e.g., Kelly v. Bumpers*, 340 F. Supp. 569, 584 (E.D. Ark. 1972).

139. *Holt v. City of Richmond*, 334 F. Supp. 228, 241 (E.D. Va. 1971).

140. *Howell v. Mahan*, 330 F. Supp. 1138, 1146 (E.D. Va. 1971) (quoting *Connor v. Johnson*, 402 U.S. 690, 692 (1971)).

141. *See, e.g., Lipscomb*, 399 F. Supp. at 789.

142. *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).



*ganizations v. Carey (UJO)*.<sup>143</sup> The case was brought by a group of Hasidic Jews who alleged that the value of their votes was diluted when their community, which was contained within a single senate and assembly district, was “split” during a reapportionment to provide for a majority non-white district to comply with Section 5 of the Voting Rights Act.<sup>144</sup> These facts provided the Court with an ideal vehicle to clarify its position about the nature of group rights engendered by the *Regester* opinion.

Unsurprisingly, the Court declined to provide much needed clarity to this area of the law.<sup>145</sup> The plurality opinion refrained from offering any commentary or clarity on the dilution claim. Instead, the plurality focused on the fact that the redistricting presented “no racial slur or stigma with respect to whites,” as there was no “fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.”<sup>146</sup> Again, the *plurality* did not offer any meaningful guidance to lower courts on how to adjudicate dilution claims. The Justices, predictably, refused to compromise and neglected to develop the doctrine, other than through their individual commentaries on the role of race and redistricting.<sup>147</sup>

#### B. The Court Changes Course—Again

Rather than provide clarity to this uncertain area, the Court only muddied the waters further in its next installment: *City of Mobile v. Bolden*.<sup>148</sup> Anyone looking for simplicity in this area came away sorely disappointed; the Justices spoke through the course of six separate opinions—the Justices could not even agree with one another, much less provide clarity within this area. The setting was by now a familiar one. In their complaint, the plaintiffs alleged that the multi-member system for the election of Mobile’s

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143. 430 U.S. 144 (1977).

144. *Id.*

145. Note, *United Jewish Organizations v. Carey and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571, 576 (1978) (complaining that the Court declined “to resolve the uncertainties that persisted after *Regester*”).

146. *United Jewish Orgs.*, 430 U.S. at 165.

147. Tellingly, the doctrine remained in flux well into the 1990s, with *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. In *Shaw*, the dissenting justices pointed to *UJO* for support, while the O’Connor majority looked elsewhere while dismissing *UJO* as outside the scope of these new facts. *Id.* at 657-58. The nature of aggregate rights remains both elusive and contested. Of note, Professor Gerken published her influential criticism of the Court’s approach to vote dilution, Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665 (2001), almost 30 years after *UJO*. The Court is either unaware of the central questions in this area, or simply unable or unwilling to resolve them. That *Shaw* causes of action essentially disappeared after *Easley v. Cromartie*, 532 U.S. 234 (2001), lead us to the conclusion that these questions are too difficult for the Court to handle.

148. 446 U.S. 55 (1980) (plurality opinion).

three-member City Commission diluted the voting strength of black voters in violation of both the Fourteenth and Fifteenth Amendments, as well as Section 2 of the Voting Rights Act. Following a bench trial, and while adhering to the *Whitcomb*, *White*, and *Zimmer* line of cases, the district court ruled in favor of the plaintiffs,<sup>149</sup> and the court of appeals affirmed the judgment in its entirety.<sup>150</sup>

The Supreme Court reversed in a plurality opinion.<sup>151</sup> In an opinion authored by Justice Stewart, the Court began its analysis by discarding the *Zimmer* formula.<sup>152</sup> In its stead, the Court turned to the proper constitutional standards.<sup>153</sup> In examining the three claims separately, the Court concluded at the onset that Section 2 of the Voting Rights Act must be understood as codifying the command of the Fifteenth Amendment.<sup>154</sup> As such, these two claims were merged into one.<sup>155</sup> Then, when turning to the constitutional standard, the Court concluded that both the Fourteenth and Fifteenth Amendments must be understood to adopt the infamous intent standard.<sup>156</sup> Within the ambit of the Fifteenth Amendment, the Court offered its reading of *Guinn v. United States*, *Gomillion v. Lightfoot*, and the White Primary Cases for support.<sup>157</sup> In light of recent case law, it may be said that the argument under the Fourteenth Amendment bore an easier burden; the Court offered here *Wright v. Rockefeller*, *Washington v. Davis*, *White v. Regester*, and *Gaffney v. Cummings*.<sup>158</sup>

So understood, this analysis thus posed a relatively simple question: did the establishment and maintenance of the at-large system in Mobile date back to racial hatred and animus against black voters? The district court answered this question affirmatively, on the strength of two factors: that no black had ever been elected to the city commission, and that city officials were unresponsive to the interests of black residents, or were at least less responsive than to the interests of whites.<sup>159</sup> These two findings led the district court to the conclusion that the system was invidiously discriminato-

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149. *Bolden v. City of Mobile*, 423 F. Supp. 384, 404 (S.D. Ala. 1976).

150. *Bolden v. City of Mobile*, 571 F.2d 238, 247 (5th Cir. 1978).

151. *Bolden*, 446 U.S. at 80.

152. *Id.* at 71.

153. *Id.* at 60-61.

154. *Id.*

155. *Id.*

156. *Id.* at 62.

157. *Id.* at 62-65 (citing *Guinn v. United States*, 236 U.S. 347 (1915); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953)).

158. *Id.* at 66-69 (citing *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Washington v. Davis*, 426 U.S. 229 (1976); *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973)).

159. *Bolden v. City of Mobile*, 423 F. Supp. 384, 402 (S.D. Ala. 1976).

ry.<sup>160</sup> The court of appeals affirmed this judgment.<sup>161</sup> As we know, the Supreme Court disagreed. Two points are worth discussing.

First, the Court looked to the support provided by the district court for its inference of invidious discrimination. The Court writes,

The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an 'unequal application of the law . . . as to show intentional discrimination,' . . . to [the] present purpose to dilute the black vote as evidenced in this case."<sup>162</sup>

More specifically, the lower court, explained, "There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes*."<sup>163</sup> To be sure, this is a cryptic sentence. Perhaps, the Court means that the implementation of the at-large system at issue must be explained like the jury exclusion cases, only on racial grounds. The Court concludes that this is not so, for such an "inference is contradicted by the history of the adoption of that system in Mobile."<sup>164</sup> Curiously, however, the Court offers nary a shred of evidence on this point. All we have from the *Bolden* opinion is a passage early on when the Court simply asserted that the Alabama legislature authorized all large municipalities to adopt a commission as its form of government and required them to hold elections for such seats on an at-large basis.<sup>165</sup> We also have a further passage in a footnote where the Court posits that "a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government."<sup>166</sup> That is all. Thus, when the Court concludes that the establishment of the at-large system in Mobile is devoid of a racial purpose, we must take the point on faith, not on the evidence.

Second, the Court makes clear that simply pointing to the practice of multi-member districting and its deleterious effects on minority groups within them is not enough to meet the constitutional test.<sup>167</sup> A plaintiff must offer more than the mere establishment of a facially neutral electoral prac-

160. *Id.*

161. *Bolden v. City of Mobile*, 571 F.2d 238, 247 (5th Cir. 1978).

162. *See City of Mobile v. Bolden*, 446 U.S. 55, 71 n.17 (1980) (plurality opinion) (internal citations omitted).

163. *Bolden*, 423 F. Supp. at 398 (citations omitted) (emphasis added).

164. *Bolden*, 446 U.S. at 72 n.17.

165. *See id.* at 59.

166. *Id.* at 70 n.15 (citing E. BANFIELD & J. WILSON, CITY POLITICS 151 (1963); M. SEASONGOOD, LOCAL GOVERNMENT IN THE UNITED STATES (1933); L. STEFFENS, THE SHAME OF THE CITIES (1904)).

167. *Bolden*, 446 U.S. at 74.

tice. Multi-member districts, the Court concludes, “are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.”<sup>168</sup> This is a curious position to take in light of the previous point. Put simply, the Court demands evidence from the plaintiffs in order to meet the exacting constitutional test, yet requires very little from the state. Thus, this position is quite deferential to multi-member districts in general and their use. The general history of the practice will not do, or the social context, or its effects over time. Apparently, nothing short of a “smoking gun” will do.

On remand, the district court “pieced together” the six separate opinions, noting that “[f]ive justices agree, therefore, that this court and the court of appeals applied the wrong legal standard, although no majority agreed on the details of the correct standard.”<sup>169</sup> The court also noted that “[o]ne of the six and the other three justices apparently held such purpose had been shown,”<sup>170</sup> and determined that its “obligation” on remand was to “take additional evidence and evaluate that evidence and the record and make such additional findings as necessary to decide the issue of discriminatory purpose (intent) under the proper standard.”<sup>171</sup> The court did take additional evidence, namely a comprehensive history of the municipal government and statistical information related to the current electoral system in Mobile.

The court pulled three principles from the *Bolden* line of cases: (1) “an intent to discriminate is a necessary element of a violation of the fourteenth and fifteenth amendments;” (2) “discriminatory intent need not be the sole purpose behind the challenged action;” and (3) “the decision maker must have ‘selected or reaffirmed a particular course of action at least in part “because of” not merely “in spite of” its adverse effects upon an identifiable group.’”<sup>172</sup> From these principles, the court determined that it should inquire into the discriminatory purpose in the adoption of the at-large commission system and whether the discriminatory system had adverse effects on the plaintiffs.<sup>173</sup> The court, not surprisingly, found that “the principal motivating factors for the at-large election system for the Mobile City Commission was the purpose (intent) to discriminate against blacks, and to deny them access to the political process and political office. . . . [and] that the effects of this discriminatory intent continues [sic] to the present.”<sup>174</sup>

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168. *Id.*

169. *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1053 (S.D. Ala. 1982).

170. *Id.*

171. *Id.*

172. *Id.* at 1072 (internal citations omitted).

173. *Bolden*, 542 F. Supp. at 1073.

174. *Id.* at 1077.

The court, therefore, found that the at-large system violated both Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.<sup>175</sup>

One more doctrinal twist occurred in the Court's dilution jurisprudence in *Rogers v. Lodge*,<sup>176</sup> which was decided three months after the district court addressed *Bolden* on remand.<sup>177</sup> In *Rogers*, the Court upheld the intent requirement of *Bolden*, but also upheld a lower court's finding that an at-large election scheme was unconstitutional because, while "racially neutral when adopted, [it was] being *maintained* for invidious purposes" in violation of appellees' Fourteenth and Fifteenth Amendment rights.<sup>178</sup> This case might best be explained by pending congressional legislation, as it was decided two days after Congress legislatively overturned *Bolden* with the 1982 amendments to the Voting Rights Act.<sup>179</sup>

### C. Congress to the Rescue?

The same year *Rogers* was decided, Congress overruled *City of Mobile* and returned to the "effect" standard through its amendment to Section 2 of the Voting Rights Act.<sup>180</sup> The amendment prohibited electoral systems that *resulted* in vote dilution, regardless of the underlying purpose.<sup>181</sup> Section 2(b) provided that Section 2(a) is violated where the

totality of circumstances [reveals] . . . that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their participation in the population.<sup>182</sup>

The purpose of the amendment was to return the state of the law to the *Whitcomb*, *White*, and *Zimmer* line of cases.<sup>183</sup> In so doing, it cannot be said that Congress brought needed structure and clarity to the law. After all, Congress sought to codify the case law prior to *Bolden*, so the earlier complexities were bound to rise again. Of greater interest for our larger thesis is

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175. *Id.*

176. 458 U.S. 613 (1982).

177. Compare *Rogers v. Lodge*, 458 U.S. 613 (1982) (decided July 1st), with *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982) (decided April 15th).

178. *Rogers*, 458 U.S. at 622.

179. Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in *MINORITY VOTE DILUTION* 145, 160 (1989).

180. 42 U.S.C. § 1973 (1982).

181. *Id.*

182. *Id.*

183. See Derfner, *supra* note 179, at 152.

what happened soon after the 1982 amendments. Four years later, in *Thornburg v. Gingles*,<sup>184</sup> a splintered Court sought to cabin the “totality of circumstances” inquiry by recasting the factors under the amended Section 2 as a three-part evidentiary inquiry.<sup>185</sup> The 1982 amendment to Section 2 brought the Court’s dilution jurisprudence to an end, as cases are now brought under the much easier to prove “effects” test of Section 2 rather than the “purpose” test required by the Constitution.<sup>186</sup> But as the Court began to interpret the amended Section 2, its penchant for disorder and chaos was also likely to arise as well. As seen in the recent *LULAC v. Perry*<sup>187</sup> and *Bartlett v. Strickland*,<sup>188</sup> uncertainty and confusion reign. Put simply, the justices cannot help themselves.

As the unpredictable jurisprudence in this area demonstrates, the Court has always behaved in an “interregnum-like” manner. It was common for the individual Justices to express their independent views on representation, and it was ordinary for opinions to produce unclear results leaving lower courts to fend for themselves. The Court has always behaved this way with respect to the law of democracy and, as Gerken correctly notes, it continues to behave this way today.<sup>189</sup> In our minds, this should lead us to at least question the Court’s role in regulating the law of democracy.

### III. TAKING STOCK OF THE LAW OF DEMOCRACY

Were the Court’s confused and haphazard approach to questions of minority vote dilution an isolated occurrence within this difficult area, we would not be writing this Essay. But the reality is far from that. We could choose from any sub-field within the law of democracy, from political<sup>190</sup> or racial gerrymandering<sup>191</sup> and the equipopulation principle,<sup>192</sup> to campaign

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184. 478 U.S. 30 (1986).

185. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1850-53 (1992).

186. See, e.g., *United States v. Blaine County*, 363 F.3d 897, 900 (9th Cir. 2004) (bringing challenge under VRA); *Cousin v. McWherter* 46 F.3d 568, 569 (6th Cir. 1995) (same); *Jones v. City of Lubbock*, 727 F.2d 364, 385 (5th Cir. 1984) (upholding § 2 violation of at-large elections in Lubbock, Texas, but disagreeing with the district court’s decision that the case violated the Constitution, as there was not adequate proof of purposeful discrimination).

187. 548 U.S. 399 (2006).

188. 129 S.Ct. 1231 (2009).

189. Gerken, *Lost*, *supra* note 10, at 505.

190. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986).

191. See *Shaw v. Reno*, 509 U.S. 630 (1993); *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977).

192. See *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff’d*, *Cox v. Larios*, 542 U.S. 947 (2004).

finance<sup>193</sup> or the Voting Rights Act.<sup>194</sup> Any of these areas make clear that what we see in the minority-vote-dilution cases is not an exception. The Court's handling of the law of democracy does not inspire much confidence.

And so we come to what must be, by all accounts, the crux of the matter: as the Court regulates the political thicket as it does, mindful of neither consistency nor coherence, it is time to take stock of the field. This final Part takes up this project. The first section looks back to the debate between Justices Brennan and Frankfurter over the proper role of the Court in the field of politics. This is a debate clearly reflected in our present debate over the Court's approach to the law of democracy, between the structuralists and the individualists. Justice Brennan, as we shall see shortly, moved the Court to adopt the individualist approach, while Justice Frankfurter offered a structuralist argument against judicial intervention. In looking to this argument, we seek to recapture the context that led the Court to take on these difficult questions, as well as the obvious complexities that inhere within the law of democracy. The second section looks to the future and asks whether the benefits of judicial intervention outweigh the costs.

#### A. Justice Frankfurter v. Justice Brennan

In *Baker v. Carr*, the U.S. Supreme Court confronted a question it had yet to decide in its history: whether the drawing of district lines presented a justiciable question under then-existing constitutional principles.<sup>195</sup> According to those who stood against intervention—a camp that included, most prominently, Justice Frankfurter—this was a classic political question better left to the political branches to decide.<sup>196</sup> Advocates of intervention understood this question as no different from many other questions the Court already adjudicated, while the problem presented was just as important. Or as Anthony Lewis wrote in an influential 1957 article in the *Harvard Law Review*,

The Supreme Court has found special justification for judicial intervention to preserve basic political liberties—of speech, press, assembly. The right to fair repre-

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193. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 499 (2007).

194. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

195. 369 U.S. 186 (1962).

196. See *Colegrove v. Green*, 328 U.S. 549, 552 (1946); *Baker*, 369 U.S. at 266 (Frankfurter, J., dissenting).

sentation can be of no less importance. A vacuum exists in our political system; the federal courts have the power and the duty to fill this vacuum.<sup>197</sup>

Writing for himself and five other Justices, Justice Brennan swept all difficulties aside and concluded that these questions fit comfortably within the Court's traditional powers.<sup>198</sup> None of the questions that troubled other Justices and commentators through the years proved too complicated for him. The Court had jurisdiction, the case did not present a non-justiciable political question, and the lower courts would be able to fashion relief if it determined on remand that constitutional violations existed.<sup>199</sup> This case was no different from anything else the Court did.<sup>200</sup> The fact that his opinion covered sixty-five pages of the *U.S. Reports* betrayed his confidence. Or as Justice Clark began his concurring opinion, in reference to the multiple opinions accompanying Justice Brennan's, "One emerging from the rash of opinions with their accompanying clashing of views may well find himself suffering a mental blindness."<sup>201</sup> This was not an easy case, and Justice Brennan could not wish it so.

One move in particular remains with us and deserves special mention. In discussing whether plaintiffs had standing to bring forth their claims in federal court, Justice Brennan concluded as follows, "The injury which appellants assert is that this classification [under review] disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties."<sup>202</sup> The injury in question, according to Justice Brennan, was an injury to voters as individuals. Let us repeat this point lest the reader miss its importance: in refusing to apportion the state to accommodate changes in population, the state action in question injured voters as individuals. To live in a malapportioned district was to sustain a constitutionally cognizable injury, an injury that the federal courts were equipped to handle.

Justice Frankfurter disagreed with every one of these arguments. We focus on two arguments in particular. On the question of injury, Justice Frankfurter explained—in our minds correctly—that this was not a case where plaintiffs were claiming a private injury to their interests.<sup>203</sup> To be sure, that was what they pled, but that was not what this case was about. As

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197. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1059 (1958).

198. *Baker*, 369 U.S. at 209-11.

199. *Id.* at 237.

200. See Luis Fuentes-Rohwer, *Back to the Beginning: An Essay on the Court, the Law of Democracy, and Trust*, 43 WAKE FOREST L. REV. 1045, 1060 (2008) (contending that the Court understood the issue in *Baker* as no different from issues it handled across the spectrum of constitutional law).

201. *Baker v. Carr*, 369 U.S. 186, 251 (1961) (Clark, J., concurring).

202. *Baker*, 369 U.S. at 207-08 (majority opinion).

203. See *id.* at 298-300 (Frankfurter, J., dissenting).



he wrote, “the discrimination relied on is the deprivation of what appellants conceive to be their proportionate share of political influence.”<sup>204</sup> After all, he continued, the plaintiffs are able to both exercise their right to vote and to have their votes counted. And so the plaintiffs’ real objection was to the state’s adoption of a “basis of representation with which they are dissatisfied.”<sup>205</sup> In other words, the plaintiffs were asking the Court to choose a different basis of representation from what the state had chosen, to impose a different theory of political philosophy from the one chosen by the state and its representatives.<sup>206</sup> This was the essence of the litigation in *Baker v. Carr*.

Justice Frankfurter ultimately had the better argument once the early disparities in representation lessened. At a time when the population disparities were as much as 41 to 1, as seen in the *Reynolds* litigation, it was easy to argue that voters in malapportioned districts had what amounted to no vote at all. The injury was so obvious to the naked eye that the Court could easily deploy the language of individual rights and get away with it.<sup>207</sup> But once the Court’s intervention had its desired effect, Justice Frankfurter’s argument gained greater currency. Once the original injury lessened, subsequent judicial intervention required sharper and more fine-tuned distinctions about how we wish to structure our democratic institutions. This is true of ballot access cases or the regulation of political parties, of political gerrymandering or the wrongful districting cases. These are cases about what role the political parties should play in our political system, about the proper level of political power for persons of color, or the fair way to divide seats in a legislature.<sup>208</sup> These are not issues of individual rights, but the proper structure of our democratic process.

Justice Frankfurter also disagreed on the question of standards. Recall that Justice Brennan found this issue simple enough to dismiss with a casual reference to the “well developed and familiar” standards under the Equal Protection Clause.<sup>209</sup> Dissenters and commentators alike wished for the Court to delineate specific standards for redistricting cases, but the Court was content to only go as far as to offer the “arbitrary and capricious” standard.<sup>210</sup> This was no answer, according to Justice Frankfurter. His answer is worth quoting at length:

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204. *Id.* at 299.

205. *Id.* at 300.

206. *See id.*

207. *See* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1652 (1993).

208. *See* Gerken, *Lost*, *supra* note 10, at 512.

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

210. *See* Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 130-46 (1962) (quoting *Baker*, 369 U.S. at 226); *see also* Robert G. McCloskey, *The Supreme Court, 1961 Term – Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 55 (1962) (“[T]he Supreme Court [in *Baker*]

Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.<sup>211</sup>

This is clearly right as far as it goes. But as Justice Frankfurter continued, how would a judge evaluate this amalgam of factors under equal protection principles? Or, in his words, “these are not factors that lend themselves to evaluations of a nature that are the staple of judicial determinations or for which judges are equipped to adjudicate by legal training or experience or native wit.”<sup>212</sup> And he was surely right about that.

His point bears repeating only because of what came next. As he wrote about these factors and the impossibility of choosing among them, the difficulties were all the more challenging “because in every strand of this complicated, intricate web of values meet the contending forces of partisan politics.”<sup>213</sup> More to the point, matters of this kind involved questions of pure politics. This was an important point in two ways. First, these were matters that would ultimately affect future election results. The Court must interfere with these issues cautiously. Second, these were “overwhelmingly party or intra-party contests.”<sup>214</sup> As the Court decides to enter this terrain, it must tread only too carefully; for once it begins to take sides in these politically-charged controversies, the line between politics and law begins to blur.

#### B. Should the Court Simply Go Away?

The lessons of the debate between Justices Frankfurter and Brennan are clear. Justice Frankfurter advocated for a cautious approach, an approach respectful of politics and deferential to compromises reached elsewhere. This view recognizes that the Court cannot do all things and must protect, first and foremost, the one asset it does have: its legitimacy. This is why Justice Frankfurter focused on the many reasons why the Court should

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offered the lower court no standards by which the decision should be reached and no hints about the remedy that might be appropriate if the plaintiffs prevailed.”); C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 871 (1964) (arguing that *Baker* “did not indicate what standards the judiciary should apply in passing on complaints about legislative apportionment”).

211. *Baker*, 369 U.S. at 323 (Frankfurter, J., dissenting).

212. *Id.* at 324.

213. *Id.*

214. *Id.*

not intervene when confronted with the refusal by state legislatures to re-draw its district lines for many years. In contrast, Justice Brennan took a far more expansive view of the Court and its powers. This was a view of the Court as an engine of social change, as a muscular institution that could solve all problems, large and small. In this way, the redistricting cases were no different from anything else the Court was willing to do.

Understood this way, both camps were partly right and partly wrong. Justice Brennan was undoubtedly correct that the Court could handle these cases and impose its vision of equality upon the states. The states hardly put up a fight, and the better question at the time was in trying to explain why the states acquiesced as readily as they did.<sup>215</sup> But Justice Frankfurter was also correct that the Constitution offered the Court no firm guidance for handling these cases. Making matters worse, he recognized that the law of democracy was full of complex questions of structure devoid of easy answers. This is why we see the chaos that we do in these cases from the time of *Baker v. Carr*. As the Court makes its way through the famed thicket, and the Justices face these difficult questions, constitutional principle gives way to idiosyncratic answers to the problems presented. This is true about the gerrymandering cases, interpretations of campaign finance laws and the Voting Rights Act, ballot access, and vote dilution cases. Among all the factors at issue, how is the Court to choose among them?

Looking to the future, the question at the heart of the law of democracy asks us to take sides on this debate. The contemporary answer is clear enough: most scholars side with Justice Brennan and offer their preferred theories of choice. The leading accounts argue for judicial adoption of a “political competition” value<sup>216</sup> and the enforcement of core equality rights.<sup>217</sup> Our favorite account offers a theory of “Constitutional pluralism,” which encourages the Court to “utilize democratic principles to direct its interpretation of the Constitution.”<sup>218</sup> This is a defense of judicial review in defense of “core democratic principles.”<sup>219</sup> These theories all share a common view of the Court as muscular and aggressive.

We do not offer a theory of our own. Instead, our point is that in offering our preferred theories of choice we run directly into the objections raised by Justice Frankfurter. Professors Pildes and Issacharoff, two of the leading structuralists of our generation, implicitly concede as much. As they write,

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215. See McCloskey, *supra*, note 210.

216. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

217. See HASEN, *supra* note 5, at 79-81.

218. Charles, *supra* note 73, at 1107.

219. *Id.*

[F]or an emerging field seeking to build on the Warren Court's initial, critical engagement with the deep, structural features of democratic institutions, the central question is how deep into existing practices a robust, functional, historically-aware understanding of democracy will penetrate. "Elections" can look legitimate with full access and fairly counted ballots. But what ideas about social life and political representation should inform the antecedent and far more decisive questions of whether elections are conducted through cumulative voting, proportional representation, or the longstanding but hardly examined American tradition of single-member, winner-take-all elections in geographic districts? Or whether within democratic bodies, decisions should be reached with minority vetoes, with consociational requirements of concurrent majorities, or with simple majority rule?<sup>220</sup>

This passage is reminiscent of Justice Frankfurter's complaint we quoted earlier about the difficulties that inhere to the task of redistricting.<sup>221</sup> The point then, as it is today, is whether the Court can distinguish among all these factors, and whether we would want it to.

First, consider the argument by Professors Issacharoff and Pildes that the Court should enforce a value of political competition. The obvious first question asks where this value comes from. Its answer is disarmingly simple:

The way to sustain the constitutional values of American democracy is often through the more indirect strategy of ensuring appropriately competitive interorganizational conditions. It is in this way that central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation, are best realized in mass democracies.<sup>222</sup>

This is a view of judicial intervention grounded in democratic theory and of the Justices as democratic engineers. Justices Frankfurter and Harlan responded to this argument in their dissents in *Baker*; as they argued, this is nothing short of choosing one argument over another and asking the Court to choose "among competing theories of political philosophy."<sup>223</sup> In so doing, this view "reflects more an adventure in judicial experimentation than a solid piece of judicial adjudication."<sup>224</sup> This is another way of saying that this view asks the Court to take sides in these controversies in accordance with the Justices' own preferences about the proper structure of our government. Recall in this vein the objections raised by Justice Frankfurter about the myriad values and choices reflected in this area that the Court is forced to confront. Some Justices might prefer "responsiveness" as *the* cen-

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220. Samuel Issacharoff & Richard H. Pildes, *Not By "Election Law" Alone*, 32 *LOY. L.A. L. REV.* 1173, 1183 (1999).

221. See *supra* text accompanying note 211.

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

223. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

224. *Baker*, 369 U.S. at 339 (Harlan, J., dissenting).

tral democratic value; yet others might choose political stability instead.<sup>225</sup> How is a Court to choose among them?<sup>226</sup>

To be fair, Issacharoff and Pildes concede that the Court need not be the one institution that enforces this important value. Yet they conclude that no other institution is likely to fill this void.<sup>227</sup>

The argument for enforcement of core equality rights faces similar difficulties. The argument here is that the Court should focus its attention in protecting core equality rights and leave contested rights to the vagaries of the political process. As a theoretical matter, the argument can be as persuasive as one wishes it to be, but the details soon get in the way. To the question of how a Court would decipher what these core equality rights are, Professor Hasen offers two answers: these are the basic rights essential to a contemporary democracy,<sup>228</sup> or else, looking to the future, these are also the rights that are the product of “social consensus.”<sup>229</sup> We set aside for purposes of this argument his enumeration of these basic essential rights and happily concede that limitations on the right to vote on the basis of “gender, literacy, national origin, race, religion, sexual orientation” and wealth belong on that list.<sup>230</sup> We also agree that states must not place unreasonable burdens on individuals wishing to organize with others for political purposes. Hasen writes that this is a “small universe” of rights.<sup>231</sup>

We are more curious about the basis for these rights. Hasen argues that these rights have been socially constructed; thus, he argues that any other rights must achieve core status through a similar process of social consensus.<sup>232</sup> The problem then becomes obvious: how is a court to know when a right achieves social consensus?<sup>233</sup> This question is particularly important in light of Hasen’s admission that the history of the Court’s political equality jurisprudence shows that “there has been no distinction between the justices’ views of the meaning of the Equal Protection Clause and what the Constitution requires.”<sup>234</sup> Or as he states more forcefully a few sentences later, “[a]t least in the area of political equality, there is little question that

225. See generally *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O’Connor, J., concurring); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

226. The same point applies to Professor Charles’ model of constitutional pluralism. See Charles, *supra* note 73.

227. See Pildes, *supra* note 220, at 1611; Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL’Y 91, 97 (2000).

228. See HASEN, *supra* note 5, at 79-80.

229. *Id.* at 80-81.

230. *Id.* at 82.

231. See *id.* at 79.

232. *Id.* at 80-81.

233. See Luis E. Fuentes-Rohwer, *Of Platonic Guardians, Trust, and Equality: A Comment on Hasen’s Minimalist Approach to the Law of Elections*, 31 J. LEGIS. 25, 32-33 (2004).

234. HASEN, *supra* note 5, at 158.

justices of the Warren Court (like the justices of the Burger and Rehnquist Courts that followed) have ‘made it up’ as they went along.”<sup>235</sup> And so, the question becomes, why should we assume that the notion of social consensus will cabin the Court’s decisionmaking in any noticeable way?

As we discuss these contrasting theories of judicial decision-making in the law of democracy, we return to Justice Frankfurter one final time. Note first that both theories wish for the Court to take a limited and limiting approach in this area. Yet, in the end, they return us to the place where Justice Frankfurter began. How to choose from the many factors from which a Court must necessarily choose? In light of the history of the Court in this field, it is hard to trust the Court to regulate this important field. This must mean, at the very least, that argument for less intervention, or any intervention at all, must at least be taken seriously.

#### CONCLUSION

The Court’s handling of the law of democracy is not worthy of much praise. It is haphazard, confused, and messy. Recent scholarship either tries to explain this messiness and incoherence as a strategy to buy the Court time until a new and stable majority emerges, or else scholars retrieve the world they know best, where normativity is the norm and they offer their judicial theories of choice. We do neither. Rather, we contend that what we witness today is not new but the way the Court has handled the field of democracy from the moment it intervened in *Baker v. Carr*. As a result, we go back to *Baker* and the debate between Justices Frankfurter and Brennan over the wisdom of judicial intervention. In our minds, this is a debate with a clear winner: to this day, Justice Frankfurter’s forceful argument has gone both unheeded and unanswered. The evidence is in, and so, after forty years of judicial review in the realm of politics, the question for the future should be whether judicial intervention in the realm of politics is worth the cost.

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235. *Id.*