

ESSAY

LEAVING THE THICKET AT LAST

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Luis Fuentes-Rohwer, an associate professor of law at Indiana University – Bloomington School of Law, teaches courses in voting rights, civil procedure, legislation and legal ethics. Professor Fuentes-Rohwer received a law degree and a doctoral degree in political science from the University of Michigan, and served as a Future Law Professor Fellow at the Georgetown University Law Center. He has taught at Michigan, Georgetown, Chicago-Kent, Minnesota and Indiana. Professor Fuentes-Rohwer's scholarship has appeared in the *William and Mary Law Review*, the *Notre Dame Law Review*, the *North Carolina Law Review*, the *Washington & Lee Law Review*, the *Florida State University Law Review*, *Constitutional Commentary*, the *Cornell Journal of Law and Public Policy*, and the *Journal of Legislation*. Soon after the Supreme Court handed down the recent political gerrymandering case, *LULAC v. Perry*, Professor Fuentes-Rohwer appeared as guest blogger on the SCOTUS blog. He is currently at work on a book about the early history of the reapportionment revolution.

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*Luis Fuentes-Rohwer**

The Law of Democracy is in a state of incoherence. The experiment begun by Baker v. Carr showed great promise, yet soon gave way to disappointment. The promise was one of modest review and respect for political choices made elsewhere. The reality has been far from that. The U.S. Supreme Court displays an aggressive posture towards questions of politics, yet refuses to intervene in political gerrymandering controversies, the one area where intervention appears normatively warranted. The Court throws its weight around the political thicket at will, arbitrarily and with little semblance of rationality, irrespective of doctrine, precedent or history. It is time for the Court to return to the promise of Baker and a standard of heightened rationality across the law of democracy. Absent that, it should call it a day and leave the thicket at last.

Courts ought not enter this political thicket.¹

My own sense . . . is that the current Court is deeply distrustful of the political branches and ambitious for its own power. And so, it will plunge even further into the political thicket, ever more encroaching on the power of the political branches. Like Macbeth, it will find it impossible to wade no more.²

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¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

² Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 698 (2002); see Pamela S. Karlan, *Northing Personal: The Evolution of the Newest Equal Protection From Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1366(2001) (“Once again, as it did in the *Shaw* cases, the Court intervened [in *Bush v. Gore*] to short circuit the nor-

If there was ever any doubt, none should remain after the Court's decision in *LULAC v. Perry*:³ the law of democracy is one messy thicket indeed and the Court is stuck within it. Over the space of 6 opinions and 132 pages, the Court announced the following: (1) a majority is yet to find a suitable standard for adjudicating political gerrymandering questions; (2) the fact that a legislative majority enlisted the redistricting machinery of the state mid-decade adds nothing to the previous point; and (3) the state can't essentialize Latinos – or Blacks, or anybody else, it would appear.

For one who came of age in the voting rights field during the dark ages of *Shaw v. Reno* and its progeny,⁴ the nuance of this last point bears repeating: not all Latinos are the same for purposes of representation and redistricters may not treat them as if they are. The point seems especially remarkable coming from Justice Kennedy, the same Justice who seldom if ever sides with the interests of people of color,⁵ and appears to cast an intriguing light on the future challenge to the constitutionality of the Voting Rights Act. In particular, and as Adam Cohen conjectured in the *New York Times* some months ago, we must wonder how shifting to the center of the Court and becoming *the* deciding vote on these important issues will affect Justice Kennedy.⁶ If *LULAC* teaches us anything, it may be that we cannot read Justice Kennedy on race as well as we thought we could.

The case is remarkable for how it failed to advance our understanding of the fundamental conflicts in the law of democracy. What do we know today that we did not know prior to *LULAC*? Nothing. Take, for example, Kennedy's anti-essentialist point. There is nothing new there; this "insight" flows directly from the *Shaw* line of cases.⁷ Consider also the political gerrymandering non-argument. We would generally expect the Court to interpret the Constitution and develop standards as de-

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

³ 26 S.Ct. 2594 (2006).

⁴ See *Shaw v. Reno*, 509 U.S. 630 (1993); *Bush v. Vera*, 517 U.S. 952 (1996); *Easley v. Cromartie*, 532 U.S. 234 (2001).

⁵ See, e.g., *Presley v. Etowah County Comm'n*, 503 U.S. 491 (1992) (offering a narrow reading of the coverage provision of the Voting Rights act); *Miller v. Johnson*, 515 U.S. 900 (1995) (concluding that redistricting plans are subject to the predominant factor test)

⁶ See Adam Cohen, *Anthony Kennedy is Ready for his Close-Up*, N.Y. TIMES, April 3, 2006.

⁷ See *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("But where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates.") (quoting *Shaw v. Reno*, 509 U.S. 530, 647 (1993)); Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227 (2001).

manded by some accepted norm of constitutional interpretation. Instead, we find the Court in a public display of futility, fracturing along competing lines while asking for help in locating these hard-to-find standards. So for all the waiting, all the arguments, and all the time and expense, the Court offered nothing new. This is not the behavior of a Court in charge of the political thicket as guided by constitutional norms, but rather, of a Court that has nothing to offer. This is hardly an endorsement of the Court and its role in the law of democracy.

It is time to call it a day. The experiment begun by *Baker v. Carr* had great promise and the best of intentions. Yet all too soon, the Court forgot both the reasons that led it to enter this political minefield and the complexities that made the law of democracy particularly difficult to adjudicate. Worse yet, it has now become clear that the Court is throwing its weight in the political thicket at will, arbitrarily, and irrespective of doctrine, precedent or history. It is time for the Court to exit this morass once and for all.⁸

This Essay defends this position over the course of four Parts. Part I discusses the special nature of political questions and the reasons why the law of democracy presents the Court with unique challenges. Part II contends that the political question doctrine is now dead and the Court no longer hesitates on the question of judicial power. This is the clear lesson of the reapportionment revolution. Once the Court betrayed the promise of *Baker v. Carr* and exalted the equipopulation principle as the standard of choice, it soon became a platonic guardian of sorts, willing and able to regulate the law of democracy in accordance to its own views about the political process. The Court could extend this principle quite far, and take on the outcome of presidential elections.⁹

Parts III document this development and concludes that the Court is confused and ultimately incoherent in its handling of questions of race and politics. More damningly, this is a story where ideology and judicial attitudes are in command of adjudication. In conclusion, Part IV advocates a return to the promise of *Baker v. Carr* and a doctrine of heightened rationality. Absent that, the Court should leave the thicket at last.

I. On the Special Nature of Political Questions

“Some claims of unconstitutionality, however much they may be wrapped in the form of conventional litigation,” wrote Justice Frankfurter in 1934, “the Court will never adjudicate.”¹⁰ These were the noto-

⁸ For strategies about accomplishing this goal, see Karlan, *supra* note 2.

⁹ See *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁰ Felix Frankfurter, *The Supreme Court of the United States*, 14 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 424 (1934), reprinted in *LAW AND POLITICS: OCCASIONAL PA-*

rious political questions, outcasts in a legal universe where courts decide all matters, great and small, brought to their attention. Judges would decide these questions at their own peril, Justice Frankfurter explained, for they are “not suited for settlement by the training and technique and the body of judicial experience which guide a court.”¹¹ These questions were unwieldy, imprecise, and best left alone, to be handled and resolved by the political process. As for how to define the boundaries of such questions, Justice Frankfurter left open a small window, as “the wisdom of the Court defines its boundaries.”¹²

It is now commonplace to document the demise of the Frankfurterian view of political questions as a central component of our constitutional law orthodoxy. And in fairness, the political question doctrine has been long dead, as exemplified by the Court’s foray into presidential elections and vote recounts in *Bush v. Gore*.¹³ Yet, as this Part argues, Justice Frankfurter’s shadow looms large over the law of democracy, even if conceding that his influence is relatively modest.¹⁴ Three features of the law of democracy counsel for a judicial posture couched in humility and restraint.

A. Stalking Horses and the Question of Power

The first feature dates at least as far back as Justice Frankfurter’s forceful admonition in *Colegrove v. Green*.¹⁵ The Court must be particularly careful in this arena, lest it be confused with yet another actor in the process. To his mind, complainants are essentially asking the Court to intervene in party contests while dressing up their prior defeat in the political process “in the abstract phrases of the law.”¹⁶ Put another way, the law of democracy must of necessity take sides in politically charged controversies, and invoking doctrines and constitutional clauses does nothing to alter that fact. Robert Dixon made a similar point soon after the Court’s explicit entry into the realm of politics in *Baker v. Carr*,¹⁷ when

PERS OF FELIX FRANKFURTER 1913-1939, at 26 (Archibald Mac Leish and E. F. Pritchard, Jr., 1939).

¹¹ *Id.*

¹² *Id.*

¹³ 531 U.S. 98 (2000); see Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899 (2006).

¹⁴ On this point, it agrees with Norman Dorsen when he writes that Justice Frankfurter’s “judicial legacy has been surprisingly limited.” Norman Dorsen, *Book Review*, 95 HARV. L. REV. 367, 368 (1981) (reviewing H. N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981)).

¹⁵ 328 U.S. 549 (1946).

¹⁶ *Colegrove*, 328 U.S. at 554.

¹⁷ 369 U.S. 186 (1962).

he complained that the case was “an invitation to courts to sit in judgment on the structure of political power; even to effect a judicial transfer of political power.”¹⁸

This point has not been lost on indefatigable plaintiffs wishing to challenge the electoral outcome of their choice. To lose in the political process is to return to fight another day in the courts, under a dizzying array of available doctrinal tools, from Article 1 and the First or Fourteenth Amendments to the Voting Rights Act, campaign finance law and/or state law principles.¹⁹ These challenges are known as “stalking horse” cases, and the litigants are often defeated candidates or the political parties themselves looking for any chance to upset settled political outcomes.²⁰ In turn, much of the effort within the law of democracy is focused not on the vindication of individual rights by aggrieved litigants, but on the use of the courts as a means to the achievement of the larger goal of electoral success. *Bush v. Gore* was one such case, yet hardly stands alone.²¹ The incentives created by the law of elections guarantee as much.

B. The Political Question in Context: Power Meets Fear

The second feature harkens back to Justice Frankfurter’s reasons for refusing to enlist the Court in the hard work of regulating democratic institutions. These were arguments for which the political question doctrine did much of the heavy lifting. The classical strand of the doctrine made a fleeting appearance, and the view that this was an area exclusive for Congress to regulate.²² But the Court has never really paid much

¹⁸ Robert G. Dixon, Jr., *Apportionment Standards and Judicial Power*, 38 NOTRE DAME L. REV. 367, 368 (1963).

¹⁹ See Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 542 (2004).

²⁰ See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, CUMB. L. REV. 287, 297 n. 60 (1995-96); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1733-35 (1993) (describing the strategic use by interested partisans of the equipopulation rule and the Voting Rights Act); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1608 (1999) (discussing the Karcher opinion and complaining that “[t]he ‘right’ claimed here, as often in political cases, was obviously a stalking horse for other interests”).

²¹ See Michael Barone & Grant Ujifusa, *The Almanac of American Politics* 1994, at 1252 (1995) (Edward Blum, plaintiff in the Texas wrongful districting case, was an unsuccessful Republican candidate for Congress in one of the challenged districts); *id.* at 358 (George L. DeLoach, plaintiff in the Georgia wrongful districting case, was an unsuccessful candidate in the Eleventh District Democratic primary).

²² *Colegrove v. Green*, 328 U.S. 549, 551 (1946). For a contrary view, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 190-91 (2d ed. 1986). (disagreeing that *Colegrove* stands for the view that the Constitution leaves to Congress exclusive authority to monitor congressional elections,

attention to this argument. More important was the prudential strand, and the notion that the Court must traverse this terrain carefully. The question wasn't whether the Court had the power to handle these questions, for the Court clearly did.²³ Rather, the question was whether the Court should. This was a real concern for Justice Frankfurter, for in the end Congress may reject the Court's work.²⁴ And to Justice Frankfurter, the Court "ought not enter this political thicket",²⁵ lest it risk eroding its considerable yet fragile legitimacy and public standing.

The advent of *Baker v. Carr* set these fears aside and brought the political question doctrine to its knees. It also offers the first lesson of the reapportionment revolution and its aftermath. The real question in *Baker* focused on the Court's power to hear these difficult and contested claims. Critics of the opinion,²⁶ as well as lower courts across the country,²⁷ understood *Colegrove* to bar review. Yet the Court set this and others precedents aside with a simplicity that spoke volumes about the Court and its desire to correct a perceived wrong. On the question of *Colegrove* as precedent, for example, the Court counted votes and concluded that four of the seven voting Justices upheld a grant of jurisdiction over the subject matter.²⁸ Even Frankfurter's controlling opinion appeared "questionable" on this issue. The political question doctrine did not fare much better. The Court took on the Guarantee Clause head on and concluded that the inquiry here was "primarily a function of the separation of powers."²⁹ The question was thus whether the Constitution has committed the matter under review to another branch of government, or whether the actions exceed the grant of authority as exercised by the

as both the 14th and 15th Amendment may be said to so authorize the Court to play a role in this area); see also Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963) ("That such a claim is within the subject matter committed to the Court seems beyond dispute.").

²³ See *Baker v. Carr*, 369 U.S. 186, 277 (Frankfurter, J., dissenting) ("Both opinions joining the result in *Colegrove v. Green* agreed that considerations were controlling which dictated denial of jurisdiction though not in the strict sense of want of power.").

²⁴ *Colegrove*, 328 U.S. at 552-53

²⁵ *Colegrove*, 328 U.S. at 556. But see Charles L. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13, 14 (1962) ("[*Colegrove*] can satisfy only if one starts with the postulate that judicial wisdom . . . always consists in judicial self-restraint, and that the reasons preferred for such restraint are . . . always to pass for well-founded, if stated in the set terms of art.").

²⁶ See Philip B. Kurland, *Foreword – Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 149 (1964) ("It is impossible to believe that the Court was as artless as it represented itself to be; it is difficult to believe that the Court thought it could find an audience ingenious enough to accept the assertion [that *Baker* did not conflict with precedents].").

²⁷ See *Baker v. Carr*, 179 F. Supp. 824, 826 (E.D. Tenn. 1959).

²⁸ *Baker*, 369 U.S. at 202.

²⁹ *Id.* at 210.

proper branch. And *that* question belongs to the Court “as ultimate interpreter of the Constitution.”³⁰ Put in simple terms: this was a case, *ergo* the Court may decide it. On *Baker’s* logic, one may even conclude that it has an “unsought responsibility” to so act. The reception for this line of argument was far from unanimous.³¹

And so the first lesson of *Baker* and its progeny should be clear: questions of politics are no different from questions of constitutional law writ large.³² Seen this way, the chasm between Justice Frankfurter and the *Baker* majority was simply a disagreement grounded in principle – not law – about how to handle these questions. To Justice Frankfurter, these cases should not be brought within the constitutional law orthodoxy. A majority of the Court resoundingly thought otherwise.

C. Standards (and the Endless Search for Stone Tablets)

The third feature also finds expression in the reapportionment debates. Justice Frankfurter’s complaint boiled down to the fact that these were political conflicts of the highest order, a “clash of political forces in political settlements.”³³ And he was undoubtedly right about that. The question under review in *Baker* was a political question, plain and simple, a matter that entailed “accommodating the incommensurable factors of policy that underlie these mathematical puzzles.”³⁴ Among these, he included the following:

Considerations of geography, demography, electoral convenience, economic and social cohesion of divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.³⁵

³⁰ *Id.* at 211.

³¹ See Kurland, *supra* note 26, at 149.

³² See, on this point, Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 372 (2004) (“But I do not think that electoral law can be cut free from constitutional law more generally, which requires the Court to continue playing an active role in defining basic norms.”).

³³ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).267.

³⁴ *Id.* at 268.

³⁵ *Id.* at 323-24. Alexander Bickel similarly asked, how to craft representative institutions with everything that such a difficult task entails? This was a difficult question, since

“To charge the courts with th[is] task,” he concluded, “is to attribute, however flatteringly, omnicompetence to judges.”³⁶

Justice Frankfurter must get his due on this issue, whatever else we may think of his larger arguments. How would a court decide from among all these competing considerations in crafting a districting plan? To the critics, the Court’s answer fell far short, for the opinion offered neither a workable, manageable standard for examining redistricting plans³⁷ nor, assuming an equal protection violation, did the opinion explain what remedies a court was authorized to grant.³⁸

To the Court, however, these questions proved far too easy and hardly worthy of much discussion. The lower courts would simply determine whether the plans under review violate equal protection by turning to the “well developed and familiar” equal protection standards. As the Court explained, somewhat hastily and opaquely, “it has been opened to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.”³⁹ And as for the question of remedies, the Court offered the following: “we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found.”⁴⁰ The critics were far from impressed.⁴¹

Yet the Court hardly blinked. A scant two years later, during the 1963 Term, the Court came back to the thicket in full force. In the prin-

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

BICKEL, *supra* note 22, at 192.

³⁶ *Baker*, 369 U.S. at 268.

³⁷ See Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 108 (1962) (“Nowhere does the Court indicate, by dictum or otherwise, what standards might be used in determining the validity of an apportionment scheme which creates such inequalities.”); Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 62-4 (1962).

³⁸ See Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 262 (“The issue, of course, was not what remedy would be ‘most appropriate’ but whether any remedy at all lay within the power of a federal court of equity acting within its discretion, an issue which it could hardly have been ‘improper’ to consider in advance of trial.”).

³⁹ *Baker*, 369 U.S. at 226.

⁴⁰ *Id.* at 198.

⁴¹ See Neal, *supra* note 38, at 262 (“For the Court to remove that issue from the case, if that was its meaning, by asserting that it had ‘no cause . . . to doubt’ was little less than an expression of contempt for the views of numerous other responsible judges.”).

cial case of *Reynolds v. Sims*,⁴² the Court sidestepped a great deal of important information from the lower courts and moved ahead with its standard of choice, the now familiar equipopulation principle. As it explained, “Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.”⁴³ This meant, more specifically, that population was “the controlling criterion”⁴⁴ for judging districting plans.

This conclusion was neither surprising nor radical in light of *Baker* and the egregious population disparities then in existence. The simplicity of the standard is undeniable, particularly under its traditional moniker of “one person, one vote.” It bespeaks of common sense, traditional democratic values and majority rule, qualities that help explain why the public embraced the Court’s intervention.⁴⁵ After all, who could disagree with a constitutional rule that demands that each vote count as much as another?

Unsurprisingly, members of Congress could disagree, and some of them fought hard to reverse the Court’s decision or blunt its impact.⁴⁶ Part of this response was undoubtedly self-interested. Yet it is worth remembering that the equality principle at the heart of the Fourteenth Amendment offered the Court multiple doctrinal paths and could find expression in innumerable judicial standards. Put another way, the equipopulation standard was not demanded by constitutional precedent, text, or history, as Justice Frankfurter forcefully argued in his *Baker* dissent. The standard was certainly simple to administer, but as John Ely explained, the harder task was in explaining what else it had to commend it.⁴⁷ This was not like the issue in *Brown*, where the equality principle offered the Court a self-evident path to equality. No such path existed here, and so the *Reynolds* opinion must be understood for what it is: a moment in the Court’s history when the justices drew a line in the sand and carved a doctrinal niche from among competing rationales. The Court chose a line and committed to it, and all it took was courage and conviction. As for the second lesson of the reapportionment revolution: we should not forget, particularly in light of the Court’s hesitations in *Vieth* and its professed inability to locate a standard to govern political

⁴² 377 U.S. 533 (1964).

⁴³ *Id.* at 565.

⁴⁴ *Id.* at 567.

⁴⁵ Robert McCloskey attributed this overwhelming reaction to a “latent consensus.” See McCloskey, *supra* note 37, at 58-59.

⁴⁶ See Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 231-38 (1964).

⁴⁷ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 121 (1980).

gerrymandering controversies,⁴⁸ that the Court in *Reynolds* pulled its standard of choice essentially out of a hat.⁴⁹

II. Lessons from the Past: On the Demise of Political Questions; or, How the Logic of *Baker* Took Over the Law of Elections

Baker and *Reynolds* tell an important story about the Court and its power in contemporary American politics. Taken together, they make clear that the Court's power extends as far as the justices demand that it does, cabined only by pragmatic considerations. Recall in this vein Robert Dixon's prescient analysis; to his mind, *Baker* was an *invitation* for courts to judge the structures of political power, or "even to effect a judicial transfer of political power."⁵⁰ This is an important point in two ways. Note first that *Baker* was only an invitation to courts, not a requirement that they do so. This is clearly right, and the reason why *Baker* must be understood as contra distinct from *Reynolds* and the equi-population revolution. *Baker* allows for intrusion into politics yet clearly stops short of aggressive judicial intervention.⁵¹ Yet the Court pushed this invitation to its limits, leading Professor Dixon to remark soon after the Court's decision in *Reynolds* and its companion cases,⁵² "[c]ourts not only have entered the thicket, they occupy it."⁵³ The second point un-

⁴⁸ See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) ("As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.")

⁴⁹ For a discussion on this point, see Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J. L. & PUB. POL'Y 423, 435 (2006).

⁵⁰ Dixon, *supra* note 18, at 368.

⁵¹ See Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353 (2002); see also BICKEL, *supra* note 22, at 196 ("The point decided was not what function the Court is to perform in legislative apportionment, and certainly not whether it is to take over full management, but whether it can play any role at all.")

⁵² See *Reynolds*, 377 U.S. 533 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Lucas v. Forty Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964); see Robert G. Dixon, Jr., *The Court, the People, and "One Man, One Vote,"* in REAPPORTIONMENT IN THE 1970'S 7, 11 (Nelson W. Polsby ed., 1970).

⁵³ Dixon, *supra* note 46, at 210; see *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting) ("These decisions, with *Wesberry v. Sanders*, involving congressional districting by the States, and *Gray v. Sanders*, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary."); see also Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999) ("In the relatively short time since [*Baker*], the United States Supreme Court has not only entered the 'political

derscores how prescient Dixon's sentiment was and how close it came to describe the controversy surrounding the aftermath of the 2000 presidential election. The case, of course, is *Bush v. Gore*.⁵⁴

This section does not retell this oft-told story, nor does it offer any new insights about the Court's handling of what is easily the most politically-charged case in recent memory.⁵⁵ Instead, it makes two modest claims. The first claim looks back to *Baker* and the reasons that thrust the Court into the realm of politics. At their core, the similarities between *Baker* and *Bush v. Gore* are striking,⁵⁶ to the point that *Bush* is nothing but a logical if extreme extension of *Baker*.⁵⁷ And so Justice Frankfurter must get his due, as his concerns have come to pass and the Court has become another political actor, taking sides in politically charged controversies.⁵⁸ A distinct difference, of course, lies in the normative reasons for the Court to take the initial step of "deciding to decide." The Court in *Baker* had impeccable reasons, grounded in what was a clear failure of the political process. It is difficult to offer a strong defense of the Court's intervention here, though some commentators have certainly tried.⁵⁹ If anything, the political process appeared to be working too well. And so the lessons of the case are both clear and uncontroversial: the Court is mired in our politics, willing and ready to strike a blow for our constitutional democracy.

The second claim situates the case within our political question tradition, and agrees that the case raised a political question. By this I don't mean a political question in the crude sense of day-to-day politics, of the world inhabited by Republicans and Democrats; of course *Bush v. Gore*

thicket,' but with remarkable speed has found conflicts of democratic politics coming to dominate its docket.").

⁵⁴ 531 U.S. 98 (2000).

⁵⁵ See David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1427 (2006) ("Few cases in the Supreme Court's 200-plus year history have more deeply tested its institutional legitimacy than *Bush v. Gore*.").

⁵⁶ Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMM. 359, 390 (2001) ("*Bush* is *Baker v. Carr* in conservative garb.").

⁵⁷ See Richard L. Hasen, *A "Tincture of Justice": Judge Posner's Failed Rehabilitation of Bush v. Gore*, 80 TEX. L. REV. 137, 154 (2001) (book review) ("*Reynolds v. Sims*, whether it is good or bad politics, begets *Bush v. Gore*.").

⁵⁸ See *Colegrove*, 328 U.S. at 554; see also Michael C. Dorf and Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 932-33 (2001) ("The pointillism of their decision aimed to avoid entanglement in future political thickets, even as they emerged badly bloodied from the thorns of *Bush v. Gore* itself. Somewhere, Justice Frankfurter is chuckling.").

⁵⁹ See, e.g., RICHARD A. POSNER: *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); Richard A. Epstein, "*In Such Manner as the Legislature Thereof May Direct:*" *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001); Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002).

is *that*. Rather, I mean it in the doctrinal sense, which places the case in distinguished company, with *Luther v. Borden*⁶⁰ and *Pacific States Tel. Co. v. Oregon*.⁶¹ To be sure, many commentators have situated *Bush v. Gore* within this tradition.⁶² Yet the crucial insight of the political question doctrine cannot be understated and often goes unnoticed: it is not that particular questions are textually committed to the political branches rather than the courts. This aspect of the political question doctrine – known as its classical strand – has ceased to do any work for quite some time.⁶³ Instead, the real bite of the political question doctrine lies in its prudential strand: courts choose to intervene in or abstain from deciding particular controversies for pragmatic reasons, often out of a real concern that its edicts will go underenforced.⁶⁴ Such was the case in *Colegrove v. Green* and *Luther v. Borden*, and there is very little reason to think that this should not have been *Bush v. Gore*.

Let me be clear: in *Bush v. Gore*, the *per curiam* opinion professed an inability to decline to hear the case. The language here was of an “unsought responsibility.”⁶⁵ But this is clearly misleading. The Court could have declined to hear this case, and in fact, if the prudential political question doctrine retained any vitality whatsoever, the Court would have been wise to let the political process run its course. Yet the Court plunged ahead and essentially stopped the Florida recount,⁶⁶ confident that its edict would not go unenforced. And so the real insight of *Bush v. Gore* lies precisely here: public perceptions about judicial supremacy are so strong, and the Court’s legitimacy so secure, that the justices no longer need to hide behind platitudes such as “political questions” and “judicially manageable standards.” The political question doctrine is

⁶⁰ 48 U.S. 1 (1849).

⁶¹ 223 U.S. 118 (1912).

⁶² See Steven G. Calabresi, *A Political Question*, in *BUSH V. GORE: A QUESTION OF LEGITIMACY* 129-41 (Bruce Ackerman, ed.2002); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1105-09 (2001); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 639-41(2001); Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism*, in *BUSH V. GORE, supra*, at 145-62; Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571 (2002).

⁶³ See Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899 (2006).

⁶⁴ See *id.*

⁶⁵ *Bush*, 531 U.S. at 111 (“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.”).

⁶⁶ See L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 730-31 (2003) (explaining that “the claim in *Bush v. Gore* that deciding the election was an ‘unsought responsibility’ rings hollow. The Court could have avoided the responsibility by denying certiorari.”).

dead, and the Court is clearly in charge of our politics, ready to act and unafraid of any negative repercussions.

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

III. Confusion and Incoherence in the Law of Democracy: A Short Survey

Bush v. Gore is not an isolated example of the Court's aggressive handling of questions of politics. It is standard fare. This is true even in areas where moderation would appear to present a better approach. The wrongful districting cases, discussed in the first section, offer a poignant example. The second section examines the political gerrymandering cases, an area where the Court displays a cautious side we no longer see. This is puzzling, particularly because questions about judicial power and standards for adjudication have been settled long ago. This was the reapportionment revolution. Taken together, the first two sections lead to incoherence in the law of democracy. This is the subject of the third section.

A. The Politics of Race

Consider first the wrongful districting cases, the source of much controversy and disarray.⁶⁷ To begin, take a legislature during a redistricting session. Assuming partisan control of all necessary posts, one would expect legislative outcomes to reflect the partisan attitudes and desires of their authors. Throw into the mix controlling federal law, and particularly pre-clearance and vote dilution requirements under the Voting Rights Act,⁶⁸ and the legislative handiwork immediately increases in

⁶⁷ For criticisms of the Court's forays in this area, see, e.g., Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45; Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN L. REV. 731 (1998); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

⁶⁸ 42 U.S.C. § 1971 (2000). The vote dilution requirement is codified under section 2 of the Act. It essentially proscribes, under a totality of circumstances inquiry, whether "members of a class of citizens protected by [the statute] . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C.A. § 1973. The non-retrogression re-

complexity. On this scenario, the controlling party could give up hope and relent to the federal pressures not of its own making, while stretching its partisan gains as much as possible; or it could attempt to comply yet hold onto previous gains.

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

This is a nutshell account of the political process leading up to *Shaw v. Reno* and its progeny. At first blush, the facts pointed clearly in the direction of partisan shenanigans, and the plaintiffs so understood them, grounding their initial claim on the Court's partisan gerrymandering doctrine. The lower court did not buy it, and neither did the Supreme Court.⁶⁹ Undeterred, the plaintiffs tried again, this time on a racial gerrymandering claim. Their evidence consisted of maps, DOJ's insistence on a second majority black district, and the fact that a black legislator had won the contested seat.

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

quirement is codified under section 5 of the Act. Under this requirement, the Department of Justice may not allow changes in jurisdictions covered by the Voting Rights Act if these changes "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁶⁹ See *Pope v. Blue*, 809 F. Supp. 392 (W.D. NC 1992), summarily affirmed 506 U.S. 801 (1992).

separate districts because of their race.”⁷⁰ This type of harm came to be known as an “expressive harm.”⁷¹ Or, in the Court’s oft-cited words,

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin . . . reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls.⁷²

While the Court conceded that this was a claim “analytically distinct”⁷³ from prior race cases, there was nothing new here, for “[w]e have rejected such perceptions elsewhere as impermissible racial stereotypes.”⁷⁴

This case has a clear explanation. The Court understood the map in *Shaw* as an example of uber-race consciousness,⁷⁵ as flashing the message “RACE, RACE, RACE” in big, bold letters, for the entire world to see.⁷⁶ More perniciously, one may interpret it as conveying a message of extreme race consciousness in the pursuit of districting goals. As John Hart Ely eloquently put it, the message is “in your face,” and may lead one to conclude: “Is there no length to which they won’t go to help Black people?”⁷⁷ For the Court, the facts in *Shaw* offer an “ostentatious display of race consciousness run amok,” instances of “in-your-face visual representations of racial interest as raw political power.”⁷⁸ The Court sees race, the Court does not like race, and so the Court applies strict scrutiny. How the Court can get all this information from the map and the factual setting, of course, is in itself a difficult and troubling question.⁷⁹ Unsurprisingly, the Court ultimately struck down the districting plan.⁸⁰

⁷⁰ 509 U.S. 630, 658 (1993)

⁷¹ See Richard H. Pildes and Richard Niemi, *Expressive Harms*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

⁷² *Shaw*, 509 U.S. at 647.

⁷³ *Id.* at 652.

⁷⁴ *Id.* at 647.

⁷⁵ Charles & Fuentes-Rohwer, *supra* note 7, 240-41 (2001).

⁷⁶ See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 610-11 (1993).

⁷⁷ John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 615 (1998).

⁷⁸ Charles & Fuentes-Rohwer, *supra* note 7, at 240-41.

⁷⁹ See MARK MONMONIER, *BUSHMENDERS AND BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS* (2001); Hampton

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

B. Muddling Through our Politics

Compare the scenario in the wrongful districting cases to the more traditional gerrymandering claim, as examined in *Vieth v. Jubelirer*.⁸¹ The same set of conditions exist: a rogue legislature, hell-bent on enacting the partisan plan of its choice; total partisan control of the redistricting process; and a forgiving – perhaps non-existent – doctrinal canvass. The one absent player in this setting was the Department of Justice, and that made all the difference in the world. Without an institutional push to imbue race into the process, the outrage was restrained and altogether different. And the Court responded in kind.

To be sure, the political gerrymandering doctrine is replete with half-steps, missteps, and even non-steps. Soon after *Baker*, for example, the Court refused to explicitly adjudicate these questions, deciding instead to monitor them through related yet indirect means. Chief among these has been the equipopulation standard, which the Court applied with unrelenting rigor in *Karcher v. Daggett*.⁸² Once the Court officially declared the justiciability of these questions in the fractured *Davis v. Bandemer*,⁸³ our democracy hardly felt its effects. The recent *Vieth v. Jubelirer* once again put in full display the Court’s struggle with the hated gerrymander. While a plurality argued that judicially manageable standards are unavailing, Justice Kennedy is still looking for one, unwilling for the Court to abdicate the field just yet. *LULAC v. Perry*⁸⁴ – as blatant a political gerrymander as we are likely to see – did not improve matters, as Justice Kennedy decided the case on alternate grounds.

This posture should strike us as odd and misconceived. Having set the question of power aside generations ago, it seems too late in the day to argue that standards are lacking, or power unavailing. The Court has

Dellinger, *Words Are Enough: The Troublesome use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997).

⁸⁰ See *Shaw v. Hunt*, 517 U.S. 899 (1996).

⁸¹ 541 U.S. 267 (2004).

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

⁸³ 478 US 109 (1986).

⁸⁴ 126 S. Ct. 2594 (2006).

power to do anything it wants, and myriad standards exist, coming practically from all corners of the academy. More troubling still, political gerrymandering claims are the one area of the law of democracy where judicial intervention appears normatively warranted. What would be more in need of judicial supervision than the very process whereby the people in power are also entrusted with the duty to draw district lines?⁸⁵ The facts seem uncomplicated: this is one area where the political market appears to have failed, as the ins have choked off all avenues of political change in order to remain in power.⁸⁶ If electoral competition is the *sine qua non* of politics, then clearly our political process is one place where judicial intervention is decidedly justified.⁸⁷

The successes of the reapportionment revolution should put any and all doubts to rest. First, it is very difficult to decide *Baker* yet set gerrymandering questions aside as unfit for judicial resolution. The issues are one and the same.⁸⁸ The early cases worried about political representation and how much change could be expected from a political process that could no longer be trusted to function properly. These same worries arise in the political gerrymandering context. Second, the question of standards is similar in both contexts and makes it hard to accept the Court at its word that standards are lacking in the political gerrymandering context. It is hard to accept this argument coming from the same institution that brought us *Reynolds v. Sims*, which introduced and enforced the equipopulation standard by fiat and irrespective of history, tradition, or constitutional precedent. The *Shaw* doctrine, with its analytically-distinct “expressive harms” inquiry; and *Miller v. Johnson*,⁸⁹ which introduced the “predominant factor” test, only strengthen this argument.

Any remaining hesitancy to discern or apply heretofore-unknown standards should be put to rest in light of the recent *Larios v. Cox*.⁹⁰ In *Larios*, the district court, clearly disturbed by the naked partisan nature of the plan, struck down the Georgia state districting plan on equal protection grounds. To the court, all traditional districting principles, from

⁸⁵ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 594 (2002).

⁸⁶ See ELY, *supra* note 47, at 103 (“[A] political malfunction deserving of judicial correction “occurs when the *process* is undeserving of trust, when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.””); Jeffrey Toobin, *The Great Election Grab*, NEW YORKER, Dec. 8, 2003, at 65 (“Voters no longer choose members of the House [of Representatives]; the people who draw the [district] lines do.” (quoting Samuel Issacharoff)).

⁸⁷ See Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 269 (2006).

⁸⁸ See Fuentes-Rohwer, *supra* note 49.

⁸⁹ 515 U.S. 900 (1995).

⁹⁰ 300 F. Supp. 2d 1320 (N.D. Georgia 2004).

compactness and contiguity to preserving the cores of pre-existing districts and county lines, were ignored in the name of partisan advantage. Hence:

We cannot escape the conclusion that the population deviations were designed to allow Democrats to maintain or increase their representation in the House and Senate through the underpopulation of districts in Democratic-leaning rural and inner-city areas of the state and through the protection of Democratic incumbents and the impairment of Republican incumbents' reelection prospects.⁹¹

These are not legitimate state interests, and so the plans did not withstand constitutional scrutiny. Curiously, the U.S. Supreme Court summarily affirmed.⁹²

Larios exemplifies the role played by judicial will and the feign impotence displayed by the Court in its political gerrymandering jurisprudence.⁹³ The lower court could see the obvious and struck down the plan under equal protection principles. For the Court to suggest an inability to behave otherwise is both implausible and suspect.

C. The Failings of our Modern Philosopher Kings

This last section underscores that ironies and follies of the law of democracy. Compare, for example, the contrasting judicial approaches in *Vieth* and *Shaw*. In *Vieth*, we see a clear use of the redistricting process for partisan gains, without the extreme racial component witnessed in *Shaw*. But while in *Shaw* the Court saw “uber-race,” in *Vieth* the Court saw “uber-politics.” These cases were really this simple. Race is condemned across the board, yet politics are treated delicately, if at all. This is perverse for a number of reasons.

In an earlier case, for example, Justice O’Connor warned that

the Court’s “reflexive application of precedent ignores the maxim that ‘[p]articularly in dealing with claims under broad provisions of the Constitution, which derive content an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be ap-

⁹¹ *Id.* at 1334.

⁹² 542 U.S. 947 (2004).

⁹³ See Samuel Issacharoff and Pamela S. Karlan, *Where to draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 568 (2004).

plied out of context in disregard of variant controlling facts.”⁹⁴

“In cases such as this one,” Justice O’Connor continued, “it is not enough to cite precedent: we should examine it for possible limits, and if they are lacking, for possible flaws.”⁹⁵ This is a remarkable assertion, particularly in light of *Shaw*, where the Court deployed any and all available precedents in pursuit of its questionable conclusion, while distinguishing unhelpful cases.⁹⁶ *Shaw* was as reflexive an application of precedent as we will ever see, even while, paradoxically, the Court carved a new cause of action out of this worn and misguided cloth. But *Shaw* involved race, of course, not politics. And therein lies the difference.

Ironies abound. The Justice O’Connor of the political gerrymandering cases worries about inviting the losing side in every reapportionment to fight their battles anew in the federal courts;⁹⁷ about opening the doors of the federal courts to “pervasive and unwarranted judicial superintendence of the legislative task of apportionment;”⁹⁸ and besides, the framers of the Fourteenth Amendment never intended to create a group right to representational equality.⁹⁹ Yet curiously, *Shaw* did exactly these things, in an analogous context, and we heard nary a complaint from the non-justiciability faction. The map alone told us everything we needed to know. Ely captured this point with characteristic wit: “We don’t know how, we don’t know why, but this district has got to be unconstitutional, so somebody, anybody, must have standing to raise the claim.”¹⁰⁰

The Court displays a similar approach across the law of democracy. In *Shaw*, the Court behaved assertively, yet in the last installment of the *Shaw*-line, *Easley v. Cromartie*,¹⁰¹ the Court was somehow able to decipher whether the use of race predominated during the redistricting process.¹⁰² The Court concluded that race did not predominate, despite protestations from the dissenting justices that the Court was not reviewing

⁹⁴ *Davis v. Bandemer*, 478 U.S. 109, 145-46 (1986) (O’Connor, J., concurring in the judgment) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339-343-44 (1960)).

⁹⁵ *Id.* at 146.

⁹⁶ *E.g.*, *Shaw v. Reno*, 509 U.S. at 651-52 (distinguishing *UJO v. Carey*, 430 U.S. 144 (1977)).

⁹⁷ *Davis*, 478 U.S. at 147.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 579-80 (1997).

¹⁰¹ 532 U.S. 234 (2001).

¹⁰² *See Ely, supra* note 77, at 611 (labeling *Miller’s* test a “dominant purpose” test, and asserting that these tests “aren’t simply vague and manipulable; they are incoherent”).

the lower court case under the proper standard of clear error.¹⁰³ Hardly coincidentally, we see a similar dynamic in *LULAC*, with a Court majority overturning a lower court ruling as clear error, against arguments in dissent that this high threshold had not been met.

In *Rutan v. Republican Party*,¹⁰⁴ the Court struck down patronage practices in employment on First Amendment grounds. Justice Scalia dissented, as he concluded that a constitutional ban on patronage “reflects a naïve vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of politically powerless groups.”¹⁰⁵ He complained that this ban on patronage practices has weakened the parties and has in turn led to the rise of interest groups. Yet, in *California Democratic Party v. Jones*,¹⁰⁶ the Court struck down a blanket primary system, a system under which “all persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate’s political affiliation.”¹⁰⁷ While *Jones* upholds the worth of party autonomy, the patronage decisions take a contrary view. But the ironies hardly end there.

For Justice Scalia, patronage practices are a way to fulfill “the social and political integration of excluded groups;”¹⁰⁸ its abolition, he complains, “prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.”¹⁰⁹ Yet, and quite perversely, blacks better not attempt to put this newfound power to use, in the form of social goods and preferential policies, as the Court, including Justice Scalia, stands ready to strike them down as examples of racial spoils and racial politics.¹¹⁰ For Justice O’Connor, the state may not discriminate on political grounds when awarding contracts to haul trash or tow cars;¹¹¹ but similar discrimination

¹⁰³ See *Easley*, 532 U.S. at 259.

¹⁰⁴ 497 U.S. 62 (1990).

¹⁰⁵ *Id.* at 107 (Scalia, J., dissenting). For criticism of this view, and in particular Justice Scalia’s contention that patronage practices in fact helped disadvantaged groups, see Cynthia Grant Bowman, “*We Don’t Want Anybody Anybody Sent: The Death of Patronage Hiring in Chicago*,” 86 *Nw. U. L. Rev.* 57 (1991) (“[T]he more a machine was able to consolidate its power by use of patronage, the less likely it was to fulfill the function of broadening the number of groups involved in the political process.”).

¹⁰⁶ 530 U.S. 567 (2000).

¹⁰⁷ Cal. Elec. Code Ann. Sec. 2001 (West Supp. 2000).

¹⁰⁸ *Rutan*, 497 U.S. at 108.

¹⁰⁹ *Id.*

¹¹⁰ See *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989); *Shaw v. Reno*, 509 U.S. 630 (1993); Luis Fuentes-Rohwer and Guy-Uriel E. Charles, *In Defense of Deference* 21 *CONST. COMMENT.* 133 (2004).

¹¹¹ See *Board of County Comm’rs v. Umbehr*, 518 U.S. 668 (1996); *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

in the crafting of districting lines does not even raise a justiciable question.¹¹² For the dissenting faction in *Shaw*, the Court should stay out of this political minefield; yet the Court must step in and cure the political distortions created by excessive political gerrymandering.¹¹³

These positions exemplify the justices' confused approach to questions of politics.¹¹⁴ The justices are driven by their issue preferences, by their idiosyncratic views and assumptions about the political world and the uses to which political power can be legitimately put, and much less so by doctrine. This is true across the field, from the gerrymandering and patronage cases and campaign finance law.¹¹⁵ According to a leading commentator, for example, "[w]here other judges have seen competitive practices that ensure a robust and vital democratic system, the current Court has seen threats to orderly democratic processes."¹¹⁶ The Court sees chaos, in other words, and thus its willingness to step in and set the political structures on their proper course. Such is the true measure of a philosopher king.

IV. A New Beginning

A philosopher king revels in determining when the use of race predominates in a redistricting plan;¹¹⁷ when burdens on the ballot are severe and must be "narrowly tailored and advance a compelling state interest,"¹¹⁸ or less severe and justified by "the State's important regulatory

¹¹² See *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O'Connor, J., concurring in the judgment); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

¹¹³ Cf., e.g., *Shaw v. Reno*, 509 U.S. 630, 679 (1993) (Souter, J., dissenting) with *Vieth*, 541 U.S. at 343 (Souter, J., dissenting).

¹¹⁴ See Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 290 (1997) ("The Supreme Court as an institution seems increasingly confused, or indifferent, about what politics is for and when courts need to regulate the process."); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 319 (2000) ("[J]udicial application of constitutional law to issues of democratic political organization has been tentative, hesitant, erratic, and lacking in sustained commitment or conviction.").

¹¹⁵ See, e.g., Bradley A. Smith, *McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L. J. 345, 350 (2004) ("Ideology, not a careful consideration of facts, theory, or the real-world effects of legislation, appears to drive the majority to repeatedly fashion its opinion in such categorical terms.").

¹¹⁶ Richard H. Pildes, *Constitutionalizing Democratic Politics*, in A BADLY FLAWED ELECTION 155, 182 (Ronald Dworkin ed., 2002).

¹¹⁷ See *Shaw v. Hunt*, 517 U.S. 899 (1996).

¹¹⁸ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). As an example of such an extreme burden, the Court has offered the following: "Of course, what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot." *American Party of Texas v. White*, 415 U.S. 764, 783 (1974).

interests;¹¹⁹ and when campaign finance laws prevent corruption or the appearance of corruption.¹²⁰ These are difficult inquiries, to be sure, inquiries that only a philosopher king would dare undertake.

The Court regularly plays the part of philosopher king in contemporary American law. Yet note the nature and complexity of the enterprise, particularly in reference to the law of democracy. What in the world could corruption possibly mean in the context of campaign finance?¹²¹ The Court provides little guidance on this score, treating the term as an *ipse dixit*.¹²² When are burdens on the ballot severe or less so? The Court offers myriad admonitions about the case-by-case nature of this inquiry,¹²³ while conceding that the proof is in the application.¹²⁴ And when exactly does race “predominate” during the redistricting process?¹²⁵ The Court’s answer is wholly unsatisfying on this score.

The challenges posed by the law of democracy are difficult and complex. Yet, as noted previously, the Court’s performance as democratic engineer is not worthy of much confidence. It is confused and incoherent. Assertiveness in one area is closely followed by passivity in another, and justifications for some actions are rejected as insufficient in others.

This final Part offers two paths of reform. The first section argues that the Court should turn back to the promise of *Baker v. Carr*, a promise grounded in rationality review and the pursuit of legitimate state interests. The second section contends that, absent a move away from aggressive review, the Court should reject its modern posture and overturn *Baker*. It is time to leave the thicket at last.

¹¹⁹ *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

¹²⁰ *See Buckley v. Valeo*, 424 U.S. 1, 25-27 (1976); *see also* *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985).

¹²¹ *See* Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997); Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 798-804 (1985).

¹²² *See* Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENT. 97, 103 (1986) (“The phrase – corruption and the appearance of corruption – has a ring that most Americans will like. But its apparent clarity is deceptive, and its origin is at best clouded. Worst of all, it is irrelevant to the issues of contemporary campaign finance.”).

¹²³ *See, e.g., Storer v. Brown*, 415 U.S. 724, 730 (1974) (“The rule is not self-executing and is no substitute for the hard judgments that must be made.”); *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 234 (1986) (Scalia, J., dissenting) (“Our cases make it clear that accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case.”).

¹²⁴ *See, e.g., Storer*, 415 U.S. at 730 (“What the result of this process will be in any specific case may be very difficult to predict with great assurance.”); *Celebrezze*, 460 U.S. at 789 (“The results of this evaluation will not be automatic.”).

¹²⁵ *See* Ely, *supra* note 77, at 611-12.

A. *Back to the Promise of Baker*

While opening the field of democracy for judicial review, *Baker v. Carr* stopped short of aggressive review. The Court wrote a very doctrinal opinion while careful to sidestep – not overrule – existing precedents. This was a very shallow opinion, as the Court said precious little about underlying theories of political representation and offered instead a rationality test.¹²⁶ *Baker* was also a narrow decision, as the Court limited the case to its facts.¹²⁷ So long as its holding applied to other cases, it was only “to the extent that one decision necessarily bears on other cases.”¹²⁸ *Baker* is thus a prototypical minimalist decision.¹²⁹

Such was the promise of *Baker*. The Court did not enter the redistricting field in full force, but only decided the question of whether to play a role in redistricting at all.¹³⁰ The Court did little else, as exemplified by its adoption of a rationality standard, a standard that might be said to lead nowhere, “for most apportionments can be deemed irrational only if the legislature is *a priori* foreclosed from pursuing certain purposes, such as over-representation of some or of all rural areas.”¹³¹ Yet the state of Tennessee proved to be that extreme case, as the legislature had failed to redistrict for many years, thus rendering a finding of rationality quite easy.¹³² In this way, Alexander Bickel read *Baker* as a case where the Court was prodding the political process into action and going no further. To Bickel, the Court had simply “opened a colloquy, posing to the political institutions of Tennessee the question of apportionment, not answering it for them.”¹³³ As soon as the legislature passed a new

¹²⁶ See Fuentes-Rohwer, *supra* note 51; cf. Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20 (1996) (“In a parallel process, judges may adopt a standard in the form of a ‘reasonableness’ test instead of deciding the appropriate rule.”).

¹²⁷ See Abner Mikva, *What Justice Brennan Gave Us to Keep*, 32 LOY. L.A. L. REV. 655, 656-57 (1999) (“[A]lthough Justice Brennan had votes to burn for his opinion, he still kept the language of *Baker v. Carr* narrow.”).

¹²⁸ Sunstein, *supra* note 126, at 15.

¹²⁹ See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

¹³⁰ BICKEL, *supra* note 22, at 196 (“The point decided was not what function the Court is to perform in legislative apportionment, and certainly not whether it is to take over full management, but whether it can play any role at all.”).

¹³¹ *Id.*

¹³² *Id.* (explaining that the situation in Tennessee is the result “not of deliberate if imperfect present judgment of the political institutions, but merely of inertia and oligarchic entrenchment”)

¹³³ *Id.*; see Nicholas deB. Katzenbach, *Some Reflections on Baker v. Carr*, 15 VAND. L. REV. 829, 836 (1962) (“The Supreme Court has not attempted to define what are the inequities of representation or to prescribe remedies. It has issued merely a call for action.”). Phil Neal strongly disagrees with the Court’s approach as interpreted by

statute, “curing the situation in some degree,” the need for judicial intervention would end.¹³⁴

This is the proper posture for the law of democracy writ large. The Court must approach questions in the field with a measure of respect for the choices made by the political branches. Minimalism is particularly important in this area, for the Court is ultimately taking sides in politically charged controversies and elevating one policy preference over another. This is true as an abstract proposition, yet more so in light of the incoherence prevalent in the field. The Court must only demand, as in *Baker*, a showing that the challenged statute pursues legitimate state interest. This is a standard of heightened rationality, or what Gerald Gunther labeled “rationality with bite.”¹³⁵ This was the posture adopted by the Supreme Court in *Baker* and by the lower court in *Larios*, which was summarily affirmed by the Court. The Supreme Court should extend this standard to the law of elections.

B. A Time to Go

The Court has exhausted its capacity to regulate the law of democracy effectively. Its handling of questions of politics is confused and confusing, often incoherent, and exemplifies how judicial review is a cure worse than the disease. In response, this final section concludes that, absent a move to a standard of heightened rationality across the field, the Court should exit the thicket and return the doctrine to the days of *Colegrove v. Green*.

What would a world without judicial review of politics look like? For one, it would be a world with the political branches at the helm, in charge of designing the structures of our democracy and accountable to the public while doing so. This would mean, more specifically, that the equal protection clause would lose its preferred position among litigants seeking to challenge their prior losses in the political process. It would also mean that the Court will no longer need to turn policy arguments into legal ones, while at the same time keeping them consistent from arguments in related areas.

This argument is subject to the criticism that it will give the political branches a free pass to rig the system to their advantage. I am receptive to this position; after all, nobody wants to support a system where

Katzenbach, calling the preceding quote “the most devastating comment on *Baker v. Carr*.” Neal, *supra* note 38, at 327 n.211.

¹³⁴ See BICKEL, *supra* note 47, at 196-97 (“Once a new apportionment statute has been passed, curing the situation in some degree, there will be little more that the judicial process can or should do.”).

¹³⁵ See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-22 (1972).

“the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.”¹³⁶ And yet, it is clear the law of democracy is currently not all that interested in keeping the political branches in check. For example, the political gerrymandering doctrine would change very little if the Court were to leave these questions alone. Campaign finance cases – up until the recent *Randall v. Sorrell* case¹³⁷ – and ballot access questions also would not change very much if the Court were to exit from the regulation of politics. These are areas where the Court has markedly deferred to the political branches.

In the ballot access cases, for example, the Court has proven very attentive to the rights of major political parties, much less so of the rights of third parties. The Court takes this position quite far, explaining in *Timmons v. Twin Cities Area New Party* that “[t]he Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.”¹³⁸ Under the Court’s understanding of the political process, major parties ineluctably win, minor parties lose.¹³⁹ The value of political stability, and particularly the Court’s understanding of how to achieve such stability, rules the day.¹⁴⁰

Two important benefits would accrue from this proposal. First, the biggest change in the doctrine would be with respect to voters of color, as the Court would cease to examine the use of race in crafting electoral structures under its highest and most exacting level of review. This would be welcomed news, as it would mean that the Court would finally begin to treat voters of colors as “grown-ups who, generally speaking, can take care of themselves.”¹⁴¹ Rather than treat any gain by voters of color as suspect and subject to strict scrutiny review, the Court might finally concede that *Gomillion* is not *Shaw*, and that people of color can “pull, haul and trade to find common political ground” with others.¹⁴² And second, this would bring much needed candor to the role of the Court in our politics.¹⁴³ We should stop wishing for the Court to be something that it is clearly not. Countermajoritarian stories aside, the Court seldom pushes back against majoritarian policy preferences as re-

¹³⁶ ELY, *supra* note 47, at 103.

¹³⁷ 126 S. Ct. 2479 (2006).

¹³⁸ 520 U.S. 349, 367 (1997).

¹³⁹ See Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court’s Understanding of Elections*, 86 B.U. L. REV. 1277 (2005).

¹⁴⁰ For an extended discussion on this point, see *Anderson v. Celebrezze*, 460 U.S. 780, 801-06 (1983).

¹⁴¹ Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical inquiry*, 71 *Tex. L. Rev.* 1741, 1790 (1993) (making this point in reference to the major political parties).

¹⁴² *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

¹⁴³ Issacharoff and Karlan, *supra* note 93, at 543 (explaining that “the lack of candor about what courts are doing may carry its own costs”).

flected in enacted law.¹⁴⁴ For better or for worse, the law of democracy is no exception. Rather than wish for a different institution – an institution, I must point out, we have seldom seen in American history – we should instead wish for the doctrine to reflect the Court as we know it.

Conclusion

Four decades have elapsed since the Court entered the political thicket in *Baker v. Carr*. And unfortunately, the evidence is decidedly mixed. To be sure, the early days of the reapportionment revolution brought about needed change within the stagnant legislative processes across the nation. But as the Court gained confidence in its handling of political questions, its posture became increasingly aggressive. And of course, this aggressiveness is quite selective and not always consistent across the field.

We could go on making the arguments we do and behaving as if it all makes sense. Or else, as this Essay argues, we could exhort the Court to exit the political thicket. Over the course of four decades, the Court has had its chance to regulate the field of democracy. The evidence is in, and not very flattering: the doctrine is confused, incoherent, and driven by judicial attitudes and the justices' notions of good public policy. We should pretend no longer. It is time for the Court to leave the political thicket at last.

¹⁴⁴ See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957), reprinted in 50 EMORY L.J. 563 (2001); see GLENDON SCHUBERT, *JUDICIAL POLICY-MAKING: THE POLITICAL ROLE OF COURTS* 13 (rev. ed. 1974) ("[T]he federal courts have always (and correctly) been perceived by party leaders as a major instrument for exercising control over the substantive content of public policy."); MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 796 (1975).