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**Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence Is Our Constitutional Order Broken - Structural and Doctrinal Questions in Constitutional Law: Gerrymandering, Congressional Representation, and Trust in the Political System: Essay**

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## Essay

### Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence

LUIS FUENTES-ROHWER

*The redistricting season is about to begin in full swing, and with it will come renewed calls for the federal courts, particularly the U.S. Supreme Court, to aggressively review the work of the political branches. This is an intriguing puzzle. Since the early 1960s, the federal courts have regulated questions of politics aggressively. They have done this even in the face of difficult questions of political representation. The courts have taken sides, to be sure, but these can only be described as acts of volition and will, not constitutional law. The leading case was Reynolds v. Sims. This was when the Supreme Court ultimately divorced these political questions from the constitutional text. Reynolds informed all subsequent case law within the Law of Democracy. If the Court could decide Reynolds as it did, it could decide anything. But this is not true for political gerrymandering questions. What explains this hesitation on the part of the Justices? This Essay answers this important question. Understanding the Justices as strategic actors, this Essay conjectures that the Court removes itself as an institutional player in the gerrymandering debate because the redistricting process left alone tilts to conservative policies and outcomes. More generally, this Essay argues that scholarly calls for judicial intervention demand the existence of philosopher kings to choose amongst myriad theories of representation. These are calls, in effect, for an activist judicial role in an area that demands judicial deference. At the very least, this is an area that demands comparative institutional analysis. This is something we seldom see.*

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# Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence

LUIS FUENTES-ROHWER\*

## I. INTRODUCTION

The constitutional questions raised by the political gerrymander have proven as elusive as any question of constitutional law of the past half century. The reasons for this elusiveness remain shrouded in mystery. This is an area, after all, where the consensus is almost unanimous in its derision for the hated gerrymander and the intentional and harmful manipulation of districting lines for political gain. According to their many critics, these practices are anticompetitive,<sup>1</sup> distortive,<sup>2</sup> and may even violate our political rights.<sup>3</sup> Few commentators defend modern political gerrymandering practices as a common good.<sup>4</sup> Yet, puzzlingly, the U.S. Supreme Court refuses to intervene and try its considerable hand at the perceived problem. Citing a lack of judicially manageable standards, a plurality recently argued that the practice raises a nonjusticiable political question.<sup>5</sup>

One obvious way to answer this puzzle takes the Court on its own terms and provides a judicially manageable standard. This is a popular response. It is also quite uninspiring and even boring. This is because the

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<sup>1</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 680–81 (1998) (“The task then is to discern which regulations of politics are anticompetitive and lock up democratic competition in impermissible ways . . . . Without a worked-out vision of appropriate partisan factors in redistricting, the Court was able to hold partisan gerrymandering unconstitutional.”).

<sup>2</sup> See, e.g., Guy-Uriel E. Charles, *Democracy & Distortion*, 92 CORNELL L. REV. 601, 607 (2007) (arguing that “the problem with political gerrymandering is the intentional manipulation of democratic institutions by state actors”).

<sup>3</sup> See generally, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003) (defending a rights-based model of judicial review for election law); Bruce E. Cain, Commentary, *Garrett’s Temptation*, 85 VA. L. REV. 1589 (1999) (same).

<sup>4</sup> For notable exceptions, see THOMAS BRUNELL, *REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA* 113–14, 116–25 (2008) (proposing that the government should draw highly uncompetitive, homogeneous districts in order to minimize disproportionate electoral districts in the aggregate) and Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. THEORETICAL POL. 431, 431–36 (2005) (“I argue that structuring our elections in such a way as to maximize competition does not uniformly serve democratic interests.”).

<sup>5</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 301 (2004).

question at the heart of the gerrymandering debate is not really a question of standards.<sup>6</sup> Instead, the real question—to my mind the only question—lies here: This is not a shy Court, unwilling and unable to take on the pressing political issues of its day. From Guantánamo and questions of war to questions of campaign finance law to even presidential elections,<sup>7</sup> the modern Court is happy to take on any and all questions presented to it. In the coming years, it even promises to take on the second Reconstruction.<sup>8</sup> Why then does the Court refuse to take on this issue? What makes the political gerrymander a special case, a question outside of the Court's area of competence?

This short Essay sketches an answer to these questions as a way to better understand the gerrymandering puzzle. The second question is particularly important, because in order to make sense of the political gerrymandering question as a legal question, we must treat it as a question of institutional competence. To argue that political gerrymanders must come to an end begs the question at the heart of constitutional law: Is the Court the proper institution to take on this issue? This Essay argues that absent egregious circumstances, redistricting questions in general and the political gerrymander in particular raise questions that should remain outside of the Court's scope of review. Whether the political gerrymander is a problem that must be solved by anyone, a persuasive argument is yet to be made that the U.S. Supreme Court is the one institution to do so. This is an argument in four Parts.

Part II sides with the rational choice tradition, which argues that the Justices are strategic actors who understand that their preferred choices are constrained by the preferred choices of others.<sup>9</sup> This premise counsels for a passive and deferential judicial role as a matter of course.<sup>10</sup> This is because while a strategic judge is ultimately seeking to see her preferred policy choices reflected in law, she is not subject to the same electoral

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<sup>6</sup> 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, 438 (2006) [hereinafter Fuentes-Rohwer, *Domesticating the Gerrymander*].

<sup>7</sup> See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 1, 1–5 (2010) (striking portions of the federal campaign finance law); *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (discussing the detainment of enemy combatants at Guantánamo Bay); *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006) (discussing a Yemeni national's detainment at Guantánamo Bay); *Bush v. Gore*, 531 U.S. 98, 100–03 (2000) (interjecting itself into the presidential elections in 2000).

<sup>8</sup> See generally Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125 (2010) [hereinafter Fuentes-Rohwer, *Future of Section 2*] (contending that the Voting Rights Act is in constitutional danger).

<sup>9</sup> See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–10 (1998) (contending that Justices “are not unconstrained actors who make decisions based only on their own ideological attitudes” but rather “strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors”).

<sup>10</sup> See, e.g., *id.* at 13 (advancing the idea that Justices must defer to, or consider the preferences of, other actors—including the public—in order to see their favored policies become the law).

checks as other political actors.<sup>11</sup> This Part further argues that the Justices must be especially deferential in the field of democracy and representation. This is an area where the Justices risk replacing their personal goals for those of the electorate, which is precisely what makes *Bush v. Gore*<sup>12</sup> so repulsive in the eyes of many.<sup>13</sup> Unhappily, this Part argues that *Bush v. Gore* is the norm, not the exception. This Part concludes that while judicial intervention is sometimes necessary, it must be reserved for the most extreme cases.

Part III argues that *Baker v. Carr*<sup>14</sup> is the prototypical example of legitimate judicial intervention. The political process in Tennessee in the early 1960s was clearly a process where the body politic could not exact any kind of meaningful change. This was the classic entrenchment problem. Elected officials in Tennessee could not be dislodged from power in any way absent violence or revolution. Mere voting could not do it, and the state did not provide the public with a way to bypass legislative choices on its own. As soon as Justice Clark recognized the problem for what it was, the Court in *Baker* took the necessary step.<sup>15</sup> But this Essay argues *Baker* should stand alone in our constitutional constellation.

As Part IV explains, however, the Court took a different path. *Reynolds v. Sims*<sup>16</sup> changed everything. In *Reynolds*, the Court went much farther than *Baker* ever intended to go and offered its very own understanding of what redistricting plans must look like.<sup>17</sup> From among all the possibilities, the Court chose population equality as the value of choice and enshrined it as the preferred constitutional value.<sup>18</sup> To be sure, population equality is easily defended as a legitimate constitutional value. The criticism focuses on how the Court elevated it as the one value that jurisdictions must follow and respect. For a time, this move looked like a strategic miscalculation, as members of Congress took serious steps to overturn the Court's choice.<sup>19</sup> More importantly, the Court's move in

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<sup>11</sup> See *id.* at 17–18 (discussing the impact of the institution of life tenure on the Justices' goals).

<sup>12</sup> 531 U.S. 98 (2000).

<sup>13</sup> The Court, in *Bush*, appeared conscious that its decision would rouse controversy:

None are more conscious of the vital limits on judicial authority than are Members of this Court, and none stand more in admiration of this 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.

*Id.* at 111.

<sup>14</sup> 369 U.S. 186 (1962).

<sup>15</sup> See HASEN, *supra* note 3, at 2, 4 (pointing out that *Baker* has now “been canonized as an example of appropriate court intervention in the face of a failure in the political process”).

<sup>16</sup> 377 U.S. 533 (1964).

<sup>17</sup> *Id.* at 577–81.

<sup>18</sup> *Id.* at 579.

<sup>19</sup> Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 231–37 (1964).

*Baker* unnecessarily opened the Justices to the charge of activism, of acting as philosopher kings.<sup>20</sup> This criticism reflects the mind-set that the Court is not the proper institution to cure all that ails our political culture. This is a charge that remains to this day. *Bush v. Gore* is but one example among many, of which *Citizens United*<sup>21</sup> is only the latest exemplar.<sup>22</sup> These cases all trace back to *Reynolds*.

Finally, Part V examines the lessons of this shift in attitude for the political gerrymander. This Part considers the gerrymandering question as a practical question of drawing lines, as a question of strategic judicial decision-making, and as an institutional question. This Part argues that the line-drawing question must directly confront Frankfurter's challenge. How does one choose from among the myriad of possible factors? The strategic model instead offers an intriguing puzzle: What explains the conservative Justices' reticence to take on these questions, considering the fact that they are no different from the questions presented by *Reynolds* and its considerable progeny?

Finally, the institutional question leads to the view that the Court should follow its posture in *Baker*, not *Reynolds*. Instead, scholars who write about the Court's gerrymandering jurisprudence take the opposite view. They are quick to offer their views about everything that ails our political system and how the Court should cure our democracy.<sup>23</sup> This Part notes that these are calls to follow *Reynolds*, not *Baker*.<sup>24</sup> More importantly, these calls follow closely in the wake of the Court's oft-criticized cases, such as *District of Columbia v. Heller*<sup>25</sup> and *Citizens United*.<sup>26</sup> This Essay concludes that we cannot have it both ways. The judicial activism that brought us *Reynolds* and *Bush v. Gore* is the same activism needed for the Court to intervene in political gerrymandering controversies.

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<sup>20</sup> Fuentes-Rohwer, *Domesticating the Gerrymander*, *supra* note 6, at 430 (discussing the how the *Baker* majority "believed that the Court can and should take a more active supervisory role in redistricting controversies").

<sup>21</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

<sup>22</sup> *Id.* at 913, 914 (striking down select provisions of the Bipartisan Campaign Reform Act of 2002).

<sup>23</sup> See generally Charles, *supra* note 2; Issacharoff & Pildes, *supra* note 1.

<sup>24</sup> See *infra* text accompanying note 141.

<sup>25</sup> 554 U.S. 570 (2008).

<sup>26</sup> *Citizens United*, 130 S. Ct. 876. The Court in *Heller* held that (1) the Second Amendment conferred an individual right to keep and bear arms, (2) statutes banning handgun possession in the home violated the Second Amendment, and (3) the Washington, D.C. statute containing a prohibition against rendering any lawful firearm in the house operable for purposes of immediate self-defense violated the Second Amendment. *Heller*, 554 U.S. at 595, 635.

## II. UNDERSTANDING THE COURT ON ITS OWN TERMS: STRATEGIES AND ATTITUDES

In order to make sense of the U.S. Supreme Court's proper role within the law of democracy,<sup>27</sup> it is imperative to properly understand how the Court arrives at its decisions. One popular approach in law schools—for support, one need only open a first-year law book—is to place the legal model at the center of the Court's work. This is a model where law and precedent constrain judges and where extralegal factors, such as the judges' backgrounds or political preferences, play no role at all. The legal model is analogized to a “quest for the holy grail of perfect, nonpolitical, aloof neutral law and legal decisions[.]”<sup>28</sup> Under the legal model, a judge is faithful only to the law. Right answers to legal questions exist, and it is up to the judge to figure out what these answers are. Everything else is unimportant. This is what Frank Cross and Blake Nelson call the “naïve legal model.”<sup>29</sup>

This Part takes a different view. A more complete account of judicial decision-making assigns judges a much more active and influential role. Unlike the legal model, which assigns no role to the judge other than the robotic search for correct legal answers, this is an account that understands judges as individuals with goals and political preferences that they wish to see reflected in legal outcomes. These preferences will vary from one judge to the next, which in turn means that the identity of the deciding judge will make all the difference in the world. But there is more. According to the strategic model, a judge is not free to express her political attitudes at will irrespective of everything else. Instead, a judge must account for the relevant political context and the attitudes and likely responses of other institutions.<sup>30</sup> To act strategically, in other words, is to keep in mind one's preferences while keeping an eye on the likely responses of others.

Chief Justice Marshall's actions surrounding *Marbury v. Madison*<sup>31</sup> offer a paradigmatic example.<sup>32</sup> Marshall knew full well that the

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<sup>27</sup> While this Part focuses on the work of the U.S. Supreme Court, its teachings could be applied to all courts generally, including all lower courts.

<sup>28</sup> JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS*, at x (1986).

<sup>29</sup> Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1439 (2001).

<sup>30</sup> See EPSTEIN & KNIGHT, *supra* note 9, at 9–10; Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 526 (1998) (book review) (“Strategy within the Court is generally conducted with an eye to external constituencies. The decision to accept a case may be influenced by the potential public and governmental reaction to the Court's involvement.”).

<sup>31</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>32</sup> See Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POL. SCI. 285, 285–86 (1994) (arguing that Marshall, during *Marbury v. Madison*, behaved rationally so as to achieve his objectives); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87, 95 (1996) (placing the Court's decision to hear *Marbury* in a political context). For other examples, see Lee Epstein &

administration of President Jefferson would not deliver the commissions in question.<sup>33</sup> Rather than risk such a stinging rebuke, Marshall offered a reading of the constitutional text that allowed him to both assert the duty to interpret the document while at the same time feigning impotence to do as required.<sup>34</sup> But *Marbury* hardly stood alone, for Marshall “often voted strategically” and “sustained laws he thought unconstitutional when more aggressive judicial action would damage the political foundations for judicial review.”<sup>35</sup> To vote his sincere preferences, in other words, would risk retaliatory actions from the political branches.

This Part argues that acceptance of the strategic model as an accurate depiction of the Supreme Court and its work immediately demands a passive role for the Court. This is not true as a general proposition, since “law is clearly the domain of the courts,” which necessarily means that they should not defer to the judgments and conclusions of the political branches on questions of law.<sup>36</sup> The argument is particularly apt when the Court enters the field of political questions, that is, when the Court faces questions of representation and democratic theory in general. This is true for two reasons.

First, the types of questions raised here are particularly intractable and devoid of right answers. All that a judge can do is offer her preferred answers. For example, and as the remainder of this Essay argues, how does a judge choose from among the many variables that inform any redistricting challenge? This is, in a nutshell, Frankfurter’s challenge:

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

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Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in CONTEMPLATING COURTS 315, 316 (Lee Epstein ed., 1995) (“Justices do not decide a priori to protect minority rights or to legitimate the ruling regime. Rather, they base their votes on their political ideologies, with a consequence being that liberal justices *tend* to protect minority interests, whereas conservative ones *tend* to legitimate the ruling regime.”) and Josh Benson, *The Guantánamo Game: A Public Choice Perspective on Judicial Review in Wartime*, 97 CALIF. L. REV. 1219, 1219 (2009) (discussing the Court’s increasing role in shaping the detention policies at Guantánamo Bay).

<sup>33</sup> Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y.L. SCH. L. REV. 481, 483 (2010–11) (“President Thomas Jefferson had made it known that he was not prepared to abide by any decision holding against him . . .”).

<sup>34</sup> *Id.* at 484 (“The Court held that the Constitution did not allow the Court to have original jurisdiction over mandamus petitions, and the federal act that purported to give it such jurisdiction was therefore unconstitutional. In giving up its power to hear the case, the Court seized the power of judicial review . . .”) (footnote omitted).

<sup>35</sup> Mark A. Graber, *The Problematic Establishment of Judicial Review*, in THE SUPREME COURT IN AMERICAN POLITICS 28, 41 (Howard Gillman & Cornell Clayton eds., 1999).

<sup>36</sup> Cross & Nelson, *supra* note 29, at 1449.

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>37</sup>

Think what you want about Justice Frankfurter's brand of conservatism, he had a powerful point. Choosing among these many variables is certainly difficult, and the U.S. Constitution offers hardly any help at all.<sup>38</sup> Choosing among them is an unbounded choice.

Second, once the courts step into the political process, the conclusion that they will play a direct role in deciding who wins and who loses as a matter of law is not hard to reach. Worse yet, they will so decide in accordance with their personal goals and values, not in accordance with choices bound by the constitutional text.<sup>39</sup> The argument is actually quite straight-forward. It only requires two steps: first, that judges have personal preferences that they wish to see reflected in legal outcomes; and second, that these goals are not particularly tempered by the fact that a judge is facing questions of politics. Once we assume that these two steps are true, the conclusion follows that judges have a direct hand in deciding political winners and losers.

For a fitting example, we need to look no further than *Bush v. Gore*,<sup>40</sup> though the case does not stand alone. This case had it all: a political controversy of the highest order, carried out in a public stage unlike any other; a swing Justice—Justice O'Connor—expressing frustration that her preferred candidate would not win a crucial state—Florida;<sup>41</sup> and an uncertain judicial canvass, which allowed the Justices to arrive at any conclusion they so desired. This is not to say that *Bush v. Gore* was wrong as a matter of law, but rather, it is to say that the Justices had almost unfettered discretion in deciding the case. So long as they could trust that the sitting President would not intervene in any way—declare martial law,

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<sup>37</sup> *Baker v. Carr*, 369 U.S. 186, 323 (1962) (Frankfurter, J., dissenting).

<sup>38</sup> *See, e.g.*, U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”); *id.* amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers . . .”).

<sup>39</sup> *See* Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) (“In addition, *Bush v. Gore* was troubling because it suggested that the Court was motivated by a particular kind of partisanship, one much more narrow than the promotion of broad political principles through the development of constitutional doctrine. The distinction is between the ‘high’ politics of political principle and the ‘low’ politics of partisan advantage.”).

<sup>40</sup> 531 U.S. 98 (2000).

<sup>41</sup> Balkin, *supra* note 39, at 1440 n.98 (relating reports that Justice O'Connor may have become visibly upset at initial reports that Al Gore had won Florida).

for example, or maybe deploy the armed forces in the name of “freedom”—and so long as they could trust that the sitting Congress would also stay on the sidelines—a likely proposition in light of the composition of the 110th Congress—the Justices could do as they wished. And that is exactly what they did.<sup>42</sup>

To argue that questions of politics inevitably thrust the Court in the middle of partisan controversies is neither new nor controversial. Justice Frankfurter warned as much over half a century ago.<sup>43</sup> The better question is, how should the Court respond to this reality? One answer is to return to the constitutional world when the Court did not take on these questions at all. This is the world of *Colegrove v. Green*.<sup>44</sup> But this Essay does not necessarily agree that this is a good idea. Instead, this Essay argues that a middle ground exists between non-intervention and aggressive judicial review. The case was *Baker v. Carr*.<sup>45</sup>

### III. A MODEL FOR INTERVENTION: *BAKER V. CARR*

*Baker* arose from the unwillingness of state legislators in Tennessee to redraw its state districting lines for decades.<sup>46</sup> Their reasons were clearly self-interested, since these were the very districting lines that ensured the legislators’ success at the polls.<sup>47</sup> They had little incentive to act. Complicating matters was the lack of the initiative or referendum process in Tennessee.<sup>48</sup> The voters were essentially trapped in a quandary not of their own making. They could not vote the rascals out of office, for the districts were grossly malapportioned and uncompetitive, but they also could not circumvent the process on their own, since the state did not afford them that choice. The political process was frozen, locked up, and voters were devoid of any recourse.

This context made *Baker* an easy point-of-entry for the Court into the

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<sup>42</sup> See *id.* at 1442 (recounting an argument that “[t]he Justices used the forms of legal argument to arrive at a particular result that suited their respective political ideologies”).

<sup>43</sup> See *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (noting that “due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination”); see also *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“Disregard of inherent limits in the effective exercise of the Court’s ‘judicial Power’ not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined.”).

<sup>44</sup> 328 U.S. 549, 556 (1946) (holding that, in an action challenging changes to Illinois voting districts, “[t]o sustain this action would cut very deep into the very being of Congress” and “Courts ought not to enter this political thicket”).

<sup>45</sup> 369 U.S. 186 (1962).

<sup>46</sup> See *id.* at 191 (“In more than 60 years since [the 1901] action, all proposals in both Houses of the [Tennessee] General Assembly for reapportionment have failed to pass.”).

<sup>47</sup> See *id.* at 193 (“Appellants also argue that, because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible.”).

<sup>48</sup> *Id.* at 193–94 n.14.

political process. All the Court needed to do was demonstrate a willingness to police this area of the law, and the states and federal courts would take care of the rest. This is the conventional wisdom, which argues that the Justices in *Baker* simply agreed on answers to basic procedural questions—whether the case presented a classic political question, for example, or whether the Court had jurisdiction to hear the case at all—while setting aside substantive questions for another day.<sup>49</sup> This is a common reading bolstered by Justice Stewart’s concurring opinion in the case.<sup>50</sup> Justice Stewart’s opinion is particularly important because he was the Justice whose vote controlled the outcome of the *Baker* litigation for some time. In the end, his opinion reads as nothing more than an effort to control the future of this nascent doctrinal area. According to Justice Stewart, all Justices but himself missed the big picture. In his words:

The complaint in this case asserts that Tennessee’s system of apportionment is utterly arbitrary—without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother Harlan, the Court does not say or imply that “state legislatures must be so structured as to reflect with approximate equality the voice of every voter.” The Court does not say or imply that there is anything in the Federal Constitution “to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.” And contrary to the suggestion of my Brother Douglas, the Court most assuredly does not decide the question, “may a State weight the vote of one county or one district more heavily than it weights the vote in another?”<sup>51</sup>

Justice Stewart argues his point yet offers no evidence to support it. His reading of the import of the majority opinion in *Baker* is one of many readings. And much better readings were offered at the time.

Consider, for example, the majority opinion on its own terms. Here is what it said on the question of judicial standards, the question at the heart of the disagreement between the Justices: “Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been

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<sup>49</sup> Luis Fuentes-Rohwer, *Baker’s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1357 (2002) [hereinafter Fuentes-Rohwer, *Baker’s Promise*].

<sup>50</sup> *Baker*, 369 U.S. at 265 (Stewart, J., concurring).

<sup>51</sup> *Id.* (internal citations omitted).

open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”<sup>52</sup> These words could not be any clearer. How else to understand them but as an attempt to situate the facts in *Baker* within the constitutional law orthodoxy? Once *Baker* opened the door for the Court to consider questions of politics, this passage assumes that these questions would be handled as all other questions under the Equal Protection Clause. Any other reading of the opinion is simply implausible and far too charitable to Justice Stewart and his attempt to control the meaning of *Baker*.

A better argument understands *Baker* as a perfect example of strategic decision-making. For quite some time, judicial intervention remained uncertain.<sup>53</sup> Once Justice Clark agreed to side with the Brennan majority, the case broke.<sup>54</sup> Only two Justices—Frankfurter<sup>55</sup> and Harlan<sup>56</sup>—filed dissents in the case. Finding common ground proved far more difficult.<sup>57</sup> Some Justices were quite comfortable pressing claims of vote dilution, that is, questioning “the extent to which a State may weight one person’s vote more heavily than it does another’s.”<sup>58</sup> Others viewed the Court as the only institution capable of unlocking the political process and “would not consider intervention by [the] Court into so delicate a field if there were any other relief available to the people of Tennessee.”<sup>59</sup> This is because, according to Justice Clark, the people of Tennessee were “caught up in a legislative strait jacket.”<sup>60</sup>

Reaching a majority within the Court was only the first step. Two difficulties remained. The first was the tenor of the times and the Court’s standing in the public eye. Think here about some of the more recent cases in the Court’s docket, from *Brown*<sup>61</sup> and *Brown II*<sup>62</sup> to *Cooper v. Aaron*,<sup>63</sup> *Naim v. Naim*,<sup>64</sup> and *Williams v. Georgia*.<sup>65</sup> These are cases where the

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<sup>52</sup> *Id.* at 226 (majority opinion).

<sup>53</sup> See Stanley H. Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 676 (1962) (describing how the “lower courts had little choice except to follow” Supreme Court precedent on “litigation concerning districting practices”).

<sup>54</sup> Fuentes-Rohwer, *Baker’s Promise*, *supra* note 49, at 1365.

<sup>55</sup> *Baker*, 369 U.S. at 266 (Frankfurter, J., dissenting).

<sup>56</sup> *Id.* at 330 (Harlan, J., dissenting).

<sup>57</sup> Fuentes-Rohwer, *Baker’s Promise*, *supra* note 49, at 1362–63.

<sup>58</sup> *Baker*, 369 U.S. at 242 (Douglas, J., concurring).

<sup>59</sup> *Id.* at 258 (Clark, J., concurring).

<sup>60</sup> *Id.* at 259.

<sup>61</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>62</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>63</sup> 358 U.S. 1 (1958).

<sup>64</sup> 350 U.S. 891 (1955); see also Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423, 1475–76 (1994) (stating that some Justices were concerned about the political effect the Court’s ruling could have and that the Court chose not to decide the case even though it was legally obligated to do so); Gregory Michael Dorr,

Court demonstrated an acute awareness of the political context of the time and the fact that the Justices could not assume that its decisions will be readily accepted by the relevant publics. These cases ensured, in other words, that the question of judicial impact was fresh on their minds.

One answer is that the Court was keenly aware of the reception that *race* cases received by Southern publics, while redistricting controversies were a different matter. But this was simply not so. Or at the very least, the Court could not be sure that redistricting cases would be received any differently than race cases. This was the second difficulty facing the Court. Prodded by Justice Frankfurter, the Court could not ignore the fact that to decide these redistricting questions would be to step into political embroilments, “in the sense of party contests and party interests.”<sup>66</sup> Redistricting battles are, in other words, “overwhelmingly party or intra-party contests.”<sup>67</sup> Think what you want about Justice Frankfurter, but he was right about the nature of the redistricting process. To side with Frankfurter on this point, however, was not to decide the ultimate question: Should the Court step into this political minefield and take sides in these political controversies? To Frankfurter, the answer was clear: “It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in [party contests].”<sup>68</sup>

With the eyes of the nation fixed on the Court,<sup>69</sup> the Justices faced a difficult challenge. This is where the strategic account helps us understand what happened in *Baker*. To the Court’s majority, the answer was not to stay out, but instead, to intervene cautiously, carefully, even apprehensively.<sup>70</sup> Justice Brennan wrote an opinion long on cases and doctrine and short on specifics. This was because he was almost begging his readers to believe that the Court was not engaging in politics, but law. Readers versed in law were not impressed, and it is quite easy to parse through the law reviews of the time and find leading voices in

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*Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 120–22 (1998) (stating that the Court’s decision was based upon political considerations and concerns about judicial activism).

<sup>65</sup> 349 U.S. 375, 391 (1955); see also Dickson, *supra* note 64, at 1478 (noting that the Supreme Court would have issued a harsh response, but the Court was concerned that the case would “cost the Court too dearly in terms of image and authority”).

<sup>66</sup> *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

<sup>67</sup> *Baker v. Carr*, 369 U.S. 186, 324 (1962) (Frankfurter, J., dissenting).

<sup>68</sup> *Id.*

<sup>69</sup> See Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 56 (1962) (writing in the aftermath of *Baker* that “no development since the *Segregation Cases* has so focused the public eye on the doings of the Court” (internal citations omitted)).

<sup>70</sup> See *Baker*, 369 U.S. at 209, 211 (“[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a [nonjusticiable] political question . . . . Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a *delicate* exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.” (emphasis added)).

constitutional law railing against the Court on this point.<sup>71</sup> But this was not the Court's intended audience. The real audience was elsewhere, in state legislatures, courtrooms, and the nation at large. How would these publics respond?

It is hard to overstate the degree to which the Court's decision was accepted across the country. In the words of Robert McCloskey:

[I]t is hard to recall a decision in modern history which has had such an immediate and significant effect on the practical course of events, or—again excepting the *Segregation Cases*—which seems to contain such a potential for influencing that course in the future. The short-term response has been nothing short of astonishing. It has been as if the decision catalyzed a new political synthesis that was already straining, so to speak, to come into being. Not only federal judges, but state judges as well, have taken the inch or so of encouragement offered by the Supreme Court and stretched it out to a mile. Legislatures all over the country have been bidden to redistrict or to face the prospect of having the judiciary do the job for them. Under this spur, and sometimes in anticipation of it, a number of them have set going their laborious machinery of conflict and compromise. The shape of the apportionment plans that will emerge from this strange confluence of judicial and legislative power remains to be seen, but there can be no doubt that the American political world is stirring.<sup>72</sup>

More importantly, this reception makes it clear that the Court was on the right side of public opinion. The question was no longer whether the Court would step into this political terrain, but how far it was willing to go. Professor McCloskey could not be sure, yet conjectured that “the decision, even without further adumbration, may precipitate a train of events that will alter profoundly the nature of representation in American politics.”<sup>73</sup> He would not need to wait long to get an inkling about the Court's next

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<sup>71</sup> See, e.g., Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 108 (1962) (noting that the Court in *Baker* did not indicate anywhere in its decision what standards might be used to determine the validity of an apportionment scheme that creates inequalities of individual voting power); Philip B. Kurland, *Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 175 (1964) (noting that as courts continue to strive towards omnipotence, law reviews “will continue to play the game of evaluating the Court's work in light of the fictions of the law . . . rather than deal with the realities of politics and statesmanship”); Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 253 (describing the *Baker* decision as an “incipient judicial reformation of our political structure”).

<sup>72</sup> McCloskey, *supra* note 69, at 56–58 (internal citation omitted).

<sup>73</sup> *Id.* at 59.

step. The case was *Reynolds v. Sims*.<sup>74</sup>

#### IV. THE ROAD TAKEN: FROM *REYNOLDS* TO THE MODERN WORLD OF JUDICIAL SUPREMACY

Once the Justices saw that they were riding a high wave of public sentiment, the promise of *Baker* soon gave way to a much more assertive alternative. The Court need not be a passive participant in this debate but, instead, it could actually lead it. More specifically, the Court could face Frankfurter's challenge and take sides, and in so doing it could decide which of those factors would form part of a larger constitutional mandate.<sup>75</sup> But make no mistake: Choosing among these factors would be an exercise in will, not law. The constitutional text is simply unclear, even silent, on which of these factors must control the redistricting process.<sup>76</sup> So long as the Justices were on the side of democracy and public opinion, however, nothing else mattered.

This is the best way to explain *Reynolds v. Sims* and its enshrinement of population equality.<sup>77</sup> The Justices settled on a mantra—one man, one vote—and imposed it on the states confident that compliance would follow.<sup>78</sup> This was strategic acting at its best, down to the choice of slogans. After all, who could possibly be against according everybody one vote?

But where *Baker* was a necessary yet cautious move into a difficult terrain, *Reynolds* was its mirror opposite, both substantively and institutionally. Substantively, *Reynolds* cannot be defended as constitutional law. To say that the Equal Protection Clause demands population equality will not do. As Justice Harlan remarked in dissent:

Whatever may be thought of this holding as a piece of political ideology—and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate—I think it demonstrable that the Fourteenth Amendment does not

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<sup>74</sup> 377 U.S. 533 (1964).

<sup>75</sup> See *Baker*, 369 U.S. at 323–24 (Frankfurter, J., dissenting) (describing the considerations involved in the complex subject of apportionment and noting that these are “not factors that lend themselves to evaluations of a nature that are the staple of judicial determination or for which judges are equipped to adjudicate . . .”).

<sup>76</sup> See, e.g., *id.* at 323 (“[T]he Equal Protection Clause supplies no clearer guide for judicial examination of apportionment methods than would the Guarantee Clause itself.”).

<sup>77</sup> See *Reynolds*, 377 U.S. at 579 (“Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”).

<sup>78</sup> See *id.* at 558 (“[W]e concluded: ‘The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.’” (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963))).

impose this political tenet on the States or authorize this Court to do so.<sup>79</sup>

Justice Frankfurter presaged this argument in his dissent in *Baker*, where he wrote: “What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.”<sup>80</sup> The argument required much more than a bow to the equality principle, but the Court was not interested in offering anything more. It clearly did not have to do so.

Institutionally, the Court was usurping the role of state legislatures for no better reason than the fact that it disagreed with their choices. To make sense of how monumental this fateful step was, go back to Frankfurter’s challenge once again.<sup>81</sup> Clearly, state actors in charge of redistricting may choose from myriad factors for reasons suited to the particular needs of their states, or even for no reason at all. The same is not true of the Court. Judicial intervention requires more. The Court needs a reason to act. This is why *Baker* makes sense in ways that *Reynolds* does not. Once the locked up process in *Baker* gave way to change, the Court could step back and let the political process run its course. Further judicial intervention required a new argument, but the Court did not see it that way. Instead, to the Justices, *Baker* gave the Court license in perpetuity to mold the political process to its liking. The Court could do as it wished, confident that its edicts would be carried out. It is hard to overstate this point. The Court could even declare all fifty state legislatures unconstitutional.<sup>82</sup>

The immediate aftermath of the *Reynolds* revolution underscores this point. Rumblings from Congress took aim at *Reynolds* and the “one person, one vote”<sup>83</sup> principle,<sup>84</sup> but they eventually fizzled out and led nowhere. The amendment process proved far too difficult to overcome.<sup>85</sup> In the meantime, the equipopulation principle quickly became the law of the land, accepted by state legislatures and state and federal courts.<sup>86</sup> The

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<sup>79</sup> *Id.* at 590 (Harlan, J., dissenting) (internal citation omitted).

<sup>80</sup> *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting).

<sup>81</sup> See *supra* Part II (explaining Frankfurter’s challenge).

<sup>82</sup> See *Reynolds*, 377 U.S. at 589 (1964) (Harlan, J., dissenting) (“In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. Under the Court’s ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate.” (footnote omitted)).

<sup>83</sup> *Id.* at 587 (Clark, J., concurring).

<sup>84</sup> Dixon, *supra* note 19, at 231–37 (describing proposed bills and constitutional amendments in response to the reapportionment court decisions).

<sup>85</sup> See Everett McKinley Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837, 859 (1968) (stating that a proposed constitutional amendment did not receive the necessary votes and failed in the Senate); Robert B. McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255, 256 (1964) (outlining the logistical difficulties in amending the Constitution).

<sup>86</sup> McKay, *supra* note 85, at 258–59.

matter was thus settled. The Court could mold the political process to its liking and face few if any repercussions for its actions. This was precisely the moment when the Court began to take over the field of election law at a dizzying pace. Some of these intrusions were quite expected, such as burdensome ballot access laws and racial vote dilution inquiries. But the Court was also unafraid to strike deep into the heart of Congress. For not only was the Court willing to rewrite federal statutes to its liking,<sup>87</sup> but the Justices were also willing to look Congress directly in the eye and usurp the apparent congressional right to “be the Judge of the . . . Qualifications of its own Members . . . .”<sup>88</sup> Moving ahead, in other words, it appeared that there was nothing the Court could not do.

#### V. LESSONS FOR THE FUTURE: BACK TO THE GERRYMANDER

The stage is now set to better understand the questions at the heart of the gerrymandering debate. The big question today is this: Should the Court look for guidance to *Baker* and its promise of deferential review, or should it look instead to the more aggressive posture introduced by *Reynolds* and continued by the Court since? More specifically, the question is whether the Court should take the lead in organizing and regulating our political institutions or whether it should allow these institutions to regulate and structure themselves subject to broad and forgiving guidelines. These are not easy questions yet they are largely ignored. To properly understand their importance, we must parse the discussion into three separate strands.

##### A. *Frankfurter’s Challenge and the Problem of Drawing Lines*

The first is the practical/descriptive problem of judicial line-drawing as applied to the gerrymandering question. Assuming that political considerations are legitimate factors for political actors to consider when drawing districting lines, the critique of the practice boils down to the argument that political factors cannot play *too* central a role. Political factors cannot predominate in the process and overwhelm all other factors. This is a version of Frankfurter’s challenge.<sup>89</sup> How confident can we be that the Court will be able to separate the legitimate use of political factors from illegitimate uses?

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<sup>87</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 236 (1976) (Burger, C.J., concurring in part and dissenting in part) (“Congress intended to regulate all aspects of federal campaign finances, but what remains after today’s holding leaves no more than a shadow of what Congress contemplated.”).

<sup>88</sup> U.S. CONST. art I, § 5, cl. 1; see also *Powell v. McCormack*, 395 U.S. 486, 548–50 (1969) (holding “that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution” and that the political question doctrine does not bar courts from interpreting the law in regards to the eligibility of members of Congress).

<sup>89</sup> See *supra* Part II.

### B. *The Strategic Model in the World of Politics*

This leads directly to the second problem. Recall the argument that judicial decision-making is essentially a strategic accommodation of the Justices' personal goals and values.<sup>90</sup> Once we agree on this premise, a very troubling conclusion follows as applied to the gerrymandering problem when considered as a judicial question. For in the end, it follows that the Justices will draw their preferred lines as a direct reflection of their personal preferences about how they wish the political process to be structured. In other words, to the prior line-drawing question—how to separate the legitimate from the illegitimate uses of race—the answer must be that the Justices will simply choose their preferred answers and *ipse dixit* call them legitimate, while anything outside their universe of acceptable answers will be similarly labeled illegitimate. The only constraints will be external to the Court. In the post-*Reynolds* world of judicial review, these constraints are almost non-existent, assuming they ever existed at all.

This is another way of saying that the Court can do as it wishes so long as it stays within some very flexible and relaxed limits. Yet, anyone familiar with the Court's recent turn in the political gerrymandering jurisprudence must wonder about ways to explain the Court's reticence to regulate this area. Take *Vieth v. Jubelirer* as an example.<sup>91</sup> In *Vieth*, the Justices considered whether the political gerrymandering doctrine is a quixotic quest worth pursuing, or whether it is time to declare the quest insoluble and not worth the effort.<sup>92</sup> Predictably, the Justices split along traditional lines. Four conservative Justices declared that the doctrine was not worth the effort and it was time to place these cases within the ambit of political questions as traditionally understood.<sup>93</sup> They argued that judicially manageable standards are lacking—that is, that they are unable to meet Frankfurter's challenge—and so the Court should simply give up the fight.<sup>94</sup> The four moderate Justices argued instead that such standards were in fact availing, and they offered their preferred alternatives.<sup>95</sup> These Justices are on the side of history. There is no good reason why this challenge is any different than the challenges of the past. Justice Kennedy

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<sup>90</sup> See *supra* Part II.

<sup>91</sup> 541 U.S. 267 (2004).

<sup>92</sup> *Id.* at 271–72.

<sup>93</sup> See *id.* at 305 (holding that the Constitution does not “provide[] a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting”).

<sup>94</sup> See *id.* at 281 (stating that after “[e]ighteen years of judicial effort . . . no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged”).

<sup>95</sup> See *id.* at 335–36 (Stevens, J., dissenting) (opining that courts could use the racial gerrymandering standard to decide political gerrymandering cases); *id.* at 346 (Souter, J., dissenting) (arguing for the adoption of a standard requiring plaintiffs to make out a prima facie after which states could rebut and offer their justifications); *id.* at 365 (Breyer, J., dissenting) (stating that the courts could identify indicia of political abuse).

found himself in the middle, willing to wrestle with Frankfurter's challenge into the foreseeable future.<sup>96</sup> In the meantime, the doctrine remains in flux.

*Vieth* offers a refreshing example of a struggle we no longer see within the law of democracy between judicial intervention and restraint. It is tempting to side with the conservatives and their willingness to remove the Court from this particular question. This view, however, would miss the far more interesting and important questions at the heart of *Vieth*. How should we understand any move on the part of the Justices to give up the chance to impose their political goals on democratic structures and institutions? What drove Justice Scalia's plurality opinion? This question presupposes that the law is open-ended and does not lead to the conclusion to which Justice Scalia wished to take us.<sup>97</sup> But *Reynolds* already foreclosed this move. This is about volition and will, not law, and neither is in short supply. This question also presupposes that the political process is no longer able or willing to fight back. *Bush v. Gore* teaches us as much. So the only remaining question is that of political goals. What could possibly lie behind the conservatives' move in *Vieth*? What particular goals were being furthered?

To make sense of this question, compare the Court's approach in *Vieth* to the confusing *Shaw* doctrine. In *Shaw v. Reno*, the Court held for the first time that a districting plan that neither harms voters of color nor dilutes their vote is an actionable claim under the equal protection clause.<sup>98</sup> In the majority's view, a districting map that was irregular on its face and which ultimately elected a candidate of color to office bore the uneasy markings of Jim Crow segregation.<sup>99</sup> Such a map, according to the majority, created two related harms. The first was a harm to society as a whole, since it "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."<sup>100</sup> The second harm was a representational harm, in that the officials elected from the offending district "are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."<sup>101</sup> These harms are generally known as

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<sup>96</sup> *Id.* at 317 (Kennedy, J., concurring) (concluding that the lack of judicial standards for political gerrymandering makes the Court's intervention improper, but recognizing a potential role for the judiciary if workable standards emerge).

<sup>97</sup> *See id.* at 306 (majority opinion) ("Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims.")

<sup>98</sup> 509 U.S. 630, 653–54 (1993).

<sup>99</sup> *Id.* at 647.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 648.

expressive harms.<sup>102</sup>

These harms were also nonsense, for reasons that scholars have been quick to point out in the aftermath of the *Shaw* case.<sup>103</sup> Their development and ultimate demise were also easy to explain under the strategic model. Begin with the policy goal: Conservative Justices are generally unreceptive to the use of race by state actors, so they are distrustful of bizarre maps used largely by Southern jurisdictions to send Black and Latino elected officials to the U.S. Congress. The *Shaw* doctrine is best understood as a direct reaction to a particular use of race in redistricting that made conservative Justices uncomfortable. But there is quite a gap between discomfort and unconstitutionality, especially when the facts in *Shaw* fit comfortably within established case law, most notably *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.<sup>104</sup> Fully aware of this problem, the Court was forced to concede that the *Shaw* doctrine established an “analytically distinct claim.”<sup>105</sup> The claim was so distinct, in fact, that it evolved in the next case to the better known “predominant factor” test.<sup>106</sup> Though scholars worried about how the claim would affect the post-2000 redistricting round and what kind of chaos it would cause,<sup>107</sup> the claim disappeared altogether, never to be seen again.

The evolution of the *Shaw* doctrine teaches us that the Justices’ policy goals can go a long way in determining what shape legal doctrine will take. A determined Court majority will go to great lengths to see its policy views expressed in law. This is true even when legal precedent is unhelpful, or common sense lacking. One reading of *Shaw* sees it as a signal on the part of the Court to political actors—and particularly Department of Justice officials—that their aggressive use of race in redistricting must stop. This

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<sup>102</sup> See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 485 (1993) (“*Shaw* must be understood to rest on a distinctive conception of the kinds of harms against which the Constitution protects . . . . We call these *expressive harms*, as opposed to more familiar, material harms.”).

<sup>103</sup> See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 304–06 (2001) (arguing that the “expressive harms doctrine” is incoherent once districts are comprised of less than fifty percent of minority voters); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 293–95, 295 n.52 (1996) (stating that there are causality problems and questions the Court left unanswered regarding *Shaw*’s representational harm theory).

<sup>104</sup> See 430 U.S. 144, 145, 168 (1977) (affirming the district court’s holding that officials may use racial considerations in seeking corrective action under the Voting Rights Act).

<sup>105</sup> *Shaw*, 509 U.S. at 652.

<sup>106</sup> See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“The plaintiff’s burden is to show, either through the circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”).

<sup>107</sup> See, e.g., Pamela S. Karlan, *The Fire Next Time: Reapportionment after the 2000 Census*, 50 STAN. L. REV. 731, 733–34 (1998) (explaining how complicated and contentious the post-2000 reapportionment may become, due to the burdens imposed by federal law and a potential increase in litigation over the composition of districts).

is certainly a plausible reading.<sup>108</sup> A far more persuasive reading views *Shaw* and its progeny as a failed experiment. What in 1994 looked like a good idea, even a necessary one, by 1998 looked like a total mess. To its credit, the Rehnquist Court appreciated this fact and discarded *Shaw* to the dustbin of history.<sup>109</sup> These policy goals must be pursued elsewhere, through different means.

This discussion should help us understand the political gerrymandering puzzle. *Shaw* is explained as driven by a strong aversion to the use of race in public policy. Similarly, in the political gerrymandering context, the dissenting Justices in *Vieth* expressed a very common and widely accepted abhorrence for the lengths to which politicians will go to get re-elected.<sup>110</sup> This reaction is captured by the expression that the politicians pick their representatives rather than the other way around.<sup>111</sup> This is also why *Vieth* is directly connected to *Shaw*: The dissenters in *Vieth*, like the *Shaw* majority, were giving expression to their deeply held policy views, clothed in the garb of legal doctrine. Thus, the puzzle restated: What drove the conservative plurality in its wish to see the Court leave the political gerrymandering question for the political branches to resolve? One Justice's opinion we can decipher is Justice Kennedy. As the Court's swing voter, he was hesitant to give up a wide swath of legal doctrine that he was able to control. Those in power do not give up that power easily. But how can Scalia's opinion be explained? How do the Justices that readily decided *Bush v. Gore*, *Citizens United*, and are presently pondering the demise of the Voting Rights Act willingly give up on political gerrymandering questions? This question is particularly puzzling when one considers that any Court that strikes at the heart of the political gerrymander is clearly on the side of public opinion. This is *Baker-Reynolds* redux, and the consensus is not as hidden now as it might have been back in the early 1960s. It is now as clear as day.

One answer takes a page out of the attitudinal model. It may just be the case that the conservative Justices assume that conservative politicians

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<sup>108</sup> See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Rethinking Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 38, 50 (David L. Epstein et al. eds., 2006) (discussing the interpretation of *Miller* as "a stinging rebuke of the DOJ itself and its preclearance practices" with regard to the Voting Rights Act).

<sup>109</sup> Put another way, prior to the 2000 redistricting season, scholars worried about the effect of an aggressive judicial pursuit of the *Shaw-Miller* doctrine. See Karlan, *supra* note 107. And yet, the expected litigation that followed the 2000 Census did not see any such litigation arise? The Justices were no longer interested in pursuing this line of attack, and *Shaw* suffered a silent death.

<sup>110</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 318 (2004) (Stevens, J., dissenting) ("In my view, when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.")

<sup>111</sup> See, e.g., Leon W. Russel & J. Gerald Hebert, *Let the Voters Speak*, ST. PETERSBURG TIMES, Aug. 10, 2010, at 11A (describing gerrymandering as a "practice that for decades has enabled politicians to choose their voters instead of voters choosing politicians").

and voters benefit far more from political gerrymandering practices as they exist today than do liberal and progressive voters and politicians.<sup>112</sup> There seems to be a pretty good body of evidence to support that view, as liberals do not appear to have an answer to Lee Atwater and Karl Rove.<sup>113</sup> On this view, when the Court removes itself as an institutional player in the gerrymandering debate, it benefits conservative policies while conserving its political capital to use elsewhere.

A less cynical yet far less convincing answer is that the conservative Justices are sincerely ambivalent about their views on this question. While some people feel strongly about the harmful effects of the political gerrymander, it may just be the case that the conservative Justices do not feel similarly. And if their views are not all that strong, why bother taking a side?

### C. *Searching in Vain for a Few Good Philosopher Kings*

The third problem addresses the normative implications of the political gerrymandering debate. This is a question that, properly understood, begins precisely in the same place as the *Baker/Reynolds* debate. This is also a question that must similarly confront Frankfurter's challenge. As understood and carried on today, however, scholars bypass the difficult question at the heart of the gerrymandering debate and instead turn the Justices into philosopher kings. But this is too easy.

For context, look back to the early 1960s. Redistricting maps in state after state looked the same. After years of inaction yet much migration both intra- and interstate, districts bear no semblance of rationality in terms of population. In Alabama, for example, some districts have forty-one times as many people as other districts.<sup>114</sup> The question is whether such disparities violate constitutional principles. The answer in *Baker* was yes. Properly read, *Baker* left the districting task in the hands of political actors, where it should be. How is one to decide among the many bases of representation, after all, and which institution should be in charge of deciding it? In *Reynolds*, the Court entrusted itself with this delicate political task and imposes the principle of political equality upon the states.<sup>115</sup> As suggested earlier, this is an act of volition and will, not constitutional law. The Court offered no persuasive—or constitutional—

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<sup>112</sup> See Sanford Levinson, *Why Didn't the Supreme Court Take My Advice in the Heller Case? Some Speculative Responses to an Egocentric Question*, 60 HASTINGS L.J. 1491, 1499 (2009) (“[I]t has been, generally speaking, Republicans who have benefited overall from the significant use of racial criteria in designing electoral districts, and Democrats, concomitantly, who have paid significant costs.”).

<sup>113</sup> See Dan Balz, *Team Bush: The Iron Triangle*, WASH. POST, July 23, 1999, at C1 (discussing President George W. Bush's trio of political advisers).

<sup>114</sup> *Reynolds v. Sims*, 377 U.S. 533, 545 (1964).

<sup>115</sup> *Id.* at 557.

basis for its conclusion.

Once the Court made this crucial move, the gerrymandering debate should follow a similar path. These cases ask the same question about political representation. Justice Douglas understood the issue in the early 1970s:

The question of the gerrymander is the other half of *Reynolds v. Sims*. Fair representation of voters in a legislative assembly—one man, one vote—would seem to require (1) substantial equality of population within each district and (2) the avoidance of district lines that weigh the power of one race more heavily than another. The latter can be done—and is done—by astute drawing of district lines that makes the district either heavily Democratic or heavily Republican as the case may be. Lines may be drawn so as to make the voice of one racial group weak or strong, as the case may be.<sup>116</sup>

Justice Douglas made a number of moves worth highlighting. Note first how he defined the concept of “fair representation” as simply “one man, one vote.” Note further how population equality as a principle of representation did not demand strict equality but rather substantial equality. This left room for play and accommodation. This was also consistent with *Baker v. Carr*.<sup>117</sup> Note finally how Justice Douglas glossed over a question that confounds the Justices to this day—the question at the heart of the *Shaw* doctrine. To the modern Court, the use of politics is permissible in ways that the use of race is not. The better inquiry tries to distinguish between the use of race and politics in a world where African Americans vote overwhelmingly for Democratic candidates—an issue about which the Court was not terribly clear.<sup>118</sup> In contrast, Justice Douglas conflated the two inquiries and in so doing took care of the political and racial gerrymandering questions in one fell swoop.

Whatever one thinks of Justice Douglas’s approach to constitutional law, he recognized the connection between the early cases and the gerrymandering debate. In recent years, if for slightly different reasons, Justice Stevens also recognized a connection.<sup>119</sup>

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<sup>116</sup> *Whitcomb v. Chavis*, 403 U.S. 124, 176–77 (1971) (internal citation omitted).

<sup>117</sup> See Fuentes-Rohwer, *Baker’s Promise*, *supra* note 49, at 1382 (arguing that *Baker* and *Reynolds* have created a flexible standard for lower courts to follow, rather than a rule of strict population equality).

<sup>118</sup> See *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (stating that when race correlates strongly with political behavior, “[t]he basic question is whether the legislature drew District 12’s boundaries because of race *rather than* because of political behavior”).

<sup>119</sup> See *Cox v. Larios*, 542 U.S. 947, 949–50 (2004) (Stevens, J., concurring) (“[T]he equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.”).

Once we see the cases for what they are—mirror images of one another—the question at the heart of the political gerrymandering cases comes into sharper focus. Should the Court follow the path forged by *Baker v. Carr*, with its promise of due deference to the political branches? Or should it follow *Reynolds* and its implicit premise that the Court is the best institution to decide these charged and complex questions of political representation? This is, in a nutshell, the political gerrymandering debate—a question of institutional competence regarding redistricting.<sup>120</sup>

This Essay sides with *Baker* and its position of due deference. The best way to make sense of judicial intervention in redistricting focuses on Justice Clark's concurring opinion in *Baker* and the idea that the Court must play a backstop role.<sup>121</sup> This was an argument for a passive judicial role, for allowing much play in the joints and leeway for the states to devise their political institutions as they see fit. This argument has much to commend it, both as a question of democratic theory and as a question of constitutional law. Democratic theory also faces up to the challenge posed by Justice Frankfurter: How should we structure our democratic institutions, and which institution should bear the responsibility for doing so?<sup>122</sup> This is a political question in its truest sense, in that it demands the accommodation of myriad factors that are often in tension with one another. For example, are at-large elections preferable to districted elections? Are competitive elections superior to non-competitive elections? Which political interests deserve to be included in our representative bodies? Should districting plans include Black and Latino districts? And assuming that we agree that these districts should be included, what percentage of Black and Latino residents should be included within these districts?

These are difficult and contested questions—questions without right answers. Without more, they are questions better left to the political process, to the pulling, hauling and trading of politics.<sup>123</sup> They are not judicial questions.

The Constitution directly supports this view. The clear mandate of

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<sup>120</sup> See Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 366 (1984) (explaining that an institutional approach to constitutional law involves choosing a principal decisionmaker from among the government institutions, and considering the strengths and weaknesses of the government institutions).

<sup>121</sup> *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring) (“We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.”).

<sup>122</sup> *Id.* at 323 (Frankfurter, J., dissenting) (describing the considerations relevant to determining proper apportionment methods).

<sup>123</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (explaining that while “society’s racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity,” there are instances in which minorities are able to form coalitions, as “minority voters are not immune from the obligation to pull, haul, and trade to find common political ground . . .”).

Article I places the responsibility to structure our political institutions on the states and assigns Congress a supervisory role.<sup>124</sup> The states get a first pass in answering these questions, while Congress has a reserved constitutional prerogative to amend the states' choices.<sup>125</sup> Congress can decide, for example, that states must elect members of Congress via compact and contiguous congressional districts of equal population,<sup>126</sup> or it can also take a view on the representation of racial and ethnic minorities.<sup>127</sup>

To say that these are duties and responsibilities best left to the political branches is not to say that the courts should not play a role at all. Rather, the courts must play a secondary role, a deferential role. So long as the political process is working properly, the courts must stay their hand. Judicial intervention is warranted only when extreme facts are present. This is because courts do not have institutional advantages vis-à-vis the political process in answering these questions. As seen in *Reynolds*, the courts will happily answer these questions, but that is only proof that courts have a difficult time circumscribing their own spheres of authority. If called upon to resolve these issues, courts will decide them. But these would be acts of judicial will, not constitutional law.

The rub is obvious: How should courts decide when the political process is working "properly" as opposed to improperly? When are facts extreme enough to warrant judicial intervention? Put in the language of modern constitutional theory: When is the political process not "deserving of trust"?<sup>128</sup> One popular view argues that the process is not working properly when it is locked up, in the sense that political change is made too difficult if not impossible.<sup>129</sup> But even this formulation raises further questions. For example, what does a locked-up political process look like, and how would anybody know?

*Baker* offers an answer. Two aspects of the case bear repeating. First, note that the residents of Tennessee had no way to change the political

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<sup>124</sup> See U.S. CONST. art I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." (internal quotations omitted)).

<sup>125</sup> See *Foster v. Love*, 522 U.S. 67, 69 (1997) ("[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States" (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995))).

<sup>126</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 276–77 (2004) (stating instances in which Congress has exercised its power to regulate elections, such as when it has required districts to be compact, contiguous, and contain an equal population).

<sup>127</sup> For example, the Voting Rights Act of 1964 has been held to govern racial gerrymandering. 42 U.S.C. § 1973(a) (2006); see also *Chisom v. Roemer*, 501 U.S. 380, 394 (1991) ("[P]laintiffs can prevail under § 2 [of the Voting Rights Act of 1964] by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race.").

<sup>128</sup> See, e.g., Mark E. Warren, *Deliberative Democracy and Authority*, 90 AM. POL. SCI. REV. 46, 47 (1996).

<sup>129</sup> See generally Issacharoff & Pildes, *supra* note 1 (arguing for a more functional framework in cases of state regulation of democratic politics).

process in the state.<sup>130</sup> There was nothing they could have done short of taking the streets to unlock the political process. This fact became obvious only after many decades of inaction. Second, the Court subjected the facts in the case to heightened rationality.<sup>131</sup> This is the right approach. Under this standard, the right to decide these questions remained within the political process, where it belonged, subject only to a loose and forgiving rule of reason. The facts in *Baker* were extreme and clearly did not meet this standard, as counsel for the state conceded during oral argument.<sup>132</sup> Moving forward, claims under *Baker* should be harder to prove, as states resume their redistricting duties.

Instead, the Court took a different path in *Reynolds v. Sims*. But *Reynolds* can only be seen as an *ipse dixit*, as a moment in time when the Justices behaved as philosopher kings. The analogy to the political gerrymandering debate is inescapable. Commentators ask the Court to adopt various prophylactic rules and standards, from competitive principles<sup>133</sup> to anti-distortion rationales.<sup>134</sup> Commentators even take an individual rights approach in this area.<sup>135</sup> These accounts make for terrific reading and might even persuade as questions of political theory. But they ultimately fail to ask the necessary question: Is the Court the proper institution to regulate our political process?

So understood, it follows that the Court struck the right bargain in the frequently maligned *Davis v. Bandemer*.<sup>136</sup> In *Bandemer*, the Court held for the first time that political gerrymandering claims present justiciable constitutional questions.<sup>137</sup> The criticism of the case rises from its application. This is because the Court offered a nebulous constitutional standard, so nebulous, in fact, that neither judges nor scholars agree on its meaning.<sup>138</sup> This led to the leading critique, offered by Justice Scalia:

<sup>130</sup> *Baker v. Carr*, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring).

<sup>131</sup> See Fuentes-Rohwer, *Baker's Promise*, *supra* note 49.

<sup>132</sup> See 56 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 679 (Philip B. Kurland & Gerhard Casper eds., 1975) (“I think the short of the matter is—and I think there’s no need to quibble about it—that the urban counties ought to have more representation. I am not arguing that.”).

<sup>133</sup> See, e.g., Issacharoff & Pildes, *supra* note 1, at 646, 683 & n.149 (arguing that a “competitive[ly] partisan environment” is necessary to democratic politics, and explaining how the bipartisan gerrymander “locks in the distribution of power” between parties).

<sup>134</sup> See, e.g., Charles, *supra* note 2, at 607 & n.23 (“[T]he problem with political gerrymandering is the intentional manipulation of democratic institutions by state actors.”).

<sup>135</sup> See, e.g., HASEN, *supra* note 3, at 10–11 (arguing for Court intervention in the political process that is focused on individual rights and for limitations “on the government’s power to treat people differently in the political process”).

<sup>136</sup> 478 U.S. 109 (1986).

<sup>137</sup> *Id.* at 113.

<sup>138</sup> See Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 816 (1992) (“[A]s far as I am aware I am one of only two people who believe that *Bandemer* makes sense. Moreover, the other person, Daniel Lowenstein, has a diametrically opposed view as to what the plurality opinion means.” (footnote omitted)).

The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years . . . . Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in *Bandemer's* four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time—but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: Judicial intervention has been refused. As one commentary has put it, “[t]hroughout its subsequent history, *Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress.”<sup>139</sup>

This critique has great force yet ultimately misses the larger and more important point. *Bandemer* strikes the right balance, and to say that no set of facts has ever met its exacting standard does not detract from this fact. *Bandemer* makes sense when understood as a corollary of the *Baker* doctrine. Both cases worry about the same thing: the extreme case in which incumbents can “lock themselves in power in perpetuity.”<sup>140</sup> The fluidity and competition inherent to the political process ensures that this will not happen often, if ever. This is not to say that *Bandemer* is wrong, or unnecessary. It is to say, instead, that *Bandemer* guarded against the extreme case while according the political process needed flexibility.

Commentators are almost unanimous in their derision of the political gerrymander.<sup>141</sup> These accounts are often knee-jerk reactions to the problem at hand. As to whether political gerrymanders are harmful and concomitantly unconstitutional, the answer is often in the affirmative. In offering their theories of choice, these commentators are clearly siding with *Reynolds*, not *Baker*. These calls demand for the existence of philosopher kings to choose among these many theories. These are calls, in effect, for an activist judicial role in an area that demands judicial deference. At the very least, this is an area that demands comparative

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<sup>139</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 886 (rev. 2d ed. 2002)).

<sup>140</sup> Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 575–76 (2003).

<sup>141</sup> See, e.g., *id.* at 533–34 (describing commentators’ arguments against the gerrymander). But see Bruce E. Cain, Commentary, *Simple vs. Complex Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L. REV. 213, 226 (1985) (stating that the partisan gerrymander does not “‘lock-in’ one party’s control over the state” and is less of “the great evil it is portrayed to be”).

institutional analysis. This is something we seldom see.

## VI. CONCLUSION

Courts are deeply involved in our politics. This involvement traces back to the seminal *Baker v. Carr*. While *Baker* was a necessarily modest opinion, the next major case, *Reynolds v. Sims*, took a decidedly different approach. Where *Baker* was modest and deferential, *Reynolds* was aggressive and hubristic. This Essay explains this shift in judicial posture under a strategic account of judicial decision-making. In *Baker*, the Court took a modest step because it could not be sure of how the relevant political actors as well as the public would respond. Once the Justices were sure that their rulings would receive a positive reception, they pushed the doctrine and their authority as far as it would go. This gave us *Reynolds* and its progeny. To say that the Court is able to take on these questions is not the same as saying that the Court should do so.

This political gerrymandering question provides the Court with its next big challenge. This Essay argues that to intervene aggressively in this area would be to follow the example of *Reynolds* and the more troubling *Bush v. Gore*. Based on comparative institutional analysis, however, this is an area where the Court should instead follow the *Baker* model. Rather than lead the way, the courts must play a secondary role.