

DOMESTICATING THE GERRYMANDER:
AN ESSAY ON STANDARDS, FAIR
REPRESENTATION, AND THE NECESSARY
QUESTION OF JUDICIAL WILL

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From the time the Supreme Court officially entered the famed “political thicket” in *Baker v. Carr*, its role in regulating the law of democracy has been robust and aggressive. While *Baker* itself was a modest, necessary jolt to the stagnant political structures of the times, the Court’s intervention in the field of democracy has exceeded all expectations, to the point that the nature and scope of the legal questions presented hardly matter anymore. This phenomenon has been characterized by a leading commentator as the “constitutionalization of democratic politics.”¹

The Court’s commitment to securing and exercising its own power is so strong that instances when the Court appears to deviate from this general script demand an explanation. This Essay focuses on one such instance: *Vieth v. Jubelirer*,² the recent Pennsylvania gerrymandering case. In *Vieth*, four members of the Court concluded that political gerrymandering questions are devoid of judicially manageable standards and are thus unfit for judicial resolution, while four other members were equally confident that standards were readily available. Unable to adopt a standard as his own, yet unsure that the field should be immune from judicial review, Justice Kennedy retreated to familiar ground—the Court’s middle—and split the difference, agreeing with the plurality that a standard was unavailing yet refusing to foreclose the inquiry into the future. In so doing, Justice Kennedy left the issue open for the near future, in case a standard arose that met his exacting requirements.³

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¹ Richard H. Pildes, *Constitutionalizing Democratic Politics*, in A BADLY FLAWED ELECTION 155 (Ronald Dworkin ed., The New Press 2002); see Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1606, 1606 (1999) (“In the relatively short time since [*Baker*], the United States Supreme Court has not only entered the ‘political thicket,’ but with remarkable speed has found conflicts of democratic politics coming to dominate its docket.”).

² 541 U.S. 267 (2004).

³ For an argument that no such standard will ever arise, see Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626 (2004).

This Essay argues that the *Vieth* case is incoherent and ultimately indefensible. In the abstract, *Vieth* is a curious case. Although the Court is quite comfortable policing the political terrain, it goes to great lengths in *Vieth* to step aside in order to remove political gerrymandering claims from its docket. And herein lies its incoherency: while the plurality approaches gerrymandering claims as a separate area of analysis, these claims form a subset of a larger arena opened up to judicial review by *Baker v. Carr*. Political gerrymandering claims are part and parcel of the reapportionment revolution and *Vieth* is but a modern remake of *Baker v. Carr*. On this argument, the Court is faced with a stark choice: it must forge ahead and create standards out of whole cloth, as in the redistricting context, or else it must leave the field of politics altogether and return to a world where *Colegrove v. Green*—the case traditionally understood as the classic political question case—is controlling precedent. It cannot have it both ways.

This Essay examines *Vieth* and its place within the reapportionment revolution over the course of five Parts. Part I examines the Court's original reasons for staying off the political field, as explained in Justice Frankfurter's controlling opinion in *Colegrove v. Green*. In turn, Part II contrasts these reasons with the Court's ultimate and perhaps inevitable decision to enter the field full force in *Baker v. Carr* and its immediate progeny. Taken together, these Parts underscore the fact that the question of judicial intervention has always been a question of judicial will.⁴ Part III moves the story ahead a mere two years, when the Court squarely addressed the question of judicial standards in *Reynolds v. Sims*.⁵ *Reynolds* settled this question forcefully and decisively, even if its solution was no better than the "uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic."⁶ Part IV places the story in its proper context post-*Reynolds*, as a quest for a working definition of fair representation. This is a struggle that haunts the Court to this day. Finally, Part V situates *Vieth* within this struggle.

I.

Any discussion about the role of the federal courts in redistricting controversies must begin with *Colegrove v. Green*, a 1946 challenge to the Illinois congressional districting plan. There are many reasons for beginning here, not the least of which is that *Colegrove* offers a perspec-

⁴ See Alexander M. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 44 (1962) ("The point decided in *Baker v. Carr* 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.").

⁵ 377 U.S. 533 (1964).

⁶ *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting).

tive that the Court has long left behind; a humble and deferential institution willing to step aside when it determines that the facts so demand. More crucially, for many years *Colegrove* stood for the proposition that the Court must stay out of redistricting controversies no matter how egregious the circumstances might appear. This was the classic political thicket, an area where the judiciary must enter only at its own risk.

In an opinion authored by Justice Frankfurter, the Court offers myriad reasons for refusing to intervene in this area. The Court begins by looking to *Wood v. Broom*, the case adduced by the lower court as controlling precedent.⁷ According to *Wood*, Congress had eliminated a pre-existing requirement of population equality for congressional districts with the Reapportionment Act of 1929. Elections subsequently took place under this understanding of the Act, and Congress did not respond to the Court's interpretation under *Wood*. This lack of response seemed to confirm the Court's reading of the Act and Congress' intentions.⁸ And in this area, for Justice Frankfurter, Congress' intentions control.

The argument was simple enough and took very little effort. What could be easier than a contention that precedent ties one's hands? Yet Justice Frankfurter is clearly after bigger game, and one did not have to wait long to find out what it was. In the next paragraph, Frankfurter argues that this litigation must be dismissed for "want of equity."⁹ This is his familiar point about judicial competence. More specifically, he understands this case as similar to prior cases in which the Court has refused to exercise jurisdiction. The nuance of his argument bears repeating: it is not that the Court did not have jurisdiction in these other cases, but, rather, that "[t]his is one of those demands on judicial power [that] . . . must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies."¹⁰ And what exactly were these considerations? He avers that this issue, as others before it, is one "of a peculiarly political nature"¹¹ and thus not subject to judicial resolution.

His point, which he made clear in the next paragraph, is simple: the Court is quite adept and well-equipped to handle individual rights claims, such as claims by one party to recover damages for discriminatory exclusion at the hands of the state. What the Court cannot handle quite as well are structural claims, claims about the proper structure of the political system. "The basis for this suit," he offers in support of this proposition,

⁷ *Colegrove v. Green*, 328 U.S. 549, 551 (1946).

⁸ *Id.* ("Nothing has now been adduced to lead us to overrule what this Court found to be the requirements under the Act of 1929, the more so since seven Congressional elections have been held under the Act of 1929 as construed by this Court.").

⁹ *Id.*

¹⁰ *Id.* at 552.

¹¹ *Id.*

“is not a private wrong, but a wrong suffered by Illinois as a polity.”¹² Plaintiffs came to federal court in order to press their claims for a different electoral structure, for districts that reflect at the very least substantial equality of population among them. But this is no easy task, thus raising concerns about judicial competence.

To begin, he contends that the federal courts could not possibly redraw the Illinois congressional districting map. The best they could do was to declare the existing map unconstitutional and hope for a new map from the state legislature. But if the legislature fails to draw a new map, the next election would have to be an at-large election, since they could not use an unconstitutional plan. Yet such an election would circumvent the congressional demand for districts. And besides, Congress may ultimately reject these representatives under its article I, section 5 power. As such, it is best for the courts to decline any involvement in these charged political controversies. These are disputes where losing partisans are simply inviting the courts into their controversies in order to get a second chance at a favorable resolution. Using the courts in this way is “hostile to a democratic system.”¹³ Any change must instead come from Congress, from state legislatures, or apparently from the people themselves.¹⁴

All these arguments amount to the traditional view of *Colegrove* as a political question case.¹⁵ Yet this is an odd view of *Colegrove*, particularly because the Court fails to invoke the political question doctrine as then understood, dating back to *Luther v. Borden*¹⁶ and *Pacific States v. Oregon*.¹⁷ Such an argument on political question grounds would invoke the classic nonjusticiability thesis, where the Court would profess a lack of power to intervene. But the Court does no such thing in *Colegrove*. To be sure, the Court teases us a bit here, especially when it offers the view that “[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts” while citing *Pacific States*.¹⁸ But this is hardly a classic “political question” argument. From

¹² *Id.* It is worth noting that this point is not universally accepted. See, e.g., Charles L. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13, 13 (1962).

¹³ *Colegrove*, 328 U.S. at 553.

¹⁴ See *id.* at 556 (“The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.”).

¹⁵ See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (“In 1962, in *Baker v. Carr*, a case involving the apportionment of the Tennessee legislature, the Supreme Court departed from its decision in *Colegrove v. Green*, which had held that reapportionment controversies were political questions.”).

¹⁶ 48 U.S. 1 (1849).

¹⁷ 223 U.S. 118 (1912).

¹⁸ *Colegrove*, 328 U.S. at 556.

its place in the opinion, it is clear that this argument is part of a now familiar refrain about enforcing constitutional provisions outside the courts.¹⁹ This is not a political question argument, at least not in its traditional form. The Court was refusing to intervene even though it had the power to do so.²⁰

Once the smoke clears, we have a court deciding not to intervene in redistricting controversies. But I cannot emphasize enough that the Court is *choosing* to take this path. After all, “Courts *ought* not enter this political thicket.”²¹ And in fact, nobody denied, then or later, that the Court had power to act in *Colegrove*. Justice Frankfurter conceded as much in his scathing dissent in *Baker*, when he remarked that “[b]oth opinions joining in 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.”²² In his opinion for the Court in *Gomillion v. Lightfoot*, Justice Frankfurter similarly argued that the facts in *Colegrove* “presented a subject not meet for adjudication.”²³

Thus the real question behind *Colegrove*: why did Justice Frankfurter work as hard as he did to extend his deferential posture to redistricting controversies? The answer is not that the Court must treat *all* questions of the political process similarly, for Justice Frankfurter himself authored the Court’s opinion in *Gomillion v. Lightfoot* some years later, where the Court willingly intervened and struck down the Tuskegee racial gerrymander under the Fifteenth Amendment. To be sure, one can certainly distinguish *Gomillion* from *Colegrove*, and Justice Frankfurter did so effortlessly, on both constitutional and pragmatic grounds.²⁴ In this vein, it is clear from the historical record that Justice

¹⁹ In making this claim, it is clear that Frankfurter was ahead of its time. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton University Press 1999).

²⁰ See Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence and the Judicial Role*, 47 WM. & MARY L. REV. (forthcoming 2006) (manuscript at page 23-24).

²¹ *Colegrove*, 328 U.S. at 556 (emphasis added).

²² *Baker v. Carr*, 369 U.S. 186, 277 (1962) (Frankfurter, J., dissenting).

²³ *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960).

²⁴ For example, *Colegrove* arose under Article I, which gave Congress “exclusive authority” to decide the matter. Yet the same may not be said of the “discriminatory denial of the municipal suffrage alleged here.” Frankfurter draft opinion, *Gomillion v. Lightfoot* 8 (November 10, 1960) (Library of Congress (LOC), Warren papers, Box 471, case file no. 32). Further, *Colegrove* involved a nation-wide issue, as these partisan struggles “underlie so many disputes over statewide apportionment throughout the country.” Yet *Gomillion* “solely concerns state-imposed racial discrimination in a specific locale.” The fact that *Gomillion* was a race case, where the line drawing resulted “in an unequivocal withdrawal of the vote solely from colored citizens . . . lifts this controversy out of the exclusively political arena and into the conventional sphere of constitutional litigation.” *Id.* The question of remedies provided for him two final grounds. First, one case is about discrimination through inaction, whereas the other is about affirmative action. The plaintiffs in *Gomillion* are targeted, which means

Frankfurter wished to open review to race cases such as *Gomillion* while ensuring that the Court would not engage in a full scale regulatory assault on the law of democracy. This explains the great lengths to which he went, at Justice Black's insistence,²⁵ to distinguish *Colegrove* from *Gomillion* while also responding to Justice Whittaker's contention that *Gomillion* was best understood as a Fourteenth Amendment case.²⁶ To his mind, *Gomillion* was a race case, a Fifteenth Amendment case, as indicated in his communication to Justice Whittaker the day after Justice Whittaker circulated his draft of a concurring opinion,

Displacing voters from Division A, where they enjoyed rights through the ballot which they would not enjoy in Division B, presents *in fact* a very different situation from originally making two divisions, A and B, and thereby placing different voters in the two divisions. If the situation is different in fact I know of nothing that precludes it from being different in law. Displacing takes away, deprives of, theretofore existing rights. To do so on the basis of race is explicitly prohibited by the Fifteenth Amendment.²⁷

Justice Whittaker responded to this argument in his subsequent draft and ultimately remained unpersuaded.²⁸

This doctrinal debate offers a window into the heart of the reapportionment revolution. Irrespective of which constitutional provision is invoked, the redistricting cases are at their core cases of judicial will. That is to say, these cases amply demonstrate how the Court is choosing when to intervene and when to stay out of these difficult and contested controversies. For example, while the Court refuses to intervene in *Colegrove*, it follows a separate tack in *Gomillion* and, to be fair, perhaps it had no choice in light of the nascent civil rights revolution. But why is this so? Why should the Court stay out of the redistricting area as opposed to any

that "familiar legal remedies are available as relief." And second, the cure may be worse than the disease in *Colegrove*, as it may result in at large elections, contrary to congressional will. Whereas in *Gomillion*, invalidation of the Act will simply mean that the city will revert to its old plan. *Id.*

²⁵ See *id.* at 1.

²⁶ See Frankfurter Memorandum, *Gomillion v. Lightfoot* (November 4, 1960) (LOC, Brennan Papers, Box I: 50, case file no. 32).

²⁷ *Id.*

²⁸ See *Gomillion*, 364 U.S. at 349 (1960) (Whittaker, J., concurring) (contending, in response to Justice Frankfurter's insistence, that his view of the case "would not involve . . . the *Colegrove* problem"). Tellingly, he added this mention of *Colegrove* in response to Justice Frankfurter's memo from a week before. Cf. Whittaker draft opinion, *Gomillion v. Lightfoot 2* (November 3, 1960) (LOC, Brennan Papers, Box I: 50, case file no. 32) with Whittaker draft opinion, *Gomillion v. Lightfoot 2* (November 11, 1960) (LOC, Brennan Papers, Box I: 50, case file no. 32).

other? This is to concede that there are times when the Court is wise to stay its hand. This is Alexander Bickel's point on his reading of the Court's political question doctrine.²⁹ Yet even on this account, what makes redistricting questions the kinds of questions that the Court should leave unattended? Put another way, why assume that redistricting questions as a whole should be handled deferentially, if handled at all? It may be the situation that these cases demand a deference seldom seen in other areas of constitutional law. Yet shouldn't the Court first engage in some form of review, however minimal, before deciding to abdicate a particular redistricting controversy?

II.

The Court consistently refused to answer these questions for decades, choosing instead to offer implicit answers, in the form of short per curiam opinions.³⁰ Under Justice Frankfurter's careful watch, the force of the political question doctrine served as the Court's official position for many years.

Baker v. Carr finally brought this deferential posture to an end; in the words of Charles Black, *Baker* "put [*Colegrove*] accurately in its place."³¹ The facts in *Baker* were not unique to Tennessee. The state drew new district lines in 1901 for its state legislature, only to refuse to do so again. Such neglect, coupled with population shifts within the state, soon made these lines obsolete. And yet, the state legislature had very little incentive to intervene and draft a new plan. So it did nothing, even in the face of clear constitutional commands under the state constitution. Thus, on these facts, one meaning of *Baker* is quite pragmatic. With this case, the Court finally showed that it had the will to confront these recalcitrant political actors. Its constitutional meaning is also straight-forward: *Baker* placed redistricting questions on equal footing with all other controversies. This is not to say that voting is not different from other areas of the law; it is different.³² But as far as the majority in *Baker* was concerned, redistricting controversies could no longer receive the deference accorded to them in the past.

In saying this, it is amply clear that the Court was changing course on the question of judicial will. Although Justice Frankfurter followed a prudential course in keeping the Court away from political contests in

²⁹ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (Yale University Press 1962).

³⁰ See, e.g., *Matthews v. Handley*, 361 U.S. 127 (1959) (per curiam); *Kidd v. McCannless*, 352 U.S. 920 (1956) (per curiam); see *Baker v. Carr*, 369 U.S. 186, 202-03 (1962).

³¹ Black, *supra* note 12, at 14.

³² See Pamela S. Karlan and Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201 (1996).

Colegrove, a new majority clearly disagreed. The new majority believed that the Court *can* and *should* take a more active supervisory role in redistricting controversies. Yet this new majority was not willing to move too fast, largely out of deference to Justice Stewart's position. This is the reason we see the Court plodding through long-standing and clearly controlling precedent while carefully limiting the reach of its opinion. Justice Stewart could only go so far. Other justices, while wishing to go farther, were willing to go as far as five votes would take them. This meant that a more aggressive posture would have to wait for another day, giving way to a more cautious and patient approach.

The justices settled on a patient and measured approach early on. As soon as Justice Brennan finished his draft of the opinion, he initially circulated it to Justice Stewart, who held the decisive fifth vote. In a memorandum attached to the draft, Justice Brennan wrote the following:

You will note that I stop with the holding that the complaint states a justiciable cause of action of a denial of equal protection of the laws according to familiar equal protection criteria. As drafted it defers consideration of the application of those criteria and the matter of remedy for the determination in the first instance of the District Court after the proofs are in.³³

In its final draft, the Court did not go any further. It decided the following: that the federal courts have subject matter jurisdiction, that the case presents a justiciable question and that the litigants have standing to raise this claim.³⁴ Justice Stewart came to this position after some time and consideration. As Justice Brennan wrote in an internal memorandum to the justices, “[c]ontrary to his tentative reaction at conference, Potter now agrees with me that we should not pass on any issues except the three actually requiring decision at this time.”³⁵ Justice Stewart repeated this point about the reach of the majority opinion in his concurring opinion,³⁶ an opinion he drafted in response to Justice Douglas' own concurring opinion.³⁷

This discussion about the Court's understanding of its own role often obscures the far more important point about judicial standards. The Court was clearly struggling with this difficult question. To Justice

³³ Memorandum to Justice Stewart, *Baker v. Carr* (January 22, 1962) (LOC, Brennan Papers, Box I: 50, case file no. 6).

³⁴ See *Baker v. Carr*, 369 U.S. 186, 197-98 (1962).

³⁵ Memorandum, *Baker v. Carr* (January 27, 1962) (LOC, Brennan Papers, Box I: 50, case file no. 6).

³⁶ *Id.* at 265 (Stewart, J., concurring).

³⁷ Memorandum to Justice Brennan, *Baker v. Carr* (February 13, 1962) (LOC, Brennan Papers, Box I: 50, case file no. 6).

Brennan, the proper standard was one of rationality and whether the plan was arbitrary and capricious.³⁸ Justice Douglas believed that this was a new standard, as “[w]e have usually said ‘invidious discrimination.’”³⁹ Justice Clark sided with Justice Brennan, as the Tennessee plan resembled a “crazy quilt,” devoid of any rational explanation.⁴⁰ The Court ultimately settled on this view; policy-makers would only need to pursue a rational and legitimate state policy in order to meet constitutional proscriptions. This is a very forgiving standard, yet a necessary one in light of the difficult issues involved. Ultimately, whatever factors were taken into consideration, they must be legitimate factors, and the plan as a whole must in fact pursue them.

Justice Brennan made this point in a memorandum to the conference soon after the second oral argument in the case. In light of the curious variances in population between seemingly indistinguishable counties, Justice Brennan asked counsel for the state to explain them. The answer was quite revealing:

Answering first with the blunt claim of sovereign immunity, counsel then agreed to go to the merits of my questioning, and, as I remember it, stated that my calculations were correct, that there was no reason for the disparate treatment, and that maybe the Legislature could justify it, but he could not.⁴¹

This answer took Justice Brennan to the heart of *Baker*. “I should think that at the very least, the data show a picture which Tennessee should be required to justify if it is to avoid the conclusion that the 1901

³⁸ *Baker*, 369 U.S. at 226.

³⁹ Memorandum to Justice Brennan, *Baker v. Carr* (January 31, 1962) (LOC, Douglas Papers, Box 1266, case file no. 6).

⁴⁰ *Baker*, 369 U.S. at 254 (Clark, J., concurring) (concluding that “Tennessee’s apportionment is a crazy quilt without rational basis”).

⁴¹ Memorandum to the Conference, *Baker v. Carr* 1 (October 12, 1961) (LOC, Brennan Papers, Box I: 50, case file no. 6). The actual exchange went as follows:

The Court: Well, now, how could that be justified, if they’re both rural counties? What would be the factor which – perhaps you might justify a disparity rural-city; but how do you do it among rural counties?

Mr. Wilson: May it please the Court, we have interposed a plea of sovereign immunity here, and –

The Court: No, no. Based on the same premise that Mr. Justice Black had, that this is a justiciable question.

Mr. Wilson: Well, may it please the Court, even some of the appellees here are not authorized to speak for the State of Tennessee or to explain or to justify why the legislature has not done this. And if I could answer your Honor’s –

The Court: You said you’re not authorized, or it couldn’t be justified?

Mr. Wilson: Well, both. Maybe it couldn’t be. I don’t know. But someone would have to come here and speak for the legislature.

Oral Argument Transcript at 59-60, *Baker v. Carr* (No. 6) (October 9, 1961).

Act applied to today's facts, is simple caprice."⁴² On its face, this would be a rather lenient test, designed to account for extreme circumstances as seen across the country in the early 1960's. Once new redistricting plans came into being, the courts' role would recede accordingly.

Baker thus offered a loose and flexible standard, and in so doing it did not enshrine any one theory of representation over any other.⁴³ One may take this insight further; in the words of Professor Bickel, written in the wake of *Baker*, "in the present state of the art, the Court cannot undertake to lay down rules of legislative apportionment."⁴⁴ After all, how would a court decide from among the many relevant considerations, from equality of population to the design of a stable two-party system or the balancing of urban and rural interests?⁴⁵ A court could not decide among these considerations, short of elevating one theory of representation over all others. The Court in *Baker* recognized this difficulty and for this reason it offered to intervene only for extreme cases, instances to which Bickel referred as a "temper tantrum."⁴⁶

In the end, it is clear that Justice Brennan was looking towards population equality early on, as seen by the many charts and statistics that figured prominently in the litigation.⁴⁷ Arguments about arbitrariness and capriciousness were couched in the context of population figures, which in turn must mean that population figures mattered and deviations from equality must be explained in some reasonable way. To be clear, this is only to say that population equality was the starting point. The better question, and the one that future cases would need to sort out, was how far this understanding would be taken. As Justice Douglas remarked in his concurring opinion, "[u]niversal equality is not the test; there is room for weighing."⁴⁸ Where should the Court draw this difficult line?

III.

One obvious place to draw this line was exactly where the Court seemed to draw it in *Baker*: at rationality bounded by population equality. This is a forgiving line, for it demands only a reasonable explanation for the contours and population disparities of a given plan. In the case of Tennessee, this meant that the state needed only to demonstrate a legitimate justification for its redistricting plan. The Court did not think such

⁴² Memorandum to the Conference, *Baker v. Carr* 2 (October 12, 1961) (LOC, Brennan Papers, Box I: 50, case file no. 6).

⁴³ See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004).

⁴⁴ Bickel, *supra* note 4, at 42.

⁴⁵ See *id.*

⁴⁶ *Id.* at 43.

⁴⁷ See, e.g., *Baker*, 369 U.S. at 237 (appendix to opinion of the Court).

⁴⁸ *Id.* at 244-45 (Douglas, J., concurring).

a showing was possible, to which Justices Frankfurter and Harlan took exception.⁴⁹ Of note, this is exactly where the states understood the line to be, as did the many lower courts that considered this issue post-*Baker*.⁵⁰

Yet all too soon, the Court left *Baker* behind. In *Reynolds v. Sims*⁵¹ and its companion cases,⁵² the Court went back on the promise of *Baker* and essentially established the equipopulation principle as a constitutional requirement. As the Court wrote, “[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.”⁵³ In agreement with *Baker*, the Court explained that population must serve “of necessity” as a point of departure and the “controlling criterion for judgment” in redistricting cases;⁵⁴ the standard was one of substantial equality.⁵⁵ After all, “mathematical nicety is not a constitutional requisite,”⁵⁶ and equal protection demands that a legislature be “apportioned sufficiently on a population basis.”⁵⁷ Even further, a state may choose to “overweigh” or dilute a person’s vote if pursuant to a legitimate reason.⁵⁸ In sum, “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.”⁵⁹

This language tracks closely some notes made by Chief Justice Warren presumably before penning his first draft of the *Reynolds* opinion. In his notes, he began by recognizing quite properly that “[t]here can be no formula for determining whether equal protection has been afforded.”⁶⁰ The Chief Justice was clear about generalities. For example, the goal was “fair representation of units of government,” which immedi-

⁴⁹ *Id.* at 266-269 (Frankfurter, J., dissenting); *id.* at 330-333 (Harlan, J., dissenting).

⁵⁰ See Luis Fuentes-Rohwer, *Baker’s Promise, Equal Protection, and the Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353 (2002).

⁵¹ 377 U.S. 533 (1964).

⁵² See *Davis v. Mann*, 377 U.S. 678 (1964); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.* 377 U.S. 713 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Roman v. Sincoc*, 377 U.S. 695 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964).

⁵³ 377 U.S. at 565.

⁵⁴ *Id.* at 567.

⁵⁵ See *id.* at 568.

⁵⁶ *Id.* at 569; see *id.* at 577 (“Mathematical exactness or precision is hardly a workable constitutional requirement.”).

⁵⁷ *Id.* at 569.

⁵⁸ See *id.* at 579 (“So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.”).

⁵⁹ *Id.* at 577.

⁶⁰ Notes Made by Chief Justice, *Reynolds v. Sims* (LOC, Warren Papers, Box 608, case file no. 508).

ately placed the principle of equality at the heart of his inquiry. This also meant that the Court must eschew a “rigid rule,” as “[t]here must be some room for play in the joints.”⁶¹ More specifically, a state plan passes constitutional muster so long as the state makes an “*effort to achieve equality of representation.*”⁶²

To this point, the Court was in tune with its *Baker* opinion. But this was a mirage, empty words that served to hide the larger import of the *Reynolds* opinion. Reassurances aside, and to be fair, the Court spent a good portion of its opinion doing what *Baker* failed to do: setting out the universe of legitimate reasons that may guide redistricters when departing from strict population equality. But in the end, the Court left very little room for experimentation. For example, a state may not depart from equality on the basis of “history, nor economic or other sorts of group interests;”⁶³ for geographic considerations;⁶⁴ or while seeking to replicate the federal analogy.⁶⁵ A state *may* deviate from strict equality out of respect for political subdivisions, yet in doing so “the equal population principle [can] not [be] diluted in any significant way.”⁶⁶ Similarly, a state may seek to “insur[e] some voice to political subdivisions, as political subdivisions;”⁶⁷ yet cannot submerge population while doing so.⁶⁸

In drawing these lines where it did, the Court made clear that its power stretches as far as a majority of the Court will stretch it.⁶⁹ These lines are curious largely because population equality is not in any way demanded by the equal protection clause, by history, tradition, or precedent.⁷⁰ And yet, the tone of the Court’s opinion, its grandiose yet matter-of-fact air, belies these criticisms. To the Court, in fact, equality appears to be a logical extension of the Court’s initial incursion into the thicket in

⁶¹ *Id.*

⁶² *Id.* (emphasis added).

⁶³ *Id.* at 579-80.

⁶⁴ *See id.* at 580.

⁶⁵ *See id.* at 573.

⁶⁶ *Id.* at 578.

⁶⁷ *Id.* at 580.

⁶⁸ *See id.* at 581.

⁶⁹ *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713 (1964).

⁷⁰ The critics on this point span the political spectrum. *See, e.g., Baker*, 369 U.S. at 302-24 (Frankfurter, J., dissenting); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980); Lani Guinier and Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in *REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE* 207, 208 (E. Joshua Rosenkranz & Bernard Schwartz eds., W.W. Norton & Company 1997) (“One person, one vote . . . is not an end in itself or an equation of democracy and simple majority rule, as many members of the current, post-Brennan Court believe.”); Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 *MICH. L. REV.* 711, 773 (1963); Michael McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 *HARV. J. L. & PUB. POL’Y* 103, 107 (2000).

Baker.⁷¹ After all, under a representative government, “each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”⁷² This is heady stuff, the stuff of legend and classical tracts in political theory. Yet the Court was only getting started: “To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”⁷³ Besides, “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”⁷⁴ And in case we missed it the first time: “Again, people, not land or trees or pastures, vote.”⁷⁵

Without a doubt, the Court in *Reynolds* and its companion cases moved away from the promise of *Baker* at a very fast clip. After these decisions, at least one house in every state legislature, sometimes both, were essentially declared unconstitutional *sub silentio*, prompting a leading commentator to remark, “Courts not only have entered the thicket, they occupy it.”⁷⁶ And they still do. Far more telling, however, is the fact that the occupation took place under a questionable and clearly debatable reading of constitutional sources. Equal population is a standard whose constitutional pedigree is hardly evident. To be fair, one might argue that the Court in *Reynolds* made a reasonable judgment in light of the problem and the issues involved. But we must never forget that, ultimately, the Court pulled this standard out of thin air.⁷⁷

IV.

Once the Court settled on the concept of equal population as its guiding principle, it became easy to forget the reasons that initially

⁷¹ I make this point cautiously, as the Court itself might disagree with the characterization. After all, Justice Brennan initially responded to Justice Frankfurter’s dissent by adding a passage to his *Baker* draft that Chief Justice Warren would later repeat in *Reynolds*: “Beyond noting that we cannot say the District Court will be unable to fashion relief if violations of constitutional rights are found, it is improper at this stage of these proceedings to consider what remedies might be available if appellants prevail at the trial.” Memorandum, *Baker v. Carr* (February 1, 1962) (LOC, Brennan Papers, Box I: 50, case file no. 6); see *Reynolds v. Sims*, 377 U.S. 533, 556 (1964). To the *Reynolds* Court, this passage meant that the question of standards – understood in a formulaic sense, as demanding the existence of direct, clear guidance – remained unaddressed.

⁷² *Reynolds*, 377 U.S. at 565 (1964).

⁷³ *Id.* at 567.

⁷⁴ *Id.* at 562.

⁷⁵ *Id.* at 580.

⁷⁶ Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 210 (1964); see Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1301 (2002) (“Measured by their reach and sweep, the one-person, one-vote cases may represent the Court’s most dramatic intervention into politics in its history.”).

⁷⁷ To be clear, this is not intended as a criticism of the Court or the standard itself but, rather, as a description of the Court and its work on this score.

brought the Court into the thicket. It bears repeating: all along, the early reapportionment cases sought expression for the sensible goal of “fair and effective” representation.⁷⁸ *Reynolds* explained as much, even while implicitly endorsing two further goals, formal political equality and majority rule.⁷⁹ This is a worthy goal, yet it is also an intractable one.⁸⁰ What makes a redistricting plan “fair” or “effective,” for example, and how would a court go about measuring so? For this reason, courts must tread these difficult waters carefully, cognizant of their limitations and of the difficulties that inhere in this area. Judicial humility should be the order of the day.⁸¹

I do not mean to suggest that the case law post-*Reynolds* was exclusively concerned with issues of representation writ large. Early on, the Court continued to struggle with the boundary problem and particularly with the doctrinal limits of population equality. In 1967, for example, the Court held in three separate cases, per Justice Douglas, that population equality was not demanded for local government elections.⁸² Yet the following year, in *Avery v. Midland County*,⁸³ the Court extended for the first time the equality principle to local governing bodies. This example highlights first and foremost the judicial struggle over the equipopulation principle and its reach across the many layers of government. In subsequent years, the Court strengthened the principle as applied to congressional districting plans,⁸⁴ but relaxed it for state plans.⁸⁵

Yet even as the Court fine-tuned its *Reynolds* equipopulation jurisprudence, the concept of representation and its practical application across the multiple spheres and structures of American politics remained at the heart of the Court’s work. A vivid example of this continued attention is found in cases where the Court examined whether the use of floterial districts and multimember districts, combined with single-mem-

⁷⁸ *Reynolds*, 377 U.S. at 565; see Dixon, *supra* note 76, at 210 (“Fair representation is the ultimate goal.”).

⁷⁹ See Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?*, 33 UCLA L. REV. 257, 265 (1985).

⁸⁰ See, e.g., HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (University of California Press 1967); NANCY MAVEETY, *REPRESENTATION RIGHTS AND THE BURGER YEARS* (University of Michigan Press 1991).

⁸¹ See Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation,” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527 (2003).

⁸² See *Moody v. Flowers*, 387 U.S. 97 (1967); *Sailors v. Board of Education*, 387 U.S. 105 (1967); *Dusch v. Davis*, 387 U.S. 112 (1967).

⁸³ 390 U.S. 474 (1968).

⁸⁴ See *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969).

⁸⁵ See *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973).

ber districts, violated the Constitution.⁸⁶ And in the meantime, a much larger problem lay doctrinally dormant, the question of the constitutionality of the gerrymander. This was the question branded by Justice Douglas as “the other half of *Reynolds v. Sims*.”⁸⁷ In fact, the question of the gerrymander presented the Court with a question about “fair and effective representation” in its truest form.

The Court was keenly aware from the time it entered the thicket in *Baker* of the gerrymander lurking in every corner. Yet it refused to consider the constitutional issue time and again.⁸⁸ For one, the Court properly recognized that the task of drawing district lines was both difficult and devoid of “fair” answers. This is a difficult task because politics are part and parcel of the redistricting process. As such, the central claim against a gerrymandered plan is not that political considerations infused this process, but that politics overwhelmed all other considerations. Similarly, the Court seemed to recognize that all redistricting is gerrymandering,⁸⁹ as the central purpose of drawing lines is to achieve a “more ‘politically fair’ . . . result”⁹⁰ than otherwise would result from at-large elections. If the lines could make a resulting plan more politically fair, of course, they could also fall short and reward a party with seats incommensurate to their voting strength in a given election.

These considerations in mind, and perhaps naively, the Court sought to monitor the area cheaply. Soon after *Reynolds*, it bypassed myriad opportunities to render a definitive constitutional ruling on the gerrymandering question,⁹¹ choosing instead to apply pressure on redistricting actors through the equipopulation principle.⁹² But this was not nearly enough, at least in order to placate the concerns of many, including members of the Court themselves. This was clearly not the way to achieve

⁸⁶ See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Mahan v. Howell*, 410 U.S. 315 (1973).

⁸⁷ *Whitcomb*, 403 U.S. at 176 (Douglas, J., dissenting in part and concurring in the result in part).

⁸⁸ For courts who so understood the Court’s doctrinal stance, see *Cummings v. Meskill*, 341 F.Supp. 139, 149 (D. Conn. 1972) (citing *Cousins v. City Council of Chicago*, 322 F.Supp. 428 (N.D.Ill.1971) and *Skolnick v. Mayor & City Council of Chicago*, 319 F.Supp. 1219, 1229 (N.D.Ill.1970)); see also *id.* (contending that *Ely v. Klahr*, 403 U.S. 108 (1971) and *Whitcomb*, 403 U.S. 124 “also seem to indicate that claims based purely on political gerrymandering would be extremely difficult to sustain if justiciable at all”).

⁸⁹ See ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 462 (Oxford University Press 1968).

⁹⁰ *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

⁹¹ See, e.g., *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Wells v. Rockefeller*, 394 U.S. 542, 544 (1969).

⁹² See *Karcher v. Daggett*, 462 U.S. 725 (1983); *Cox v. Larios*, 124 S.Ct. 2806, 2808 (2004) (contending that “the equal population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength”); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1645 (1993).

the goal of fair and effective representation that anchored the Court's initial intervention in *Baker*. The Court ultimately addressed the question head on – and of necessity the general question of group representation – in *Davis v. Bandemer*.⁹³ In so doing, *Bandemer* was part and parcel of the Court's reapportionment revolution.⁹⁴

And yet, by most accounts, *Bandemer* was a disaster.⁹⁵ The problem itself was difficult enough: how to operationalize a working standard for judging gerrymandering claims? This problem was and remains a difficult question because at its root, this is a structural question about the concept of representation.⁹⁶ Once all the votes are counted, what should the resulting representative body look like? Short of a move to a system of proportional representation,⁹⁷ answers are hardly evident or universal. It is thus no surprise to see the Court struggle as it did, splintering along various axes while failing to offer clear guidance to future courts and state actors. This struggle foretold the fortune of the gerrymander in court, as seen eighteen years later in *Vieth v. Jubelirer*.⁹⁸

V.

Vieth is only the most recent installment of the Court's difficult and contentious struggle to define and implement a regime of fair and equal representation. The case offers a paradigmatic example of the difficulties that inhere in the gerrymandering area, as well as the existing judicial ambivalence in policing the famed thicket. It also displays an impatience seldom seen in our constitutional law. In an era when the Court feels quite comfortable policing innumerable fields of social policy, *this* field gives the Court great pause. Yet the Court never explains with any precision why this is so. Instead, it simply professes an inability to develop judicially manageable standards. But this is hardly enough. In light of the example offered by the Court's initial entry into the thicket in *Baker* and its subsequent development of clearer standards in *Reynolds*, as well as the general development of standards writ large in constitutional law, this argument has very little purchase. If the Court could develop and enforce a standard post-*Baker*, there is very little rea-

⁹³ 478 U.S. 109, 125 (1986) (referring to the "desirability of fair group representation").

⁹⁴ See Gordon E. Baker, *The Unfinished Reapportionment Revolution*, in *POLITICAL GERRYMANDERING AND THE COURTS* 11 (Bernard Grofman ed., 1990).

⁹⁵ See *Vieth v. Jubelirer*, 541 U.S. 267, 283 (2004) (citing numerous sources).

⁹⁶ This insight raises questions about recent calls for more competitive districts. After all, under competitive districts, representation might be more difficult to achieve as a working goal. See Persily et al., *supra* note 76, at 1320-21.

⁹⁷ Sandy Levinson makes this point in Levinson, *supra* note 79.

⁹⁸ 541 U.S. 267, 283 (2004).

son to suspect that it could not do the same now.⁹⁹ Something else must be at work in the case.

One answer may be, as I have argued elsewhere, that the *Vieth* plurality is expressing an implicit desire for the Court to vacate the field of politics once and for all.¹⁰⁰ In articulating an inability to develop standards, the plurality points the doctrine back to *Colegrove* and traditional accounts of the political question doctrine. In this vein, it is also true as a general proposition that the Court as an institution “seems firm in its trust of both the structure and outcomes of the political process.”¹⁰¹ The remainder of this essay makes two related points. First, it argues that *Vieth*—and *Bandemer*, for that matter—is a modern rendition of the same issues that plagued the Court in *Baker*. Second, it contends that the implications of a view of the Court as democratic engineer in charge of regulating the structure of our democracy should give us great pause.

The first point looks with some care to *Baker v. Carr* and the reasons that led the Court to intervene. *Baker* makes the most sense—and it’s in fact indispensable—when viewed as a redistricting lock-out case,¹⁰² in which the incumbent legislators refuse to draw a new districting plan in order to protect their future electoral success. The relevant actors in Tennessee did not act because any action would place their legislative tenures in peril. Their inaction thus amounted to a bipartisan gerrymandering of sorts, or a “silent gerrymander,”¹⁰³ for the goal was to protect those already in power irrespective of party affiliation. In response to these extreme facts, the Court could make very modest demands, and it did precisely that. Under *Baker*, policy-makers would only need to pursue a rational and legitimate state policy in order to meet constitutional proscriptions. This is a very forgiving standard, yet a necessary one in light of the difficult issues involved.

This argument takes us directly to the Court’s handling of the gerrymandering question. From the beginning, the Court displayed a great deal of self-restraint in this area, perhaps out of due deference to the difficult questions presented. This hesitancy should not in any way be

⁹⁹ See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 242 (“As the majority correctly perceived, the decision that political gerrymandering claims are justiciable flows ineluctably from the Court’s earlier judgments that cases raising claims of population inequality among districts and of racial gerrymandering are justiciable.”)

¹⁰⁰ See Fuentes-Rohwer, *supra* note 20.

¹⁰¹ See Luis Fuentes-Rohwer, *Trusting Democracy* 23 (draft on file).

¹⁰² See Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN L. REV. 643 (1998). In this context, I prefer Bruce Cain’s formulation of the problem as a lockout, which shuts minor parties out of the process altogether, rather than lockups, which serve to disadvantage them. See Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1601 (1999).

¹⁰³ Leroy C. Hardy, *Considering the Gerrymander*, 4 PEPP. L. REV. 243, 249 (1977).

interpreted as the Court's implicit agreement with the underlying issues, for it was often coupled with clear misgivings about the wisdom of the gerrymander. *Bandemer* offers a perfect example, for the population numbers at issue there were not of an egregious kind, and the relevant political actors could offer legitimate and rational reasons for drafting the plan as they did. And yet the Court also made clear its worries about the consistent degradation of voters' influence in the political process,¹⁰⁴ the effective denial of influence,¹⁰⁵ or the "continued frustration" of majority will.¹⁰⁶ This language makes sense in the context of *Baker v. Carr* and the reasons for which the Court came into the thicket. The problem then was the fact that a voting minority was able to hold onto power indefinitely.

In this way, *Baker* offers a direct link to the recent Pennsylvania redistricting case, *Vieth v. Jubelirer*. *Vieth* fits under *Baker's* umbrella on a reading of *Baker* as failing to demarcate the universe of legitimate and illegitimate reasons that redistricting actors may follow. This is a structural reading of *Baker*, and I find it particularly attractive. In this vein, *Vieth* would only need to follow the path of *Shaw v. Reno*¹⁰⁷ and conclude that while political considerations may infuse the redistricting process, it must not overwhelm it. Put another way: as in *Baker*, where the Court concluded that the challenged redistricting map could not be explained in a rational and logical way, the Court would only need to conclude that extreme partisanship, like extreme racialism, is an illegitimate state interest in order to hold for the *Vieth* plaintiffs. Yet the Court was clearly uninterested in seriously engaging this or similar arguments.

Vieth v. Jubelirer is difficult to take at face value, and not only because the Court has been all too happy to enter into similar subfields within the law of democracy in the recent past.¹⁰⁸ Far more difficult to explain is the fact that *Vieth* raises many of the questions opened up to judicial review in *Baker*. The point then, as now, is how far the Court will go in regulating the law of democracy. To be sure, *Vieth* only required a judicial recognition of any political limits on redistricting actors. That was *Baker v. Carr*, and it was also what the plaintiffs were asking the Court to do in *Vieth*. Yet, while in *Baker* the Court recognized some loose and flexible limits, the *Vieth* Court could not reach consensus on any such limits. Further, the claim in *Vieth*, as in *Baker* and its progeny,

¹⁰⁴ See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).

¹⁰⁵ See *id.* at 133.

¹⁰⁶ *Id.*

¹⁰⁷ 509 U.S. 630 (1993).

¹⁰⁸ See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); see Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663 (2004).

was grounded on the tension between the notion of fair representation and partisan districting. It is hard to draw a precise and coherent line between the two cases. Although the Court in *Baker* chooses to intervene, the Court in *Vieth* chooses not to. This leads me to the conclusion that the central question in the case must be one of judicial will.

The second point takes issue with the implications of this conclusion. We live at a time when, in the words of Rick Pildes, "it has become routine for the Court to conclude that constitutional law should determine the institutional arrangements of democracy."¹⁰⁹ The Court is at the epicenter of our democracy, regulating and fine-tuning the structuring of our democratic institutions. This is fine as a general proposition, I suppose, yet it quickly breaks down as a descriptive matter. After all, one can make a very sensible claim for judicial intervention in many spheres, and the gerrymandering area appears to be a leading candidate. The classic defense here is John Hart Ely's elegant argument for ensuring that the channels of political change remain open and free.¹¹⁰ One could suggest, as did Professor Ely, that the gerrymandering context offers a paradigmatic example of his thesis, with insiders rigging the system in order to insulate themselves from the electorate. And yet the Court refuses to intervene. Why the hesitation?

This question is further complicated by the Court itself and its vision of democracy at the heart of its electoral jurisprudence. The Court's view of democracy in other fora, such as the blanket primary and third party cases, is a view of our politics as disorderly and unstructured. Under such assumptions, the Court takes on the role of a white knight, willing and able save us even from ourselves.¹¹¹ This is a troubling and debatable view of the judicial role, and I do not intend to endorse it in any way. Rather, I wish to underscore how the Court refuses to apply a similar view of our politics to redistricting, a forum where chaos and disorder run rampant.¹¹² If we took the Court at its word elsewhere, we

¹⁰⁹ Pildes, *supra* note 1, at 177.

¹¹⁰ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (Harvard University Press 1980).

¹¹¹ See Pildes, *supra* note 1, at 186.

¹¹² If the recent episode in Texas does not suffice for support of this point, see also Andrew Gelman and Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 541 (1994):

In 1982, the Michigan Supreme Court imposed a redistricting plan on their state that was generally believed to favor the Republicans. The Democrats' alternative measure had to pass the legislature with a two-thirds vote, which was difficult even though they had a majority in both houses. Democratic leaders tried to sneak through the legislation by gutting the contents, but not the title, of an irrelevant bill at the last minute and inserting redistricting legislation. The Republicans discovered this ploy, making the situation extremely tense. In the heat of the long debate during this midnight session, a Democratic senator collapsed. Paramedics were called in, but he refused to leave the Senate floor before the vote. In a classic case of political hardball, a Republican senator used parliamentary procedure to delay the vote by

have reason to expect strong and aggressive judicial intervention in the redistricting context as well. Instead, we get *judicial* chaos and disorder, as demonstrated by the badly splintered *Vieth* opinion. Again, how to explain it?

This point is muddied by yet another complication. In deciding these cases, members of the Court are guided by their world views and cultural assumptions about the institutional arrangements of American-style Democracy.¹¹³ Yet these assumptions and world-views are not universally shared. Consider, for example, *California Democratic Party v. Jones*,¹¹⁴ where the Court examined California's blanket primary. Thirteen federal judges examined the primary, and six of them thought the primary constitutional, while seven of them concluded that it was not. It so happens that the seven who sided against the primary sit on the U.S. Supreme Court, and therefore the citizens of California were deprived of the very institution they approved via initiative four years earlier. This is a curious democratic outcome, to say the least.

* * *

In the end, the essay closes on an ambivalent note. In *Vieth*, the Court refuses to intervene in a gerrymandering dispute, feigning an inability to formulate judicially manageable and discernible standards. This position is open to criticism, or so this essay argues, for *Vieth* is part and parcel of the Court's reapportionment revolution. One question from *Vieth* is why the Court refuses to answer questions that fit squarely within its purview. An easy answer is that the Court's refusal to domesticate the gerrymander stems not from doctrinal or prudential considerations but a manifest unwillingness to do so. If and when the Court decides to plunge into this particular abyss, however, it is imperative that we ask a prior question. In light of the Court's general performance in the field of democracy, and its propensity to wield its power in accordance to its idiosyncratic views of the political process and the maladies that corrupt it: do we really want the Court doing our bidding?

insisting that the legal description of all 148 legislative districts and their boundaries be read into the record. Despite his failing health, the Democratic senator stayed through the entire proceeding, and his party won the vote.

¹¹³ See Pildes, *supra* note 1, at 166.

¹¹⁴ 530 U.S. 567 (2000).