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## INSTRUMENTALIST AND HOLMESIAN VOICES IN THE RHETORIC OF REAPPORTIONMENT: THE OPINIONS OF JUSTICES BRENNAN AND FRANKFURTER IN *BAKER V. CARR*

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“The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court.”<sup>1</sup>

“To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omniscience to judges.”<sup>2</sup>

## I. INTRODUCTION

In his autobiography, Chief Justice Earl Warren described *Baker v. Carr*<sup>3</sup> as “the most important case of [his] tenure on the Court.”<sup>4</sup> Following *Brown v. Board of Education*<sup>5</sup> by eight years, *Baker* was the second “blockbuster” case of the Warren Court.<sup>6</sup> Warren felt that, if the progeny of *Baker* had preceded *Brown*, *Brown* would have been unnecessary.<sup>7</sup> The *Baker* case would become one of “the most crucial ever taken up”<sup>8</sup> by the U.S. Supreme Court and “would forever change the nature of politics in the United States.”<sup>9</sup>

Before 1960, the Supreme Court rarely had shown concern for the electoral and legislative processes,<sup>10</sup> instead choosing to stay out of “this political thicket,”<sup>11</sup> and the country had continued to suffer from problems related to these processes. At the time of *Baker*, almost all state legislatures were malapportioned.<sup>12</sup> Many state legislators refused to reapportion their districts, and most legislatures were “backwater relics of past political deals.”<sup>13</sup> Often lawmakers came from rural areas and frustrated the interests of voters

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1. *Baker v. Carr*, 369 U.S. 186, 226 (1962) (Brennan, J., writing for the Court).
  2. *Id.* at 268 (Frankfurter, J., dissenting).
  3. *See generally id.* at 186.
  4. EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 306 (1977).
  5. 347 U.S. 483 (1954).
  6. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 199 (2000).
  7. *See* John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974). Ely clerked for Earl Warren. *Id.* at 11.
  8. ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 379 (1997).
  9. KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* 175 (1993).
  10. ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 114 (1968).
  11. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).
  12. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105 (2000). Delegations to the House of Representatives suffered from malapportionment, too. *Id.*
  13. Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote, in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE* 207, 219 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

in the cities and suburbs, particularly with regard to civil rights.<sup>14</sup> By 1960, the U.S. population had become much more urban than it had been at the beginning of the twentieth century.<sup>15</sup> In 1900, 39.6% of people in the United States lived in urban areas, but, by 1960, 63.1% lived in urban areas.<sup>16</sup> A 1961 University of Virginia study indicated that across the country urban voters had less than half of the representation of rural voters.<sup>17</sup> In Florida, one of the most poorly apportioned states, approximately nineteen percent of the population controlled the majority in the state legislature.<sup>18</sup> After the 1950 census, the 15,000 residents of three rural counties in Northern California had the same representation in the state senate as the 7,000,000 residents in Los Angeles County.<sup>19</sup> To make matters worse, the drawing up of districts often involved racial gerrymandering.<sup>20</sup>

By the 1950s, voters in Tennessee had given up appealing to the members of their legislature for voting reform.<sup>21</sup> With the population growth in urban areas, rural white voters had more political say than urban black voters.<sup>22</sup> Voters in some Tennessee counties had eight, ten, or twenty times as much representation as voters in other counties.<sup>23</sup> Although the Tennessee Constitution had required the legislature to draw district boundaries based on population,<sup>24</sup> the rural legislators who held the power had no incentive to act.<sup>25</sup> Unfortunately for the urban voters, no mechanism for judicial enforcement of reapportionment existed in state court.<sup>26</sup> In light of a “crazy quilt”<sup>27</sup> of legislative districts, systematic in nature,<sup>28</sup> that was in place, some Tennessee voters eventually turned to the federal courts, including the Supreme Court, for justice.<sup>29</sup>

With its decisions in *Baker* and the ensuing cases, the Supreme Court “sent an earthquake through a political system that was already being tossed and turned in so many directions”<sup>30</sup> and began the process of putting an end

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14. *Id.*

15. McConnell, *supra* note 12, at 104-05.

16. U.S. Census Bureau, *Table 4 - Population: 1790 to 1990* (Aug. 1993), <http://www.census.gov/population/censusdata/table-4.pdf>.

17. CRAY, *supra* note 8, at 380.

18. *Id.*

19. *Id.* at 381. Earl Warren eventually recognized how malapportioned his home state of California was. WARREN, *supra* note 4, at 309-10.

20. CRAY, *supra* note 8, at 381.

21. JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 388 (2006).

22. *Id.*

23. COX, *supra* note 10, at 115.

24. McConnell, *supra* note 12, at 104.

25. *Id.* at 105.

26. *Id.* at 104.

27. *Baker*, 369 U.S. at 254 (Clark, J., concurring).

28. McConnell, *supra* note 12, at 105.

29. See NEWTON, *supra* note 21, at 388.

30. Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1351 (2002). The turbulent era of *Baker* and progeny included the assassination of President John Kennedy, the civil rights movement, the 1964 Civil Rights Act, the 1965 Voting Rights Act, the Vietnam War, the 1968 presidential election, and other major occurrences. *Id.* at 1306.

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to rural domination of state legislatures.<sup>31</sup> *Baker* itself was a major step down the road toward the idea of “one person, one vote,”<sup>32</sup> which the Court would articulate for the first time a year later in *Gray v. Sanders*.<sup>33</sup> In *Reynolds v. Sims*, only two years after *Baker*, Chief Justice Warren would observe, “Legislators represent people, not trees or acres.”<sup>34</sup> The resulting “reapportionment revolution”<sup>35</sup> of *Baker* and its progeny would bring attention to urban voters and their problems.<sup>36</sup>

Unlike cases such as *Brown v. Board of Education*<sup>37</sup> that triggered resistance, *Baker* triggered a paradigm shift in reapportionment that has been widely popular.<sup>38</sup> The public greatly favored the decision.<sup>39</sup> Indeed, the public understood the concept of representative democracy<sup>40</sup> and, in the years after *Baker*, was eager to use, and did use, the federal courts to challenge districting schemes.<sup>41</sup> Recognizing the potential of *Baker* for addressing the problems of urban areas, the Kennedy Administration supported the deci-

31. POWE, *supra* note 6, at 203.

32. For a discussion of the meaning of this now-famous phrase, see generally Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002).

33. 372 U.S. 368, 381 (1963) (considering, in light of the Equal Protection Clause of the Fourteenth Amendment, Georgia’s county unit system of nominating officials).

34. 377 U.S. 533, 562 (1964) (considering, in light of the Equal Protection Clause of the Fourteenth Amendment, malapportionment of both houses of the Alabama Legislature). For the Court’s treatment of Georgia’s apportionment of votes for the U.S. House of Representatives, see *Wesberry v. Sanders*, 376 U.S. 1 (1964), which used the command of Article I, Section 2 of the Constitution that congressional representatives be chosen “by the People of the several States.”

35. See generally GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* (1966).

36. POWE, *supra* note 6, at 203. In bringing attention to urban voters, the Court arguably negatively impacted local communities, both urban and rural. James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1239-43 (2002). Some political theory helps to explain this point. Liberal theories of politics suggest that the individual enters politics to gain the ends that he or she seeks and may join groups to achieve those ends. *Id.* at 1240. In contrast, communitarian and civic republican theories of politics suggest that the individual exists within a meaningful political community and that membership within that community is part of self-identity, rather than a means to an end. *Id.* at 1240-41. Liberal theories reflect a thinner view of representative democracy than communitarian and civic republican theories. *Id.* at 1240. The Court’s focus on one person, one vote after *Baker*, oriented more toward numbers rather than pre-existing local groups, was more commensurate with a liberal theory of politics. See *id.* at 1241-43. However, given various nationally-oriented forces in the United States such as media organizations and other business entities, the shrinking of localism may have been inevitable. See *id.* at 1261-64. Regardless, simple, homogeneous communities are no longer the norm. See BAKER, *supra* note 35, at 102.

37. 347 U.S. 483 (1954).

38. Guinier & Karlan, *supra* note 13, at 207. See also POWE, *supra* note 6, at 203; Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1412-13 (2002). Of course, not everyone supported the decision. Several congressmen from the South were especially critical. BAKER, *supra* note 35, at 7. For example, Senator Richard B. Russell of Georgia described the decision as “another major assault on our constitutional system.” BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 426 (1983).

39. Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1380 (1987). However, not all academics viewed the decision so favorably. *Id.*

40. POWE, *supra* note 6, at 203.

41. See DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* 30 (1997).

sion.<sup>42</sup> At his first press conference after the Court announced the decision, President John Kennedy observed, “The right to fair representation and to have each vote count equally is, it seems to me, basic to the successful operation of a democracy.”<sup>43</sup> Attorney General Robert Kennedy called the decision “a landmark in the development of representative government.”<sup>44</sup>

Not only was the case popular, but it was a judicial success as well.<sup>45</sup> In the early 1960s, the legislative bodies of forty-eight states had population variances between the size of the smallest and largest districts in a given state of over fifteen percent.<sup>46</sup> After reapportionment and the 1970 census, merely fourteen states had this type of population variance.<sup>47</sup> All but three states reapportioned their legislatures, and nineteen states redrew the lines for their congressional districts.<sup>48</sup> Within several years of *Baker* and its progeny, almost all legislative institutions in the United States had reorganized themselves to comply with the new case law.<sup>49</sup>

Indeed, some of the work toward fairer reapportionment began soon after *Baker*. Hours after the announcement of the *Baker* decision, attorneys filed a redistricting lawsuit in Georgia.<sup>50</sup> Several days later, attorneys filed a similar suit in Alabama.<sup>51</sup> Within one year of *Baker*, citizens in over thirty states challenged malapportioned districts,<sup>52</sup> and within four years of the case, citizens in forty-six states challenged malapportioned districts.<sup>53</sup>

As with other major Supreme Court cases, *Baker* featured rhetoric from highly influential justices, two of whom in this case were Justice William Brennan and Justice Felix Frankfurter. Justice Brennan would write the groundbreaking opinion for the Court that would be part of “the critical mass of the Brennan legacy.”<sup>54</sup> Decades later, a noted conservative on the Supreme Court, Justice Antonin Scalia, would describe the progressive Brennan as “probably the most influential justice of the [twentieth] century.”<sup>55</sup> Justice Frankfurter would write a scathing dissent that would defend the status quo staunchly.<sup>56</sup> Frankfurter, a former professor at Harvard Law

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42. POWE, *supra* note 6, at 204.

43. *Id.*

44. SCHWARTZ, *supra* note 38, at 425.

45. Guinier & Karlan, *supra* note 13, at 207; Gerken, *supra* note 38, at 1412.

46. Guinier & Karlan, *supra* note 13, at 211.

47. *Id.*

48. Persily, Kousser & Egan, *supra* note 30, at 1301. Such line redrawing did not prevent those in charge of creating districts from drawing the lines in their own favor. *Id.* at 1351. Partisan gerrymandering has continued to occur decennially. *Id.*

49. *Id.* at 1301.

50. CRAY, *supra* note 8, at 384.

51. *Id.*

52. Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 36 (1997).

53. Persily, Kousser & Egan, *supra* note 30, at 1301.

54. *Justice Brennan Remembered – Part 1*, PBS NEWSHOUR, July 24, 1997, available at [http://www.pbs.org/newshour/bb/law/july-dec97/brennan\\_7-24.html](http://www.pbs.org/newshour/bb/law/july-dec97/brennan_7-24.html) (comments of Joshua Rosenkranz).

55. *Justice Brennan Remembered – Part 2*, PBS NEWSHOUR, July 24, 1997, available at [http://www.pbs.org/newshour/bb/law/july-dec97/brennan\\_7-24a.html](http://www.pbs.org/newshour/bb/law/july-dec97/brennan_7-24a.html).

56. Shortly after the decision in the case, Frankfurter sent a note to Justice John Marshall Harlan, in which Frankfurter said that the Court’s majority had not “‘appreciate[d] the intrinsic and acquired majesty of the Court’s significance in the affairs of the country.’” THE SUPREME COURT IN CONFERENCE

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School, arguably “was the most qualified [Supreme Court] appointee of the [twentieth] century.”<sup>57</sup>

Although the case contained various opinions, the opinions of Brennan and Frankfurter were particularly important, especially because of how well they contrasted the respective judicial philosophies of their authors. Brennan’s instrumentalist philosophy in the majority opinion looked to use the federal courts to promote justice for urban voters, while Frankfurter’s Holmesian philosophy in a lengthy dissent aimed to pass the problem of fair representation along to Congress for resolution.

This Article takes a retrospective look at how the two differing judicial philosophies of Brennan and Frankfurter, instrumentalist and Holmesian in nature, vied to influence the outcome of *Baker v. Carr*, one of the most important Supreme Court cases of the twentieth century. To do so, the Article initially will provide an overview of four major judicial philosophies, including instrumentalism, Holmesianism, formalism, and natural law. Consideration of all four judicial philosophies will provide for a more thorough understanding of instrumentalism and Holmesianism. Next, the Article will offer background on the *Baker* case. After offering background on the case, the Article will identify the various philosophical ingredients at work in the opinions of Brennan and Frankfurter. Finally, the Article will make some observations regarding the judicial philosophies at work in the two main opinions in *Baker*.

## II. JUDICIAL PHILOSOPHIES

Prior legal scholarship has identified four major judicial philosophies. Such philosophies include instrumentalism, Holmesianism, formalism, and natural law.<sup>58</sup> As noted above, although instrumentalism and Holmesianism are the two approaches that will inform the analysis in the present Article, this section of the Article will provide an overview of all four approaches to judicial decision-making to explain instrumentalism and Holmesianism in contrast to the other approaches.

### A. Instrumentalism

Instrumentalism is a judicial philosophy that is concerned with results.<sup>59</sup> Instrumentalist judges see law as a means to an end.<sup>60</sup> They believe that law advances moral concepts and that, through their work, judges help achieve

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(1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 851-52 n.71 (Del Dickson ed., 2001).

57. POWE, *supra* note 6, at 6.

58. Charles D. Kelso & R. Randall Kelso, *Judicial Decision-Making and Judicial Review: The State of the Debate, Circa 2009*, 112 W. VA. L. REV. 351, 352 (2010).

59. See R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 980 (1996).

60. *Id.*

justice.<sup>61</sup> Such judges are willing to consider social policy, especially when leeway in the law exists.<sup>62</sup> For instance, no pre-existing law may cover the specific situation at hand, ambiguities in the applicable law may exist, or several rules of law arguably could apply in one case.<sup>63</sup>

Contrasted with Holmesian judges, instrumentalist judges are less likely to defer to other branches of government.<sup>64</sup> Instrumentalists see the court system as a “co-equal third branch” of the government and reject the idea that judges only should strike down legislation that clearly violates the Constitution.<sup>65</sup> In assuming a role in formulating public policy, instrumentalist judges are comfortable with devising tests of their own because such tests offer more flexibility in addressing the facts of a particular case.<sup>66</sup> When explicitly formulating and evaluating rules of law, instrumentalists are concerned that the rules have specific purposes, so when the purpose for a rule is gone, the rule should no longer persist.<sup>67</sup> Social purpose, not pure logic, is the key.<sup>68</sup>

Instrumentalists make broadly-based historical investigations to come to their legal conclusions.<sup>69</sup> They look at both text and context.<sup>70</sup> They do not allow *stare decisis* to control when they feel that prior law is wrong for the present time.<sup>71</sup> Consequently, they see the Constitution as an evolving document.<sup>72</sup> On this note, Brennan observed, “For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”<sup>73</sup>

Instrumentalism was especially popular during the Warren Court era of the 1950s and 1960s.<sup>74</sup> Besides Brennan, instrumentalists of that era included Chief Justice Earl Warren, as well as Justices William Douglas, Thurgood Marshall, and Abe Fortas.<sup>75</sup> More recently, Justice John Paul Stevens also adopted an instrumentalist approach.<sup>76</sup>

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61. *Id.*

62. R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 213 (1994).

63. *Id.*

64. *Id.* at 215.

65. *See id.*

66. *See Kelso & Kelso, supra* note 59, at 980.

67. *See Kelso, supra* note 62, at 214.

68. *See id.*

69. *Id.* at 216.

70. *Id.*

71. *See id.* at 217.

72. *Id.*

73. William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985).

74. Kelso & Kelso, *supra* note 59, at 981.

75. *Id.*

76. *Id.*

*B. Holmesianism*

Named after Justice Oliver Wendell Holmes, Holmesianism is a judicial philosophy that favors settled law and deference to the other branches of government.<sup>77</sup> Holmesian judges like predictable rules and predictable treatment of existing law.<sup>78</sup> When the law is well-established, they generally follow precedent.<sup>79</sup> Holmesian judges prefer rules with sharp corners to balancing tests.<sup>80</sup> Such judges are sensitive to the purposes behind legal rules, including the general intent of the Framers,<sup>81</sup> and thus are inclined to go beyond the literal meanings of words,<sup>82</sup> often considering history as context for rules.<sup>83</sup>

Holmesian judges tend not to like purely mechanically-applied legal rules.<sup>84</sup> As Holmes himself wrote, “[A] page of history is worth a volume of logic.”<sup>85</sup> Decades earlier, before he was on the United States Supreme Court, Holmes had observed, “The life of the law has not been logic: it has been experience.”<sup>86</sup> To that claim, he had added, “The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”<sup>87</sup>

According to Holmesian judges, the judicial role is to interpret existing law. Any changes in the law should come from the other branches of government.<sup>88</sup> Most frequently, Holmesian judges caution judicial restraint.<sup>89</sup> Consequently, Holmesian judges generally defer to the government in constitutional cases.<sup>90</sup>

Besides its use when Holmes was on the U.S. Supreme Court from 1902 until 1932,<sup>91</sup> a Holmesian approach was popular in the years after 1937 and prior to the advent of the Warren Court in the 1950s.<sup>92</sup> In more recent years, Chief Justice William Rehnquist exemplified Holmesian decision-making.<sup>93</sup>

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77. *Id.* at 978-79.

78. *Id.*

79. *Id.* at 984-85.

80. *Id.* at 978-79.

81. *Id.*

82. Kelso, *supra* note 62, at 196.

83. *Id.* at 198.

84. *See id.* at 195.

85. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

86. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown and Company 1923) (1881).

87. *Id.*

88. Kelso & Kelso, *supra* note 59, at 979.

89. Kelso, *supra* note 62, at 197.

90. Kelso & Kelso, *supra* note 59, at 979.

91. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 384 (1993).

92. *See* Kelso & Kelso, *supra* note 59, at 980.

93. *Id.*



### C. Formalism

Formalist judges attempt to draw a distinction between law and morality.<sup>94</sup> The judge is not supposed to be concerned with obtaining a just result in a given case.<sup>95</sup> Rather, the judge is to mechanically apply legal rules to factual circumstances.<sup>96</sup> Although formalism adopts the position that legal process should be free of values,<sup>97</sup> formalism gravitates toward values such as certainty and predictability.<sup>98</sup>

In constitutional interpretation, formalists focus on literal meanings of words and the specific intents of Framers and Ratifiers, but not on purpose or general intent.<sup>99</sup> Such judges rarely place much emphasis on context,<sup>100</sup> and they avoid broadly-based historical inquiry.<sup>101</sup> They also shy away from reasoned elaboration of legal concepts over time.<sup>102</sup> Formalists prefer “bright-line rules” to balancing tests.<sup>103</sup>

Regardless of the theoretical dissonance that doing so creates, formalists sometimes will look beyond sources contemporaneous with a rule of law and identify a subsequent tradition.<sup>104</sup> They will consider a consistent legislative or executive practice as evidence of a clear tradition, and the result is a gloss on the meaning of the text.<sup>105</sup> Despite this theoretical irregularity, formalists do not allow an identified tradition to trump a clear mandate in the Constitution.<sup>106</sup>

Formalism was a popular approach to judicial decision-making between 1872 and 1937.<sup>107</sup> More recently, Justices Antonin Scalia and Clarence Thomas have adopted a formalist approach to their work on the bench.<sup>108</sup>

### D. Natural Law

Natural law judges draw upon strands of formalism and instrumentalism.<sup>109</sup> Like formalist judges, natural law judges see law as a set of principles, but like instrumentalist judges, natural law judges apply moral concepts to legal decision-making.<sup>110</sup> Indeed, natural law judges elaborate on

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94. *Id.* at 977.

95. *See id.*

96. *See id.*

97. *See* ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 39 (2d ed. 2005).

98. Kelso & Kelso, *supra* note 59, at 978.

99. *Id.* at 977-78.

100. Kelso, *supra* note 62, at 185.

101. *See id.* at 185-86.

102. *See id.*

103. *See* Kelso & Kelso, *supra* note 59, at 978.

104. Kelso, *supra* note 62, at 186.

105. *Id.*

106. *Id.*

107. *See* Kelso & Kelso, *supra* note 59, at 978.

108. *Id.*

109. *Id.* at 982.

110. *Id.*

the moral concepts in the Constitution.<sup>111</sup> Such judges follow a social contract as established in the Constitution.<sup>112</sup>

Purpose is important to natural law judges.<sup>113</sup> Context and history are also important.<sup>114</sup> Natural law judges respect reasoned elaboration of legal precedents as well as legislative and executive practices as glosses on textual meanings.<sup>115</sup>

A natural law approach to decision-making was popular in the United States from 1789 until 1872.<sup>116</sup> Chief Justice John Marshall and Justice Joseph Story exemplified an early natural law perspective.<sup>117</sup> In more recent years, Justices Sandra O'Connor and Anthony Kennedy have revived the natural law perspective.<sup>118</sup>

### III. BACKGROUND ON *BAKER V. CARR*

The factual background that the justices on the Supreme Court encountered in *Baker* constituted “a classic lockout scenario.”<sup>119</sup> Charles W. Baker and nine other plaintiffs, all of whom were Tennessee residents who lived in Memphis, Nashville, Knoxville, and Chattanooga, claimed that, because of a population shift and the lack of legislative reapportionment since 1901, the plaintiffs were suffering from dilution of their votes for the Tennessee Legislature.<sup>120</sup> In 1901, the state’s population had been 2,020,616 with 487,380 individuals eligible to vote.<sup>121</sup> In 1960, the state’s population was 3,567,089 with 2,092,891 individuals eligible to vote.<sup>122</sup> Between 1901 and 1960, the relative standings of the counties with regard to individuals qualified to vote had changed substantially too.<sup>123</sup> At the time of *Baker*, forty percent of the voters elected sixty of ninety-nine members of the Tennessee House, while thirty-seven percent of the voters elected twenty of thirty-three members of the Tennessee Senate.<sup>124</sup> The mayor of Nashville had commented that “the hog lot and the cow pasture” governed the state.<sup>125</sup> The Plaintiffs sued Tennessee Secretary of State Joseph Carr and other state officials in federal court under Sections 1983 and 1988 of Title 42 of the

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111. *Id.*

112. *Id.*

113. Kelso, *supra* note 62, at 150-52.

114. *Id.* at 153-54.

115. *Id.* at 157-58.

116. See Kelso & Kelso, *supra* note 59, at 983.

117. Kelso, *supra* note 62, at 152.

118. Kelso & Kelso, *supra* note 59, at 983.

119. Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 556 (2003).

120. *Baker*, 369 U.S. at 192-94; CRAY, *supra* note 8, at 379; POWE, *supra* note 6, at 200.

121. *Baker*, 369 U.S. at 192.

122. *Id.*

123. *Id.*

124. *Id.* at 253 (Clark, J., concurring).

125. CRAY, *supra* note 8, at 379.

U.S. Code, claiming that Tennessee's 1901 Apportionment Act violated the Equal Protection Clause of the Fourteenth Amendment.<sup>126</sup>

The federal district court dismissed the case on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.<sup>127</sup> The lower court believed that the Supreme Court's then-recent case of *Colegrove v. Green*<sup>128</sup> was controlling precedent in the current case.<sup>129</sup> Frankfurter had written the plurality opinion in *Colegrove*.<sup>130</sup>

The U.S. Supreme Court agreed to hear the *Baker* case. The Court's agreeing to hear the case after having rejected a prior challenge to the same malapportioned Tennessee Legislature in 1956 was ironic. In a per curiam opinion in *Kidd v. McCannless*,<sup>131</sup> which had come from the Tennessee Supreme Court,<sup>132</sup> the U.S. Supreme Court had cited *Colegrove* as grounds for dismissal.<sup>133</sup>

On April 19 and 20, 1961, the Supreme Court heard oral argument in the new Tennessee case.<sup>134</sup> At the conference that followed oral argument, Chief Justice Earl Warren and Justices Hugo Black, William Douglas, and William Brennan all agreed that federal jurisdiction was appropriate and that a cause of action existed.<sup>135</sup> Frankfurter strongly opposed these justices, unleashing "a brilliant tour de force . . . speaking at considerable length, pulling down reports and reading from them, and powerfully arguing the correctness of *Colegrove*," as Brennan later recalled.<sup>136</sup> Frankfurter's performance, in which he presented a parade of horrors that would ensue if the Court entered the apportionment arena,<sup>137</sup> lasted between one-and-a-half and two hours.<sup>138</sup> Both Justices Tom Clark and John Marshall Harlan agreed with Frankfurter.<sup>139</sup> Since he thought that a bare majority was insufficient to abandon *Colegrove*, Justice Charles Whittaker would vote with Frankfurter.<sup>140</sup> Justice Potter Stewart, the key fifth vote for a Warren group majority, was critical of the *Colegrove* precedent, but he did not think the plaintiffs could successfully make a claim on the merits for equal protection.<sup>141</sup> Be-

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126. *Baker*, 369 U.S. at 187-88, 192, 205.

127. *Id.* at 196.

128. 328 U.S. 549 (1946).

129. SCHWARTZ, *supra* note 38, at 410.

130. *Id.*

131. *See generally*, 352 U.S. 920 (1956) (per curiam).

132. *See generally*, *Kidd v. McCannless*, 292 S.W.2d 40 (Tenn. 1956).

133. *See Kidd*, 352 U.S. at 920.

134. *Baker*, 369 U.S. at 186.

135. SCHWARTZ, *supra* note 38, at 412.

136. CRAY, *supra* note 8, at 381.

137. Lewis, *supra* note 52, at 31.

138. *Id.* at 30; EISLER, *supra* note 9, at 171.

139. SCHWARTZ, *supra* note 38, at 412.

140. *Id.*

141. *See* Lewis, *supra* note 52, at 31.

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cause Stewart could not make up his mind, the case was put off for reargument until the next term.<sup>142</sup>

Reargument took place on October 9, 1961.<sup>143</sup> During the second round of oral argument, Warren asked Tennessee Assistant Attorney General Jack Wilson whether the plaintiffs had a remedy for their problem in the courts of Tennessee.<sup>144</sup> Wilson answered that the plaintiffs did not have any remedy at all in state court.<sup>145</sup> This candid response caught the attention of Stewart.<sup>146</sup>

Almost immediately after the reargument, Frankfurter circulated a memorandum among the Brethren, arguing for his position against taking the case.<sup>147</sup> This memorandum, sixty pages in length, was almost the same as the dissenting opinion that he would publish.<sup>148</sup> Brennan responded by circulating his own memorandum with an attached chart that illustrated the problem of vote dilution among different counties in Tennessee.<sup>149</sup>

At the conference that followed reargument, Stewart made known his intent to vote with the Warren group.<sup>150</sup> Although worried about federal court intervention in the area of apportionment,<sup>151</sup> Stewart had become concerned that the Tennessee malapportionment was so extreme as to be irrational, and he felt that federal district court jurisdiction was appropriate.<sup>152</sup> However, Stewart would agree to support jurisdiction only; he did not want to address the merits of the case.<sup>153</sup> Warren now had the five votes necessary for an opinion that jurisdiction was appropriate.

When it came time to write the Court's opinion, Warren, having previously contemplated writing the opinion himself, consulted Black and Douglas and then assigned the opinion to Brennan.<sup>154</sup> The decision to assign the opinion to Brennan had taken Warren ten days to make after the conference that followed reargument.<sup>155</sup> The assignment was somewhat ironic because, in the early 1960s, Brennan, one of the three newest justices on the Court, was still relatively unknown.<sup>156</sup> Nonetheless, Brennan, "a judicial craftsman,"<sup>157</sup> had the best chance of retaining Stewart's vote.<sup>158</sup> Brennan had his work cut out for him. Not only did Brennan have the task of writing an

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142. POWE, *supra* note 6, at 201.

143. *Baker*, 369 U.S. at 186.

144. CRAY, *supra* note 8, at 381.

145. *Id.* at 382.

146. *Id.*

147. SCHWARTZ, *supra* note 38, at 413.

148. Lewis, *supra* note 52, at 31.

149. SCHWARTZ, *supra* note 38, at 413-14.

150. *Id.* at 415.

151. CRAY, *supra* note 8, at 382.

152. SCHWARTZ, *supra* note 38, at 417.

153. *See id.* at 417-18.

154. NEWTON, *supra* note 21, at 390; CRAY, *supra* note 8, at 382.

155. Lewis, *supra* note 52, at 32.

156. *See EISLER, supra* note 9, at 12-13.

157. CRAY, *supra* note 8, at 382.

158. POWE, *supra* note 6, at 499.

opinion that would keep together a majority of the Court,<sup>159</sup> but he also had to write an opinion that would withstand the rhetorical assault of an incensed Frankfurter, Brennan's former law professor.<sup>160</sup> By the time the Court heard *Baker*, Frankfurter was no longer able to agree with his opponents at all.<sup>161</sup>

During late 1961 and early 1962, Brennan circulated various drafts of an opinion, attempting to please both Stewart, who wanted a narrow opinion, and Douglas, who wanted a sweeping opinion.<sup>162</sup> In January 1962, Stewart indicated that he would sign Brennan's opinion.<sup>163</sup> In preparing to write a dissent, Clark mysteriously wanted to consult Brennan's malapportionment chart again.<sup>164</sup> When Clark realized that the voters of Tennessee had no other recourse for their problem besides the federal courts, he changed his mind, siding with the Warren group on both jurisdiction and the merits.<sup>165</sup>

After Clark switched his vote to join Brennan, Brennan had five votes for both reversal on jurisdiction and a decision on the merits.<sup>166</sup> However, Warren wanted to respect Stewart's wishes against a decision on the merits, and Brennan wanted to keep his promise to Stewart regarding a narrow opinion.<sup>167</sup> In the end, Brennan would limit the decision to jurisdiction.<sup>168</sup>

On March 26, 1962, Brennan issued an opinion for the Court that six justices signed.<sup>169</sup> The Supreme Court held that the lower court's dismissal was in error and remanded the case to the lower court for purposes of trial.<sup>170</sup> Douglas, Clark, and Stewart issued concurring opinions,<sup>171</sup> Frankfurter and Harlan issued dissents.<sup>172</sup> Frankfurter was especially upset.<sup>173</sup> Given his poor health,<sup>174</sup> Whittaker ultimately did not vote in the case.<sup>175</sup> With their

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159. Brennan joked that a key talent for a member of the Court was an ability to count to five. Lewis, *supra* note 52, at 32.

160. NEWTON, *supra* note 21, at 390. Frankfurter had an over-blown self-image that was vital to his sense of well-being. H. N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 5 (1981). The justice could not accept opposition in areas in which he felt he had expertise, and he responded to such opposition with hostility. *Id.* at 5-6. When Stewart eventually sided with Brennan, Frankfurter told his law clerks, "This is the darkest day in the history of the Court." CRAY, *supra* note 8, at 382.

161. HIRSCH, *supra* note 160, at 198. By 1962, Frankfurter, then "old and ill," was more interested in his legacy. *Id.*

162. NEWTON, *supra* note 21, at 390.

163. SCHWARTZ, *supra* note 38, at 419.

164. Lewis, *supra* note 52, at 34-35.

165. SCHWARTZ, *supra* note 38, at 422-23.

166. *Id.* at 419.

167. *Id.*; EISLER, *supra* note 9, at 175.

168. SCHWARTZ, *supra* note 38, at 418-19.

169. *Baker*, 369 U.S. at 186-87.

170. *Id.* at 188.

171. *See id.* at 241 (Douglas, J., concurring), 251 (Clark, J., concurring), 265 (Stewart, J. concurring).

172. *See id.* at 266 (Frankfurter, J., dissenting), 330 (Harlan, J., dissenting). Law clerks wrote some of Frankfurter's well-known opinions almost in their entirety. SCHWARTZ, *supra* note 38, at 61. In *Baker*, law clerk Anthony G. Amsterdam had written what became Frankfurter's dissent. SCHWARTZ, *supra* note 38, at 413.

173. NEWTON, *supra* note 21, at 391-92.

174. *See id.* at 392. Frankfurter's constant pressuring of Whittaker to prevent him from changing his vote contributed to Whittaker's stress and health problems. SCHWARTZ, *supra* note 38, at 427-28. Whit-

six opinions, the participating justices produced 165 pages of rhetoric for the reporters.<sup>176</sup>

As the opinions of the day were read from the bench, Warren, no doubt quite pleased that his group had held together a majority, wrote a note to Brennan that said, “‘It is a great day for the Irish.’”<sup>177</sup> Then, before passing along the note, Warren replaced the word *Irish* with the word *country*.<sup>178</sup>

#### IV. JUDICIAL PHILOSOPHIES AT WORK IN THE OPINIONS OF BRENNAN AND FRANKFURTER

This section of the Article looks at how judicial philosophies played out in Brennan’s opinion for the Court and Frankfurter’s dissent. The section will illustrate Brennan’s instrumentalist approach and Frankfurter’s Holmesian approach.

##### A. Brennan’s Opinion As Instrumentalist

Brennan’s opinion demonstrated a strong instrumentalist approach to decision-making. Because the author of an opinion for the Court must maintain a majority, an opinion for the Court is often not as pure a statement of the author’s philosophy as is a concurrence or dissent, but Brennan’s opinion in *Baker* still made a clear instrumentalist statement. In his opinion, Brennan treated law as a means to an end, used law to advance moral concepts, employed the court system to help achieve justice, refrained from deferring to other branches of the government, adopted a judicially-created test, and saw the Constitution as an evolving document. This subsection elaborates on the various instrumentalist ingredients in Brennan’s opinion.

First, Brennan’s opinion viewed law as a means to an end, and the end was promoting equal voting rights for urban voters. Brennan used various legal doctrines to further the end that he and the majority desired. For instance, he determined that, under Article III, Section 2 of the Constitution, the federal courts had subject matter jurisdiction over the representation controversy.<sup>179</sup> The matter had “‘arise[n] under’” the Constitution because the matter involved an alleged violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>180</sup> Therefore, Congress could give the district courts subject matter jurisdiction pursuant to Article III, and Congress did so in Section 1343(3) of Title 28 of the U.S. Code.<sup>181</sup>

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taker retired from the Court on April 1, 1962. *Id.*

175. *Baker*, 369 U.S. at 237.

176. BAKER, *supra* note 35, at 122.

177. SCHWARTZ, *supra* note 38, at 424.

178. *Id.*

179. *Baker*, 369 U.S. at 199.

180. *Id.*

181. *Id.* at 200.

Additionally, Brennan found that the plaintiffs had standing to bring their lawsuit.<sup>182</sup> He determined that the plaintiffs had sued to vindicate their interest regarding an ability to vote and that they had sued the appropriate officials, including the Tennessee Secretary of State, the Attorney General, the Coordinator of Elections, and members of the State Board of Elections, who allegedly could be held responsible for the vote dilution.<sup>183</sup> The plaintiffs were “asserting ‘a plain, direct and adequate interest in maintaining the effectiveness of their votes.’”<sup>184</sup>

Furthermore, Brennan worked with precedent in addressing the potential problem of the political question doctrine.<sup>185</sup> He argued that *Colegrove v. Green*,<sup>186</sup> a key precedent for the argument in favor of the political question bar to allowing a federal court to hear the case, had been misinterpreted by the district court because the current case was about the Equal Protection Clause, not the Guarantee Clause in Article IV.<sup>187</sup> Brennan noted that the political question doctrine was applicable in cases that involved the relationships that the federal courts had with other branches of the federal government, not with the states.<sup>188</sup> To explain how the current case failed to fit into the political question doctrine, the justice composed a list of cases where the political question doctrine would pose a problem, including cases that involved foreign relations, dates of duration of hostilities, validity of constitutional amendments, the status of Indian tribes, and a republican form of government.<sup>189</sup> Because of Frankfurter’s dissent, Brennan focused on the republication form of government argument. He distinguished *Luther v. Borden*,<sup>190</sup> which had grown out of the Dorr Rebellion in Rhode Island in the 1840s, from the current case, noting that *Luther* had been about which government was lawful, not about vote dilution as *Baker* was.<sup>191</sup>

In both affirmative and negative ways, Brennan employed various legal doctrines, including those related to subject matter jurisdiction, standing, and political questions, to achieve the end of allowing the plaintiffs to make their case in federal court for vote dilution. Thus, Brennan used the law as a means to further an end.

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182. *Id.* at 206.

183. *See id.* at 205-08.

184. *Id.* at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)).

185. The term *political question* is a misnomer because the federal courts address matters related to politics. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 131 (4th ed. 2011). *See generally, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (determining that President Richard Nixon had to comply with a subpoena for tapes of presidential conversations sought as evidence in a criminal trial).

186. 328 U.S. 549 (1946).

187. *Baker*, 369 U.S. at 209-10. Brennan’s movement from the Guarantee Clause to the Equal Protection Clause has been described as an attempt to avoid the appearance of the Court’s departure from precedents on nonjusticiability. McConnell, *supra* note 12, at 106-07. However, this criticism itself has received criticism as being unrealistic given the composition of the Court at the time. *See* Roy A. Schotland, *The Limits of Being “Present at the Creation,”* 80 N.C. L. REV. 1505, 1508-10 (2002).

188. *Baker*, 369 U.S. at 210.

189. *Id.* at 210-19.

190. 48 U.S. (7 How.) 1 (1849).

191. *See Baker*, 369 U.S. at 223.

Second, Brennan called upon the law to promote the moral concept of equality in voting. In *Baker*, urban voters suffered from vote dilution as more people had moved to the cities in the six decades since the Tennessee Legislature last had reapportioned the state.<sup>192</sup> For example, 2,340 citizens in Moore County had one state house member, while 55,712 citizens in Sullivan County had one state house member.<sup>193</sup> Shelby County's multi-member delegation had one member for every 39,043 voters, while Gibson County's multi-member delegation had one member for every 14,916 voters.<sup>194</sup> Although Brennan acknowledged that, if the case were about a republican form of government, the Guarantee Clause would not help the plaintiffs,<sup>195</sup> he instead focused on vote dilution and called upon the Equal Protection Clause to conclude that the plaintiffs should have the opportunity to make their case in federal court for equality in voting.<sup>196</sup>

Either implicitly or explicitly, Brennan's opinion provided for several types of political equality.<sup>197</sup> The opinion assumed equal suffrage, which is that everyone would be able to vote.<sup>198</sup> While this was not always true in the South at the time of *Baker*,<sup>199</sup> Brennan supported the concept as an assumption of his main argument. The opinion also provided for equal probabilities, which means that, at a theoretical level, each vote would be equally likely to shape the results of a given election.<sup>200</sup> The focus of the opinion was on equal shares, a concept that states that each elected official should represent an equal number of voters as another politician.<sup>201</sup> This focus was the forerunner of the idea of one person, one vote.

Third, Brennan's opinion demonstrated how the federal courts could help achieve justice regarding equal voting rights. Brennan deftly avoided allowing the political question doctrine to prevent the plaintiffs from bringing their suit in federal court and instead saw the constitutional deprivation as amenable to judicial correction.<sup>202</sup> Brennan drew upon the Court's then-recent opinion in *Gomillion v. Lightfoot*.<sup>203</sup> In *Gomillion*, the black plaintiff had lived in Tuskegee, Alabama, until the state legislature had redrawn the city boundaries to exclude most of the black residents.<sup>204</sup> The plaintiff had maintained that this government action had denied him his right to vote in

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192. Guinier & Karlan, *supra* note 13, at 208.

193. *Id.*

194. *Id.*

195. *Baker*, 369 U.S. at 223.

196. *Id.* at 237.

197. For several types of political equality for which the opinion did not provide, see Guinier & Karlan, *supra* note 13, at 217-18.

198. *Id.*

199. *Id.* at 218.

200. *See id.* at 217-18.

201. *See id.*

202. *See Baker*, 369 U.S. at 229.

203. 364 U.S. 339 (1960). Frankfurter had authored the Court's opinion in *Gomillion*. *Id.* at 340. Brennan's use of Frankfurter's *Gomillion* opinion to help make the argument against Frankfurter's *Baker* dissent was ironic.

204. *Baker*, 369 U.S. at 229-30.



city elections.<sup>205</sup> Noting that the state could not act by “circumventing a federally protected right,”<sup>206</sup> the Supreme Court had held that the state action violated the Fifteenth Amendment’s guarantee of the right to vote.<sup>207</sup>

Rather than letting the state legislature discriminate against members of a racial minority group, the Court in *Gomillion* had situated the state action within the reach of the U.S. Constitution and, accordingly, within the reach of the federal courts.<sup>208</sup> Calling upon this *Gomillion* precedent in *Baker*, Brennan constructed a similar voting rights case based on the Fourteenth Amendment, rather than the Fifteenth Amendment, thereby opening the door to the prospect of justice for the plaintiffs at the district court level following remand of the case.

Fourth, Brennan’s opinion reflected a lack of inclination to defer to other branches of the federal government. Brennan could have argued, as Frankfurter did, that the matter of apportionment was a political question and that, under the Guarantee Clause, the matter would have been one for Congress to address. Well aware of the argument for the political question roadblock, Brennan instead drew a distinction between political questions and political cases.<sup>209</sup> Brennan noted, “The courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”<sup>210</sup> Touching upon matters related to the organization of state government would not turn a matter into a political question,<sup>211</sup> just a matter political in nature.

Brennan distinguished *Luther v. Borden*<sup>212</sup> from the case at bar so the Court would not have to defer to another branch of the federal system. Reviewing Chief Justice Roger Taney’s *Luther* opinion, which had dealt with a republican form of government for Rhode Island, Brennan observed that Taney had listed several factors that had established a political question in *Luther*.<sup>213</sup> The factors had included a commitment to other branches of the decision regarding the lawful government of a state, clear presidential action in recognizing a government, a need for finality in the President’s decision, and a lack of criteria a court could use to determine which type of government was republican.<sup>214</sup> Since the factors from *Luther* did not cover the matter of diluted voting rights in *Baker*, the *Baker* matter was outside the area that the federal courts were prohibited from entering. The Court did not have to defer to Congress or the President, and Brennan was pleased to remand the matter to the federal district court for further proceedings.

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205. *Id.* at 230.

206. *Id.* at 231 (quoting *Gomillion*, 364 U.S. at 347).

207. *Id.* at 229.

208. *See id.* at 230.

209. *Id.* at 217.

210. *Id.*

211. *See id.* at 218.

212. 48 U.S. (7 How.) 1 (1849).

213. *Baker*, 369 U.S. at 218, 222.

214. *Id.* at 222.

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Fifth, Brennan adopted a judicially-created test that gave the federal courts a great deal of flexibility in assessing whether a case presented a political question that would bar federal judicial process in that case. Brennan indicated that “[p]rominent on the surface of any case held to involve a political question” would be the following:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>215</sup>

In the absence of factual satisfaction of at least one of these factors, the Court should refrain from dismissing a case on political question grounds.<sup>216</sup> As noted above, Brennan found factual support for none of the factors he listed.<sup>217</sup>

The political question factors presented anything but the sharp-cornered rules that a Holmesian justice would appreciate.<sup>218</sup> For instance, “a textually demonstrable constitutional commitment of the issue to a coordinate political department”<sup>219</sup> was problematic because the power of judicial review allows courts to review most actions of other branches, and the Constitution, which does not even reference judicial review, accordingly fails to list exceptions to the federal courts’ power of judicial review.<sup>220</sup> The matter of what constituted “judicially discoverable and manageable standards”<sup>221</sup> was open to a fair amount of interpretation. In constitutional cases, the Court has created a variety of standards to interpret nebulous constitutional provisions.<sup>222</sup> Indeed, in the apportionment cases that followed *Baker*, the Equal Protection Clause itself, absent judicial contribution, offered no standards for evaluating state apportionment laws.<sup>223</sup> One could make the same

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215. *Id.* at 217.

216. *Id.*

217. *See id.* at 226.

218. *See* CHEMERINSKY, *supra* note 185, at 132-33 (describing the *Baker* political question doctrine factors as “useless”). *See also* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1184 (2002) (describing *Baker* as “delphic and protean”).

219. *Baker*, 369 U.S. at 217.

220. Pushaw, *supra* note 218, at 1176-77.

221. *Baker*, 369 U.S. at 217.

222. *See* CHEMERINSKY, *supra* note 185, at 551-54; Pushaw, *supra* note 218, at 1176.

223. Pushaw, *supra* note 218, at 1176. In *Baker*, Brennan avoided providing a specific equal protection standard. *BAKER*, *supra* note 35, at 8. Nonetheless, Brennan did note the following: “Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts

vagueness point about whether another branch of government should make an initial policy determination.

The other factors were not any clearer. With regard to whether a court might fail to express respect due to another branch of government, the federal courts implicitly show disrespect for the other branches of government when the courts strike down legislative and executive actions as unconstitutional,<sup>224</sup> yet judicial review remains a commonly accepted power. One might ask when the courts should refrain from questioning a political decision. Also, when a court declares the action of another branch of government unconstitutional, then two branches of government have made different, and thus conflicting, pronouncements on an issue,<sup>225</sup> but, with judicial review, this phenomenon is well-established. Brennan did not clarify these factors. In laying them out, he gave the federal courts a great deal of room for maneuvering in the realm of political questions.<sup>226</sup> In that way, judges' understandings of the facts and social policies, not of the rules, would drive the analyses in future cases.

These factors were so flexible, in part, because they did not draw upon one consistent theoretical perspective; rather they drew upon at least three such theoretical perspectives.<sup>227</sup> One such perspective is the classical theory of political questions, which, as John Marshall articulated in *Marbury v. Madison*,<sup>228</sup> states that a federal court can decide all matters before it except those that the Constitution specifically gives to another branch of the government to address.<sup>229</sup> Another perspective is the prudential theory of political questions, which says that a court should avoid deciding the merits of a case when doing so would put the court in a position to compromise an important principle or undermine the credibility of the court.<sup>230</sup> An additional perspective is the functional theory, which looks at considerations such as a court's gaining access to relevant information, the need for uniformity of decision in an international matter, and the various responsibilities of other branches of the government.<sup>231</sup>

Each of the six factors that Brennan presented reflected a theory of the political question doctrine. The first factor, "a textually demonstrable con-

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

224. Pushaw, *supra* note 218, at 1175-76.

225. See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 163 n.250 (1988).

226. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 107 (2d ed. 1988). See also Pushaw, *supra* note 218, at 1181-83.

227. TRIBE, *supra* note 226, at 96.

228. 5 U.S. (1 Cranch) 137 (1803).

229. TRIBE, *supra* note 226, at 96; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959).

230. TRIBE, *supra* note 226, at 96; ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 23-28, 184 (1962).

231. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566-83 (1966).

stitutional commitment of the issue to a coordinate political department,<sup>232</sup> reflected the classical theory.<sup>233</sup> The second two factors, “a lack of judicially discoverable and manageable standards for resolving [the question]” and “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,”<sup>234</sup> reflected the functional theory.<sup>235</sup> The final three factors, “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” “an unusual need for unquestioning adherence to a political decision already made,” and “the potentiality of embarrassment from multifarious pronouncements by various departments on one question,”<sup>236</sup> reflected the prudential theory.<sup>237</sup> By drawing upon at least three theories of the political question doctrine, Brennan’s *Baker* opinion embodied the flexibility that instrumentalist judges desire and provided such flexibility for judges who would be hearing apportionment cases on the merits in the near future.

Sixth, Brennan worked with an evolving Constitution that met the needs of the day. Although Brennan did not admit it,<sup>238</sup> specifically to keep the Court’s majority together,<sup>239</sup> he revised the Court’s understanding of *Colegrove v. Green*,<sup>240</sup> the then-recent precedent on apportionment that was lingering in the background in *Baker*.<sup>241</sup> In *Colegrove*, several Illinois voters had challenged the apportionment of Illinois congressional districts.<sup>242</sup> The Supreme Court had upheld the district court’s dismissal of the case.<sup>243</sup> While the Court had not had a majority opinion,<sup>244</sup> the implication of the result had been that the Constitution did not allow for this type of suit in federal court. The other justices who wrote opinions in *Baker* noted Brennan’s rhetorical move. In his concurring opinion in the case, Douglas commented that the Court had held in *Colegrove* that the protection of voting

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232. *Baker*, 369 U.S. at 217.

233. TRIBE, *supra* note 226, at 96 n.6.

234. *Baker*, 369 U.S. at 217.

235. TRIBE, *supra* note 226, at 97 n.6.

236. *Baker*, 369 U.S. at 217.

237. TRIBE, *supra* note 226, at 96-97 n.6.

238. *Baker*, 369 U.S. at 208-10.

239. SCHWARTZ, *supra* note 38, at 419. *See also* NEWTON, *supra* note 21, at 390. Stewart had wanted a narrow opinion. *Id.* In his concurrence, Stewart wrote “to emphasize in a few words what the opinion does and does not say.” *Baker*, 369 U.S. at 265 (Stewart, J., concurring). He observed, “The Court today decides three things and no more: (a) that the [trial] court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes.” *Id.* In contrast, in his concurrence, Douglas claimed that many of the prior political question doctrine cases that the Court had decided were wrong. *Id.* at 241 n.1 (Douglas, J., concurring).

240. 328 U.S. 549 (1946).

241. *See* Richard L. Hasen, *The Benefits of “Judicially Unmanageable” Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1475 (2002) (explaining that Brennan “essentially overruled *Colegrove*”).

242. *Colegrove*, 328 U.S. at 550.

243. *Id.* at 556.

244. *Id.* at 550.

rights was beyond the attention of the federal judiciary.<sup>245</sup> In his *Baker* dissent, Frankfurter explained that the Court's series of cases that included *Colegrove* had been "overruled or disregarded" with the majority opinion in *Baker*.<sup>246</sup> Still, Brennan diplomatically moved from a *Colegrove*-esque understanding of whether the Constitution afforded citizens whose votes were diluted an opportunity to be heard in federal court to a *Gomillion*-esque understanding of that problem. Since *Colegrove* as previously understood did not work, Brennan reshaped the Court's understanding of a federal constitutional right.

Although tempered to maintain a Court, Brennan's instrumentalist judicial philosophy was at work in the Court's majority opinion in *Baker*. Brennan treated law as a means to an end, used law to advance moral concepts, employed the court system to help achieve justice, refrained from deferring to other branches of the government, adopted a judicially-created test, and saw the Constitution as an evolving document. This type of judicial philosophy helped to open the door to fairer representation in government.

### B. Frankfurter's Opinion As Holmesian

In contrast to Brennan's instrumentalist opinion, which Frankfurter described as "empty rhetoric,"<sup>247</sup> Frankfurter's opinion demonstrated a strong Holmesian philosophical approach. Indeed, Holmes himself had been a mentor to Frankfurter.<sup>248</sup> In his opinion, Frankfurter called upon predictable rules and precedent, emphasized the need for rules with sharp corners, looked at the purpose behind the law, expressed his belief in the limited role of the judiciary, and wanted to defer to another branch of the government. This subsection elaborates on the various ingredients in Frankfurter's Holmesian opinion.

First, Frankfurter called upon predictable rules and precedent to make his case. Committed to a case whose plurality opinion he had authored, Frankfurter looked to *Colegrove v. Green*<sup>249</sup> for precedent. As noted above, *Colegrove* was the recent Supreme Court case in which Illinois voters had challenged the apportionment of their congressional districts, and the Su-

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245. *Baker*, 369 U.S. at 249-50 (Douglas, J., concurring).

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

247. *Id.* at 270. Frankfurter's use of this term reflects the fact that, at times, rhetoric has been a marginalized discursive genre. Throughout Western history, rhetoric has existed "within a dialectic of authority and marginality." Robert Hariman, *Status, Marginality, and Rhetorical Theory*, 72 Q. J. SPEECH 38, 51 (1986). Rhetoric's having held a place of marginality is in part due to Plato's critique of the Sophists and their use of rhetoric, which he described as "cookery." *Id.* at 39. Indeed, Plato provided the first association of rhetoric with deceit and flattery. GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 66 (2d ed. 1999). Despite Plato's critique of rhetoric, "[r]hetoric was the superior art in ancient Rome and throughout the Renaissance." Hariman, *supra*, at 41.

248. HIRSCH, *supra* note 160, at 10. Frankfurter later picked law clerks for Holmes. POWE, *supra* note 6, at 6.

249. 328 U.S. 549 (1946).

preme Court had upheld the district court's dismissal of the case,<sup>250</sup> which implied that the Constitution did not allow for this type of suit in federal court. As Frankfurter saw it, "*Colegrove* held that a federal court should not entertain an action for declaratory and injunctive relief to adjudicate the constitutionality, under the Equal Protection Clause and other federal constitutional and statutory provisions, of a state statute establishing the respective districts for the State's election of Representatives to the Congress."<sup>251</sup> In *Colegrove*, Frankfurter had described the problematic area to be judicially avoided as a "political thicket."<sup>252</sup> The dissenting justice in *Baker* believed that the two opinions by the four justices who comprised a majority of the seven members of the Court who participated in *Colegrove* were sufficient to establish this legal principle.<sup>253</sup> In a series of cases since *Colegrove*, the Supreme Court had heeded the considerations behind the political question doctrine.<sup>254</sup>

Additionally, Frankfurter offered his historical understanding as precedent for the idea that representation was not necessarily proportionate to the geographic spread of the population.<sup>255</sup> He looked to the past of Great Britain,<sup>256</sup> where, until the nineteenth century, the base of representation was the county or borough, from which a set number of representatives would be selected, regardless of the population.<sup>257</sup> Before the Reform Act of 1832, citizens in well-populated northern industrial centers had been largely disenfranchised.<sup>258</sup> By the 1870s and 1880s, one-quarter of the electorate had two-thirds of the members of the House of Commons.<sup>259</sup> Although Parliament made various attempts to distribute its seats by population, the problem persisted.<sup>260</sup> Frankfurter noted that English judges long had been reluctant to become involved in disputes over political power.<sup>261</sup>

In the British colonies that later became the United States, a similar system of representation based on local government entities such as towns or counties developed, even though the British experience "was a model to be avoided."<sup>262</sup> "[G]rossly unequal electoral units" were the result.<sup>263</sup> Since the Constitution did not apportion based on population, the problem persisted

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250. *Id.* at 550, 556.

251. *Baker*, 369 U.S. at 277 (Frankfurter, J., dissenting).

252. 328 U.S. at 556 (plurality opinion).

253. *Baker*, 369 U.S. at 277-78 (Frankfurter, J., dissenting).

254. *Id.* at 278.

255. *See id.* at 301.

256. In England and later Great Britain, because the Parliament had its origins in a non-democratic medieval society, the idea of political equality took a long time to develop. BAKER, *supra* note 35, at 15.

257. *Baker*, 369 U.S. at 302 (Frankfurter, J., dissenting). The borough that retained its level of representation despite reduced population and importance was a "rotten borough." BAKER, *supra* note 35, at 15-16.

258. *Baker*, 369 U.S. at 302 (Frankfurter, J., dissenting).

259. *Id.* at 304.

260. *See id.* at 304-07.

261. *Id.* at 288 n.21.

262. *Id.* at 307.

263. *Id.*

after the Constitutional Convention.<sup>264</sup> Frankfurter noted that, at a state level, the problem of disproportionate representation persisted up until and after the adoption of the Fourteenth Amendment in 1868.<sup>265</sup>

For good measure, Frankfurter looked at apportionment contemporaneous with *Baker*. He observed that only twelve state constitutions provided for periodic apportionment of both legislative houses, and only about another twelve state constitutions called for such reapportionment of one house.<sup>266</sup> In many cases, legislatures had not reapportioned, despite state constitutional requirements to do so.<sup>267</sup>

In sum, Frankfurter argued that consistent and longstanding precedent existed for non-proportional representation. As he understood the situation, the case was about “a Guarantee Clause claim masquerading under a different label,”<sup>268</sup> and precedent did not allow for judicial relief.<sup>269</sup> Frankfurter described a problem, but he was unwilling to address it via the federal courts.

In believing that precedent offered a predictable rule contrary to the rule the Court adopted, Frankfurter was not restrained in his assessment of the Court’s rhetoric. He described the Court’s shift as “a massive repudiation of the experience of our whole past.”<sup>270</sup> By straying from well-established precedent, the Court was “asserting destructively novel judicial power.”<sup>271</sup>

Second, if the federal courts were to address the case, which Frankfurter did not support, the dissenting justice expressed a need for rules with sharp corners. He noted the difficulty of creating judicial standards for addressing reapportionment,<sup>272</sup> particularly under the Guarantee Clause.<sup>273</sup> The problem, he argued, was complex and beyond judicial capacity to handle; the courts lacked the expertise to work with such a problem.<sup>274</sup> Indeed, “[t]he dominant consideration [was] ‘the lack of satisfactory criteria for a judicial determination.’”<sup>275</sup> This was especially so when the apportionment issue was the main issue for a federal court to hear in a case.<sup>276</sup>

Frankfurter added that adopting the Equal Protection Clause as a standard instead of the Guarantee Clause would not help to address the problem of judicial standards.<sup>277</sup> If reasonableness under the Equal Protection Clause were a function of the type of government allowed, then the Court would

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264. *Id.* at 308.

265. *See id.* at 310-18.

266. *Id.* at 319.

267. *See id.* at 320.

268. *Id.* at 297.

269. Frankfurter lost the Guarantee Clause argument, but he was not the last person to make a Guarantee Clause argument related to apportionment. *See, e.g.,* McConnell, *supra* note 12, at 113-16.

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

271. *Id.*

272. *Id.* at 277-78.

273. *See id.* at 289.

274. *See id.* at 282.

275. *Id.* at 283 (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939)).

276. *Id.* at 282.

277. *Id.* at 300-01.

have to determine what constituted a republican form of government before determining the issue of equal protection.<sup>278</sup> Accordingly, in the absence of a clear standard for the courts to apply, the Court should not allow the plaintiffs to proceed with their case.

Despite what Frankfurter wrote, various standards did or soon would exist. Options for standards under the Equal Protection Clause included substantial equality and absolute equality.<sup>279</sup> If it had been created slightly earlier, the soon-to-be-famous one person, one vote standard would have been an option.<sup>280</sup> Also, after *Baker* and before the Court decided the factually similar case of *Reynolds v. Sims*<sup>281</sup> two years later, the lower federal courts effectively devised and applied their own standards in apportionment cases.<sup>282</sup> Focusing his analysis exclusively on the Equal Protection Clause regardless of the type of government involved, Frankfurter could have adopted or devised one standard or another, but he opted not to do so.<sup>283</sup> The standards were or could have been available, although, besides absolute equality, the standards were not rules with sharp corners.

Third, Frankfurter examined the purpose behind one of the key matters at issue in the case. Standing persistently beside the idea that the courts should not consider reapportionment cases, Frankfurter pointed out that the Framers refused to allow the federal judiciary to remedy every social problem.<sup>284</sup> Other branches had roles to play in government, too. Frankfurter observed, “To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omniscience to judges.”<sup>285</sup> Shuddering at the thought of such judicial “omniscience,” Frankfurter then explained that “[t]he Framers of the Constitution persistently rejected a proposal that embodied this assumption and Thomas Jefferson never entertained it.”<sup>286</sup> Because of their limited role in government, as Frankfurter understood it, the courts were not the forum for addressing the reapportionment problem.<sup>287</sup>

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278. *Id.* at 301.

279. See Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1124 (2002).

280. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 120-21 (1980).

281. 377 U.S. 533 (1964).

282. See Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1360, 1408 (2002).

283. If one thinks less about the existence of standards and more about how the Court could choose among those existing standards, and also if one accepts Frankfurter's concern with judicial policymaking, then Frankfurter's claim could make more sense. See Charles, *supra* note 279, at 1124-26. Still, in adopting standards, the Court has chosen among various options, such as the different levels of scrutiny in equal protection cases. See, e.g., *CHEMERINSKY*, *supra* note 185, at 551-54.

284. *Baker*, 369 U.S. at 269-70 (Frankfurter, J., dissenting).

285. *Id.* at 268.

286. *Id.*

287. *Id.* at 267.



Fourth, and on a related note, Frankfurter insisted that the role of the judiciary was merely to interpret existing law. Quoting Chief Justice Taney in *Luther v. Borden*,<sup>288</sup> Frankfurter commented, “It is the province of a court to expound the law, not to make it.”<sup>289</sup> The dissenting justice did not want the judiciary to enter a new area of law and develop new principles. In moving into an area where the Court was breaking new ground, the Court showed its “[d]isregard of inherent limits in the effective exercise of the Court’s ‘judicial Power.’”<sup>290</sup> Frankfurter expressed his concern regarding the Court’s authority.<sup>291</sup> Such authority was a function of “sustained public confidence in [the Court’s] moral sanction.”<sup>292</sup> If the Court began to make law, as Frankfurter understood the situation, the Court would suffer the consequence of reduced public confidence. In dramatic fashion, Frankfurter scolded the Court for its action as follows: “It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power.”<sup>293</sup> The Court, Frankfurter maintained, had overextended itself.<sup>294</sup>

Fifth, Frankfurter emphasized the importance of judicial deference to the government in cases of political questions. From past case law, he devised a list of matters that would constitute political questions, including the following: war and foreign affairs; the structure and organization of institutions of the states; and abstract questions regarding political power, sovereignty, or government.<sup>295</sup> Of note, Frankfurter admitted that the Court could act in cases of black disenfranchisement because of the specific constitutional mandates in the Fourteenth Amendment’s Equal Protection Clause and the Fifteenth Amendment.<sup>296</sup>

With this list of political questions in mind, Frankfurter observed that Congress should decide the matter of what government was appropriate for a state.<sup>297</sup> The authority for this principle was the Guarantee Clause.<sup>298</sup> “The crux of the matter,” Frankfurter maintained, “is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums . . . .”<sup>299</sup> If the plaintiffs were to be heard on the merits, then Congress would have to decide the matter.

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288. 48 U.S. (7 How.) 1 (1849).

289. *Baker*, 369 U.S. at 295 (quoting *Luther*, 48 U.S. (7 How.) at 41).

290. *Id.*

291. *See id.*

292. *Id.*

293. *Id.* at 269-70.

294. *See id.* at 269.

295. *Id.* at 280-88.

296. *Id.* at 285-86.

297. *Id.* at 294.

298. *Id.*

299. *Id.* at 287.

Frankfurter's Holmesian judicial philosophy was at work throughout an acerbic dissent in *Baker*. Frankfurter called upon predictable rules and precedent, emphasized the need for rules with sharp corners, looked at the purpose behind the law, expressed his belief in the limited role of the judiciary, and would have deferred to another branch of the government. This type of philosophy would have avoided judicial action to remedy the obvious problem of malapportionment.

#### V. OBSERVATIONS REGARDING THE JUDICIAL PHILOSOPHIES AT WORK IN THE OPINIONS OF BRENNAN AND FRANKFURTER

Overall, the judicial philosophies at work in the *Baker* opinions examined here brought several matters to light. For instance, the philosophies illustrated the ongoing legal dialectic of change versus tradition. In *Baker*, Brennan saw the very real problem of disproportionate representation and used the federal courts to open the door to a legal remedy for that problem. Instrumentalism was a tool for social improvement. In contrast, Frankfurter looked to the past for guidance on how, if at all, to address the problem, and, based on tradition, passionately insisted that the courts refrain from taking action to remedy the problem. Holmesianism was a tool for the status quo. In a system based on precedent, tradition will always play a role, but sometimes society needs to move forward.

On a related note, the philosophies in the opinions dramatized another legal dialectic, that of activity versus passivity, particularly with regard to the role of courts in the United States.<sup>300</sup> As both Brennan for the Court and Frankfurter in dissent agreed, some questions are “political” in the sense that other branches of government should address them; courts do not remedy all wrongs.<sup>301</sup> Still, in conversation with the passive virtues<sup>302</sup> of Holmesianism are the active virtues<sup>303</sup> of instrumentalism. As Alexander Hamilton noted, courts are supposed to be “the bulwarks of a limited Constitution against legislative encroachments.”<sup>304</sup> Hamilton added that the judiciary is “an essential safeguard against the effects of occasional ill humors in the society.”<sup>305</sup> Judicial review, a key tool of the courts, is particularly

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300. See COX, *supra* note 10, at 115.

301. See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 624-25 (1976).

302. See generally Alexander M. Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Passive virtues are avoidance techniques. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues” – A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 9 (1964). Courts do not always have to decide cases. BICKEL, *supra* note 230, at 200-01. However, passive virtues do not necessarily produce completely passive results. For example, passive virtues might lead to a judicial decision that avoids reaching a result via constitutional analysis. See *id.* at 207. With passive virtues, the focus is on the exercise of less judicial power. See *id.*

Passive virtues proponent Alexander Bickel clerked for Frankfurter during the Supreme Court's 1952-53 term. SCHWARTZ, *supra* note 38, at 78. Bickel apparently learned the passive virtues well from his Holmesian mentor.

303. Courts have “an obligation to decide in some cases.” Gunther, *supra* note 302, at 25.

304. THE FEDERALIST NO. 78, at 494 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

305. *Id.* at 494-95.

appropriate for “unblocking stoppages in the democratic process.”<sup>306</sup> Seeing a situation that violated basic principles of representative democracy<sup>307</sup> and recognizing that rurally-dominated legislatures were unlikely to address the problems of urban voters,<sup>308</sup> Brennan opened the door to using the Equal Protection Clause to address the ill humor of malapportionment. At the same time, he increased the power of the federal judiciary.<sup>309</sup>

In this active sense, Brennan’s instrumentalist philosophy helped to shape *Baker* as a classic Footnote Four case.<sup>310</sup> As Justice Harlan Stone suggested in the famous footnote in *United States v. Carolene Products Co.*,<sup>311</sup> the Court might have to apply “more exacting judicial scrutiny” under the Fourteenth Amendment in cases in which “legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”<sup>312</sup> Stone also suggested that a more exacting judicial review might be appropriate in cases of “discrete and insular minorities,” particularly when the political processes that normally protect such minorities are curtailed.<sup>313</sup>

Directly or indirectly, *Baker* was relevant to both of these Footnote Four concerns. The lack of compliance with the apportionment requirement of the Tennessee Constitution severely restricted the way urban voters could change the composition of the Tennessee Legislature. Indeed, the majority of the state population did not have recourse to bring about more equitable representation.<sup>314</sup> Brennan addressed this problem head on. Also, although Brennan did not make an issue of race,<sup>315</sup> since malapportioned states gave disproportionately greater representation to rural areas that, at least at the ballot box, were generally white,<sup>316</sup> malapportionment sometimes acted as a mask for state-sponsored racism against black individuals in the urban areas.<sup>317</sup> The disproportionately empowered rural white voters were often disinclined to work to remedy black disenfranchisement.<sup>318</sup> Thus, the normal political process was not able to help such “discrete and insular minorities.”<sup>319</sup> Brennan opened the door to federal judicial action to address the

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306. ELY, *supra* note 280, at 117. An assumption of this approach is trust in the judiciary. Hasen, *supra* note 241, at 1471.

307. Charles, *supra* note 279, at 1132.

308. POWE, *supra* note 6, at 202-03.

309. MARION, *supra* note 41, at 27.

310. POWE, *supra* note 6, at 214-15. *See also* Persily, Kousser & Egan, *supra* note 30, at 1307.

311. 304 U.S. 144 (1938).

312. *Id.* at 152 n.4.

313. *Id.* at 153 n.4.

314. *See* Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 79 (1962).

315. The issue of race came up briefly at oral argument in *Baker*. Robert M. Crea, *Racial Discrimination and Baker v. Carr*, 30 J. LEGIS. 289, 300-02 (2004).

316. Levinson, *supra* note 32, at 1296.

317. Crea, *supra* note 315, at 289-90.

318. *Id.* at 289.

319. *Carolene Prods. Co.*, 304 U.S. at 153 n.4.

problem of vote dilution in general, and that included vote dilution of black Americans.<sup>320</sup>

Although Frankfurter was incensed with Brennan's instrumentalism, Brennan was not as active as he might have been. Rather than proceeding on the merits, the Court remanded the *Baker* case to the district court for a trial.<sup>321</sup> Two years later, in *New York Times v. Sullivan*,<sup>322</sup> another classic instrumentalist opinion,<sup>323</sup> Brennan not only established at the Supreme Court level the legal principle of actual malice under the First Amendment to protect the press that was covering the civil rights movement,<sup>324</sup> but he also applied that standard of actual malice to the facts at hand and came to a pro-speaker, anti-public official conclusion on the merits.<sup>325</sup> In contrast, in *Baker*, Brennan exercised some caution so as not to lose an important vote and jeopardize the future of federal judicial review of apportionment issues. He deftly refrained from arriving at an ultimate conclusion, specifically to retain the vote of Stewart, who would support only jurisdiction and not a decision on the merits.<sup>326</sup> While somewhat restrained for an instrumentalist approach, this approach was not enough to console the distressed Holmesian Frankfurter.<sup>327</sup>

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320. This statement does not imply that Brennan's opinion in *Baker* was the key to resolving the problem of black disenfranchisement in the United States in the 1960s. The key step forward in that regard was the 1965 Voting Rights Act, which, in banning poll taxes, literacy tests, and other forms of explicit racially based discrimination, led to a substantial increase in black enfranchisement. Deval L. Patrick, *The "Right that Is Preservative of All Rights": Voting Rights Act Enforcement*, in REASON AND PASSION, *supra* note 13, at 223-24; Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 758-59 (2002). Remedying diluted black voting rights would have been hard to do when blacks in the South could not vote in the first place. Persily, Kousser & Egan, *supra* note 30, at 1301 n.4. Still, the spirit of Brennan's *Baker* opinion is consistent with the spirit of the Voting Rights Act.

321. *Baker*, 369 U.S. at 237.

322. 376 U.S. 254 (1964).

323. See generally Carlo A. Pedrioli, *A Key Influence on the Doctrine of Actual Malice: Justice William Brennan's Judicial Philosophy at Work in Changing the Law of Seditious Libel*, 9 COMM. L. & POL'Y 567 (2004). In addition to being described as "the most important libel opinion ever written," the *Sullivan* case has been labeled as potentially "the most important free-expression opinion in U.S. jurisprudence." W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION 83 (1991). In the years since 1964, the opinion has taken on "iconic stature." KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 201 (2011).

324. Even though the case dealt with libel, observers have viewed *Sullivan* as a civil rights case because it helped civil rights advocates promote their message. HALL & UROFSKY, *supra* note 323, at 182.

325. W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* 116-17 (1989).

326. SCHWARTZ, *supra* note 38, at 418.

327. The *Baker* case apparently took a serious toll on Frankfurter. Fewer than two weeks after the announcement of the decision, Frankfurter suffered a stroke in chambers, and then he suffered a more serious stroke while in the hospital. POWE, *supra* note 6, at 205; CRAY, *supra* note 8, at 385; EISLER, *supra* note 9, at 176. The second stroke caused Frankfurter to lose his ability to speak. ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 167 (2003). According to Solicitor General Archibald Cox, a former mentee of Frankfurter, Frankfurter expressed to Cox that *Baker* had been responsible for the justice's deteriorating health. POWE, *supra* note 6, at 205. Unable to resume his duties as a justice, Frankfurter submitted his resignation to President Kennedy on August 28, 1962. SCHWARTZ, *supra* note 38, at 427.

## VI. CONCLUSION

This Article has looked back at how the differing judicial philosophies of Justice Brennan and Justice Frankfurter vied to shape the outcome of the critical twentieth century Supreme Court case *Baker v. Carr*. To do so, the Article provided an overview of four primary judicial philosophies, including instrumentalism, Holmesianism, formalism, and natural law, and offered background on the *Baker* case. The Article considered the various philosophical ingredients at work in the opinions of Brennan and Frankfurter and made several observations regarding those judicial philosophies in the two opinions.

As Charles Baker and the other plaintiffs saw the matter, at stake was the value of each citizen's vote based on where in the state he or she happened to live. In focusing on change and activity, Brennan's opinion for the majority, guided by instrumentalist principles, opened the door to a future that looked very different from the present that the Court confronted. In focusing on tradition and passivity, Frankfurter's dissent, guided by Holmesian principles, would have retained the malapportionment of the status quo, at best suggesting that Congress consider the problem. Despite Frankfurter's adamant protests,<sup>328</sup> the Court and the country moved forward. By the 1962 election, only a few months after the Court's *Baker* decision, Georgia and Maryland each had reapportioned one state house, and Tennessee and Alabama each had reapportioned both state houses.<sup>329</sup> Other states soon would follow. If that progress had not happened, Chief Justice Warren would have lacked the opportunity to claim credibly that *Baker* was "the most important case" of his time on the Supreme Court.<sup>330</sup>

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328. Some commentary has suggested that Frankfurter's warning that the Court avoid the "treacherous thicket" of reapportionment has "been consigned to the dustbin of history." John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 501-02 (2002). However, other commentary sees Frankfurter as still relevant to theories of representative democracy and the role of the courts in such a political system. See Luis Fuentes-Rohwer, *Back to the Beginning: An Essay on the Court, the Law of Democracy, and Trust*, 43 WAKE FOREST L. REV. 1045, 1053 (2008).

329. BAKER, *supra* note 35, at 9.

330. WARREN, *supra* note 4, at 306.