

# THE SUPREME COURT'S QUEST FOR FAIR POLITICS

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The idea of my purifying politics is absurd. . . . I do not cling very closely to life, and do not value my own very highly, but I will not tangle it in such a way; I will not share the profits of vice; I am not willing to be made a receiver of stolen goods, or to be put in a position where I am perpetually obliged to maintain that immorality is a virtue.<sup>1</sup>

That attitude, Henry Fairlie opines, reflects not so much what politicians say and do, but rather a credibility gap caused by a "general lack of understanding of what politics can and should attempt to do."<sup>2</sup> The gap is not limited to the uneducated or those who have little time for politics, but even extends to a majority of the justices on the current Supreme Court. Writing for a six-man majority recently in *Branti v. Finkel*,<sup>3</sup> Justice Stevens argued that the first amendment prohibits firing a county assistant public defender because of his political party affiliation. Reasonable persons can disagree with Justice Powell's dissent that there are "substantial governmental interests served by reasonable patronage,"<sup>4</sup> but Stevens does not even consider whether politics should play a role in such appointments, despite the long history of patronage in the United States.

The ease with which the courts dismiss the importance of politics reflects the curious irony that the only people who still believe the myth that courts are nonpolitical seem to be the judges themselves. Because of its important implications for the American political system, however, this is more than an amusing irony. It encourages a guardian ethic<sup>5</sup> whereby judges impose change on the political system on behalf of some higher principle. It also enables the courts to advocate pure, majoritarian democracy at the expense of reflective, political democracy. Both facets emerge

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1. H. ADAMS, *DEMOCRACY* 238 (1952).

2. Fairlie, *The Politician's Art*, *HARPERS*, Dec. 1977, at 33.

3. 445 U.S. 507 (1980)

4. *Id.* at 532 (Powell, J., dissenting).

5. *Cf.* W. ELLIOT, *THE RISE OF GUARDIAN DEMOCRACY* (1974).

in cases involving reapportionment, patronage, and conflicts between national political parties and state election laws.

Reapportionment, in particular, has been described, analyzed, and debated at great length; yet few commentators pay serious attention to how those decisions affect the activity of politics. In part, I believe, that is because so many students of constitutional law see the Court as the isolated center of the political universe rather than one voice within the larger political colloquy. My intent here is to propose a view of the Court that includes participation in the political process. I will begin by discussing "what politics can and should attempt to do," and will illustrate how the courts have succumbed to the credibility gap Fairlie describes.

### I. BICKEL'S VISION OF POLITICS

Alexander Bickel's defense of politics emanated from a life-long fascination with law and the courts.<sup>6</sup> Implicit in his writings are four propositions: (1) politics accommodates competing interests; (2) politics is empirical; (3) politics is inspired by an underlying moral foundation; and (4) politics is an ongoing conversation. Although it may seem like a detour, understanding Bickel is a prerequisite for understanding the proper role of the courts.

"The business of politics is not with theory and ideology but with accommodation."<sup>7</sup> This has been true in the United States at least since Madison persuaded his fellow participants at the Constitutional Convention that a large republic would be preferable to a small one. Besides the "various and unequal distribution of property,"<sup>8</sup> individuals differ in their wants and needs, in their fortunes, and in their opinions about religion and government. These differences lead people to form groups—Madison calls them factions—that seek their own gain at the expense of others. Whether or not increasing the size of the republic solves the problem, it does increase the number of groups and competing interests, as well as the need for some kind of accommodation.

Furthermore, no group or interest can legitimately claim an absolute right to any position. Not only are absolute claims fraught with dangerous consequences—consider the French

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6. What follows really is a synthesis of Bickel's discussion of politics based on most of his writing. I do not intend to suggest that Bickel is right in every detail; to analyze him critically at this point would result in a different paper. Here I am interested primarily in drawing the broad picture for the sake of discussing the role the Court should play.

7. A. BICKEL, *THE MORALITY OF CONSENT* 19 (1975).

8. *THE FEDERALIST* No. 10, at 54 (J. Madison) (H. Lodge ed. 1902).

Revolution—but absolute rights do not exist. Rights are real only when and because society grants them. Thus, one can argue persuasively that society should grant the right to vote or the right to decent health care, but they become rights only when the society's accommodation affirms them as rights.

The formation of electoral districts illustrates Bickel's proposition. We district geographically in the United States because no theory of representation is universally valid. Interests are important and like-minded groups should be allowed to speak as a unified voice. At the same time, we do not dare let those interests govern completely, in part for the reasons Madison explained. The compromise recognizes the difference in theories of representation, and it also recognizes the presence of diverse interests. Having determined to use geographic districts, our need to accommodate intensifies. Which interests shall be represented? Do we break up a sect of Hassidic Jews to guarantee better group representation for black voters?<sup>9</sup> Do we favor Democrats in some districts and Republicans in others? And which theory of representation do we then embrace? One that guarantees absolute equality of votes as measured by population? One that proportions votes by ethnicity? By geography? By occupation? Whatever the answer, it will be found not by appealing to heaven, but rather will depend on someone, somehow accommodating diverse interests.

For politics truly to be an accommodation, it must begin with the facts of our existence, which is to say politics is empirical. Abstractions are nice, but politics must deal empirically with "human nature as it is seen to be."<sup>10</sup> Martin Diamond's response to speculation that a president could win the electoral votes while losing the popular votes is to the point: his grandfather, Diamond mused, often said of his grandmother that "if [she] had wheels she'd be a trolley car."<sup>11</sup> The game of "what if" can be played endlessly, but politics deals with "what is." As Bickel writes about reapportionment:

What does it mean to juggle ratios or to bewail the fact that 20 per cent of a state's population can elect a majority of its legislature,  $X$  per cent of the population of the United States can elect the President, and  $X-10$  per cent can elect the Senate? These are not facts; such things never happen.<sup>12</sup>

9. See *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S.144 (1977).

10. A. BICKEL, *supra* note 7, at 4.

11. Diamond, *The Electoral College and the Idea of Federal Democracy*, 8 *PUBLIUS* 63, 72 (1978).

12. Bickel, *Reapportionment and Liberal Myths*, *COMMENTARY*, June 1963, at 483, 491.

To paraphrase Henry Fairlie, the politician is like a potter who does not get to choose his clay, the painter who is not allowed to mix his own paints, the conductor who must direct a brass band with music scored for a string quartet. That is, politicians may wish for more money to enact new programs, bewail that not everyone is altruistic and caring, hope beyond hope that alliances will remain firm, and search for a certain path from here to there. But resources are finite, many people are solipsists, majorities constantly change, and unexpected happenstances do interfere with carefully chosen plans. Machiavelli may have been wrong about much, but his insights about the role of Fortune remain authentic today. Politics must accommodate that which is given, not that which is wished.

That is why Bickel could be a Bobby Kennedy liberal in the 1960's<sup>13</sup> and wonder publicly in the 1970's whether wide-scale integration should be reevaluated.<sup>14</sup> In real life the results in the South might not be replicable in the North. And who can be certain as to the effects integration has had on education? When a certain black-white ratio is reached in the schools, Bickel contended, white flight becomes an empirical reality. And when federal involvement increases, both black and white families begin to clamor for decentralized, local control of schools. The reality is that "[m]assive school integration is not going to be attained in this country very soon, in good part because no one is certain that it is worth the cost."<sup>15</sup> That is not an easy thing for many to accept, and yet the prudent politician has to work with the conditions and materials available.

Politics that is only accommodation and empirical seeks only to satisfy the selfish interests of competing groups by doling out morsels to each. But politics properly understood engages the citizenry in the quest for the good state, which in turn contributes to the personal quest for the good life. Thus, politics must be principled. At a minimum that includes the moral duty to obey the law, which is the fabric that holds society together. It includes assenting to the moral authority of rational, civil discourse, with an accommodation that reflects persuasive argument rather than brute force. And it may even include an acceptable tone—call it a quality of life—that is shared by the entire community.

In addition to those basic procedural principles, some substantive values are worthy of being treated as "a rule of action that

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13. J. ELY, *DEMOCRACY AND DISTRUST* 71 (1980).

14. Bickel, *Where Do We Go From Here?*, *NEW REPUBLIC*, Feb. 7, 1970.

15. *Id.*

will be authoritatively enforced without adjustment or concession and without let-up.”<sup>16</sup> They are the first principles upon which all else builds, the enduring values of the nation. They are the values that people fight—and die—to preserve.<sup>17</sup> For Americans, these values include adherence to liberty and equality as stated in the Declaration of Independence and the Constitution. And they must be present if politics is to be a worthy activity.

Does this praise for a politics that simultaneously is principled and empirical expose a contradiction? No, we merely have come to grips with what Bickel called the “Lincolnian [t]ension” between principle and expediency.<sup>18</sup> This tension characterized Lincoln’s attempt to inculcate the Declaration of Independence’s principled commitment to equality on existing institutions. Lincoln knew the value of principle, but he also knew the necessity of expedient compromise: “a radically principled solution would collide with widespread prejudices, which no government resting on consent could disregard, any more than it could sacrifice its goals to them.”<sup>19</sup> Most important, he knew that accommodation of enduring values with empirical realities is the heart of enduring government.

The accommodation of interests and principles emerges from an ongoing conversation. Accommodations never are final or complete. They may receive all of the attention and study, but it is the accommodating—the ongoing conversation—that does all of the work. Lyndon Johnson received much praise in 1964 when he signed the Civil Rights Act. The struggle for that Act began at least as early as Hubert Humphrey’s participation in the 1948 Democratic National Convention and led through numerous filibusters in the Senate, Rules Committee delays in the House, litigation before the Supreme Court, protests by the citizenry—both violent and peaceful, by both blacks and whites, in favor and against—and endless other activities. Even then the final law was not the “right law” preordained years earlier, but rather a good law that reflected the tensions of many sides, the reciprocal relations of Democrats and Republicans, Northerners and Southerners, the impositions of federal courts, and generally the activity of politics in all of its glory and all of its despair. As im-

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16. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 59 (1962).

17. They are the values found in the public opinion of the nation. Cf. Nisbet, *Public Opinion versus Popular Opinion*, 41 *PUB. INTEREST* 166 (1975).

18. A. BICKEL, *supra* note 16, at 65.

19. *Id.* at 68.

portant as that 1964 Civil Rights Act was—and is—it was but one frame in the cinema of politics.

And thus, the emphasis on particular policies and specific elections is misplaced. Policies change and elections are occasional, whereas politics is continuous:

[T]he bulk of the political process is below. . . . The jockeying, the bargaining, the trading, the threatening and the promising, the checking and the balancing, the spurring and the vetoing are continuous.<sup>20</sup>

Out of this conversation come the accommodations. And not one of those accommodations is final, because empirical conditions are in constant flux, self-evident principles are never evident to all in the same way, and the diversity of needs and wants is inherent to man's nature. This process of accommodating supercedes any substantive policy position and "seems . . . to make everything else possible."<sup>21</sup> Specifically, it makes possible stability, freedom, and the consent of the governed.

Most of us feel more comfortable in familiar surroundings. We are more willing to accept that which is new if it has evolved naturally instead of being foisted upon us. The same is true for society: it rarely can "digest radical structural change" and reverberates in ways no one can predict when faced with the "sudden abandonment of institutions" that have governed and held it together.<sup>22</sup> The revolutionary's pursuit of absolute truth makes ramshackles of society or tyrannizes it, destroying consent or authority and leaving only raw power.

This is not to suggest that politics is good only because it is the absence of tyranny and chaos. Politics is a positive good because it inculcates freedom by encouraging diversity in a society. Group participation is the reason for diversity, and in politics "the cry is for group participation. . . ."<sup>23</sup> One can join a group and do battle in the political arena, "exerting every ounce of power and influence we can command,"<sup>24</sup> hoping to win the day. The group may be right or wrong, it may win or lose, but the rules are the same for all and the contest is open to all. Participation is "equally available or foreclosed to all"<sup>25</sup>—and that is what enables our government to be both open and free.

20. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 83 (1978).

21. A. BICKEL, *supra* note 7, at 30.

22. A. BICKEL, *THE NEW AGE OF POLITICAL REFORM: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* 3 (1968).

23. A. BICKEL, *supra* note 20, at 116.

24. Bickel, *supra* note 12, at 491.

25. Bickel, *The Revolution of Unreason*, *NEW REPUBLIC*, Oct. 17, 1970, at 18, 21.

Most important, where there is politics there is consent, and where there is consent there is democracy. Democracy exists when the people have "access to, participation in, influence on the process of decision, and only ultimately and in necessarily attenuated fashion . . . ensuring at election time the legislature's fidelity to the popular will."<sup>26</sup> Elections, consequently, are only a "sort of symbol of political democracy."<sup>27</sup> Real democracy exists where there is popular responsiveness, so that government represents the numerical majority and reflects the diversity of the people.

Most political conflicts are pragmatic disputes in which each contestant believes he alone is being rational. In reality, politics involves opinion rather than certifiable truth, and reflects conflicting demands for power and goods in society. The final resolution, therefore, is never right in any absolute sense, but merely reflects the deliberate choice of society. Regardless of the specific substantive choice made, if the people have given their consent by sharing in the process, and if the choice has evolved from an open dialogue and has accommodated the diversity of interests in the society, then we have a well-working democracy.

## II. THE JUDICIAL INTRUSION INTO POLITICS

When the courts overturn a political decision, they unwittingly challenge the political process. If we think of the courts as just another political actor, and if the court has avoided the finality of a constitutional interpretation, there is scant reason to be disturbed. The stakes increase, however, when a court uses judicial review to strike down a political decision, for that puts a damper on the colloquy. But the most troublesome judicial decisions are those that change the fundamental structure of the political system. During the past fifteen years the courts increasingly have chipped away at the form of politics that evolved within the American tradition. They have attempted to replace it with a competing model that only resembles politics.

There is nothing malicious about the justices' intentions. Their goal is the noble one of achieving "fair and effective representation for all citizens."<sup>28</sup> Chief Justice Warren, who always professed the concern that his decisions be fair, and Justice Brennan, who has been in the forefront of the movement to open up the political process, were fully familiar with the "real world of politics" before ascending to the Supreme Court. Perhaps a life-

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26. Bickel, *supra* note 12, at 488.

27. Bickel, *The Supreme Court and Political Democracy*, 44 F.R.D. 158, 160 (1968).

28. 377 U.S. 533, 565-66 (1964).

time of observing examples of politics leads to a desire to make it fairer.

No, the proponents of fairer politics are not part of an evil conspiracy. The problem is their refusal—or inability—to understand that because fairness is a relative concept, it cannot be realized in a pure form. Sometimes fairness calls for absolute equality; at other times it would be grossly unfair to treat everyone equally. But more than that, fairness ultimately is a product of the conversation that accommodates empirical reality and underlying principles. It is not a quantifiable value that can be imposed impartially.

#### A. REAPPORTIONMENT

The search for fairness blossomed in the reapportionment cases, beginning with *Baker v. Carr*.<sup>29</sup> Indeed, when one considers this line of cases, it is plain that although equality is the means, fairness is the end. And it also is clear this pursuit of fairness has led the Court into a quagmire.<sup>30</sup> What began as a quest for the equal weighting of votes by population, then evolved to evaluating the quality of access to the political system, and finally matured into a call for equal success in the political system.

In *Baker v. Carr* the Court “‘discovered the Fundamental Principle of equal representation for equal numbers.’”<sup>31</sup> This principle posits the vote as the cardinal concept of representative democracy. This model of democracy is mechanical and stresses “universalism, individualism, equality, and abstract conceptual symmetry”;<sup>32</sup> it is contractarian and regards individuals as the primary unit, with equal opportunity to participate as the fundamental right; it is majoritarian and believes that political decisions must reflect as closely as possible the will of the majority. As a result, it is as wrong to dilute one’s vote as to deny it outright, whether at the lowest levels of government or the highest.<sup>33</sup> To be sure, absolute equality might be unattainable, but that problem can be resolved by establishing a *de minimis* deviation,<sup>34</sup> while recognizing that extraordinary cases may require exceptions to be made.

The second stage of reapportionment grew out of the Court’s

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29. 369 U.S. 186 (1962).

30. *Cf.* W. ELLIOT, *supra* note 5, ch. 5.

31. *Id.* at 132.

32. *Id.* at 196.

33. *See* Avery v. Midland County, 390 U.S. 474 (1968).

34. *Cf.* Gaffney v. Cummings, 412 U.S. 735 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).



recognition that perhaps it was digging itself into a hole. Specifically, it confronted the paradox that the logical way to maximize equality is the multimember district. As every introductory civics book explains, such districts lessen the likelihood for successful participation by minority groups. If there is racial, ethnic, or party bloc-voting, the minority Blacks, Mexican-Americans, or Republicans never have much chance at the voting booth. Perhaps, a lower court judge proposes, there can be more than one meaning to fair:

A case alleging violation of the one person, one vote standard, based solely on mathematical analysis, may properly be called a "quantitative" reapportionment case. That an apportionment scheme satisfies the quantitative standard does not, however, insure equality in all the aspects of political representation. The heterogeneity of our society manifests itself in an unequal distribution of interest groups; racial and ethnic groups tend to be compartmentalized. . . . Cases alleging a distortion of group voting power . . . have been termed "qualitative" reapportionment cases because they focus "not on population-based apportionment but on the quality of representation."<sup>35</sup>

Using that distinction, lower courts began to exceed the one-man, one-vote standard by also demanding that the votes cast be equal in strength. Although the Court found no constitutional violation in *Whitcomb v. Chavis*,<sup>36</sup> it did hint at a willingness to treat seriously a case where voter dilution correlated with invidious discrimination. Justice Harlan presciently observed that standards based on debasement, dilution, and voting power were replacing mere majoritarianism. Two years later the Supreme Court did order reapportionment of multimember districts where the history of discrimination, the lack of minority success at the polls, and various ingredients in the electoral process indicated that access had been denied.<sup>37</sup>

The third stage may have been snuffed out by the Supreme Court in *Mobile v. Bolden*<sup>38</sup> before it had a chance to develop fully. It began in a 1973 test devised by the Fifth Circuit for evaluating the invidious effect of unfair representation.<sup>39</sup> According to that test, the court would evaluate: (1) factors that indicated minority access to the political process (filing fees, party slating, number of elected officials); (2) whether elected officials are responsive to the interests of the community (minority appointments to boards, services provided minority neighborhoods); (3) whether

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35. *Nevett v. Sides*, 571 F.2d 209, 215-16 (5th Cir. 1978).

36. 403 U.S. 124 (1971).

37. *White v. Regester*, 412 U.S. 755 (1973).

38. 446 U.S. 55 (1980).

39. *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

state policy affects the inability of minorities to be elected; and (4) whether the effects of historical discrimination remain alive. The approach reached its pinnacle when the Fifth Circuit determined the commission government of Mobile, Alabama to be unfair and ordered it replaced with a fairer form of government. The Supreme Court overturned that decision and rejected the Fifth Circuit's test in an opinion I will examine more closely below.

What stage four will entail is uncertain, but the Court's involvement probably has not ended. First, the gerrymander question remains unresolved. Although there is no reason that the courts must settle it, some extremely political gerrymandering during the most recent round of reapportionment already has led to at least one suit in the California federal courts. The Court may be willing to hear such a case. In the New Jersey redistricting decision last Term,<sup>40</sup> Justice Stevens wrote a lengthy concurring opinion in which he proposed a well-developed case for regarding political gerrymandering as one species of vote dilution. In dissent, Justice Powell also stated his willingness "to entertain constitutional challenges to partisan gerrymandering." Second, the third decennial reapportionment since *Baker v. Carr* resulted in a host of disputes, some of which have made their way to the Supreme Court. The New Jersey case even seemed like old times. Justice Brennan opined for the majority that a .7% deviation between the largest and smallest district failed to satisfy the requirements of article I, section 2 because a truly good faith effort could have reduced the deviation even further. Justice White vigorously argued for the four-person minority that at some point there must be a satisfactory 'de minimus' deviation. Third, *Mobile v. Bolden* may be less significant than it first seemed. In *Rogers v. Lodge*,<sup>41</sup> the Court announced that those factors deemed insignificant in *Mobile* really are significant. Furthermore, the extension of the Voting Rights Act, including an "effect" standard, may shift the litigation from the constitutional question to a statutory one, forcing the courts to remain in a quagmire whether or not that is their preference.<sup>42</sup> Finally, even if the courts do retreat in their pursuit of fairness here, they have indicated a willingness to carry the quest elsewhere.

By taking "over from political institutions the pragmatic, nec-

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40. *Karcher v. Daggett*, 103 S.Ct. 2653 (1983). See *id.* at 2667 (Stevens, J., concurring); *id.* at 2689 (Powell, J., dissenting).

41. 458 U.S. 613 (1982).

42. Cf. Berns, *Voting Rights and Wrongs, Commentary*, Mar. 1982, at 31.

essarily unprincipled management"<sup>43</sup> of apportionment, the courts have obviated any semblance of accommodation. And as Justice Stewart argues, redistricting is essentially accommodation:

Representative government is a process of accommodating group interests through democratic institutional arrangements. . . . Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation . . . . [T]his ideal is approximated in the particular apportionment system of any State by a realistic accommodation of the diverse and often conflicting political forces operating within the State.<sup>44</sup>

That is, the courts err in imposing their standards on national, state, and municipal legislative bodies when it is politics that is being debated. Of course there are winners and losers in apportionment, because the "very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large."<sup>45</sup> And thus, the courts are wrong in thinking that there is a correct, fair apportionment for every legislature in America, because "[e]quality of representation is one goal among many, to be accommodated to others."<sup>46</sup>

The solution the courts have imposed ignores our Madisonian political tradition. Most Americans identify with one or more groups, and those groups, representing varying constituencies, compete with each other for advantage. One consequence of Madisonian politics is an inherent tension in the scheme of representation. It calls for majoritarian government, which requires that most of the time most of the people will rule. But it also calls for reflective representation, which means that the institutions will "reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices . . . were brought to bear on the decision-making process."<sup>47</sup> That is why the state and national executives represent different constituencies than the legislatures. And federalism further compounds the variety of interests reflected. Ours is a reflective democracy in which groups, as well as individuals, are represented.

## B. PATRONAGE

The push for a fair politics has not been limited to reapportionment. Twice in the past decade the Supreme Court has challenged aspects of the time-honored patronage system. In *Elrod v.*

43. Bickel, *The Great Apportionment Case*, NEW REPUBLIC, Apr. 9, 1962, 13, 14.

44. *Lucas v. Colorado General Assembly*, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting).

45. 412 U.S. at 753.

46. Bickel, *supra* note 43, at 13.

47. Bickel, *supra* note 12, at 488.

*Burns*<sup>48</sup> Justice Brennan, speaking for a plurality, prohibited the sheriff of Cook County, Illinois from firing non-civil-service, non-policy-making employees. The firings unconstitutionally restrained their freedom of belief and right to associate and affiliate with a political party. True, Brennan conceded, speech can be limited if the action furthers some vital government interest, is the least restrictive way of doing so, and provides benefits that outweigh the loss of first amendment rights. Political firing by a newly elected sheriff satisfies none of those requirements: there are better ways to obtain effective and efficient government; political loyalty is not relevant to the jobs of non-policymaking employees; weakening patronage politics will not destroy political parties and might reinvigorate political democracy.

The Court followed Brennan's precedent and clarified his test in *Branti v. Finkel*,<sup>49</sup> which involved the firing of two assistant public defenders because they were Republicans. Sometimes party membership is important, Justice Stevens acknowledged, as in the appointment of election judges; other times it is insignificant despite a high degree of confidentiality, as in hiring a football coach. But the burden always is on the hiring authority to show that politics is an appropriate requirement for effective performance. Because the public defender is responsible to the citizenry and shares no confidentiality regarding policymaking, it is constitutionally impermissible to fire him for political reasons.

Two lower court cases are relevant here. *Illinois State Employees Union v. Lewis*<sup>50</sup> is an early case where the Seventh Circuit developed an argument similar to that of *Burns* and *Branti*. The lengthy opinion was written by then Judge Stevens. *Shakman v. Democratic Organization of Cook County*<sup>51</sup> is also germane because it advances what might be the logical extension of the political firing cases: the unconstitutionality of a state's entire patronage system. District Judge Bua declared that patronage politics provides "a substantial electoral advantage for regular Democratic Party candidates, with a corresponding disadvantage to opposing candidates and voters,"<sup>52</sup> from which one can conclude that politics as practiced in Cook County is unfair.

Indeed, the pith of each of these decisions is the conviction that politics is unfair when incumbency weighs so heavily. The same conviction was frequently used to justify court-ordered reap-

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48. 427 U.S. 347 (1976).

49. 445 U.S. 507 (1980).

50. 473 F.2d 561 (7th Cir. 1972).

51. 481 F. Supp. 1315 (W.D. Ill. E.D. 1979).

52. *Id.* at 1321.

portionment, on the theory that incumbent state legislators were unlikely to vote themselves out of jobs. In the same sense, Justice Brennan states, political firing "tips the electoral process in favor of the incumbent party,"<sup>53</sup> which might enable those incumbents to "starve political opposition."<sup>54</sup> If allowed to remain unencumbered, "[p]atronage can result in the entrenchment of one or a few parties."<sup>55</sup> And even if the worst case does not come to be, patronage undoubtedly can retard the process of political democracy.<sup>56</sup>

Brennan sounds moderate compared to Judge Bua, who reads *Reynolds* and other reapportionment cases to prescribe equal participation in the political process. If patronage creates any significant advantage, he concludes, that is sufficient proof that it is unfair. And thus, it is enough that the patronage system deliberately favors some candidates over others. Judge Bua does not stop there, but continues with a conspiracy theory:

[T]he non-consenting defendants have independently infringed the plaintiffs' constitutional rights through their use of patronage hiring, firing, and promotion practices, as well as through their *conspiracy* with the consenting defendants to practice and further patronage hiring practices.<sup>57</sup>

In declaring patronage unconstitutional, the courts err in two ways. First, they focus on individual actions taken out of context. As Powell maintains, the Court underestimates the strength of government interests and exaggerates the burdens suffered by the fired workers.<sup>58</sup> Displaying so little appreciation for the long-range nature of politics, the judges appoint themselves as the guardians of fair play. Concurring in *Illinois State Employees v. Lewis*,<sup>59</sup> Judge Campbell foresees the courts becoming "super civil service commissions" as they struggle to cope with a possible 1,946 additional trials. In New York and Illinois, state legislatures already had responded to the evils of patronage politics by opting for a fifty-fifty blend of civil service and spoils appointments.<sup>60</sup> In other words, the ongoing dialogue did speak to failings within the political system; the problem, of course, is that it was not a response approved by the guardian judges.

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53. 427 U.S. at 356.

54. *Id.*

55. *Id.* at 369.

56. *Id.*

57. 481 F. Supp. at 1349 (emphasis added).

58. 427 U.S. at 382 (Powell, J., dissenting).

59. 473 F.2d at 578.

60. 427 U.S. at 375 (Burger, C.J., dissenting); 445 U.S. 508, 521 (1980) (Powell, J., dissenting).

Second, the courts' reasoning is fallacious. Incumbents may have an unfair advantage and politics may be unfair, but it does not follow that therefore patronage is unconstitutional. Gerrymandering is patently unfair, as are the advantages that incumbent congressmen have because they are more visible, have franking privileges, and can claim expertise. Sure, it was unfair to fire Burns and Finkel, but the way they were hired originally was also unfair. To call these actions unconstitutional simply because they seem unfair is to evidence considerable naivete about the realities of a healthy political democracy. Is it possible to attain the "unfettered judgment of each citizen"?<sup>61</sup> And how can one equalize influence? Some are better thinkers; some have more money; some care more intensely; some are lucky. To suggest that all influence can be removed—or should be removed—is to propose a dream world devoid of politics.

The degree to which the courts misunderstand democratic politics is manifest in their choice of precedents. The pertinent cases, they declare, are those where communists and socialists have been fired from teaching in the public schools for advocating subversive ideas. But the suppression of ideas expounded by communists and socialists is not apposite to the use of hiring and firing to make politics work more effectively. Patronage is a "practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics."<sup>62</sup> Rather than suppressing beliefs, it opened the system for much of the populace originally and for the waves of immigrants later.

Furthermore, the two beliefs are different in kind. Communists advocate an ideological position that needs first amendment protection because it challenges the predominant views of most Americans. Political parties, to the contrary, avoid ideology in favor of broad-based policies that will further their primary goal of winning elections. Rather than reflecting ideological beliefs, political parties generate interest in politics and help organize government. To fire someone because of his political beliefs, from a job that he originally obtained because of his political beliefs, hardly denies the right to advocate a policy position. What it does reflect is the political position favored by a majority of the populace. When you fire a communist because you do not want him to express his views, he may be shut off permanently; when you fire a political appointee it is because the folks back home decided to kick his boss temporarily out of office. Patronage advances demo-

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61. 427 U.S. at 372.

62. *Id.* at 376 (Powell, J., dissenting).

cratic politics; unlike firing of teachers with dissident views, patronage does not threaten the existence of an open society.

Here, as in the reapportionment cases, the courts assume that there is a single standard of fairness. Instead of letting the political system accommodate competing notions of representation, the courts impose their own definition of accountable representation. Hence, Justice Brennan's evaluation of the state interest in effective government assays the efficiency of public employees and concludes that requirements such as merit are the best way to assure accountability.<sup>63</sup> But that ignores a different kind of accountability, that of the nonexpert whose loyalty is to the policies of those elected and who advocates that loyalty in many ways. To think that a midlevel clerk in a voter registration office only processes forms is sheer folly. That clerk works diligently to keep politics alive between elections; he is a representative of the in-party and those who contact him for information or favors know it; he serves the party loyally even when not privy to confidential policy; he probably entered politics not because of "some academic interest in 'democracy,'"<sup>64</sup> but for other reasons, including the prospect of a good job. Only Justice Powell, it seems, grasps that accountability and effectiveness work in many ways:

Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.<sup>65</sup>

Only Powell seems to be aware that "the theoretical abstractions of a political science seminar" do not always apply to the real world of politics.<sup>66</sup>

In his dissenting opinions Powell extols the virtues of a lively, vigorous politics, in which patronage is especially valuable because it enhances party loyalty. And political parties, he asserts, advance a "variety of substantial governmental interests"<sup>67</sup>; they help connect executives and legislatures; they help clarify the choices in an election; they constrain political fragmentation in a society; they keep interest alive in local elections; they "supply an essential coherence and flexibility to the American political scene."<sup>68</sup>

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63. *Id.* at 366-68.

64. *Id.* at 385 (Powell, J., dissenting).

65. *Id.*

66. *Id.* at 382.

67. 445 U.S. at 528 (Powell, J., dissenting).

68. *Id.* at 532.

## C. STATE REGULATION OF POLITICAL PARTIES

Wisconsin law establishes an open primary whereby any registered voter can participate in either primary. After the primary, delegates to the national convention are chosen by a process that does require open affiliation with the party, but those delegates are committed by Wisconsin law to follow the results of the primary election at the national party convention. Because that is contrary to procedures established by the National Democratic Party, a controversy arose in 1980 as to whether the Wisconsin delegation should be seated.

In *Democratic Party v. LaFollette*,<sup>69</sup> the Supreme Court decided in favor of the Democratic Party on the basis of the right to associate freely and to "define their associational rights by limiting those who could participate in the processes."<sup>70</sup> Following earlier decisions in party convention and election ballot cases, the Court declared that political parties have a right to protect themselves from intrusion by external forces. The compelling interests advanced by the state were rejected because those interests are limited to the primary and not to the separate voting for delegate selection. As Stewart seems to imply, in cases such as this one there really is not much the Court can do. To enter the fray would be to "substitute its own judgement for that of the Party,"<sup>71</sup> so neither the Supreme Court nor Wisconsin can order the national Democratic Party to seat delegates chosen in violation of its rules. And besides, Stewart suggests this way everyone should be happy: the state's interest in elections and the party's interest in delegate selection can coexist harmoniously.

At first glimpse it seems as if the Court finally has come to understand politics. And yet Powell, the previous defender of politics, dissents. The reason, I believe, is that again only he perceives the breadth and subtlety of politics. The majority incorrectly equates politics with political parties. To the contrary, political parties are only one actor in the broader conversation of politics, and they represent only one interest in the ensuing accommodation. Both the national Democratic party and the state of Wisconsin are committed to opening the political process. If the open primary skews the delegates one way, the party reforms skew them a second way. The point is, there is no "right" way to guarantee an open political process. The colloquy between the

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69. 450 U.S. 107 (1981).

70. *Id.* at 122.

71. *Id.* at 124.



political parties and state election laws is proof that the process is open:

The history of state regulation of the major political parties suggests a continuing accommodation of the interests of the parties with those of the States and their citizens. . . . Today, the Court departs from this process of accommodation. It does so, it seems to me, by upholding a First Amendment claim by one of the two major parties without any serious inquiry into the extent of the burden on associational freedoms and without due consideration of the countervailing state interests.<sup>72</sup>

Accommodation of that sort is best left to the ongoing political conversation.

### III. DEFINING THE JUDICIAL ROLE

What then should be the role of the courts in the political system? To begin with they must remember that they are one actor in the ongoing dialogue, that their decisions are not law finalized, but merely the "beginnings of conversations between the Court and the people and their representatives."<sup>73</sup> They also would do well to rely frequently on the passive virtues. Vagueness, delegation, ripeness, political questions—all "techniques of 'not doing,' devices for disposing of a case while avoiding judgment on the constitutional issues it raises"<sup>74</sup>—enable the court to observe and enhance the political process. Sometimes it is better for democracy to allow the representative branches, rather than the counter-majoritarian one, to make decisions. Sometimes the decision depends on expediency instead of principle, and the court has no business participating. Sometimes the accommodation makes more sense when additional actors are encouraged to participate. But always these passive virtues strengthen the colloquy, so that when a decision finally is made, it encompasses different paths, "lesser doctrines," and a series of "partial answers," so that the final doctrine is one "to which widespread acceptance may fairly be attributed."<sup>75</sup>

And yet, the courts are more than just another political actor. There is a proper mystique about the courts that grows out of their special interest in protecting the fundamental principles of the nation. The courts can encourage politics to be more than just a contest of wills, but only if they sometimes are willing to overrule the political accommodation.

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72. *Id.* at 137 (Powell, J., dissenting).

73. A. BICKEL, *supra* note 20, at 91.

74. A. BICKEL, *supra* note 16, at 169.

75. *Id.* at 246.

The problem, which has been the cause for considerable debate, is to identify those times. If politics is as important as I have argued, the standard the Court might employ is to intervene only when it becomes evident that politics no longer is working. If politics is excluding groups or individuals (denying the right to vote because of race) or if the continued existence of politics is threatened (speech that creates a clear and present danger) or if the political system refuses to rectify fundamental wrongs (segregated schools in a nation founded on the principle of equality), then the Court should enter the fray by invoking those principles that “rest on fundamental presuppositions rooted in history.”<sup>76</sup>

Commentators suggest two reasons why that standard is too limited. According to one argument, representation, not traditional values, is the essence of popular government and the key to protecting minorities. Because the Constitution is a “process of government, not a governing ideology,”<sup>77</sup> there should be absolute standards that guarantee the integrity of representation. The court should interfere whenever the ins choke off opportunity for change by limiting the outs, or whenever an “effective majority” systematically disadvantages a minority out of “simple hostility.”<sup>78</sup> It is not enough to protect the basic right to vote; the courts also must see that the vote is not diluted or lessened through excessive delegation.

A second contention is that politics is working only when the Constitution’s substantive rights are protected and enhanced, which presupposes that the Constitution has a moral character. Furthermore, the ensuing process cannot be regarded as neutral. Behind every procedural question—from voting to reapportionment—there always is a “substantive vision of proper conduct.”<sup>79</sup> Rather than hiding behind procedural questions, the Court is obligated to defend the substantive Constitution.<sup>80</sup>

That, of course, leads us back to the initial problem: courts imposing their understanding of fair and equal representation upon the political system. And the dilemma remains. When is the Court justified in casting aside its role of equal conversant in the colloquy and becoming a guardian by overruling the political accommodation? There is no easy answer, but courts could do well

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76. *Id.* at 238.

77. J. ELY, *supra* note 13, at 101.

78. *Id.* at 103.

79. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1076 (1980).

80. See, e.g., Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?* 42 *OHIO ST. L.J.* 335 (1981).

to take a lesson from Aristotle, sharpen their practical wisdom, and set their sights on a mean that accommodates process and rights. I have in mind something like Justice Stevens's opinion in *Mobile v. Bolden*.<sup>81</sup> It is especially instructive when placed apposite Stewart's majority opinion, which defers to the political process, and Marshall's dissent, which propounds an absolute constitutional standard.

Marshall perceives a neat hierarchy of rights and demands absolute fairness. His starting point is the dogma of *Reynolds*: "the right of suffrage is a fundamental matter in a free and democratic society,"<sup>82</sup> equally fundamental whether the vote is denied or diluted, because they are "analytically the same concept."<sup>83</sup> Indeed, the "fundamental right to equal electoral participation . . . encompasses protection against vote dilution."<sup>84</sup> Any discriminatory effect debases the vote: "[t]he theoretical foundations . . . are shattered where, as in the present case, the right to vote is granted in form, but denied in substance."<sup>85</sup> Because those rights exist independently of the historical process, they are fundamental and must take precedence over all else.

By carrying the principles first declared in *Reynolds* to their logical conclusion, Marshall exposes the flaws in establishing an absolute "fairness" standard. First, there is the irony that the Court's defense of individual rights results in abnegating the right of an entire city to choose a form of government. It also is ironic that what began as a defense of individual rights has become a call for proportional representation of groups.<sup>86</sup> But the greatest irony—and it is a disheartening one—is Marshall's threat that unless the government of Mobile, Alabama behaves, it "cannot expect the victims of discrimination to respect political channels of seeking redress."<sup>87</sup>

The cornerstone of Stewart's opinion is that although everyone has the right to participate, no one has the right to any particular outcome. Showing considerable deference to the existing process, Stewart focuses on whether Mobile's commission government is "motivated by a discriminatory purpose."<sup>88</sup> He does so

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81. 446 U.S. 55, 83 (1980). See the discussion of judicial statesmanship in G. JACOBSON, *PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT* (1977).

82. 446 U.S. at 115 (Marshall, J., dissenting).

83. *Id.* at 116 (Marshall, J., dissenting).

84. *Id.* at 114.

85. *Id.* at 141.

86. To be fair, Marshall does reject the charge that he is calling for proportional representation.

87. 446 U.S. at 141 (Marshall, J., dissenting).

88. *Id.* at 62.

because if there are no “official obstacles” and if all persons can “register and vote in Mobile ‘without hindrance,’” there is no constitutional violation.<sup>89</sup> He considers the question of motivation from different perspectives, and each time the conclusion is the same: if there is no purposeful discrimination, there is no constitutional wrongdoing. Even a history of past discrimination now discontinued cannot “condemn governmental action that is not itself unlawful.”<sup>90</sup>

Stewart resists playing the role of guardian because, true to the political system, he envisions a world of many groups: Blacks, whites, Republicans, Democrats, union workers, university personnel—the list is endless. Even to attempt to assure an absolutely fair chance to each would “spawn endless litigation.”<sup>91</sup> In reminding the dissenters that no group has the right to be protected from electoral defeat, Stewart upholds the validity of the process whereby everyone has an equal right to vote and participate and groups compete for control. Winners cannot be foreordained but will emerge from that process.

The theory makes sense, but anybody who has lived in the Deep South might question whether it is true to the facts. The at-large commission form of government in Mobile does lessen the probability of effective participation by black citizens. And even if all of the physical obstacles have been removed, there *is* a long history of discrimination in Mobile, Alabama. To be sure, Stewart’s ultimate conclusion is correct, but he gets there too easily.

Stevens avoids the sure answers of Marshall and Stewart and seeks an accommodation of their opinions. He sets the stage with a distinction between state action that inhibits the right to vote and the issue in *Mobile*—state action that affects the political groups competing for leadership. This issue has two, interrelated dimensions. It involves both rights—fourteenth and fifteenth amendments in *Mobile*—and process, and the rights must be judged by a “standard that allows the political process to function effectively.”<sup>92</sup> That is, the process must be kept alive, but there are substantive rights that have to be protected.

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89. *Id.* at 65, 71-73.

90. *Id.* at 74.

91. *Id.* at 80.

92. *Id.* at 85 (Stevens, J., concurring in the judgment). Stevens develops the argument more fully in *Rogers v. Lodge* and *Karcher v. Dagget*. In the former he focuses on why black voters as a group cannot be singled out for protection, unless there is clear racial gerrymandering. In the latter he develops his theory of gerrymandering. Whether these are acceptable, logical extensions of the argument in *Mobile* is a separate question.

*Gomillion v. Lightfoot*,<sup>93</sup> Stevens believes, suggests a way the two dimensions can coexist. In that case the Court overruled the political process because a gerrymander that excluded blacks (1) was "not the product of a routine or traditional political decision," (2) "had a significant adverse impact on a minority group," and (3) "was unsupported by any neutral justification."<sup>94</sup> By focusing on the "objective effects of the political decision,"<sup>95</sup> Stevens is satisfied that all groups are being treated the same and that none is being excluded unfairly. His test also takes into account that for the legislative process of apportionment to work, "it must reflect an awareness of group interests and it must tolerate some attempts to advantage or disadvantage particular segments of the voting populace."<sup>96</sup> Hence, the process is protected, but so too are the rights of groups within the process.

It may not matter to the black citizens of Mobile, but this is a more intellectually satisfying explanation than Stewart's. I do not suggest it is the last word, but merely that it is an important opinion because it shows a sensitivity to politics that is rare on the Court. It conveys the crucial idea that politics involves both a process and fundamental rights. Most of the time these two dimensions keep each other in check with the support of all the actors engaged in the conversation. Occasionally, politics will lean too far one way or the other and threaten its own survival. Only then should the Court become more than just another actor—and then only for long enough to nudge politics back to a healthy mean between process and rights.

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93. 364 U.S. 339 (1960).

94. 446 U.S. at 90 (Stevens, J., concurring in the judgment).

95. *Id.* at 90.

96. *Id.* at 91.