THE COURT'S MISSED OPPORTUNITY TO DRAW THE LINE ON PARTISAN GERRYMANDERING: *LULAC v. Perry*, 126 S. Ct. 2594 (2006)

Over the past decade, the growing polarization of the American electorate has led state political parties to redouble efforts to implement politically advantageous electoral maps.[1] Majority parties regularly adopt irregularly shaped districts in an attempt to pack opposition voters into a few districts while setting up their own "safe" legislative seats—a process popularly known as "gerrymandering."[2] The Supreme Court has addressed the practice twice. In *Davis v. Bandemer*,[3] the Court established that partisan gerrymandering presents a justiciable controversy, but it failed to settle on a test or standard to determine the constitutionality of any given plan.[4] After *Bandemer*, emboldened state legislatures created increasingly extreme districting maps with the purpose of entrenching the favored political party. The practice has escalated to the point that one commentator now believes that there are as many as four hundred safe congressional seats.[5] Eighteen years after *Bandemer*, the Court dismissed a similar case, *Vieth v. Jubelirer*,[6] because it was not able to agree on a workable standard to apply.[7] *Vieth* did not leave much hope of resolution, as four Justices advocated three separate approaches for adjudicating partisan ger-

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1. *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (2003); *see also* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 542 (2004).

2. BLACK'S LAW DICTIONARY 708–09 (8th ed. 2004). The term gerrymander has been in the political lexicon since 1812, originating as a reference to Massachusetts Governor (and later U.S. Vice President) Elbridge Gerry and the salamander-shaped electoral districts he helped produce. *Id.* at 709.

3. 478 U.S. 109 (1986).

4. *See id.* at 119–20, 142.

5. Jeffrey Toobin, *The Great Election Grab: When Does Gerrymandering Become a Threat to Democracy*?, NEW YORKER, Dec. 8, 2003, at 64 (quoting Professor Richard Pildes of New York University School of Law).

6. 541 U.S. 267 (2004).

7. *See id.* at 307–08 (Kennedy, J., concurring). Although Justice Kennedy provided his vote with a solitary concurrence, he agreed with the four-Justice plurality that "[n]o substantive definition of fairness in districting seems to command general assent." *Id.* at 307.

rymandering claims,[8] four other Justices concluded that these claims presented a nonjusticiable controversy,[9] and one Justice found *Vieth* itself to be nonjusticiable, but hesitated to declare justiciability for all such suits.[10]

Last Term, in *League of United Latin American Citizens v. Perry* (*LULAC*),[11] the Supreme Court attempted for the third time to create a reliable standard for adjudicating claims of political gerrymandering. Although the Court held that a redistricting plan violated section 2 of the Voting Rights Act with respect to a specific district, it once again dismissed appellants' claims of statewide partisan gerrymandering because of the absence of a workable standard.[12] It seemed plausible that the Court's new composition would lead to the resolution and consensus lacking in *Bandemer* and *Vieth*, but that hope proved to be misplaced; instead, the present Court gave no new direction for the political branches or lower courts. If anything, *LULAC*'s limited majority opinion and six separate concurrences plunged partisan gerrymander jurisprudence deeper into confusion. The third failure to delineate a workable framework, along with the constitutional delegation of districting to Congress and the States, should have led the Court to rule partisan gerrymandering nonjusticiable as a "political question."

In 1990, Texas Democrats capitalized on their control of the state legislature by enacting a redistricting plan designed to favor Democratic candidates.[13] The move effectively neutralized Republicans' growing success in statewide elections; in 2000, Republicans carried 59% of the statewide vote but won just 13 of the 30 House seats.[14] After the 2000 census, a split legislature forced the implementation of a court-ordered plan (Plan 1151C) to comply with the one-person, one-vote requirement.[15] Hesitant to be seen as politically motivated, the architects of Plan 1151C left the 1991 Democrat-drawn map largely

8. *See id.* at 317–42 (Stevens, J., dissenting); *id.* at 343–55 (Souter, J., dissenting); *id.* at 355–68 (Breyer, J., dissenting). Justice Ginsburg joined Justice Souter's opinion.

9. *See id.* at 281 (plurality opinion).

10. *See id.* at 306–17 (Kennedy, J., concurring).

11. 126 S. Ct. 2594 (2006).

12. *See id.* at 2605.

13. *See id.*

14. *Id.* at 2606.

15. *Id.*

in place, which culminated in a 17-15 Democratic advantage in House seats after the 2002 elections.[16]

Republicans gained control of both houses of the state legislature in 2003 and immediately set out to address their electoral disadvantage.[17] After a lengthy and infamous partisan struggle, the legislature enacted a new map (Plan 1374C) which enabled Republicans to parlay 58% of the 2004 statewide vote into a 21-11 advantage in House seats.[18] Opponents of the plan brought suit, alleging that the plan, both generally and with respect to two specific districts, violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and section 2 of the Voting Rights Act of 1965.[19]

A three-judge panel of the district court rejected the plaintiffs' claims that the plan should be invalidated as an unconstitutional partisan gerrymander.[20] With appeal pending, the Supreme Court vacated the district court's judgment and remanded the case for further consideration in light of the Court's ruling in *Vieth*.[21] The district court again entered judgment for the defendants,[22] and the Supreme Court took the case on appeal.

The Supreme Court affirmed in part, reversed in part, vacated in part, and remanded.[23] Writing in part for a Court majority,[24] in part for a plurality,[25] and in part for himself,[26] Justice Kennedy relied on *Bandemer* to rule that an equal protection

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16. *See LULAC*, 126 S. Ct. at 2606.

17. *See id*.

18. *Id*. The struggle culminated with Democratic legislators staging a walkout in May 2003 and leaving Texas in a nationally-publicized attempt to thwart the GOP redistricting plan. *See, e.g.*, Sheryl G. Stolberg, *Sound, Fury, Pension Rules: Nasty Party Clash in House*, N.Y. TIMES, July 3, 2002 (late ed.), at A1.

19. *See* Session v. Perry, 298 F. Supp. 2d 451, 457 (E.D. Tex. 2004).

20. *Id.*; *see also LULAC*, 126 S. Ct. at 2604. Claims "challenging the constitutionality of the apportionment of congressional districts" are heard by a three-judge district court, with direct appeal to the Supreme Court. 28 U.S.C. § 2284 (2000).

21. *See, e.g.*, Henderson v. Perry, 543 U.S. 941 (2004) (mem.).

22. *See* Henderson v. Perry, 399 F. Supp. 2d 756 (E.D. Tex 2005).

23. *LULAC*, 126 S. Ct. at 2605. The Court affirmed the district court's dismissal of the statewide political gerrymandering claims and the District 24 Voting Rights Act claim, reversed and remanded the district court's dismissal of the District 23 Voting Rights Act claim, and vacated the district court's race-based equal protection and District 23 partisan gerrymandering holdings because the Court failed to reach them. *Id.*

24. Justices Stevens, Souter, Ginsburg, and Breyer joined the majority opinion.

25. Chief Justice Roberts and Justice Alito joined Justice Kennedy in the plurality.

26. In addition, Justices Souter and Ginsburg joined a portion of Justice Kennedy's opinion.

challenge to a political gerrymander presented a justiciable case or controversy, although he conceded that the Court could not agree on a substantive standard.[27] Justice Kennedy defined the key inquiry as "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[28] Justice Kennedy considered and rejected appellants' proposed "sole-intent"[29] and "symmetry"[30] standards. Appellants' argument, at its core, was "that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders;"[31] Justice Kennedy disagreed and thus refused to uphold appellants' statewide gerrymander claims.

Moving to the district-specific gerrymander claims, the Court held that the Texas legislature's redrawing of District 23 violated section 2 of the Voting Rights Act.[32] The Court held that all three preconditions of vote dilution were present to support a section 2 violation, and the totality of the circumstances established a denial of opportunity.[33] By finding a section 2 violation, the Court failed to reach appellants' First Amendment

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27. *LULAC*, 126 S. Ct. at 2607.

28. *Id*.

29. The sole-intent standard would render mid-decade redistricting plans unconstitutional as inherently motivated by partisan objectives. Justice Kennedy rejected the standard because any successful gerrymander claim has to "show a burden, as measured by a reliable standard, on the complainants' representational rights," but appellants' standard expressly disavowed any such showing. *Id*. at 2609–10 (opinion of Kennedy, J.).

30. The proposed symmetry standard measures a map's bias by "the extent to which a majority party would fare better than the minority party should their respective shares of the vote reverse." *Id*. at 2610. Justice Kennedy found difficulty in identifying a reliable measure to evaluate asymmetry and to establish the point at which asymmetry becomes unfair.

31. *Id.* at 2612 (opinion of Kennedy, J., joined by Souter, J., and Ginsburg, J.).

32. *LULAC*, 126 S. Ct. at 2623 (majority opinion). A violation of section 2 occurs when "it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a racial group in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at 2613–14 (quoting 42 U.S.C. § 1973(b) (2000)) (internal brackets omitted).

33. *Id*. at 2613–23. In *Thornburg v. Gingles*, the Court identified three preconditions of a section 2 violation: (1) that the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the racial group is politically cohesive; and (3) that the majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. 478 U.S. 30, 50–51 (1986). Once these three conditions are established, the totality of the circumstances will determine whether a violation has occurred. *Id*. at 50.

and Equal Protection claims with respect to District 23.[34] The Court rejected the section 2 claim with regard to District 24 because the minority group could not meet the requirement of demonstrating an ability to elect a candidate of its choice.[35]

Justice Stevens concurred in part and dissented in part. He argued that Plan 1374C should be entirely invalid as a violation of "the State's constitutional duty to govern impartially."[36] Justice Stevens viewed the *LULAC* issue more narrowly than Justice Kennedy, limiting it to "whether it was unconstitutional for Texas to replace a lawful districting plan in the middle of a decade, for the sole purpose of maximizing partisan advantage."[37] In making the fundamental distinction between mid-decade and regular redistricting, Justice Stevens aimed to circumvent *Vieth* and render Plan 1374C inherently unconstitutional. Justice Stevens also defended the symmetry standard as a widely-accepted measure of vote dilution and discriminatory impact, and proposed a standard for evaluating the merits of district-specific political gerrymander claims.[38]

Justice Breyer wrote an opinion concurring in part and dissenting in part. Like Justice Stevens, Justice Breyer found the Plan invalid as a violation of the Equal Protection Clause because its sole motivation was partisan gain.[39] Justice Breyer pointed out that the plan was an effort to produce a majority of Republican congressional representatives even if the party received a minority of votes and argued that the "unjustified use of purely partisan line-drawing" should be enough to show

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34. The Court consequently vacated the district court's judgment regarding these other claims. *LULAC*, 126 S. Ct. at 2623.

35. *Id.* at 2625 (plurality opinion). Justice Kennedy found that the district court "committed no clear error in rejecting this questionable showing that African-Americans have the ability to elect their candidate of choice in favor of other evidence that an African-American candidate of choice would not prevail." *Id*.

36. *Id.* at 2626 (Stevens, J., concurring in part and dissenting in part). In the event that Plan 1374C was found valid generally, Justice Stevens maintained that the boundaries of Districts 23 and 24 were unconstitutional.

37. *Id.* at 2631 (internal quotation marks omitted).

38. *See id*. at 2637–42. Under the standard, an unconstitutional partisan gerrymander would occur where a candidate or voter within the challenged district could show both improper purpose and effect. *Id*. Plaintiffs would satisfy the purpose prong by demonstrating that the legislators' predominant motive was maximizing partisan power. *Id*. at 2642–43. The effect prong would require demonstration that: (1) plaintiffs' chosen candidate won election under the old plan; (2) plaintiff now resides in a "safe" district for the opposite party; and (3) the "new district is less compact than the old district." *Id*. at 2642–43.

39. *See LULAC*, 126 S. Ct. at 2651–52 (Breyer, J., concurring in part and dissenting in part).

that "the plan in its entirety violate[d] the Equal Protection Clause."[40]

Justice Souter concurred in part and dissented in part. He agreed with the majority that the mid-decade timing of the Plan was not inherently unconstitutional, but "saw nothing to be gained by working through these cases" because the Court had "no majority for any single criterion of impermissible gerrymander . . . ."[41] Taking issue with Justice Kennedy's opinion, Justice Souter explicitly declined to rule out the symmetry standard and refused to reject procedurally-based gerrymander tests generally.[42] He also found the "requisite degree of control" requirement to be satisfied with a showing that the affected group constituted a majority within the dominant party's primary, rather than in the general election.[43]

Chief Justice Roberts also wrote separately, concurring in part and dissenting in part. He affirmed the disposition of the case without taking a position on whether or not political gerrymander claims present a justiciable case or controversy because "the question whether any reliable standard exists ha[d] not been argued in these cases."[44] Chief Justice Roberts disagreed with the Court's conclusion that District 23 violated section 2, pointing out that Latinos made up 58% of the voting population but controlled 85% of the voting districts in the area.[45] Moreover, he maintained that to sustain a section 2 vote dilution claim, the appellants were required to show an alternative apportionment that would have increased the number of single-member districts under their control.[46] Because appellants failed to make such a showing, Chief Justice Roberts would have dismissed their district-specific claims.

Finally, Justice Scalia concurred in part and dissented in part. Justice Scalia wanted to dismiss the case, arguing that claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy.[47] He would have also dismissed the vote dilution claims on the ground that the legislature's

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40. *Id*. at 2652.

41. *Id*. at 2647 (Souter, J., concurring in part and dissenting in part).

42. *Id*.

43. *Id*. at 2648.

44. *LULAC*, 126 S. Ct. at 2652 (Roberts, C.J., concurring in part and dissenting in part).

45. *Id*. at 2653.

46. *Id*. at 2654–55 (citing Johnson v. De Grandy, 512 U.S. 997 (1994)).

47. *Id*. at 2663 (Scalia, J., concurring in part and dissenting in part).

motivation was political, not racial.[48] Conversely, because District 25 classified individuals on the basis of race in an attempt to comply with the Voting Rights Act, Justice Scalia found that the district triggered strict scrutiny and violated section 2.[49]

LULAC was the Supreme Court's third failure to settle on a standard for the adjudication of partisan gerrymander claims. In all likelihood, litigation will continue unabated as majority parties aim at further entrenchment. It is clear that partisan gerrymandering, "motivated as it is by narrow, self-interested ends, offends the ideal of a public-regarding politics toward which our polity should strive."[50] Indeed, gerrymandering marginalizes government legitimacy, minimizes the impact of the voters, and manipulates the democratic process.[51] The extent to which partisan gerrymandering thwarts the will of the people, however, should not be overstated. In 2004, Republicans claimed 53.1% of House seats while garnering 48.9% of the votes, and Democrats received 45.9% and 46.5%, respectively.[52]

Moreover, the Constitution does not subject every societal imperfection to judicial regulation. As abhorrent as partisan gerrymandering may be, policing it is arguably not within the Court's domain. Article I, Section 4 of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."[53] Thus, the constitutionally prescribed system involves federal legislative regulation of state legislative redistricting. In hearing partisan

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48. *Id*. at 2664. Justice Scalia asserted that if race was not the predominant factor motivating the legislature, then no violation occurred. *Id.* (citing Easley v. Cromartie, 532 U.S. 234 (2001)). *But cf*. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (rejecting requirement that plaintiff prove that racial discrimination was a sole or even predominant purpose).

49. *LULAC*, 126 S. Ct. at 2664 (Scalia, J., concurring in part and dissenting in part).

50. Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1330 (1987).

51. For a thorough explanation of how gerrymandering makes it nearly impossible to defeat an incumbent representative, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 620–30 (2002).

52. FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2005). These figures should not be read to suggest that partisan gerrymandering has no negative impact on the electoral system, but they do support the proposition that the House of Representatives generally reflects the political makeup of the nation. While there are significant problems that need attention, the sky is not falling.

53. U.S. CONST. art I, § 4.

gerrymandering claims, the Court usurps power and assumes an oversight role that the Constitution has explicitly selected Congress to fill.[54] As a result, Justices have understandably clamored for judicial restraint in partisan gerrymandering ever since it was first considered in *Baker v. Carr*.[55] As Justice Kennedy noted in *LULAC*, Article I "leaves with the States primary responsibility for apportionment of their federal congressional districts."[56] The *Bandemer* Court therefore should not have found partisan gerrymandering to be a justiciable controversy, and the *LULAC* Court erred to the extent that it relied on *Bandemer*'s finding of justiciability. As the *Vieth* plurality noted, "[s]ometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches . . . ."[57] Partisan gerrymandering is one such case.

The "political question" doctrine presented an adequate vehicle for the Court to exercise this judicial restraint. In *Baker*, the Court laid out six independent tests to determine whether or not a case was a political question and thus outside the scope of the judiciary.[58] Partisan gerrymandering

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54. There is hope on the horizon. Congress has recently begun to consider legislation responsive to the evils of partisan gerrymandering. *See* Fairness and Independence in Redistricting Act of 2005, H.R. 2642, 109th Cong. (2005). H.R. 2642 would ban mid-decade redistricting and introduce national standards to govern how lines are drawn. For treatment of the non-judicial nature of redistricting, see Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*?, 33 UCLA L. REV. 1, 4 (1985) (stating that legislative districting constitutes "the very stuff of politics" (internal quotation marks omitted)). *But see* Daniel. H. Lowenstein, Vieth*'s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering*?, 14 CORNELL J.L. & PUB. POL'Y 367, 370–73 (2005) (explaining why the Court failed to find nonjusticiability under U.S. CONST. art I, § 4).

55. 369 U.S. 186, 267–330 (1962) (Frankfurter, J., dissenting). In dissent, Justice Frankfurter urged that "[d]isregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined." *Id*. at 267.

56. *LULAC*, 126 S. Ct. at 2607 (quoting Growe v. Emison, 507 U.S. 25, 34 (1993) (internal quotation marks omitted)). *But cf.* Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) ("If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.").

57. *Vieth*, 541 U.S. at 277 (plurality opinion) (citing Nixon v. United States, 506 U.S. 224 (1993)).

58. The political question doctrine excludes from judicial review those controversies that "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or state legislatures or to the confines of the executive branch." 16A AM. JUR. 2D *Constitutional Law* § 265

intuitively seems to qualify as a political question under the second test: "a lack of judicially discoverable and manageable standards for resolving it."[59] However, because the *Bandemer* court was "not persuaded that there are no judicially discernable standards," the second test failed and the claim was found to be justiciable.[60] This logic made sense in the Court's first partisan gerrymandering case, but the repeated failures of three incarnations of the Court to find a workable, manageable standard illustrate the futility of the search. After two decades brought the Court no closer to consensus, *LULAC* presented an ideal opportunity to officially close the search that began with *Bandemer*.[61] The Court could have respected precedent and reached the right outcome by communicating that, while it was not ready to concede the lack of judicially manageable standards in *Bandemer*, twenty years of jurisprudence and multiple fruitless attempts demonstrated the unlikelihood of finding such a standard. Thus, the second *Baker* political question test should have been employed to find nonjusticiability.

One of the key motivations behind the political question doctrine is to preserve the integrity and independence of the judiciary.[62] When the judiciary delves into complicated political matters, it threatens the constitutional separation of powers and undermines the independence that is essential to the

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(2006). Thus, there is significant overlap between the political question doctrine and the argument that the court has stepped into the legislative domain.

59. The other tests help elaborate on the doctrine and its scope: if the Court finds [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question; then the case will be dismissed as a nonjusticiable political question. *Baker*, 369 U.S. at 217.

60. *Bandemer*, 478 U.S. at 123.

61. For a discussion of the unworkability of the Court's current equal protection framework for evaluating partisan gerrymandering claims, see generally Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000).

62. *Baker*, 369 U.S. at 217 (cautioning against "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

American system of government.[63] It is worth noting in this vein that in *LULAC*, the more liberal Justices (Breyer, Stevens, Souter, and Ginsburg) came down against the Republican gerrymander, whereas Justice Scalia (a conservative) would have upheld the plan entirely. Whether the members of the Court allowed their political leanings to affect their reasoning is beside the point. The resulting split creates an unfortunate appearance of impropriety that undermines the legitimacy of the Court's holding. The political question doctrine was designed to avoid precisely this type of situation.

Partisan gerrymandering is clearly a pothole in the road to electoral accountability, and the Court's impulse to correct it is thus understandable. Article I, however, grants Congress (not the Court) the power to regulate state redistricting decisions. By deeming partisan redistricting cases to be justiciable, the Court ignores this delegation. Not only has the Court acted outside of its constitutional authority, but it has repeatedly failed to delineate a workable standard for evaluating partisan gerrymanders. The ironic result of the confusion has been that lower courts are hesitant to invalidate districts, thus opening the door for the very political entrenchment that the Court seeks to avoid. By deferring to the legislature and classifying partisan gerrymandering as a political question, a future Court can correct its failure in *LULAC* and put this tortured body of law to rest once and for all.

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63. *See* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed. 1992) ("[T]here is no liberty, if the powers of judging be not separated from the legislative and executive powers.") (internal quotation marks omitted).

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