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Testimony of Professor Samuel Issacharoff, NYU School of Law

On the Nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court

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For over 40 years, the Supreme Court has recognized a profound judicial obligation to protect the integrity of the electoral process, the right to vote, and the right to run for office. The Court's insistence on rigorous compliance with the constitutional requirements of electoral equality has provided – and continues to provide – an invaluable foundation for American democracy. The Court has energized the American political system through its enforcement of the guarantees of the First, Fourteenth and Fifteenth Amendments, as well of its protections of the right of the People to elect effectively their representatives to Congress, as guaranteed by Article 1 of the Constitution.

No Justice of the Supreme Court over the past 35 years has hesitated to assume the responsibilities so well articulated by the Supreme Court in the famous *Carolene Products* footnote in 1938.[1] Justice Stone, on behalf of the Court, recognized a special need for exacting judicial review in the case of laws that "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." Structural flaws in the legislative process were not only undeserving of judicial deference; they unsettled the premises upon which judicial deference to most legislation was founded. Moreover, the Court recognized that blockages that compromised the democratic legitimacy of the political process were not self-healing, for they were often the product of legislative self-dealing.

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[1] *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

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In the 40 years that have passed since the Supreme Court bravely entered into the political thicket, the Court's oversight role has encompassed the seemingly routine, such as access to the ballot and the polling place, and the truly extraordinary, as with *Bush v. Gore.*[2] The result of these interventions, though not without controversy, is a political system that is more open and more participatory than at any time in our history.

The Reapportionment decisions of the 1960s, which appear to have deeply concerned Judge Alito as a young man, were the realization of the *Carolene Products* insights. Those cases involved, as the late Professor and Dean John Hart Ely wrote, "rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo."[3] In those early Reapportionment cases and in four decades of evolving case law, when the infirmity lay at the core of the electoral process, time and again, the Court proved to be the only institution that could rise above these political process failures and intervene effectively.

It is well to recall the facts presented by the Reapportionment cases of the 1960s. The willful failure to reapportion state legislatures had transformed American legislative districts into self-perpetuating fiefdoms, and state legislatures into grossly unrepresentative institutions in which the voters of growing cities and suburbs found themselves unable to participate effectively in a political process controlled by rural minorities. In Tennessee, the site of *Baker v. Carr,*[4] one county had 23 times as many representatives per person as another county in the state. In Alabama, the site of *Reynolds v. Sims,*[5] the disparities were as high as 41-to-1. That pattern repeated itself across the country. In California, to pick just one, Los Angeles County had one state senator, as did another county 1/100th its size.

For those primarily rural areas that benefitted from this distortion of democratic representation, the gains from engorged representation were protected through a stranglehold on the legislative process and, through it, on the redistricting process. Those whose votes were discounted to the point of irrelevance were repeatedly frustrated by that entrenched political power. The intervention of the Supreme Court was not only decisive, it was indispensable. Indeed, it was perhaps the single most successful remedial effort in the history of the Court, for it set in motion a fundamentally more democratic legislative process, one that was deserving of judicial deference.

The Reapportionment cases were indeed a bombshell at the time, for they did a great deal to destabilize political power that had immunized itself from political accountability. But

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2 531 U.S. 98, 107, 109 (2000).
3 John Hart Ely, Democracy and Distrust 117 (1980).
4 369 U.S. 186 (1962).
5 377 U.S. 533 (1964).

when I teach these cases to students today, it is difficult even to convey to them the controversy that these decisions provoked. For my students, and even for me and my law school classmates in the early 1980s, the idea of equality among voters, of one-person, one-vote, appears so elemental, so in keeping with the most rudimentary sense of democracy and legitimacy, that they cannot even fathom that a democratic society could be organized on any other basis.

I do not know how a young college student might have reacted to these cases ten years earlier, particularly when presented with the formidable writings of Alexander Bickel. Bickel captured well the tension between a commitment to popular sovereignty and the overriding commands of the Constitution. And it is well to remember that, although our attention is drawn to the Court by these hearings, Congress has also played a crucial role in expanding our democratic horizons, especially with the Voting Rights Act of 1965 and its subsequent amendments.

Nonetheless, that such doubts about the Reapportionment cases should reappear on a job application in the 1980s is at least a curiosity. Perhaps it was the recounting of an intellectual path, perhaps an indication of a continuing view that courts have no business in the superintendence of the political process. If the latter, it should be deeply troubling. For the issue of the day is not the intellectual trajectory of a thoughtful college student, but the implications of the Reapportionment cases for the vital role the Supreme Court plays in our democratic life.

It is difficult to imagine in this day and age any serious objection to the rights identified in the Reapportionment cases. In *Reynolds v. Sims,* for example, Chief Justice Warren wrote that "Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature."[6] These basic democratic principles are by now so deeply imbedded in our political culture as seemingly to defy any controversy. Unfortunately, while these principles may be well-honored at an abstract level, they are hardly self-executing.

Critical issues in the organization of our democratic life remain unsettled and are certain to arise before the Court in the years to come. Our system of redistricting has run amok, the competitive lifeblood drained by self-perpetuating insiders. This may prove to be the same sort of structural obstacle to democratic reform as that which had to be dislodged by the reapportionment decisions of 40 years ago. The answer may not be as seemingly simple as "one-person, one-vote," but the problem is widespread and perhaps even more corrosive. So too, our campaign finance system continues to be a source of practical and constitutional difficulties without easy resolution. Even the mechanics of our electoral system are increasingly a source of legal concern.

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[6] 377 U.S. at 565.

In all of these areas there is reason to doubt that incumbent officials are able to rise above self-interest to fix the political process that elected them. As Justice Scalia has wisely cautioned, "the first instinct of power is the retention of power."[7] While not without controversy or difficulty, our collective experience over the past 40 years confirms that the Nation is much the better for the robust attention of the Court to the health of our democracy.

Before confirming any nominee to the Supreme Court, the Senate of the United States should be able to conclude with confidence that, regardless how a nominee may vote on any given case, there is no doubt that he or she will assume the responsibility of protecting the integrity of our democratic processes.

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7 *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part).