

10-1962

What's Wrong With Baker v. Carr?

Robert Lancaster

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Constitutional Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Robert Lancaster, What's Wrong With Baker v. Carr?, 15 *Vanderbilt Law Review* 1247 (1962)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol15/iss4/8>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

What's Wrong With Baker v. Carr?

Robert Lancaster*

The writer attacks the decision and rationale of the Court in this landmark case. Dean Lancaster is of the opinion that the Court's action violates the principle of stare decisis and offends the theory upon which our Democracy is based. The author further believes that the decision is ill-reasoned and offers no guidelines for action by inferior courts.

The decision of the majority of the Supreme Court in *Baker v. Carr*,¹ the recently decided *Tennessee Reapportionment Case*, may well turn out to be one of the landmark decisions of American jurisprudence. If by reason of apathetic acquiescence such a judicial intrusion is permitted to go unchallenged and undebated, our federal system of limited and constitutional government may be further weakened. Although the balance of power as between the states and the national government has shifted and this shift has been reflected in and furthered by judicial interpretation of our Constitution, it seems questionable that such a far-reaching and "massive repudiation of our whole past" should be accomplished by so few at the expense of so many. In the realm of value choices, judges are scarcely better equipped than laymen to pronounce authoritative judgments. In our system such choices have been generally left to the people speaking through their representatives in conventions and assemblies or to the slow but satisfying adjustments effected by an aroused public opinion.

The decision in *Baker v. Carr* is questionable for several reasons:

- I. It strikes a crippling blow at our federal system.
- II. It offends democratic theory and practice.
- III. It jeopardizes unnecessarily the judicial function.
- IV. It provides no guide lines for lower court action.
- V. It violates the principle of stare decisis in an artificial and wholly unwarranted manner.
- VI. It is not well reasoned.
- VII. It comes from a fractious and fragmented court.

I.

Our federal system has developed in accordance with a theory of gov-

*Dean of the College of Arts and Sciences, University of the South.

1. 369 U.S. 186 (1962).

ernment that is both wise and generous. Matters that affect the nation as a whole are the concern of the national government and generally within the ambit of its power. Local matters or those affecting a single state are left to the people of that state. In this way the national government is relieved of much political and administrative detail, and local problems can be dealt with by those who understand them best. Thus civic responsibility is cultivated and political aptitude acquired. Over the years, problems once local have become national; a new technology has moved in the direction of amplifying national power. Yet the states have not withered on the vine. A new federalism has emerged that has been in many ways as vigorous and politically satisfying as the old. Under it, states have retained strength, dignity, and power. Now in a move as sudden and unprecedented as it is inept and unwise, a majority of the Supreme Court of the United States has struck a blow at the new federalism. When the Supreme Court of the United States presumes to tell a state of the Union that the election of its legislature, the composition of its electoral districts, and the apportionment of its delegates is a matter over which federal courts will exercise sovereign supervisory authority, the first act in a drama of unconstitutional revision of our federal system has been enacted. By such an arrogation of power, the Court merges its role as monitor and umpire of the system into that of active participant—and on the side of the unitary state. A Court that is capable of reading into the equal protection of the laws clause of the fourteenth amendment authority for unhinging a basic and articulate premise of the American system has lost sight of the nature of its function and the limits of its power. If by an extravagant intrusion into the local political arena, a state may be made to toe the line in the matter of how it allots representation in its assembly to its geographical subdivisions, then there are, indeed, few matters so local as to escape the dragnet of authoritative supervision by the national courts. What of the way by which a state's governor is elected? Will the Court soon give its blessing to the runoff principle? Will it under the guise of guaranteeing a republican form of government or insuring due process extend its supervisory jurisdiction to municipal charters and attach the great cities to the national teat? Will the schools of the states by judicial fiat of the national courts not only be called upon to integrate the races, but also to adopt methods of administration and standards of instruction prescribed by certain invisible radiations from the "equal protection clause," detectable only by Judge and Company? Will what is good law on Thursday be called bad law on Friday? A few years ago such questions would have been considered fantastic. Today they are as real as last night's killing frost.

Nor will the often heard plea that social justice will be achieved by the prodding of the courts suffice. In the long run, judge-made policy may

well prove to be more arbitrary, less generous, and more chilling than what emerges from the political market place. There, at least, ambition counters ambition, and chicanery cancels chicanery. In the political market, voters may ever so often choose their wares and pay the price, but a group of Platonic guardians, peering suspiciously from behind the protective barrier of life tenure and sustained by the undisciplined character of the American party system, is a sorry spectacle.

II.

The charge that *Baker v. Carr* offends democratic theory and practice may at first glance seem untenable. After all, the Court is saying in effect, if not actually, to Tennessee: "Reapportion your legislature in such a way as to reflect in your representative assembly the proportional voting strength of your geographical units. Carry out the mandate of your Constitution. Let one man's vote equal that of another." This oversimplification is as appealing as a great many other oversimplifications of political problems. It is theoretically and practically unsound for several reasons. To begin with, it does not result from the interplay of political forces in the State of Tennessee. Rather it is to be imposed by six men who do not depend upon the electorate for their power and who cannot be removed from office except by the slow, tortuous and seldom tried impeachment process. The command comes from a pitifully small number of men who have been permitted to assume the role of Platonic guardians, men whose political experience is limited, whose value choices are open to question, whose judgment on this issue is no better than their understanding of democracy or their social wisdom. To trust to the unlimited discretion of a few men insulated from the tensions and contradictions of the political arena has never been the American way. Throughout our political theory runs the somber thread of distrust for the unguarded discretion of the few. Rather do we place our faith in devices for hedging power with power, and in an intricate system of checks and balances. We have pinned our hopes on the informed conscience of the average man and on the sometimes slow processes by which minorities are changed into majorities. The correctives we have historically approved are those that emerge from public awareness of injustice made articulate and powerful by the whiplash of a mobilized, persuasive, and well led vanguard of concerned men. Who among our heroes revered for their wisdom and understanding has written or spoken on the side of the guardianship theory of the state? We have had no Platos, no philosopher kings, among our Founding or Sustaining Fathers. From Jefferson and Calhoun to Roosevelt and Wilson, not a voice has been raised in defense of a theory that would permit judges to set aright the social ills of a tense world.

Apart from incorporating the guardianship theory of the state, *Baker v.*

Carr repudiates the whole history of the operating representative principle. From the beginning we have refused to follow the theory or the practice of equal and contiguous electoral districts. Geography, peculiar interests, both mercantile and agrarian, political considerations, and the view that every delegate represents something more than his constituency have worked against such a theory or practice. The Founding Fathers provided a Congress of two houses, one of them the Senate, a diplomatic assembly in which numbers were not to be considered, and the other the House of Representatives, in which people were to find representation by districts but with no provision for numerical equality. Although feeble efforts have been made in this direction by the Congress, it is a commonplace of American government that congressional districts vary significantly, and to some alarmingly, in population. Now the Court, restrained for the moment by the separation-of-powers principle from working its cathedral-chair justice in the national domain, feels free to bring its political salvation to Tennessee in a spirit of sweetness and light suddenly discovered in the text of the fourteenth amendment.

The extent to which this sudden revelation violates past and present state practice is nowhere better examined than in the dissenting opinion of Mr. Justice Frankfurter. That careful and studious dissenter is at his incisive best in showing that not only were the legislatures which gave their approval to the fourteenth amendment at the time of its adoption elected by an apportionment scheme falling under the ban of the majority opinion, but that the constitutions of the thirteen states admitted since the adopting of the amendment permit the same inequalities in representation of geographical units so offensive to the majority.

In addition to flying in the face of time-honored practice, the decision may be questioned on the basis of what it fails to take into account. The opinion fails to recognize that the governor of the state is elected by the voters of the state at large. Any student of Tennessee politics could have informed the Court that a Governor in Tennessee can as a matter of fact get from the Legislature almost anything within reason for which he is willing to fight. To obtain a referendum, practically speaking, all that is necessary is for the urban interests of the state to bring out a gubernatorial candidate pledged to reapportionment. The failure of urban interests to select such a candidate and rally to his support indicates that the situation in Tennessee is not so grim a denial of justice as the High Court evidently concluded. Reapportionment has never been an issue in a gubernatorial campaign in Tennessee. Furthermore, it may be cogently argued that over the short term, rural voters moving into urban areas bring their rural attitudes with them. Most certainly, they bring their property, and this property could be subjected to municipal taxation by a vigorous municipal effort. If the real interest in reapportionment is a fairer allocation of tax

revenues, the remedy for the urban dweller is a more effective tax policy within the municipality. By centering their attention on mathematical formulae and on abstract problems of theoretical justice, they were blinded to the political situation. For guardians of democracy, such blindness is fatal.

III.

The practice of judicial activism is always attractive to those who are unwilling to wait for the slower democratic processes to work their way. To those who pursue with blood in their eyes the will-o'-the-wisp of social justice, short cuts are always appealing. It is easy for such people to think that the curing of a social ill will insure the permanent health of the body politic. To them, judges are the proper physicians when they apply a congenial remedy. They seldom, if ever, take into consideration the nature of the judicial function.

Courts exist to decide cases and controversies. They apply law and in doing so necessarily make some. Both the law-applying function and the law-making function are jeopardized when judges enter the political lists. Judgment demands detachment, objectivity, coolness of mind, greatness of spirit, tolerance, understanding, and, above all, a deference to a tradition of self-restraint. When judges run at the head of the pack panting for the kill, they necessarily lose these characteristics that make them what they are. This is what the majority has done in the *Tennessee Reapportionment Case*. Although their mandate may for the moment be heeded, in the long run the judiciary can only lose by following such a course. The risk is obvious. The Court has behind it neither the purse nor the sword nor the means and opportunities for organizing political power. Only the force of public opinion and the reason behind their actions support them in their judgment seats. By contributing to the slow erosion of deference and respect built up over the long years by judges who were aware of the need for self-restraint, for keeping aloof from problems requiring the delicate adjustment afforded by political encounters, the present majority has endangered the very craft they serve.

Recently a great deal of writing has centered around the political role of the Supreme Court. We have been invited to look at the political facts of judicial life realistically. Arguments on the Court have been explored, bloc behavior analyzed, personal voting behavior scrutinized carefully. A whole body of literature devoted to a study of the behavior of judges has led us to a pragmatic consideration of the nature of the judicial process. Certainly a strong case can be made for subjecting the judicial process to rigorous, statistical, and methodical study. A method of analysis that concentrates on what judges say rather than on what they do, that rejects as unworthy of attention the political influences that bear upon judicial

decision-making, is fruitless and frustrating. Professor Jack Peltason reveals for social science the shallowness of such a method by applying it to the legislative process. Says he:

Biographies of leading congressmen would be the main staple of research. Discussion of statute-making would concentrate on activity within the legislative chamber. Legislators would be seen as an isolated group. A Congressman's vote, say, for the Taft-Hartley Act would be explained as reflecting his conviction that such a law was a reasonable regulation of commerce designed to promote the national interest. Studies of the legislative process would deal primarily with legislator's speeches and certain critical comments on their arguments. Attention would be focused on the formal rules of procedure. Students in courses on legislation would be assigned readings from the *United States Code*. Little attention would be paid to the consequences of legislative decisions.²

While this realistic treatment of the process has led to a better understanding of judicial behavior, it has not contributed to the generation of more respect for the judiciary.

The point of this discussion is simply that the cumulative effect of the constant drive to lay bare the political underpinnings of judicial decision-making is creating a wholly different image of the Justices than the traditional one of aloof, impartial, and neutral guardians of law. If the new image becomes accepted by the public at large, will not sooner or later this public demand that these officials be subjected to the usual political restraints on political officers, *i.e.*, limited tenure, electoral approval, and responsibility to constituency or to political superiors?

While it is perfectly true that no court can long remain indifferent to the political winds, and that policy-making is an integral part of high level judging, still it is also true that the judging function is unique, that by its very nature it demands cool appraisal, indifference to temporary political interests, detachment and god-like humility. It is likewise true that democracy itself sets up appropriate instrumentalities for political compromise and adjustments and that traditionally judges have not sought involvement in these delicate manipulations. If justices demand for themselves a more active and creative role, they must be prepared to see their corporate image distorted and weakened and their supposedly inherent lack of bias questioned. On the balance, neutrality and objectivity ultimately tip the beam.

That *Baker v. Carr* is an errant exercise of judicial muscle becomes even more compellingly apparent when its holding is subjected to close appraisal. In the words of the opinion the Court holds only:

(a) that the Court possessed jurisdiction of the subject matter; (b) that a

2. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 1 (1955).

justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.³

What the Court has done here is to pass upon an abstract question of standing and justiciability without giving to the lower courts more than a faint hint of what standards are appropriate for their actions or what guide lines must be followed in balancing the political and policy factors involved in determining what plans for electoral districts meet the test of equal protection of the laws. Such a procedure is open to several objections. It is first of all an open invitation to a multiplicity of lawsuits in the fifty states, many of which must certainly ultimately come to the Supreme Court for final adjudication. Presumably by a process of inclusion and exclusion the contours of a judicial policy for fashioning state electoral districts will emerge. In the meantime, it does not take an active imagination to discern the political turmoil and agitation into which the states will be thrown in their efforts to meet a constitutional test, the outlines of which are not even clearly perceived by the Judges themselves. In the final analysis, without guide lines, courts must necessarily flounder in their attempts to reach a satisfactory adjustment. Since courts are not political forums for the exercise of the deliberative function, their solutions must in the nature of the case be negative rather than positive. Their answers must be couched in such terms as, "Yes, this will do; no, that will not." State legislatures are not likely to relish the role of schoolboys chided by judges for doing their sums wrong. There is something basically un-American and distasteful in such a picture.

Furthermore, the articulation of an opinion without standards for enforcement or indications of appropriate modes of relief in respect to a matter political in nature and virgin to judicial experience is scarcely more than an exercise in shadowboxing. Justice Frankfurter in his dissenting opinion expressed his dissatisfaction with such an abstract and hypothetical formulation in pointed language. Said he:

The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guide-lines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is devoid of reality as "a brooding omnipresence in the sky" for it

3. 369 U.S. at 197-98.

conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety.⁴

Finally, such an abstract pronouncement as handed down in the *Baker* case, devoid of guide lines and bare of standards, is, in effect, merely an attempt to frighten assemblies of the people into reapportionment legislation. That it has succeeded in certain states is no measure of the wisdom of such a judicial posture. Though the scarecrow may frighten away wary birds for a time, ultimately they come to perch upon the shoulders of the ragged and bareboned fraud. Surely a Court as influential as our High Court has been in affecting the course of our social history can ill afford to engage in scarecrow tactics. In this connection Mr. Justice Clark in his concurring opinion, characterized by its failure to perceive the rationality of an urban versus rural struggle, did say:

The federal courts are, of course, not forums for political debate, nor should they resolve themselves into state constitutional conventions or legislative assemblies. Nor should their jurisdiction be exercised in the hope that such a declaration, as is made today, may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief. To my mind this would be nothing less than blackjacking the Assembly into reapportioning the State.⁵

It is true that Mr. Justice Clark attempted to provide some direction. He suggested the feasibility of consolidating districts and awarding the released seats to the "counties suffering the most egregious discrimination."⁶ The futility of a mathematical approach to a political problem involving interests that must be satisfied or appeased, geography, and demography is fairly exposed in the dissenting opinion of Mr. Justice Harlan. The truth of the matter is that as the Court attempts to develop standards and guide lines, the more it becomes evident that the case is not one for judicial cognizance. This may well be the reason for a judgment merely abstract and threatening. Fundamentally, the whole problem of reapportionment in Tennessee is one which involves a struggle between rural and urban interests over the division and use of public funds in the state. Hitherto it has been the view of constitutional lawyers that a state is constitutionally entitled to prefer its agricultural interests. In such a struggle imposed plans

4. 369 U.S. at 267-68.

5. *Id.* at 259-60.

6. *Id.* at 260.

and artificial guide lines are seldom useful. As a matter of fact, political experience has demonstrated the ephemeral nature of armchair solutions. Witness the experience of France in imposing constitutions rationally conceived.

It may be argued that the three-judge federal court opinion in the reapportionment case after it was remanded did find certain guidelines in the decision of the majority. In the per curiam opinion of the three-judge court of June 22, 1962 the court said:

In its opinion in the present case the Supreme Court, although not specifying exact standards or criteria under the equal protection clause for testing the sufficiency of legislative apportionments, did indicate certain guidelines which are applicable and controlling in assessing the 1962 statutes here in question. Thus in the majority opinion the Supreme Court, in referring to the plaintiffs' claim, stated that such claim was in substance "that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution of any standard, effecting a gross disproportion of representation to voting population." It was further stated that "the injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties."⁷

The district court thus presumed to find a standard of reason and a guide line of rationality suggested by the opinion of the High Court. It is apparent that this is nothing more than a return to the "rule of reason" asserted by the pre-Roosevelt Court as a means of monitoring the economy of the country in the interest of laissez-faire economics. That it is judicial reason as opposed to legislative reason does not make it more reasonable. The term *reason* is a fig-leaf phrase anyhow, often convenient for covering both judicial and legislative nudity. What the High Court really meant is that it was arrogating the right never before enjoyed to dictate to a state the size, shape, and voting strength of its electoral districts. Both the High Court and the district court pretended to be blind to the "real reason" behind Tennessee's districting policy which is so obvious to all—that is that the Tennessee Legislature prefers rural to urban interests. To say this policy is unreasonable is nothing more than the expression of a value judgment. Such a judgment does not gain moral force by questionable adornment of legal language nor does it become constitutional by usurpation of power.

IV.

The simple, clear fact about the *Tennessee Reapportionment Case* is its

7. Baker v. Carr, 206 F. Supp. 341, 344 (M.D. Tenn. 1962).

reversal of long established policy. Before *Baker v. Carr* the Supreme Court refused to intervene in state political struggles over legislative reapportionment. No amount of judicial legerdemain or artificial distinguishing among precedents can obfuscate this simple fact. Anyone at all familiar with the judicial process knows the Court has at hand many precedents running in many different directions. It is relatively easy for a Court having determined its decision to find among the available materials support for its more or less arbitrary decisions. A sentence lifted here and there from a commonplace opinion, a clever use of analogy, a straining of interpretation can work wonders. By such devices even lawyers can be taken in. Still, to hard minds the fact, the important fact, is that prior to the *Baker* case the Court had declined to interfere in such political struggles. Now it does intrude. Surely it must be apparent to all that the ancient doctrine of stare decisis is scorned and repudiated. In deciding to intervene the Court has turned its back on decisions that every student of constitutional law thought controlling. What of *Colegrove v. Green*,⁸ *South v. Peters*,⁹ *Colegrove v. Barrett*,¹⁰ *Kidd v. McCannless*,¹¹ and all the rest?¹² Who can doubt that these precedents are consigned to the judicial dump heap? What of stability and certainty in law? Are they too to be shoved into a crowded corner of the garret reserved for dead legal ducks?

At the October term, 1946, the Court denied in *Colegrove v. Barrett*¹³ an appeal exactly analogous to *Baker v. Carr*. In this case the legislative reapportionment laws of Illinois were challenged under the equal protection clause. The Illinois Constitution required reapportionment after each census, but the state had not reapportioned in more than forty-five years. In *Kidd v. McCannless*¹⁴ the Court rejected an attack made in 1956 against the same statute of Tennessee challenged in the *Baker* case. Not a Justice dissented. What has happened in the meantime to unsettle the law? The Constitution has not been formally amended. True, a new face appears on the High Court. It is a shabby situation, though, which makes the law be measured by the value choices of a new Justice or the vacillating disposition of old ones.

The one doctrine that makes the common law acceptable, that gives it system and coherence and balance, is stare decisis—to stand by the decision. When courts, without justification acceptable to the informed wisdom of a people, jeopardize the living principles of their craft and the sturdy bul-

8. 328 U.S. 549 (1946), *rehearing denied*, 329 U.S. 825 (1946).

9. 339 U.S. 276 (1950).

10. 330 U.S. 804 (1947).

11. 352 U.S. 920 (1956).

12. See *Mathews v. Handley*, 361 U.S. 127 (1959); *McDougall v. Green*, 335 U.S. 281 (1948); *Turman v. Duckworth*, 329 U.S. 675 (1946); *Wood v. Broom*, 287 U.S. 1 (1932).

13. 330 U.S. 804 (1947).

14. 352 U.S. 920 (1956).

warks of their authority, they unhinge their own function and invite trouble. To say that it is done in the name of justice is not enough, for too many people know that justice is a wild bird as hard for judges as others to cage.

V.

The reasoning of the Court in *Baker v. Carr* proceeds in a series of propositions something like this: (a) article III, section 2 of the federal constitution provides that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."¹⁵ (b) The appellants base their claim to relief on a debasement of voting rights occasioned by the existence of numerically unequal state electoral districts contrary to the equal protection clause of the fourteenth amendment. (c) The district courts have been given jurisdiction by Congress to decide cases for the redressing of deprivations, under color of state law or usage of any right, privilege, or immunity secured by the Constitution of the United States. (d) The federal courts' jurisdiction over such constitutional claims has been sustained in the past. Therefore, the Court has jurisdiction in *Baker v. Carr*. (e) The appellants have standing, that is, a sufficiently direct and personal interest to justify litigation, because *Colegrove v. Green* held that voters who allege facts showing disadvantage to themselves have standing to sue. (f) The question before the Court is not a political question because it does not arise under the guaranty clause; it does not concern coordinate branches of the federal government; it does not lack a "judicially discoverable and manageable" standard for resolving it; it involves no expression of disrespect for a coordinate branch of government; it does not require an initial policy determination of a kind unsuitable for judicial discretion; it does not demonstrate a need for "unquestioning adherence to a political decision already made"; it does not exhibit a potentiality of embarrassment by reason of "multifarious pronouncements by various departments on one question."

The opinion concedes that if one of the foregoing formulations are present the case should be dismissed because of the political question doctrine.

Now, let us see what is wrong with this reasoning.

The first proposition, based upon the judicial jurisdiction grant of article III, section 2 of the federal constitution is very general in nature. It simply states that the jurisdiction of federal courts extends to cases in law and equity arising under the Constitution, laws and treaties of the United States. If the facts of the *Reapportionment Case* arise under the Constitution and laws of the United States, such jurisdiction must be spelled out and determined. The guaranty clause is not invoked but the

15. U.S. CONST. art. III, § 2.

equal protection clause of the fourteenth amendment is. So the case must be anchored to this clause. Furthermore, if the district court is to have jurisdiction it must arise by act of Congress involving proposition (c) above. Here the majority opinion accomplishes a *tour de force*.

Actually, no competent scholar believes that the Founding Fathers intended the Court to function as powerfully in the field of judicial review as it does today. Likewise, it is generally accepted that the Congress in passing the act securing against deprivation of constitutional rights by persons acting under color of state law or usage scarcely intended to secure against the acts complained of in *Baker v. Carr*. What the Court has done in the past in connection with franchise privileges is to use the jurisdiction granted in the act to secure the Negro equality of voting rights, to insure against fraudulent elections and corrupt officials. In the other cases hitherto decided involving problems affecting state electoral policy the Court, if not denying a petition for rehearing, has simply sustained the right of the state to establish its own policy. If this latter is an assumption of jurisdiction, it is a left-handed assumption. For it is clearly one thing to affirm the power of a state to make its own policies in this field and quite another to strike down as the Court has done in an unprecedented way in the instant case. Evidently, the Court reasoned that if it had the right to jurisdiction at all, it had the right to annul as well as to affirm, and in annulling it turned its back upon reason and precedent. But the claim to having jurisdiction at all is questionable, and the claim to power to annul the laws of a state setting up districts for the election of its own assembly is revolutionary; for there are no recorded cases to support such an action. The first case cited to support the view that federal courts have jurisdiction to decide cases arising under the Constitution and electoral districting laws of a state is *Ohio ex rel. Davis v. Hildebrand*.¹⁶ Here the Court *dismissed* a complaint directed at a state law incorporating a referendum principle in the legislative process and which was seeking to mandamus state officials into giving effect to a law voided by the referendum providing new congressional districts. The Court, Chief Justice White speaking, *affirmed* the power of the state over its own districting policies, gave lip service to the political question doctrine, and said plainly:

[T]here must either be a dismissal for want of jurisdiction because there is no power to reexamine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied.¹⁷

The entire drive of this case is in the direction of *support* of state power

16. 241 U.S. 565 (1916).

17. *Id.* at 570.

and the political question doctrine. The question of jurisdiction was left in the air. The case involved federal interests because it concerned problems affecting the election of members of the House of Representatives. What is there in this case to support jurisdiction of wholly local problems concerning the districts from which a state elects its legislature?

The second case relied upon is *Smiley v. Holm*.¹⁸ The question at issue in *Smiley v. Holm* was the validity of a state statute setting up new congressional districts after a census, the statute having been vetoed by the governor and not repassed over his veto. Chief Justice Hughes delivered the opinion of the Court. Again the import of the decision was to defer to state policy. The question of whether or not the governor was to have a part in the making of state law was held to be a matter of state policy. It is quite true that the constitutional merits of the legislation were reviewed. This was done, however, because article I, section 4 of the Constitution of the United States after devolving upon the legislatures of the states the right to determine "the Times, Places, and Manner of holding Elections for Senators and Representatives" goes on to say, "but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators." What is there here to support the right of the federal judiciary to take supervisory authority over *state districting policy* for the election of the *state legislature*?

Surely the majority opinion in *Baker v. Carr* goes astray here in its use of analogy as a judicial tool. Actually, the *Smiley* case is almost wholly *unlike* the *Baker* case. *Smiley* did not touch the question of the power of a state over its own electoral districts; *Smiley* did not involve the crucial relationship of the federal judiciary and the authority of the state over its own processes; *Smiley* involved only remotely, if at all, a political question; *Smiley* decided only that the action of the Legislature of Minnesota in districting the state for congressional electoral purposes required under Minnesota law either the Governor's approval or passage over his veto; *Smiley* specifically articulated the view that the legislative role of the Governor of Minnesota was a matter of state policy; and finally, *Smiley* related to the election districts from which representatives were to be elected to the House of Representatives of the United States.

Conversely, *Baker* *does* involve the power of the State of Tennessee over the districts from which it elects its own legislature; *Baker* *does* involve the federal judiciary in a heated political contest between organized political interests in the State of Tennessee; *Baker* *does* involve conflicting interests for which judicial standards are lacking.

The third case cited in the majority opinion as bearing upon the question of the justiciability of the controversy in *Baker v. Carr* is *Wood v.*

18. 285 U.S. 355 (1932).

Broom.¹⁹ Again, this case merely holds that the Act of Congress of June 18, 1929, providing for reapportionment after the fifteenth census does not incorporate the expired provisions of the act of 1911, requiring compactness, contiguity, and equality in population for districts from which members of the House of Representatives are elected. On the question of justiciability, the Court said, "[I]t is unnecessary to consider the questions raised as to the right of the complainant to relief in equity upon the allegations of the bill of complaint, or as to the justiciability of the controversy, if it were assumed that the requirements invoked by the complainant are still in effect."²⁰

Again observe that this case concerns districts from which members of the House of Representatives of the United States are elected and that it does not touch the justiciability issue even there.

The cases from which the majority draws most comfort on the justiciability issue are *Bell v. Hood*²¹ and *Colegrove v. Green*.²² *Bell v. Hood* held that a district court of the United States had jurisdiction to adjudicate a claim for damages against agents of the Federal Bureau of Investigation who violated the constitutional rights of petitioners arising under the fourth and fifth amendments of the Constitution of the United States. At issue were charges of false imprisonment and unreasonable search and seizure. The case did not involve the power of a state over its own governmental processes and only by a stretch of legal ingenuity does it bear at all upon the justiciability of the issue in *Baker v. Carr*. It was a suit for damages; it involved no intervention into matters of state political policy; it had nothing to do with electoral districts. Its sole claim to attention lies in the fact that it held that federal courts have jurisdiction over deprivations of constitutional rights whether this jurisdiction be specifically conferred by Congress or not. By no stretch of legal dexterity, however, does the *ratio decidendi* of the case apply to the questions at issue in the *Tennessee Reapportionment Case*.

It is well known that *Colegrove v. Green* is famous for its lack of agreement among the Justices participating. Nevertheless, four Justices concurred in holding that federal courts have no business entering a political thicket. What the Court did is more important than what it said by way of side remarks or dissenting views. It did refuse to require Illinois to divide the state into numerically more or less equal congressional districts. Said Mr. Justice Frankfurter for the Court in that case:

This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations

19. 287 U.S. 1 (1932).

20. 287 U.S. 1, 8.

21. 327 U.S. 678 (1946).

22. 328 U.S. 549 (1946).

on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.²³

It is scant comfort that the dissenters were joined by Justice Rutledge in a half-hearted way on the justiciability issue for the reason that this case, too, is not in point since it deals only with the power of federal courts over congressional districts. Between this case and *Baker v. Carr* rises the barrier of the federal principle on which our government is established. It is apparent, though, that such an historic barrier is but a straw fence to Justices panting to re-make the Constitution to conform to their own views about political values. The stark fact is that the majority had no precedent for its actions. Perhaps this accounts for the weakness of its logic and the novelty of its assumptions.

Although the majority find that the appellants have standing to maintain their suit, such a finding does injury to the doctrine. The generally accepted view of the doctrine has been that the person who brings a suit to challenge the validity of a statute must have an interest at least greater than that shared with all his fellow citizens. In *Ex parte Levitt*,²⁴ the case challenging the right of Mr. Justice Black to take his seat on the Supreme Bench, the Court said:

It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action and it is not sufficient that he has merely a general interest common to all members of the public.²⁵

One may well ask what is the direct injury suffered by the appellants. They vote like other people, have their votes counted, charge no fraud or corruption to officials. What is it that they complain of? It is simply that their votes are debased because they vote in districts having more voters than other districts. Yet it is well known that numerical inequality of election districts is characteristic of our system and exists in every state. But, say they, the equal protection clause of the fourteenth amendment entitles them to have their votes weighed equally with those in less heavily populated districts.

The substance of this claim is that the political institutions of the State of Tennessee are unhinged. If this be the case, how do the complainants suffer disability beyond that of any citizen of the state forced to live in a society in which the republican principle is flaunted and denied? If this is

23. 328 U.S. 549, 552.

24. 302 U.S. 633 (1937).

25. *Id.* at 634.

the substance of the complaint, then they should proceed under that clause of the Constitution guaranteeing to each state a republican form of government. But the High Court has consistently said that such claims are not amenable to judicial remedy. They are political and require political remedies. As a matter of fact, the majority opinion in *Baker* goes out of its way to expressly disavow the applicability of the guaranty clause. Thus, if the question is to be litigated at all, it must be under the fourteenth amendment. So once again the equal protection of the laws clause is stretched to cover a situation to which it has never before been applied. Once again the Constitution is amended by judges without authority. When a Justice of the Supreme Court with the learning, the judicial experience, and the understanding of our system of Justice Frankfurter says, as he does say in his dissenting opinion, that the Constitution in this instance is being rewritten, it is time for laymen to alert themselves to the dangers threatening their system. For the same power that today gives, may tomorrow take away. Says Justice Frankfurter:

What Tennessee illustrates is an old and still widespread method of representation—representation by local geographical division, only in part respective of population—in preference to others, others forsooth more appealing. Appellants contest this choice and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution.²⁶

What then is wrong with the reasoning of the Justices in the majority in *Baker v. Carr*? It is simply that they find precedents where none exist, stretch old formulae to the cracking point, break the edge of analogy, their finest tool, and see meaningless distinctions like ghosts where none exist. All of this they do as self-appointed court physicians to the body politic to remove a mole from the fair face of that child, democracy.

VI.

This revolutionary decision, this overturning of old and established practice, this arrogation of the last political word does not come from a calm, deliberate, united, well-adjusted Bench. Rather it comes from a Court riven by disagreement, unsettled by the tensions of a changing age, and insecure in its judicial poise. Because of this, the opinion is less power-

26. 369 U.S. 186, 300.

ful and compelling. The High Court has, perhaps, never been an assemblage of philosopher kings, and surely it does not exhibit today the characteristics of such philosophic wisdom and detachment. There have been moments in its history, however, when it achieved poise, unanimity, and a guiding philosophy of its place and function. There have been, too, Justices who by their wisdom, strength of mind, and sprightliness of spirit became members of that "Society of Jobbists" about which Learned Hand wrote so movingly. It is not strange that these noble spirits were men of cool minds, dispassionate and tolerant, always loath to substitute their own judgment for a consensus resulting from the operating principles of a complex system.

During the last term, 148 cases were argued and submitted. Of these, 125 were decided by written opinions; 22 of these were *per curiam*; and one was restored for re-argument, leaving a total of 110 opinions in which the decisions were supported by discussion of the issues. For the 110 opinions there were filed a total of 94 dissenting opinions and 244 dissenting votes. These figures show to some extent the volume of disagreement among the Justices.

Recently, the public has been treated to some rather spectacular outbursts of temper on Opinion Day. As related by a recent commentator, one incident runs thus:

The Court, once again by a 5-4 vote, as is so frequently the case in criminal cases involving Bill of Rights interpretations, had reversed the murder conviction of one Stewart in the District of Columbia. In a ringing dissent, Mr. Justice Frankfurter, going far beyond anything he had written accused the majority of "plucking out" of the lengthy trial record an isolated episode, and suggested that judges find in the written record "what the mind is looking for." He went on to categorize the majority opinion as an "indefensible example of finicky appellate review of criminal cases" and warned against "turning a criminal appeal into a quest for error." When he had finished, Mr. Chief Justice Warren leaned forward and with evident emotion stated that the dissent just heard was not a proper statement of opinion, but rather a "lecture . . . a closing argument by a prosecutor to a jury. It is properly made, perhaps, in the conference room [of the Court], but not in the Court room . . . The purpose of reporting an opinion [there] is to inform the public and is not for the purpose of degrading this Court." But at the end of the session the two adversaries were engaged in friendly and cordial conversation!²⁷

The foregoing is related merely for the purpose of indicating that the present Court is divided and peevish. Surely Justices may be forgiven as human beings for exhibiting human qualities.

27. ABRAHAM, *THE JUDICIAL PROCESS* 197-98 (1962).

VII.

This, then, is my case against the decision in *Baker v. Carr*. It violates the federal principle by invading a domain left to the states. It is undemocratic as coming from a panel of Platonic guardians, against whose bad judgment the only appeal is to the corrective adjustment of time. It unnecessarily jeopardizes the judicial function by involving the Court in a struggle that can be decided only by the political process. It is poorly reasoned because it misuses analogy and the other tools of an ancient craft. It violates stare decisis in overturning time-honored precedents while doing them lip service. Finally, it is an opinion handed down by a Court without consensus, riddled by deep-lying differences.