

5-1-2002

# Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality

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# BAKER'S PROMISE, EQUAL PROTECTION, AND THE MODERN REDISTRICTING REVOLUTION: A PLEA FOR RATIONALITY

LUIS FUENTES-ROHWER\*

*The conventional wisdom contends that Baker v. Carr did not set down a standard for lower courts to follow. This Article responds to this position. It reaches three conclusions. First, it argues the implicit promise of Baker v. Carr pointed toward a loose, flexible rationality standard for deciding redistricting controversies. Under this approach, states were given much room to enact redistricting plans in accordance to their states' particular needs. Second, the lower courts applied precisely this standard in litigation in the wake of Baker, and did so quite capably. This conclusion responds to those who exhort the imposition of a rigid equipopulation standard in redistricting. The third conclusion is normative in scope. In essence, this Article sides with those who exalt the virtues of standards over rules. Particularly in the redistricting context, this Article concludes that equal protection principles must point toward flexible standards, toward heightened rationality review, and away from an inflexible straightjacket. Put differently, this is to say that the Court got it exactly right in Baker, even in Reynolds v. Sims. In time, however, the Court failed to live up to Baker's implicit promise.*

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In his dissenting opinion in *Shaw v. Hunt* (*Shaw II*),<sup>1</sup> Justice Stevens repeated his oft-stated contention that the racial gerrymandering cases do not involve traditional constitutional harms—harms to individuals—but instead involve objections to the way that individual states have chosen to balance their competing political interests.<sup>2</sup> This position led him to the conclusion that the Court must abandon the redistricting field. As Justice Stevens wrote,

1. 517 U.S. 899 (1996).

2. 517 U.S. at 918 (Stevens, J., dissenting); see also *Miller v. Johnson*, 515 U.S. 900, 929 (1995) (Stevens, J., dissenting); *Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting); *Shaw v. Reno*, 509 U.S. 630, 679 (1993) (Souter, J., dissenting).

[w]hen a federal court is called upon, as it is here, to parse among varying legislative choices about the political structure of a State, and when the litigant's claim ultimately rests on "a difference of opinion as to the function of representative government," rather than a claim of discriminatory exclusion, there is reason for pause.<sup>3</sup>

For support, Justice Stevens offered Justice Frankfurter's opinion for the Court in *Colegrove v. Green*<sup>4</sup> and Justice Harlan's dissent in *Baker v. Carr*.<sup>5</sup>

In response, and as expected, commentators have objected to Justice Stevens's choice of supporting case law. This response draws its inner strength from the passage of time and the reception accorded to the post-*Baker* line of cases. As John Hart Ely, one such critic, put this point: "Frankly, I wouldn't have anticipated the necessity of this reminder, but *Baker v. Carr* and *Reynolds v. Sims* . . . , controversial as they may have seemed at the time . . . , are now conventionally recognized . . . as among the Court's more legitimate and successful interventions, the Frankfurter and Harlan opinions as well-intended but short-sighted."<sup>6</sup>

These two positions stand at the core of this Article's thesis. To begin, I recognize the allure of the one-person, one-vote principle, which "has now been sanctified by history."<sup>7</sup> It is also true that

3. *Shaw II*, 517 U.S. at 922–23 (Stevens, J., dissenting) (citing *Baker v. Carr*, 369 U.S. 186, 333 (1962) (Harlan, J., dissenting)); see *Abrams v. Johnson*, 521 U.S. 74, 117 (1997) (Breyer, J., dissenting) ("The decision . . . increases the risk of significant judicial entanglement in the inherently political redistricting process.").

4. 328 U.S. 549 (1946).

5. 369 U.S. at 333 (Harlan, J., dissenting).

6. John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 577 n.7 (1997). What Ely means by "short-sighted" in this context, I cannot say.

7. Bernard Grofman, *Toward a Coherent Theory of Gerrymandering*: Bandemer and Thornburg, in *POLITICAL GERRYMANDERING AND THE COURTS* 29, 57 (Bernard Grofman ed., 1990) ("It has now been sanctified by history, and is generally regarded as a resounding success."). This point has been made often. See Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy Grail of "One Man-One Vote,"* 1969 SUP. CT. REV. 219, 268 ("'One man-one vote' should be perceived as the symbol of an aspiration for fairness, for avoidance of complexity, for intelligibility in our representational process—indeed, for a sense of meaningful membership in the *polis*."); Bernard Grofman & Howard A. Scarrow, *Current Issues in Reapportionment*, 4 LAW & POL'Y Q. 435, 438 (1982) ("[T]he doctrine of 'one person, one vote' has been elevated to the status of moral platitude."); C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 872 (1964) ("I believe that [one person, one vote] comes closer to summarizing current notions of democracy in representation than any other."); *id.* ("[T]he history of democratic institutions points compellingly in the direction of population as the only legitimate basis of representation today.") (quoting *One Man, One Vote*, THE TWENTIETH CENTURY FUND 4 (1962)).

federal courts have played a leading role in voting rights controversies for quite some time and, as such, the mere mention of a lessened judicial role in this area is sure to ruffle many feathers. And yet, in light of present circumstances, I remain troubled by the modern judicial approach to questions of democratic theory and electoral politics. To put it mildly, the Court's aggressive pursuit of idiosyncratic notions of political fairness has led to much uncertainty.<sup>8</sup> Pam Karlan stated this point well, in looking ahead to the 2000 census and the state of the doctrine: "The only safe predictions are that the courts will become increasingly embroiled in battles over the distribution of political power and that their contradictory interventions will profoundly alter, in unforeseen and sometimes perverse ways, the terrain on which the next round of political battles will be fought."<sup>9</sup>

This state of affairs raises important questions about the role of federal courts in matters of electoral politics. These are long-standing questions for which definitive answers are unavailing. Those looking for the competing arguments about the proper role of federal courts in elections would do well to turn to the Court's opinion in *Baker v. Carr*. At one end of the continuum one finds the "political question" crowd, for whom the courts should contribute very little, if anything at all.<sup>10</sup> The other end is occupied by those who believe in aggressive court intervention of the type we have come to experience in the wake of *Baker*.<sup>11</sup> This Article focuses on the gray area between these two polar ends. It is here where we find *Baker*'s doctrinal promise.<sup>12</sup>

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8. To be clear, this passage does not refer to the one-person, one-vote revolution post-*Baker*. The clarity of this rule is, to many, its virtue. Rather, I have in mind the Court's spate of cases after the 1990 redistricting, begun with *Shaw v. Reno*, 509 U.S. 630 (1993). This line of cases is misguided at best and quite confusing, especially to those in charge of the redistricting process. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2505 (1996) (contending that the Supreme Court's racial redistricting doctrine "teeters on the brink of legal incoherence and political chaos"). To my mind, and as I argue elsewhere, the Court has pushed the doctrine much further than necessary. See Luis Fuentes-Rohwer, *Gerrymandering, 'Fair Representation,' and Equal Protection: An Exegesis into the Judicial Role* (draft on file with the North Carolina Law Review).

9. Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998).

10. See *Baker*, 369 U.S. at 266 (Frankfurter, J., dissenting); *id.* at 330 (Harlan, J., dissenting). For a recent analysis of the doctrine, see Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

11. See John Hart Ely, *Gerrymanders: The Good, The Bad, and The Ugly*, 50 STAN. L. REV. 607 *passim* (1998).

12. Cf. Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 U. ILL. L. REV. 683, 697 ("Defects in the political process

In *Baker*, the Court spent most of its time justifying its conclusion about the justiciability of redistricting questions. When it came to the question of guidance, however, a cursory look at the opinion leads to the immediate view that the Court did not provide much. This conclusion comports with conventional wisdom, which argues that the Court did not establish a standard to guide lower courts in the litigation following in *Baker's* wake.<sup>13</sup> Rather, it simply forced lower courts to develop a standard, that is, to decide the cases before them in accordance with their understandings of what an equal protection violation might look like.<sup>14</sup>

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sometimes call for judicial involvement, but, just as clearly, the complexities of the political process should limit the role judges play in it.”).

13. See *WMCA, Inc. v. Simon*, 370 U.S. 190, 194 (1962) (Harlan, J., dissenting) (“It is unfortunate that the Court, now for the second time, has remanded a case of this kind without first coming to grips itself with this basic constitutional issue, or even indicating any guidelines for decision in the lower courts. *Baker v. Carr* . . . of course did neither.”); *Lisco v. McNichols*, 208 F. Supp. 471, 476 (D. Colo. 1962) (“No guidelines or criteria are laid down for determining the extent or level of disproportion necessary to constitute infringement of the Equal Protection Clause of the Fourteenth Amendment.”); *Md. Comm. for Fair Representation v. Tawes*, 184 A.2d 715, 719–20 (Md. 1962), *rev'd*, 377 U.S. 656 (1964); ROYCE HANSON, *THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY* 116 (1966); Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 108 (1962) (“Nowhere does the Court indicate, by dictum or otherwise, what standards might be used in determining the validity of an apportionment scheme which creates such inequalities.”); see also Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 55 (1962) (“[T]he Supreme Court [in *Baker*] offered the lower court no standards by which the decision should be reached and no hints about the remedy that might be appropriate if the plaintiffs prevailed.”); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 106 (2000) (“As an interpretation of the political question doctrine, this was nonsense. At the time of *Baker*, the Equal Protection Clause had never been applied to the districting question, and there were any number of possible interpretations, with no judicially manageable means of choosing among them.”).

The Court repeated this theme in *Reynolds v. Sims*, where it wrote that “[w]e intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme.” 377 U.S. 533, 556 (1964). This is a criticism of judicial review of legislative redistricting in general. See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 211–12 (explaining that the hard question in political gerrymandering cases is that of standards); cf. Charles L. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13, 14–15 (1962) (arguing that the question of remedies poses a complex problem in redistricting cases).

14. During the conference after the second oral argument in *Baker*, Chief Justice Warren remarked: “I would reverse solely on jurisdiction, and leave the rest of the case and the form of decree to the district court. I would not at this time say what decree should be entered, although I would suggest certain guidelines.” THE SUPREME COURT IN CONFERENCE, 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 847 (Dell Dickson ed., 2000) [hereinafter PRIVATE DISCUSSIONS]; see *Reynolds*, 377 U.S. at 578 (“Lower courts can and assuredly will work

And that, in a nutshell, is *Baker's* promise. In particular, this Article argues that lower courts were given the proper room after *Baker* to decide redistricting questions in accordance with their particular views about rationality and arbitrariness. For example, many courts applied a rationality test,<sup>15</sup> some looked to the equipopulation principle,<sup>16</sup> and others looked to the federal analogy for approval (for example, one of two legislative houses is apportioned on the basis of population).<sup>17</sup> In so doing, these courts decentralized what is at best a complex issue. This is as it should be.<sup>18</sup>

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out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.”); see also *Brief of the United States as Amicus Curiae*, reprinted in 56 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 279, 338 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS] (“Since the substantive issue is complex in itself, we do not believe that it should be determined initially by this Court. We think that the case should be remanded to the three-judge court for a full and detailed examination of this question.”); Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 803 (1963) (contending that the Court “tortured the precedents beyond recognition and, without giving any guiding principles, invited the district courts to entertain the welter of suits it must have anticipated”); cf. Stanley H. Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 691 (1962) (“[T]he absence of standards cannot be taken to imply simply that federal and state courts are free to devise their own measures. Rather it suggests that the pattern of deference to the states in most areas of contemporary federalism is inapplicable to the apportionment problem.”).

15. See, e.g., *Butterworth v. Dempsey*, 229 F. Supp. 754, 764 (D. Conn. 1964); *Germano v. Kerner*, 220 F. Supp. 230, 237 (N.D. Ill. 1963), *rev'd*, 378 U.S. 560 (1964); *Alsup v. Mayhall*, 208 F. Supp. 713, 716 (S.D. Ala. 1962); *Moss v. Burkhart*, 207 F. Supp. 885, 891 (W.D. Okla. 1962); *Baker v. Carr*, 206 F. Supp. 341, 345 (M.D. Tenn. 1962).

16. See, e.g., *Moore v. Moore*, 229 F. Supp. 435, 438 (S.D. Ala. 1964); *Bush v. Martin*, 224 F. Supp. 499, 512 (S.D. Tex. 1963).

17. See, e.g., *Md. Comm. for Fair Representation v. Tawes*, 184 A.2d 715, 718–19 (Md. 1962), *rev'd*, 377 U.S. 656 (1964).

18. See *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (“Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.”); Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 650 (1963) (“Nor is there anything novel in announcing for the first time a new proposition of constitutional doctrine and leaving its implementation for future development on a case-by-case basis.”); *id.* at 681 (“The forum for testing [the question of standards] is, and will continue to be, as the Supreme Court intended, . . . state and lower federal courts; and considerable wisdom emerges from their separate encounters with the almost infinite variety of individual apportionment formulas.”); cf. Friedelbaum, *supra* note 14, at 698–99 (contending that the Supreme Court must move slowly in this area). But see Lucas, *supra* note 14, at 802–03 (“There have been almost as many views of what equal treatment is as there have been courts which have considered the matter, and frequently the members of a single court had widely diverging views.”). For a defense of the use of “nonformalistic law . . . as an invitation to courts to participate actively and consciously in the law’s ongoing development,” see Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U.

For one, it is a sensible reading of *Baker v. Carr*. More importantly, this is a logical extension of equal protection principles into the redistricting area. In taking this position, I contend that rational basis review is the proper standard for redistricting questions.<sup>19</sup>

This Article is divided into four Parts. The first Part looks with particular care to *Baker v. Carr* and analyzes the Court's passage about equal protection standards in light of the facts at issue. This analysis pays particular attention to the internal debate within the Supreme Court and the many conferences and discussions that led to the institutional reversal on redistricting questions. Not surprisingly in light of their public stances both in *Baker* and subsequent redistricting cases, Justices Stewart and Clark play a very important role here.

The second Part offers a preliminary defense of rationality review in the redistricting context. It does so in two ways. The first section looks to the theoretical contours of this position. As part of this argument, this section posits a defense, albeit a preliminary and cautious one, for considering the notion of incumbency protection as a legitimate state interest. The second section moves away from the redistricting context and into the realm of administrative law. This is an area where the statutory language codifies the same "arbitrary and

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CHI. L. REV. 622, 624 (1999). See generally Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 6 (1996) ("Frequently judges decide no more than they have to decide. They leave things open. They make deliberate decisions about what should be left unsaid. This practice is pervasive: doing and saying as little as necessary to justify an outcome.").

19. This places me in the company of Rick Hasen, who extols the benefits of unmanageability in the redistricting context. Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469 (2002); see Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1086 (1958) (noting that courts should employ an equal protection test in the redistricting context and that such a test would involve a presumption that the challenged plan was constitutional "[b]ut once the plaintiff had made a prima facie showing of inequality beyond a reasonable legislative discretion, as a practical matter the burden would be on the state to show a rational, nondiscriminatory basis for the apportionment"); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 75 (1985) ("Redistricting should be one of the objects of the political struggle, not one of its ground rules."); cf. Black, *supra* note 13, at 17 ("Whatever standards may emerge, state or federal, it seems they cannot be precise or absolute; 'reasonable' departures from equality will be permitted. The law of the subject will most likely be a law of the permissibility and impermissibility of such departures."); Mikva, *supra* note 12, at 688 ("[J]udges should refrain from applying even judicially manageable standards beyond the point at which they no longer are 'politically meaningful'—that is, beyond the point where no articulable defect in the political process calls for judicial involvement.").



capricious" standard to which the Court refers in *Baker*. The analogy proves instructive.

The third Part examines the lower courts and their interpretation of the *Baker* standard. For those unfamiliar with the historical record, this Part proffers a surprising story. In a nutshell, it is clear lower courts were able to decide redistricting questions effectively after *Baker*, thus suggesting that future redistricting cases could be decided in a manner that preserves court review while limiting court interference to the most serious cases. In light of recent misadventures in redistricting,<sup>20</sup> I think of the historical account instead as hopeful. Finally, the fourth Part places the spotlight back on the Supreme Court and in particular its second wave of cases post-*Baker*. This Part contrasts the Court's handling of redistricting questions vis-à-vis the lower courts' handling of such questions. This Part sides with Justice Clark in concluding that the Court took its redistricting mission too far. *Baker's* promise need not have led down that road.

#### I. POLITICAL QUESTIONS, MALAPPORTIONMENT, AND THE GHOST OF COLEGROVE: *BAKER V. CARR*

Dating back to the early 1860s, the Tennessee Constitution directed the reapportionment of both the state house and senate every ten years, following the census of qualified voters within the state.<sup>21</sup> And yet, the legislature had refused to reapportion itself since the Act of 1901.<sup>22</sup> The legislators' refusal was obviously self-serving. After all, a legislator's main priority is securing reelection, and the crafting of new lines throws much unnecessary uncertainty into the process. So it is in their best interest to leave the lines alone. However, migrations to urban centers from rural areas within the state had rendered these lines obsolete, perhaps arbitrary. In this way, population disparities among districts grew to unseemly levels.<sup>23</sup>

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20. In particular, I have in mind the recent *Shaw* line of cases. See Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289 *passim* (1997).

21. TENN. CONST. art. II, §§ 4, 5, 6 (1870).

22. TENN. LAWS 1901, ch. 122.

23. Looking to the raw numbers in the early 1960s presents a pretty clear picture. The numbers were skewed in many parts of the country. In Georgia, for example, the largest congressional district had a population of 823,680 while the smallest district had only 271,154. In Texas, the largest district had a population of 951,527, the smallest 216,371. In Illinois, the factual setting of *Colegrove v. Green*, the largest district had a population of 914,053, the smallest only 112,116. *Reynolds*, 377 U.S. at 569-70 ("Legislative apportionment in Alabama is signally illustrative and symptomatic of the seriousness of this problem in a number of the States. At the time this litigation was commenced, there

In previous years, reformers in Tennessee had brought this particular complaint to the courts, only to be rebuffed by their own state Supreme Court.<sup>24</sup> The arguments offered by the state court here were unsurprisingly similar to those penned by Justice Frankfurter in *Colegrove v. Green*. This was the classic "political thicket," where residents of malapportioned districts were advised to take their complaints to their state legislatures, or to invoke "the ample powers of Congress."<sup>25</sup> A short time later, and as expected, the U.S. Supreme Court dismissed their case. As then understood, the relevant precedent was squarely against intervention.<sup>26</sup>

The Tennessee reformers were discouraged, and they should have been; however, a decision in Minnesota soon after their initial defeat reinvigorated their efforts. In *Magraw v. Donovan*, a three-judge panel held that, contrary to the Supreme Court's holding in *Colegrove v. Green*, it had jurisdiction "because of the federal constitutional issue asserted."<sup>27</sup> The court did not grant the requested relief, in order to give the state legislature an opportunity to perform their duty under the state constitution. It did retain jurisdiction, however, in order to give litigants a chance to return to court were the Minnesota legislature unwilling to act.

On the strength of *Magraw v. Donovan*, the Tennessee reformers began to build a second challenge to their state and congressional districts. This second time, the U.S. Supreme Court ultimately

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had been no reapportionment of seats in the Alabama Legislature for over 60 years."); GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* 24-41 (1966); GENE GRAHAM, *ONE MAN, ONE VOTE: BAKER V. CARR AND THE AMERICAN LEVELLERS* 23 (1972); Harold M. Stanley & Richard G. Niemi, *Vital Statistics on American Politics 1999-2000*, at 74-75 (2000).

24. *Kidd v. McCanless*, 292 S.W.2d 40, 44 (Tenn. 1956), *appeal dismissed*, 352 U.S. 920 (1956).

25. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

26. See, e.g., *Matthews v. Handley*, 361 U.S. 127 (1959) (mem.), *aff'g* 179 F. Supp. 470 (N.D. Ind. 1959); *Hartsfield v. Sloan*, 357 U.S. 916 (1958) (mem.); *Radford v. Gary*, 352 U.S. 991 (1957) (mem.), *aff'g* 145 F. Supp. 541 (W.D. Okla. 1956); *Kidd v. McCanless*, 352 U.S. 920 (1956) (mem.), *dismissing appeal from* 292 S.W.2d 40 (Tenn. 1956); *Cox v. Peters*, 342 U.S. 936 (1952) (mem.), *dismissing appeal from* 67 S.E.2d 579 (Ga. 1951); *Tedesco v. Bd. of Supervisors of Elections*, 339 U.S. 940 (1950) (mem.), *dismissing appeal from* 43 So. 2d 514 (La. Ct. App. 1949); *MacDougall v. Green*, 335 U.S. 281 (1948) (per curiam), *overruled in part by* *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Colegrove v. Barrett*, 330 U.S. 804 (1947) (mem.); *Turman v. Duckworth*, 329 U.S. 675 (1946) (mem.), *aff'g* 68 F. Supp. 744 (N.D. Ga. 1946); *Cook v. Fortson*, 329 U.S. 675 (1946) (mem.), *dismissing appeal from* 68 F. Supp. 624 (N.D. Ga. 1946).

27. *Magraw v. Donovan*, 163 F. Supp. 184, 187 (D. Minn. 1958).

changed its collective mind. This Part explores the dynamics of this change as well as the basis for the Court's newfound wisdom.

A. *The Case in Court and Justice Clark's Change of Heart*

On November 23, 1959, a three-judge federal district court heard arguments on *Baker v. Carr*. Less than a month later, a unanimous court returned with the expected answer.

The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment.<sup>28</sup>

The plaintiffs pressed on, and this time, on November 21, 1960, the U.S. Supreme Court noted probable jurisdiction. This section analyzes the Court's internal deliberations and coalition building that led to the opinion of March 26, 1962. These moves within the Court illustrate the myriad difficulties facing the Court at this time. They also help explain the structure of the Court's opinion and the ultimate doctrinal resolution of the *Baker* litigation.

From the time it reached the high court, the outcome of the case was hotly contested. At the conference following the first oral arguments, on April 20, Justice Frankfurter argued passionately against court intervention.<sup>29</sup> At this stage, Justices Clark and Harlan sided with him.<sup>30</sup> On the opposite side of the ledger stood Justices Douglas and Black, dissenters in *Colegrove*, Justice Brennan and the Chief Justice.<sup>31</sup> Justice Whittaker sided with this camp yet refused to join a simple majority of five Justices. This placed the onus on Justice Stewart, who ultimately pressed to schedule the case for reargument

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28. *Baker v. Carr*, 179 F. Supp. 824, 826 (M.D. Tenn. 1959) (citing *Colegrove v. Green*, 328 U.S. 549 (1946)); see *Radford*, 352 U.S. at 991; *Kidd*, 352 U.S. at 920; *Anderson v. Jordan*, 343 U.S. 912, 912 (1952); *Remey v. Smith*, 342 U.S. 916, 916 (1952); *South v. Peters*, 339 U.S. 276, 277 (1950); *MacDougall*, 335 U.S. at 281; *Colegrove*, 330 U.S. at 804; *Turman*, 329 U.S. at 675; *Cook*, 329 U.S. at 675.

29. Telephone interview by Anthony Lewis with Burke W. Mathes, Jr., quoted in Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 30-31 (1997).

30. *Id.*

31. *Id.*

the following term. The Court so ordered a week after this first conference.<sup>32</sup>

The Court heard the second argument on October 9, 1961. Justice Frankfurter had been hard at work in the interim, drafting a sixty-page memorandum that he circulated to his colleagues the day after the reargument. Justice Brennan responded with a memo of his own, drafted by Roy Schotland, his law clerk, which showed the arbitrary disparities between districts.<sup>33</sup> Neither salvo appears to have had much influence, at least initially. During the October 13 postargument conference, Justices Frankfurter, Harlan, Clark, and Whittaker (absent a fifth vote on the other side) were still in favor of affirming the lower court decision. Similarly, Justices Black, Douglas, Brennan, and the Chief Justice were in favor of reversal. In the end, Justice Stewart sided with Brennan, making it 5-4 for reversal. The Chief Justice then assigned the difficult task of writing the opinion to Justice Brennan. On January 22, 1962, Justice Brennan sent the first printed draft of the opinion to Justice Stewart. Justice Stewart was satisfied with it, thus holding the small majority together.

During the same conference of October 13, Justice Clark still sided with the Frankfurter camp. In essence, he argued that the plaintiffs could "invoke the ample powers of Congress"<sup>34</sup> for relief. He also asserted the view that aggrieved groups had not made this problem a campaign issue.<sup>35</sup> In this way, Justice Clark was essentially arguing that plaintiffs had yet to exhaust all avenues of relief. For the Court to step in, all relevant avenues must be effectively foreclosed. On February 2, Justice Clark wrote to Justice Brennan that he must delay the case, for he was working on a separate opinion in addition to Justice Frankfurter's dissent. During the course of writing this opinion, however, a curious thing happened: Justice Clark changed his mind. As Burke Mathes, his law clerk, explained:

In the process of writing his dissent he explored the argument that other remedies were available. He just concluded that there weren't any. I think he surprised himself. He felt badly doing that to Justice Frankfurter,

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32. *Baker v. Carr*, 366 U.S. 907, 907 (1962).

33. Professor Schotland, now a professor of law at Georgetown University Law Center, offers his views on *Baker v. Carr* in this symposium. See Roy A. Schotland, *The Limits of Being "Present at the Creation,"* 80 N.C. L. REV. 1505 (2002).

34. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

35. PRIVATE DISCUSSIONS, *supra* note 14, at 848-49.

whom he so often joined, at that late stage. But afterward he felt good—felt he had done the right thing.<sup>36</sup>

In taking this view, Justice Clark came to understand the facts in *Baker* as presenting a classic lockup scenario.<sup>37</sup> That is to say, the majority did not have any way to exert itself in Tennessee;<sup>38</sup> it had no

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36. Lewis, *supra* note 29.

37. The plaintiffs in *Baker* made much of this fact from the beginning of their litigation; as they wrote in their jurisdictional statement, "[t]he utter lack of reme[d]y makes the Appellants' cause unique." *Jurisdictional Statement*, in LANDMARK BRIEFS, *supra* note 14, at 24; see MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 233-36 (1964); Lewis, *supra* note 19; Louis H. Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81, 88-89 (1962) (reading *Baker* as a lockup case because majorities had no way of changing the existing redistricting plan in order to end the rural stranglehold on the legislature). This was also true in Alabama at the time of the litigation that culminated in *Reynolds v. Sims*, 377 U.S. 533, 570 n.47 (1964). See generally Ely, *supra* note 11 (discussing gerrymandering concerns); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (suggesting that courts should destabilize entrenched partisan forces and restore a more competitive political environment).

38. See *Lucas v. Forty-Fourth Gen. Assembly of the State of Colo.*, 377 U.S. 713, 742 (1964) (Clark, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 258-59 (1962) (Clark, J., concurring). In response, it may be said that these cases are not lockup cases in a normative sense, for under its Section 5 power, Congress could have ultimately intervened and, for example, established the one-person, one-vote standard. During the first oral argument, on April 19, 1961, Justice Stewart asked precisely that question: "If this is really an equal protection denial, a denial of equal protection of the laws, I suppose the Congress of the United States, under Section 5 of the Fourteenth Amendment, could do something about it, couldn't it?" *Oral Argument, April 19, 1961*, in LANDMARK BRIEFS, *supra* note 14, at 559. The state of Tennessee similarly contended that "[t]he Constitution of Tennessee can be amended. Congress can enact remedial legislation. These are the traditional processes of a democratic government. Is it better to employ these procedures or is it better for this Court to legislate judicially?" *Supplemental Brief for Appellants*, in LANDMARK BRIEFS, *supra* note 14, at 268.

In a real sense, however, it is questionable at best whether Tennessee residents had any options. I side with Justice Clark's conclusion. As he wrote in his concurring opinion in *Baker v. Carr*:

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. I have searched diligently for other "practical opportunities" present under the law. I find none other than through the federal courts.

*Baker*, 369 U.S. at 258-59 (Clark, J., concurring); see Black, *supra* note 13, at 14; Lewis, *supra* note 29, at 35; see also Comment, *Challenges to Congressional Districting: After Baker v. Carr Does Colegrove v. Green Endure?*, 63 COLUM. L. REV. 98, 115 (1963) (noting that state legislatures are unlikely to facilitate changes because "[i]nequality among state legislative districts is far worse than among congressional districts, . . . the rural interests now over-represented in Congress are even more heavily over-represented

means to exact change in the face of a grossly malapportioned legislature. Put simply, the majority was captive to the whims of an entrenched legislature. Under such limited conditions, *Baker* makes a great deal of sense.

Once Justice Clark changed his mind, all further pieces quickly fell into place. With this vote, Justice Whittaker would side with the Brennan camp and make it 6–3, maybe 7–2 if Justice Stewart stayed on board. In the end, Justice Whittaker did not figure in the final decision and Justice Stewart did stay on board, making it a 6–2 decision. As for the opinion itself, the Court remanded to the lower court for further proceedings consistent with its opinion. In so doing, a crucial question immediately arose: what standards would serve to guide the lower courts post-*Baker*? This question lies at the heart of the next section.

#### B. *The Standard: Rational Basis?*

The preceding section sought to illustrate the institutional and doctrinal complexities inherent to the reapportionment inactivity in Tennessee and across the country. Most observers readily identified the doctrinal difficulties as dating back to the Court's decision in *Colegrove v. Green*. The institutional issues were similarly predictable, as ultimately seen by the sharp divisions within the Court and the number of opinions published. This led to much confusion, particularly on the crucial question of judicial standards. What exactly did the Court decide in *Baker*? Better yet, how will the Court decide the next *Baker*, when the question is not one of inaction but the clear pursuit of a (presumably rational) state policy?

This section looks for answers to these questions in three places. First, it analyzes the lead opinion in *Baker*, authored by Justice Brennan, and particularly its claim that judicial standards under the Equal Protection Clause are "well developed and familiar." Second, it turns to the pivotal concurring opinions of both Justice Clark and Justice Stewart. When interpreting the Court's doctrinal stance, and in light of their position as swing votes, these two Justices play a particularly crucial role in unearthing how far the Court was willing to go when interjecting itself into the redistricting process. Finally, this section explores the Court's disposition of two lower court cases decided soon after *Baker*—*WMCA, Inc. v. Simon*<sup>39</sup> and *Scholle v.*

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in the state legislatures. Thus the beneficiaries of malapportionment have been in a position to prevent changes that would threaten their dominance.").

39. 370 U.S. 190 (1962).

*Hare*.<sup>40</sup> These short opinions offer an important glimpse into the Court's doctrinal commitments and institutional duties. This section concludes that rational basis review lay at the center of the Court's newfound project in electoral politics.

### 1. Our "well-developed and familiar" Equal Protection Law

In *Baker*, Justice Brennan wrote for a majority of the Court that "[j]udicial standards under the Equal Protection Clause are well-developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."<sup>41</sup> For the laborious care with which the Court sought to dispense with the imposing precedential weight in its path, this "murky"<sup>42</sup> sentence was the only guidance provided as to future cases. To the critics, the Court did not give lower courts and redistricters in general enough guidance.<sup>43</sup> This section asks whether the Court did in fact provide a standard—the trusted rational basis review. Subsequently, it explores what such a standard would look like in the redistricting context.

On its face, the Court was clear about the source of its displeasure.<sup>44</sup> The apportionment plan at issue in *Baker* reflected no policy initiative by the Tennessee legislature but simple inaction. To use the language of some members of the Court, the plan in question did not represent the enactment of a state policy, but an arbitrary and irrational quilt, the result of years of inactivity and inattention.<sup>45</sup> Some commentators have characterized Tennessee's redistricting dormancy up to the time of *Baker* as an "org[y] of inactivity,"<sup>46</sup> or

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40. 369 U.S. 429 (1962).

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

42. Lewis, *supra* note 29, at 33.

43. See sources cited *supra* note 13.

44. See *Baker*, 369 U.S. at 265 (Clark, J., concurring).

45. See *id.* at 265 (Stewart, J., concurring) ("The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary—without any possible justification in rationality."); *id.* at 254 (Clark, J., concurring) (contending that "Tennessee's apportionment is a crazy quilt without rational basis").

46. Alexander M. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 44 (1962); see Gerhard Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 7 ("*Baker v. Carr* had concerned a relatively clear situation: a state constitutional command to reapportion every ten years and no action by the Tennessee legislature since 1901."); Dixon, *supra* note 7, at 224 ("*Baker v. Carr* can be justified without jumping all the way to arithmetic absolutism. . . . [S]ome judicial intervention in the politics of the people seemed necessary to have an effective political system. . . . [*Baker*] would terminate egregious population disparities."); McCloskey, *supra*

what Leroy Hardy has called a "silent gerrymander."<sup>47</sup> Tennessee legislators in 1961 could not have given a plausible answer to the question of exactly what policy their plan was designed to further. As the lines stood, they could not be justified. During the second oral argument, on October 19, the lawyer defending the plan was asked exactly this question, and he agreed that "there was no reason for the disparate treatment, and that maybe the Legislature could justify it, but he could not."<sup>48</sup> The mere fact that the legislature had failed to redraw the state's district lines in accordance with the state constitution points to the conclusion that no legitimate state policy was being furthered, all in the name of political self-interest.<sup>49</sup>

Seen this way, a very strong argument could be made that *Baker* was as far as the Court should have gone in the reapportionment field. So long as policy-makers craft reapportionment plans with a legitimate policy in mind, and the plan at issue may be reasonably understood as a means to carry out that policy, the Court should approve of the plan.<sup>50</sup> This is traditional rational basis review, a very flexible standard that allows redistricters much leeway when crafting their redistricting plans. In this way, the Court should allow state legislators to take the lead in redistricting, and intervene only when extreme circumstances are present, as in *Baker*.<sup>51</sup>

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note 13, at 73 (proposing that *Baker* should follow a restraintist path, adopting a rule "that focused only on the opening up of the procedures of popular consent").

47. Leroy C. Hardy, *Considering the Gerrymander*, 4 PEPP. L. REV. 243, 249 (1977).

48. Lewis, *supra* note 29, at 31; see *Oral Argument, October 9, 1961 in LANDMARK BRIEFS*, *supra* note 14, at 674-75; see also *Baker*, 369 U.S. at 258 (Clark, J., concurring) (stating that no one had come up with a rational justification for Tennessee's apportionment statute). But see Bickel, *supra* note 46, at 43 ("Rationality—the presence of *some* policy, the absence of 'simply arbitrary and capricious action'—sounds good, but aside from temper tantrums, it chases its own tail. Most apportionments represent the rational pursuit of a policy if the Court is willing to allow the policy to be pursued.").

49. Cf. Bickel, *supra* note 46, at 44 ("The Tennessee legislature, to be sure, could not be accused of pursuing no intelligible end save only an unacknowledged and impermissible one."). Seen this way, *Baker* is but a direct precursor to *Davis v. Bandemer*, 603 F. Supp. 1479 (S.D. Ind. 1984). See Alfange, *supra* note 13, at 188. In fact, while the rhetoric is different, these cases are but mirror images of one another. Both cases worry about representation and political losses, while setting a high standard for litigants to meet, in deference of the complexities at issue in the reapportionment field.

50. But see Israel, *supra* note 13, at 109 (contending that the language about standards is not enough because each subject matter has its own precise standard to help ascertain whether the ground for discrimination is rational).

51. In the plaintiffs' words, judicial intervention was needed as a "necessary spur to legislative action." *Brief for Appellants*, in *LANDMARK BRIEFS*, *supra* note 14, at 129. Professor Katzenbach notes,

The Supreme Court has not said that the courts are the only appropriate instruments to reform electoral inequities. It has merely said that the legislatures are no longer free to maintain such inequities. If they continue to do so, the



This characterization hardly ends the inquiry, of course. For example, and to press what may turn out to be the hardest question, how should we determine the legitimacy of a professed state policy? This question proves far more difficult than generally acknowledged. For example, and in response to queries about the inaction on the part of the Tennessee legislature, imagine the following interview with a candid political leader within the state. The question is why the legislature has not reapportioned for so long. The answer is well known: it has not done so out of political self-interest. The interviewee puts this point much more delicately than that; he speaks of legitimate redistricting concerns, of the legislature's goal of achieving "political or other ends of the State, its constituents, and its officeholders."<sup>52</sup> When pressed, the interviewee finally concedes the obvious: the present inaction is simply a result of a legislative desire to protect incumbents.<sup>53</sup> He then points out that the Supreme Court has concluded that incumbency protection is a legitimate state interest.<sup>54</sup> How should a court respond to this position?

I will respond to this position and related objections below. I will also offer a much fuller defense for the view that rational basis review should be the proper standard in redistricting. Before doing so, the next section looks to Justices Clark's and Stewart's separate concurrences in *Baker*. In order to understand what *Baker* could accomplish in terms of doctrinal reach, the swing votes loom large.

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courts can step in. The opinion should therefore be regarded by the legislatures as an invitation to deal equitably with this problem, so long neglected.

Nicholas deB. Katzenbach, *Some Reflections on Baker v. Carr*, 15 VAND. L. REV. 829, 832-33 (1962); see also ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 268-71 (1965) (arguing that the Court must leave room for the states to experiment, as the equipopulation principle should not be a straightjacket, but a minimum condition necessary to shake up states from undemocratic circumstances). More recently, both the Court and commentators have heeded a similar call. See *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *Grove v. Emison*, 507 U.S. 25, 33-34 (1993); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245.

52. *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

53. See Justice Harlan's dissent in *Baker*, where he contends that "the foremost apparent legislative motivation has been to preserve the electoral strength of the rural interests notwithstanding shifts in population." See *Baker*, 369 U.S. at 348 (Harlan, J., dissenting).

54. See, e.g., *White v. Weiser*, 412 U.S. 783, 793-97 (1973); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.").

## 2. Back to the Swing Votes

The initial distribution of Justices in *Baker* split evenly, with four Justices standing on either side of the question.<sup>55</sup> In the middle we first found Justice Stewart, at whose insistence the Court scheduled a reargument. A scant three weeks before the decision was ultimately handed down, Justice Clark changed his mind and sided with the Brennan camp. This section explores the reasons for the change as well as Justice Stewart's ultimate position. Their expositions are key to understanding the reach of the *Baker* opinion, for these two Justices represent the narrowest ground on which the issue was decided. In order to understand *Baker*, we must first understand these two positions.

### a. Justice Clark and the Crazy Quilt

For Justice Clark, rationality was the proper constitutional standard in redistricting questions.<sup>56</sup> This was a standard, he made clear at the onset, that the Tennessee Constitution easily met. To his mind, the problem arose when looking to the actions of the Tennessee legislature, as it had failed to follow the prescriptions of the state constitution. Justice Clark's examination of the voting strength of counties with similar populations as well as the contrast of small and large counties "leaves but one conclusion, namely that Tennessee's apportionment is a crazy quilt without rational basis."<sup>57</sup> Put simply, the plan in question made very little sense whatsoever. Whether comparing districts similar in size or large districts with smaller ones, one could not discern the pursuit of a rational state policy.

From the tenor of his opinion as well as his position in *Baker* and subsequent cases, this last fact is key. As he wrote,

The truth is that—although this case has been here for two years and has had over six hours' argument (three times the ordinary case) and has been most carefully considered over and over again by us in Conference and individually—no

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55. This division takes into account Justice Whittaker's decision to side with the Frankfurter camp so long as the Brennan camp could only garner five votes. Due to the magnitude of the intrusion into state prerogatives, he was unwilling to give the fifth vote to overturn *Colegrove* on a 5–4 vote. See Lewis, *supra* note 29, at 31.

56. *Baker*, 369 U.S. at 253 (Clark, J., concurring) (citing *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), for the proposition that a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").

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

one, not even the State nor the dissenters, has come up with any rational basis for Tennessee's apportionment statute.<sup>58</sup>

In making this claim, Justice Clark immediately denied the centrality of mathematical equality to his position. He made clear the point was not that districts must be equal in population. Rather, the point was that, whatever a state decides to do, it must follow a rational pattern. In this way, if some districts adhere to mathematical equality while others do not, the state may explain the disparities.<sup>59</sup> The state of Tennessee could not do so. In light of the facts at issue, this conclusion should not be entirely surprising.

At this juncture, however, Justice Clark might still be unwilling to open the federal forum for adjudication of redistricting questions. Yet, he made clear again that the case of Tennessee was particularly problematic. Put simply, "the majority of the people of Tennessee have no '[p]ractical opportunities for exerting their political weight at the polls' to correct the existing [malapportionment]."<sup>60</sup> This was another way of saying, Justice Clark continued, that "the majority of the voters have been caught up in a legislative strait jacket." His reasons were many: the state did not allow for initiatives or referenda, the legislature refused to reapportion, nor would the Governor or the state courts, and the constitutional convention route had proven "fruitless."<sup>61</sup> The voters could still appeal to Congress before turning to the federal courts, he recognized, and yet, "from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State."<sup>62</sup> It was on these facts, and these facts only, that he concluded that the federal courts must intervene.

#### b. Justice Stewart and the Limits of the Court's Decision

In his separate concurrence, Justice Stewart took a similar view of the case. He did not agree with the reach of the Court's holding in *Baker*, to be sure, for he sought to limit it beyond what the Court's words and the relevant rules of civil procedure might sensibly bear. Yet, he still agreed with Justice Clark in a crucial sense, a sense that makes a retelling of his position worth exploring.

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58. *Id.* at 258 (Clark, J., concurring); *see id.* (Clark, J., concurring) ("But certainly there must be some rational design to a State's districting. The discrimination here does not fit any pattern—as I have said, it is but a crazy quilt.").

59. *Id.* at 260 (Clark, J., concurring).

60. *Id.* at 258–59 (Clark, J., concurring) (emphasis added).

61. *Id.* at 259 (Clark, J., concurring).

62. *Id.* (Clark, J., concurring).

Justice Stewart began his short contribution by stressing his belief about the Court's actual holding. This was needed due in large part to the sharp divisions within the Court. To his mind, the Court decided only three things: that it had subject matter jurisdiction, that the plaintiffs had standing to sue, and that the cause of action was in fact justiciable.<sup>63</sup> That was all. On this reading, the Court did not intimate a view about the facts in question, nor did it provide lower courts any standards for analyzing the issues soon to confront them.

This reading of the case comports with the conventional wisdom, which portrays *Baker* as a minimalist opinion and the Court as too willing to remand the case to the lower court without any semblance of doctrinal guidance.<sup>64</sup> Leaving aside whether Justice Stewart was right,<sup>65</sup> however, do note what he implied. He read the record to reflect no conclusion on the part of the District Court as to whether the apportionment system in Tennessee was "utterly arbitrary—without any possible justification in rationality."<sup>66</sup> He also did not understand the Court in *Baker* to have reached a decision on this question either. This was the position of the plaintiffs in *Baker*, yet, to Justice Stewart, it remained a position yet to be proved by the plaintiffs or refuted by the state.

Hence, this would be the task to which the lower courts must turn. The standard was exactly this: were the redistricting plans in question utterly arbitrary, the reflection of no policy on the part of the state but arbitrary and capricious action?<sup>67</sup> In this regard, the Court did not demand population equality, nor did it conclude that "there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.'"<sup>68</sup> A state could very well choose its legislative structure, so long as it did so rationally. It was clear from the record, Justice Harlan's hypotheses to the contrary,<sup>69</sup> that the State of Tennessee may not be credited with having done so.

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63. See *id.* at 265 (Stewart, J., concurring).

64. See *Reynolds v. Sims*, 377 U.S. 553, 587 (1964); Hasen, *supra* note 19, at 1502; Schotland, *supra* note 33, at 1510.

65. See Israel, *supra* note 13.

66. *Baker*, 369 U.S. at 265 (Stewart, J., concurring).

67. See Friedelbaum, *supra* note 14, at 690–91 ("While the Court's treatment of the issues remains technically within the 'correct' bounds outlined by Mr. Justice Stewart, the equal protection clause plainly is made the adjudicatory standard by reference to which the 'reasonableness' of apportionment plans are to be judged.").

68. *Baker*, 369 U.S. at 265 (citing *Baker*, 369 U.S. at 334 (Harlan, J., dissenting)).

69. See *id.* at 340–49 app. (Harlan, J., dissenting).

### 3. The Court in Between: *Scholle* and *Simon*

This final section looks for further clues about the Court's collective posture in *Baker*. It does so by looking to cases that reached the high court soon after *Baker*. Two such cases merit attention. These are *Scholle v. Hare*,<sup>70</sup> initially decided under the Michigan Constitution, and *WMCA, Inc. v. Simon*,<sup>71</sup> from New York. Both cases were remanded to the lower courts for decision in consideration of *Baker*.

#### a. The Michigan Supreme Court, the State Senate, and the Meaning of *Baker*

In *Scholle*, the Michigan Supreme Court confronted a challenge to a 1952 amendment to the Michigan Constitution establishing permanent state senate districts.<sup>72</sup> Under this amendment, adopted by a margin of approximately 300,000 votes during the general election, the state senate would retain a geographical bias, favoring the rural interests. In contrast with the apportionment at issue in *Baker*, however, the state house would be apportioned in accordance with population. Also worthy of note is the fact that the state legislature had twice reapportioned the seats in the lower house between 1925 and the beginning of the lawsuit in *Scholle*. To the plaintiffs, this all mattered little. They attacked the 1952 amendment as an arbitrary and unreasonable distribution of senate seats in violation of both the Due Process and Equal Protection Clauses of the Federal Constitution.<sup>73</sup>

In a 5-3 decision, the Michigan Supreme Court denied the plaintiffs relief. Four members of the court concluded that the facts did not rise to a constitutional violation. In contrast, three members of the court thought that the apportionment scheme enacted under the 1952 amendment completely lacked rationality. The court's final member, Justice Eugene Black, thought that the plan in fact violated the Equal Protection Clause, yet understood the reapportionment cases to bar the state supreme court from correcting the violation.

The U.S. Supreme Court issued its opinion in *Scholle* a month after *Baker*. It did not decide much, but instead vacated the state court's judgment and remanded the case to the lower court "for further consideration in the light of *Baker v. Carr*."<sup>74</sup> Justices Clark

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70. 369 U.S. 429 (1962).

71. 370 U.S. 190 (1962).

72. *Scholle v. Hare*, 104 N.W.2d 63, 63 (Mich. 1960), vacated by 369 U.S. 429 (1962).

73. *Id.*

74. *Scholle*, 369 U.S. at 429.

and Stewart issued a concurring opinion in response to Justice Harlan's dissent. In light of the lower court's handling of the issues as well as its reading of the proper doctrinal test, the remand in *Scholle* raises three issues worth exploring.

First, the *Scholle* case stands in direct contrast with *Baker* in many respects.<sup>75</sup> For one, the issues in *Scholle* relate only to the state senate, not the entire legislative body. Further, the apportionment scheme under attack was enacted by the citizens of the state a decade before, not fifty or sixty years prior. And finally, the apportionment in question was stipulated by the state constitution, not in violation of it.

Second, consider Justice Stewart's claim in *Baker* about the reach of the Court's opinion. On its face, one may agree with Justice Stewart that the Court decided very little in *Baker*. And yet, as I argued in the previous section, one may also agree that his concurrence in the case may be read as accepting, if implicitly, the view that *Baker* brought the Equal Protection Clause to bear on the state practices under attack. If this is true, how should one interpret the view, expressed by Justices Stewart and Clark in their joint concurring opinion in *Scholle*, that a majority of the state court had deemed the merits of the claim unenforceable in court?<sup>76</sup> To be sure, a careful analysis of the lower court's opinion makes this statement disingenuous at best.<sup>77</sup> This new concurrence, however, reinforces my earlier point. The only reason to remand in *Scholle*, even under the assumption that *Baker* decided exactly what Justice Stewart claimed it did, would be to force the lower courts to apply traditional equal protection principles to the facts at issue. Otherwise, the remand, and Justice Stewart's position in general, make very little sense.

Third, if the Court in fact established rationality as the proper constitutional parameter, why remand here? Recall that four Justices of the Michigan Supreme Court had concluded that the apportionment scheme did not violate the Equal Protection Clause, while three had concluded that the scheme was in fact irrational. The eighth Justice had found a violation yet disagreed with the state court on the question of jurisdiction. Thus, the issue could not be that the lower court had failed to appreciate the Supreme Court's earlier pronouncement in *Baker*, because the Michigan court asked precisely whether the apportionment scheme was "wholly arbitrary," and four

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75. See *id.* at 433 (Harlan, J., dissenting).

76. See *id.* at 430 (Clark, J., and Stewart, J., concurring).

77. See Lucas, *supra* note 14, at 759.

of its members concluded that it was not.<sup>78</sup> What then was the U.S. Supreme Court's motivation?

At this juncture, I offer a tentative and largely conjectural answer. Based on the facts at issue as well as the posture of the case on appeal, it appears as if the Court in *Scholle* remanded in order to bide its time for a future change of course.<sup>79</sup> Justice Harlan offered a similar hypothesis, when he wrote that the Michigan court would have to choose between upholding its prior decision or

treating the remand as an oblique invitation from this Court to hold that the Equal Protection Clause prohibits a State from constitutionally freezing the seats in its Senate, with the effect of maintaining numerical voting inequalities, even though that course reflects the expressed will of the people of the State."<sup>80</sup>

Of note, the state supreme court on remand declared the 1952 amendment unconstitutional.<sup>81</sup>

#### b. The New York Constitution and Rural Bias

The provisions of the New York Constitution at issue in *WMCA v. Simon* differed somewhat from those in Tennessee and Michigan. The New York Constitution, unlike the Tennessee Constitution, demanded the reflection of rural bias in apportionment plans. In contrast with the Michigan Constitution, which directly defined what the state senate districts would be, the New York Constitution established a formula for the General Assembly to follow. Under this formula, the ratios between urban and rural counties were similar to those seen in *Baker*. As a result, this case was not one of inaction, as in *Baker*; rather, the question in *Simon* was whether the state may pursue the policy of rural bias as codified in the state constitution.

A three-judge court held, in a 2-1 decision, that the New York plan was not irrational.<sup>82</sup> The third judge did not reach the merits but

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78. 104 N.W.2d at 83 (finding the 1962 amendments "palpably arbitrary").

79. Professor Shapiro speaks to this position in general form. As he writes, [t]he first and greatest battle rages around the relatively narrow and therefore most easily defended opinion. Then, when the shouting has died down somewhat and the position is solidified by widespread public acceptance, the Court goes on to what it really intended all along, the broadest and most extreme application of its initial decision. Such tactics are politically clever, but they may be too clever.

SHAPIRO, *supra* note 37, at 252.

80. *Scholle*, 369 U.S. at 434-35 (Harlan, J., dissenting).

81. See *Scholle v. Hare*, 116 N.W.2d 350, 355-56 (Mich. 1962), *vacated by* 369 U.S. 429 (1962).

82. *WMCA, Inc. v. Simon*, 202 F. Supp. 741, 751-752 (S.D.N.Y. 1962), *vacated by*, 370 U.S. 190 (1962).

concluded instead that the matter was not justiciable.<sup>83</sup> A scant six weeks after issuing its decision in *Scholle*, the U.S. Supreme Court remanded for consideration in light of its decision in *Baker*. Before giving way to the expected dissent from Justice Harlan, the Court added a sentence worth examining: "As in *Scholle v. Hare*, we believe that the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination."<sup>84</sup> In taking this view, the Court makes explicit the view I have defended in this Article. The merits of a claim of constitutional violation, to the Court majority, is whether the state engages in "arbitrary and invidious geographical discrimination." I do not pretend that this is an easy question, nor do I argue that the Court even attempted to explain what this might mean.<sup>85</sup> I do stand by my earlier position that the Supreme Court wished for lower courts to decide these questions on their own. In taking this view, I suspect that some readers will immediately disagree with this position. The next Part responds to these concerns.

## II. A PRELIMINARY DEFENSE OF RATIONALITY REVIEW IN REDISTRICTING

This Article has argued that the U.S. Supreme Court in *Baker v. Carr* directed lower courts to apply equal protection principles to the redistricting plans in question.<sup>86</sup> This Part places that position on more abstract ground. It does so in two ways. The first section offers an initial and concededly partial defense for the use of rationality in redistricting. In order to reinforce this first section, the second section looks elsewhere, to the Court's use of the arbitrary and capricious standard in the administrative law context. This Part concludes that rationality review may have an important role to play in the redistricting context.<sup>87</sup>

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83. *Id.* at 755 (Waterman, J., concurring).

84. *WMCA, Inc. v. Simon*, 370 U.S. 190, 191 (1962).

85. *See id.* at 194 (Harlan, J., dissenting); Lucas, *supra* note 14, at 763.

86. *See, e.g., Maryland Comm. for Fair Representation v. Tawes*, 180 A.2d 656, 668 (Md. 1962) ("[T]here is a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination.").

87. In making this claim, I must underscore that this position deserves a much more exhaustive treatment than you will find here. A future project will attempt to address this shortcoming.



### A. *Rationality in Redistricting*

This section begins with the premise that redistricting is “primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”<sup>88</sup> Two particular questions ground the discussion. First, why use rationality review as the appropriate standard as opposed to the more aggressive equipopulation standard or the toothless political questions doctrine? In answering this question as I do, the second question immediately arises: what kinds of justifications may be qualified as legitimate? For example, is incumbency protection a legitimate state interest?

#### 1. A General Theory

##### a. Reasonableness and Burden-Shifting

In answering the first question, this section keeps in mind two overarching concerns. First, it takes to heart criticisms of the Court’s unaccountable status and the countermajoritarian criticism that has pervaded the constitutional law field for the last generation.<sup>89</sup> Second, it recognizes that these concerns are magnified in the reapportionment field, an area that stands at the core of our nation’s democratic promise. Reapportionment and redistricting are the lifeblood of our political system, the initial mechanisms through which our representative system takes shape. But that is not all. As the Court intervenes in this ultra-political arena,<sup>90</sup> it is inherently affecting political decisions at their core, taking sides in a process where neutral outcomes are impossibilities.<sup>91</sup> The utmost judicial care

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88. *Grove v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); see *Bush v. Vera*, 517 U.S. 952, 978 (1996) (recognizing the Court’s “longstanding recognition of the importance in our federal system of each State’s sovereign interest in implementing its redistricting plan”). But see *Bush*, 517 at 1038 (Stevens, J., dissenting) (criticizing the Court’s doctrinal shift since *Shaw*, which “guaranteed that federal courts will have a hand—and perhaps the only hand—in the ‘abrasive task of drawing district lines’”) (citing *Wells v. Rockefeller*, 394 U.S. 542, 554 (1969) (White, J., dissenting)).

89. The classic citation here is ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 57 (1962); see Steve Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 *passim* (1995); Suzanna Sherry, *Too Clever by Half: The Problem With Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 921 (2001) (“One might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today.”).

90. See Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 541–42 (1994).

91. Gordon E. Baker, *Threading the Political Thicket by Tracing the Steps of the Late Robert G. Dixon, Jr.: An Appraisal and an Appreciation*, in REPRESENTATION AND REDISTRICTING ISSUES 21, 32 (Bernard Grofman et al. eds., 1982) (quoting Statement of Robert G. Dixon, Jr. at Hearings on S. 596 before the U.S. Senate Comm. on Governmental Affairs) (“[T]here are no ‘neutral’ lines for legislative districts.

cannot avoid this reality. These two concerns lead me away from an activist judicial model and toward a view of the Court as both cognizant and respectful of democratic politics.<sup>92</sup>

An expected response to the adoption of such a relaxed standard posits that voting is different from other doctrinal areas.<sup>93</sup> I agree with that characterization. However, this difference leads me away from an activist mode of judicial review and toward the more flexible rational basis approach. Redistricting is but a re-enactment of past political battles and a preview of future ones.<sup>94</sup> At best, one may say that particular redistricting outcomes set the ground rules for all subsequent political battles. And yet, even in this light, redistricting battles must be seen as inseparable from substantive policy-making.<sup>95</sup>

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Whether . . . drawn by a ninth-grade civics class, a board of Ph.D.'s, or a computer, every line drawn aligns partisans and interest blocks in a particular way different from the alignment resulting from putting the line in some other place."'); see BRUCE A. CAIN, *THE REAPPORTIONMENT PUZZLE* 183 (1984) (accord); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 909 (1995) ("[I]n districted representation systems, the state is the market and the vagaries of territorial boundaries yield no 'neutral' distributional mechanism that can serve as the point of departure.").

92. For a sustained critique of *Shaw* and the Court's approach to redistricting questions in general, see Erin Daly, *Idealist, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia*, 21 B.C. INT'L & COMP. L. REV. 261 *passim* (1998).

93. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201 *passim* (1996); see also Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 CUMB. L. REV. 515, 524 n.26 (1995-96) ("A legislative district functions differently from a town, a school district, or a municipal facility. The district does not govern itself. . . . Instead, it is a means by which interests are voiced and counted. It makes sense only as part of a political process that includes other, differently composed districts."); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1836-37 (1992) (explaining that the realities of racial bloc voting and the rise of a "racially defined majority faction" make the voting rights arena different from other areas of constitutional law).

94. See Karlan, *supra* note 51, at 256 (explaining how lawsuits and legal standards, particularly one person, one vote, are used in redistricting as "vehicle[s] for short-circuiting the states' routine redistricting procedures"); Lowenstein & Steinberg, *supra* note 19, at 4 (noting that redistricting is purely political); Thomas B. Edsall, *Parties Play Voting Rights Role Reversal*, WASH. POST, Feb. 25, 2001, at A4 ("Strategists in both parties are preparing to take every adverse political redistricting outcome to court."); see also Lucas, *supra* note 14, at 801-02 ("The most disturbing feature of the apportionment cases is the fact that beneath the surface of [each case], and not very far beneath at that, lies a partisan political struggle. . . . The contest is not between people living in one area or another; it is between Democrats and Republicans.").

95. To be clear, the point here is quite simple: redistricting battles are first and foremost battles over subsequent control of the legislative process. This fact accounts for the vehemence and vigor with which partisans approach the redistricting season. Taken to its logical extreme, the larger point is that the political parties will turn to the courts in

After all, those who seek control of the redistricting process do so in order to gain subsequent control of the legislative process. Legislative control is then expected to lead to the passage of amenable legislation. It is partly for this reason that this Article contends that rational basis review should be the applicable standard for redistricting cases.

This position raises two immediate questions. First, which is the appropriate kind of rationality review in this context? And second, what is the significance of the fact that redistricting involves the weighing of the right to vote, which is in itself a fundamental right?<sup>96</sup>

In looking to the facts and interests at issue, I concede at the onset my initial attraction to the application of lenient rationality in redistricting. This is the view epitomized by the Court's decision in *Williamson v. Lee Optical*.<sup>97</sup> I ultimately reject this position, for the Court's posture in like cases would move the Court too close to the political questions regime, which asserts that the Court has little to offer when confronted with redistricting questions. To the contrary, the Court has much to offer, particularly when confronted with facts such as those presented in the *Baker* and *Reynolds* cases when state legislatures refuse to reapportion themselves for decades.

This is not to say, to turn to the second question, that the Court should examine redistricting plans aggressively. Were the Court to subject redistricting compromises to aggressive review, it would essentially take the task away from state legislatures, while thrusting them onto the federal court system. This is too much. This Article looks for a middle ground between these two positions, between the use of aggressive scrutiny and rationality review.

For an answer, albeit a preliminary one, this Article looks to a hardened version of rationality review, what Gerald Gunther labeled a generation ago as "rationality with bite."<sup>98</sup> That is, this Article argues that the Court's job should be limited to examining the

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order to overturn clearly political outcomes. This development should give us reason for pause and reflection.

96. This question is similar to the position taken by Justice Marshall in *Bolden*, where he argued that the Court should focus on the "fundamental rights" aspect of this problem, because it involves the right to vote. *City of Mobile v. Bolden*, 446 U.S. 55, 113-24 (1980) (Marshall, J., dissenting).

97. 348 U.S. 483 (1955).

98. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 22 (1972).

legitimacy of the state's proffered interest.<sup>99</sup> Under this argument, a reviewing court must exhibit a deferential posture, keeping in mind at all times that redistricting is a matter left for each state to carry out. In the face of gross population disparities,<sup>100</sup> the burden would then shift to the state to provide a rational explanation for the disparities.<sup>101</sup> As for the explanations themselves, political actors need only to express the enactment of a legitimate legislative policy, and the means in question must seek to sensibly carry out such ends.<sup>102</sup> This is the kind of judicial approach that leaves ample wiggle room for legislative actors to carry out their political preferences. This strand, concededly, would leave little for the Court to do.<sup>103</sup> I take this to be not a limitation on this model but a virtue.

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99. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959). On this view, and in particular the claim that the Court's jurisprudence is concerned with the notion of "exclusionary reasons," see Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994).

100. One need not overextend this point. For my purposes, the Court's approach in the context of state legislative districts provides a pertinent referent. There, the Court settled on ten percent as the cutoff point for state redistricting plans. Deviations under ten percent were presumptively constitutional, while any deviation over that threshold required that the state in question provide a valid justification for its redistricting plan. See *Connor v. Finch*, 431 U.S. 407, 418 (1977) ("The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis*; they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments."); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) ("[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.").

101. Of note, this was exactly the approach proposed by Solicitor General Cox during the *Baker* litigation. See LANDMARK BRIEFS, *supra* note 14, at 347 ("If gross disparities and no alternative remedy available, burden should shift to the state to provide a rational explanation. If a reasonable justification exists, the disparity should not be unconstitutional.").

102. This language is analogous to Justice Stevens' own position. See *Cousins v. City Council*, 466 F.2d 830, 859 (7th Cir. 1972) (Stevens, J., dissenting) (citing *Turner v. Fouche*, 396 U.S. 346, 362 (1970)) (demanding "a showing that the legislative classification 'rests on grounds wholly irrelevant to the achievement of a valid state objective'").

103. See *id.* at 859 (Stevens, J., dissenting); Casper, *supra* note 46, at 7. I take this view, to be clear, on the strength of the competing values at issue, not on any notion of institutional incompetence. I harbor little doubt, based on their historic self-assurance and willingness to carry out their perceived constitutional duties, that the Justices feel comfortable, perhaps too much so, with districting questions. As Martin Shapiro complains:

[I]t is insufficient to tell the Supreme Court that it ought not to intervene in a certain area because it cannot construct an objective, general standard of the right, the fair, and the just in that area. The Court often has been willing to act on the basis of identifying the wrong, the unfair, and the unjust, and it surely can identify those qualities in many districting maps.

In response to this view, critics may immediately suggest that "reasonableness" will not prove easy to discern in practice. This was Alexander Bickel's point in response to the Court's opinion in *Baker*. According to Bickel, the relevant passage from *Baker* "was at best a shot in the dark, an arrow wafted skyward in the hope that some appropriate target might find it, and, at worst, an evasion of the problem."<sup>104</sup> Professor Bickel's position is now a familiar one. In his view, the reapportionment area presents difficult issues. For support, he quotes approvingly from Justice Frankfurter's dissent in *Baker*:

Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.<sup>105</sup>

In light of so many factors at play in the redistricting context, how may one discern from the available evidence whether a legislature behaved rationally? To put this point differently, how can we determine what a legislature intended?

In general, I agree with Professor Bickel; under most circumstances, the Court should stay its hand and let redistricters do as they will. In my estimation, and taking Bickel's and Justice Frankfurter's account to heart, most redistricting plans will pass constitutional review, and properly so. This is exactly what the traditional rational basis standard is designed to accomplish, and I see very little reason to change that approach in the redistricting area. It is in this vein that I argue that *Baker* was unquestionably a special

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Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 249 (1985); see also Louis H. Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81, 87 (1962) (contending that judges are competent to evaluate the reasonableness of redistricting choices). The point is not that the Court cannot do it, for it is clear that it can; the point instead is that it should not.

104. Alexander M. Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970S, at 57, 62 (Nelson W. Polsby ed., 1971); see Casper, *supra* note 46, at 29–32 (arguing that the Court has yet to distinguish the arbitrary from the rational).

105. BICKEL, *supra* note 89, at 62 (quoting *Baker v. Carr*, 369 U.S. 186, 324 (1962) (Frankfurter, J., dissenting) (citation omitted)).

case, a situation few other fact scenarios will be able to match.<sup>106</sup> As long as a contemporaneous justification is given, most plans will be legitimate exercises of state power. In *Baker*, justifications were wanting, for the issue was one not of redistricting but inactivity.<sup>107</sup> Put simply, Tennessee did not have a justification; it had instead a claim to institutional competence and judicial deference. As the Court explained in *Baker* and subsequent cases, that was not enough under the Equal Protection Clause. The least a state must do is proffer a legitimate justification for its existing plan. This is a very modest demand.

b. Of Rules Versus Standards and the Question of Manageability

The position defended in this Article implicates longstanding debates in the academy. In particular, the argument for a loose and flexible "arbitrary and capricious" standard in redistricting fits comfortably within the larger debate over the implementation of rules versus standards. Much has been written on this subject, to be sure.<sup>108</sup> For my purposes, the debate may be reduced to the following propositions. On the one hand, advocates for the implementation of rules exalt their manageability, their curtailment of discretion on the part of the relevant decision maker, and the clear guidance they provide to those who must rely on the rule in the future, to name a few classic defenses. Conversely, those who advocate for the development of standards commend the very flexibility that rules-advocates wish to avoid. In particular, standards-advocates are

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106. See Bickel, *supra* note 46, at 43 (analogizing the facts in *Baker* to those in *Colegrove*, in the sense that, as in *Tuskegee*, "it is a species of temper tantrum also, though in a somewhat different sense, to leave unchanged an ancient and obsolete apportionment"); cf. *Colegrove v. Green*, 328 U.S. 549, 565 (1946) (Rutledge, J., concurring) ("Assuming that the controversy is justiciable, I think the cause is of so delicate a character, in view of the considerations above noted, that the jurisdiction should be exercised only in the most compelling circumstances.").

107. See Bickel, *supra* note 46, at 44 (reading *Baker* for the proposition that "the situation in Tennessee . . . is the result not of a deliberate if imperfect present judgment of the political institutions, but merely of inertia and the abdication of political responsibility"). Interestingly, the facts in *Baker* mirror those of its direct and infamous precursor, *Colegrove v. Green*. See *Colegrove*, 328 U.S. at 566-68 (Black, J., dissenting).

108. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* (1991); Spencer Overton, *Rules, Standards, and Bush v. Gore: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65 (2002); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

attracted to the way in which standards make room for the application of flexible directives across different, context-specific situations.

This section addresses two of the central components of the debate as it applies to legislative redistricting. In so doing, I must underscore a point all too obvious: this Article sides with the "standards" crowd.<sup>109</sup> The first argument goes to the heart of the larger debate. In a nutshell, the claim from proponents of a rule-like approach is that *Reynolds* brought on much-needed clarity and stability to the implicit chaos begun by *Baker*.<sup>110</sup> I respond to this position in two ways. First, I do not read *Reynolds* to impose a strict population mandate for future redistricting plans. The Court could not have been any clearer on this point. As it wrote,

Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. . . . For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case.<sup>111</sup>

This is hardly the language of a Court bent on the mechanical application of strict rules. Rather, the Court simply made explicit what had been implicit from the beginning: population matters, a lot.

Second, *Reynolds* as written got the problem exactly right. The problem as framed by the courts themselves is as follows: we wish for the states to carry out their legislative duties as they deem proper.<sup>112</sup> As part of this process, we acknowledge the vast differences and the divergent needs between one state and the next, between Colorado with its geographic idiosyncrasies, Michigan with its upper peninsula, and New York and Illinois with their heavy concentration of residents in their urban centers. This is not to say that these states have free reign in devising any redistricting plan of their choice; we also wish for population to play a leading role in redistricting, as *Reynolds* made clear. These two commitments point me away from a strict rule of population equality and toward a much more flexible standard.

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109. For a general defense of this position, see Heather K. Gerken, *Morgan Kousser's Noble Dream*, 99 MICH. L. REV. 1298, 1302 (2001) (reviewing Morgan J. Kousser, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE SECOND RECONSTRUCTION* (1999)).

110. Ely, *supra* note 11, at 121.

111. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

112. See *supra* note 88 and accompanying text.

Once we remind ourselves that questions of representation are both difficult and somewhat intractable,<sup>113</sup> doctrinal flexibility clearly makes a lot of sense as applied to the redistricting context.<sup>114</sup>

This response leads directly to the second argument, which is far more interested in the question of institutional competence. In a nutshell, who should be charged with the responsibility of expressing our particularized democratic affections in the form of legislative districts?<sup>115</sup> The answer is quite easy, as I pointed out earlier: we have delegated this responsibility to the states, through either their legislatures or some other state institution. If and when we agree with this answer, then the rest is quite easy; standards must be preferred over strict rules. Taken further, the Court's position in *Baker* may be understood exactly on these terms. Alternatively, one may read the use of rationality in *Baker* as imposing a structural rule whereby courts will defer to the political process absent extenuating circumstances.<sup>116</sup> On either account, the courts' role is deferential to politics and local circumstances. This is not to say, to be clear, that the courts should not play a role at all; it is here where I part company with Justice Frankfurter's tour de force in *Baker*. Instead, it is to say that the courts' role should be limited to those moments when the political process malfunctions, when malapportionments reach the levels seen in Tennessee in the early 1960s or when political majorities are locked out of power permanently.<sup>117</sup>

It should not be surprising that both arguments in favor of standards over rules are clearly reflected in recent cases. In particular, I will comment briefly on the recent *Bush v. Gore*<sup>118</sup> as well the racial redistricting cases as epitomized by *Shaw v. Reno* and its

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113. This argument hardly requires any support, but for any skeptic out there, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION passim* (1966).

114. In framing my position this way, I find myself in partial agreement with Rick Hasen in his contribution to this Symposium. I share his view about the value of unmanageable standards. However, our aims diverge in some crucial respects, for, as he points out, his focus is "on what the Court does to bind *its own hand* in future cases." Hasen, *supra* note 19, at 1472 n.8. Conversely, my focus is far more structural in kind; that is, I am interested in the prior question of allocation of responsibility.

115. As Spencer Overton writes, "[t]he choice between rules and standards is a kind of structural determination about who will make decisions." Overton, *supra* note 108, at 98.

116. I thank Alan Brownstein for bringing this point to my attention. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Discrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 463-64 (2000); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 410 (1993).

117. See generally Issacharoff & Pildes, *supra* note 37 (arguing that courts should intervene when partisan forces have manipulated the "background rules").

118. 531 U.S. 98 (2000).



progeny.<sup>119</sup> I take up the racial redistricting cases first, for they provide by far the easiest challenge. Beginning with *Shaw*, the Court made clear that it was shifting responsibility for monitoring legislative redistricting involving race away from state legislatures and onto itself, even in the face of clear racist demands made by the Voting Rights Act. I have argued elsewhere that the Court's approach in this area was misguided.<sup>120</sup> To begin, the creation of majority-minority districts implicates political problems of the highest order. Further, the presence in this area of the Voting Rights Act lessens the need for judicial supervision of the political process on behalf of discrete and insular minorities. Taken together, these two views counsel against the formalistic application of rigid rules, such as strict scrutiny, which essentially aim to remove the use of race from politics altogether. This is especially true here, as the use of race may be attributed to a prior decision made by Congress under the amended section 2 of the Act. To be sure, the Court could always make clear what its use of strict scrutiny has made implicit: it could rule against the constitutionality of the Act.<sup>121</sup> Or, it could apply a vague standard, such as the "predominant factor" test, and shift power back to the states. From its last performance in this area, the Court appears committed to the latter approach, and thankfully so.<sup>122</sup>

*Bush v. Gore* raises more difficult questions. In *Bush*, the Supreme Court concluded that the use of the clear intent standard in the manual recount during the Florida controversy violated the Equal Protection Clause. More specifically for my purposes, the Court concluded that such a standard would result in the arbitrary and disparate treatment of voters across various jurisdictions in Florida. As the Court wrote, recount procedures in Florida did "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" of voting.<sup>123</sup> This was so, the Court explained, because counties across Florida would interpret the legal directive differently, thus failing to afford all ballots within the state

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119. 509 U.S. 630 (1993); see, e.g., *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

120. See Guy-Uriel Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227 *passim* (2001).

121. In light of the Court's decision in *City of Boerne*, the issue has gained much saliency. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998).

122. See *Easley*, 532 U.S. at 257; Charles & Fuentes, *supra* note 120.

123. *Bush*, 531 U.S. at 105.

equal treatment. As a result, what may count as a legal ballot in one jurisdiction may be discarded in another.

In taking this view, the Court was clearly shifting responsibility away from the political branches and onto itself. After all, mechanisms were in place to decide the very question that arose in the Florida controversy.<sup>124</sup> As such, I take the same position here that I take generally in matters of legislative redistricting. Absent exigent circumstances, the Court must play a lessened role. Specifically to the *Bush v. Gore* controversy, I share with others the view that the Court should have allowed the political process to run its course.<sup>125</sup> In this way, I agree with Rick Hasen when he writes that “*Reynolds v. Sims*, whether it is good or bad politics, begets *Bush v. Gore*.”<sup>126</sup> More crucially, he offers a sentiment that stands at the core of this Article: “If the Supreme Court will intervene periodically in the political process, it behooves us to continue the debate over when it is appropriate for courts to intervene in the political process.”<sup>127</sup> I agree. This Article sides with those who wish for the political process to do more, and for the Court to do less, much less.

## 2. A Question of Interests and the Protection of Incumbents

A test of reasonableness makes very modest demands. As Justice Stevens admonished long ago, “the burden which plaintiffs must overcome is a severe one, comparable . . . to a showing that the legislative classification ‘rests on grounds wholly irrelevant to the achievement of a valid state objective.’”<sup>128</sup> The judicial inquiry thus hinges, as with traditional rational basis review, on the state’s professed redistricting objective. Not surprisingly, most plans will meet constitutional prescriptions under this test.

Thus posited, the argument begs difficult questions about the legitimacy of some of the redistricting choices currently available to those in control of redistricting processes. Seen as a whole, the

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124. See Electoral Count Act, 3 U.S.C. § 15 (2000).

125. See Elizabeth Garrett, *Leaving the Decision to Congress*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 38 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Pamela S. Karlan, *The Court Casts its Vote*, N.Y. TIMES, Dec. 11, 2000, at A31.

126. Richard L. Hasen, *A “Tincture of Justice”: Judge Posner’s Failed Rehabilitation of Bush v. Gore*, 80 TEX. L. REV. 137, 154 (2001) (reviewing Richard A. Posner, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001)).

127. *Id.*

128. *Cousins v. City Council*, 466 F.2d 830, 859 (7th Cir. 1972) (Stevens, J., dissenting) (citing *Turner v. Fouche*, 396 U.S. 346, 362 (1970)); see Rex E. Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker*: *Kramer v. Union Free School District No. 15*, 15 ARIZ. L. REV. 457, 457–58 (1973).

available choices are many. A state may decide, for example, to craft its new districts in terms of population, geography, or political boundaries.<sup>129</sup> These should all be rational, legitimate choices. A much more difficult question arises when considering the role played by incumbency protection in redistricting. To date, the commentary has been mostly negative.<sup>130</sup> The Supreme Court, in contrast, has made clear that incumbency protection is a legitimate state interest.<sup>131</sup> This section offers a partial defense of the Court's position. Three arguments prove particularly convincing.

First, in light of the admitted impossibility of drawing neutral district lines, and short of imposing a proportional representation system, what on earth should an incumbent in charge of the redistricting process do?<sup>132</sup> To be sure, perhaps incumbents should design whatever districts comport with general notions of fair representation and the like. Similarly, it is perhaps a good idea to delegate the redistricting duties to special masters, nonpartisan boards, or maybe even to choose our representatives by a process of lottery selection.<sup>133</sup> In this vein, those who criticize the present system and particularly the legislative choices made therein are wishing, sometimes implicitly, sometimes explicitly, for a revival of the republican ideal. I, too, wish for similar things. Under our present system, however, the calls for change often stop short of calling for a retooling of the redistricting process and instead advocate doctrinal

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129. See, e.g., *Bush v. Martin*, 224 F. Supp. 499, 511 (S.D. Tex. 1963) ("[U]nless the State constitutional or legislative standards impose numerical equality as the predominate test and . . . such local standards [are elevated] to a federally guaranteed right, a number of other elements may well be open besides population. These perhaps include geography, area, economic, social, topographical, sociological or political factors.").

130. See, e.g., Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131 (1996); Kristen Silverberg, Note, *The Illegitimacy of Incumbent Gerrymander*, 74 TEX. L. REV. 913 (1996).

131. See, e.g., *White v. Weiser*, 412 U.S. 783, 793-97 (1973) (including incumbency protection as a legitimate districting principle); *Gaffney v. Cummings*, 412 U.S. 735, 751-54, 752 n.18 (1973) (concluding that a state may allocate seats proportionately to major political parties); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.").

132. Robert B. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 235 (1968) ("The habit of legislative redistricting for partisan advantage is so deeply ingrained in the American legislative and political structure that it will be rooted out only with difficulty.").

133. See, e.g., MCKAY, *supra* note 51, at 269-71; Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 91, at 7, 10-11; Ely, *supra* note 11, at 638-39; Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1691-95 (1993); McKay, *supra* note 132, at 235.

fine-tuning. In so doing, these criticisms implicitly place the Court at the center of the redistricting process. I reject precisely this move. Until we remove the redistricting process from the legislative arena, we should let the politicians do their work.

Second, redistricting plans are plainly unfair to the legislators on the losing side. That is to say, control of the redistricting process by an opposing party can make life very difficult for an incumbent. To name two leading examples, a redistricting plan could place incumbents from the same party in the same district; it could also place an incumbent in a new district with a majority population from the opposing party.<sup>134</sup> I concede that this is not a fair way to draw district lines. As far as the represented are concerned, however, it is far from clear whether it makes a difference who runs within the particular district.

Two reasons lead me to this view. First, elections may be understood as a way to provide representation for those at the district level. On this account, electors have a myriad of choices in the primary contests and a more focused choice during the general election. In both instances, electors make choices based on the candidates presented to them. While the candidates themselves may have a gripe about the system, and a valid one at that, it is harder for the electors themselves to raise complaints of constitutional significance. Put another way, partisan control of the redistricting process will likely lead to an attempt to maximize this advantage. Yet, as far as *representation* theories are concerned, the identity of the winning candidate matters little to the electoral majority within the district.<sup>135</sup> This is particularly true during the general election, when partisans have already selected their candidate of choice.<sup>136</sup> Second, elections must also be understood at the meta-level, where aggregation of votes at the state or national level assumes much

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134. See DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 103 (1992); David S. Broder, *Politics Without the Voting*, WASH. POST, Oct. 17, 2001, at A35; *A Case of Gender Gerrymandering*, WASH. POST, April 26, 2001, at T18; Thomas B. Edsall, *Redistricting May Unseat 6 Democrats*, WASH. POST, June 19, 2001, at A4.

135. This point deserves further clarification. The point is not that all Republican or Democratic candidates share similar views, for clearly they do not. Rather, the point is that, once the field is narrowed down to the leading candidates, the electoral majority makes its choice in light of all the available evidence, including a candidate's status as an incumbent.

136. For a recent Article calling attention to the distinction between primaries and general elections in terms of electoral success, see Bernard Grofman, Lisa Handley, & David Luban, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1385 (2001).

greater significance. On this view, winning individual elections takes a back seat to winning state and congressional delegations.

Seen from this perspective, one may go as far as to argue that it is in every constituent's best interest to ensure that her representative regains her legislative position. Put in stronger terms, to vote against an incumbent for no better reason than anti-incumbency fever is to display a deep-seated misunderstanding about the workings of our political system. The defeat of former Speaker Tom Foley in 1994 epitomizes this view. To put it mildly, Foley brought things to his districts that less influential representatives did not.<sup>137</sup> Clearly, incumbents benefit their constituents and their states generally. In response, states have what might come close to a moral obligation in ensuring that their incumbents remain in powerful positions for as long as possible.

In response, one may still argue that the constituents should have the choice to keep or replace an incumbent, a choice that the redistricting process is said to take away. This position equates the representative to the entrenched incumbents in the classic malapportionment cases of the 1960s.<sup>138</sup> Further, a critic might also complain that many congressional seats are so safe that challengers cannot even raise money to run a campaign against the given incumbent. Although these criticisms contain some validity, they fall short. To be sure, incumbents hold a decided advantage during electoral contests,<sup>139</sup> the crucial question is why. The obvious first answer is the fact that the very notion of incumbency protection, by definition, is expected to provide electoral advantages to their intended beneficiaries. And yet, in response, it is not entirely clear whether redistricting is as effective in achieving the goals attributed to it. In fact, researchers have uniformly argued against the general effectiveness of redistricting in protecting incumbents.<sup>140</sup> Instead,

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137. See Robert T. Nelson, *If Foley Goes, So Goes His Clout in House*, SEATTLE TIMES, Oct. 26, 1994, at B1. This is not to say that his constituents did not appreciate his degree of influence in Washington. In fact, when asked, close to thirty percent of residents in his district thought that whoever replaced Foley would immediately become House Speaker. See *id.*

138. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 578 (1964); *Baker v. Carr*, 369 U.S. 186, 333 (1962).

139. See Gary C. Jacobson, *The 1994 House Elections in Perspective*, in MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT 1-20 (Philip A. Klinkner ed., 1996); Andrew Gelman & Gary King, *Estimating Incumbency Advantage Without Bias*, 34 AM. J. POL. SCI. 1142 *passim* (1990).

140. See BUTLER & CAIN, *supra* note 134, at 1-16; see also LARRY M. SCHWAB, THE IMPACT OF CONGRESSIONAL REAPPORTIONMENT AND REDISTRICTING 153-62 (1988) (concluding that redistricting "is not an important factor in the success or failure of

other factors have been attributed to the high rate of incumbent success, such as prior campaigning experience and name recognition, which in turn help incumbents attract more contributions; the general decline of ideology; the franking privilege; and constituency service.<sup>141</sup>

Third, the notion of incumbency protection (and gerrymandering in general) demands the use of predictive factors, some of which will fail to perform as expected.<sup>142</sup> That is to say, to protect incumbents is to place registered voters in districts along party lines and to assume that they will vote in accordance with their prior designation. Taken further, and as Justice Stevens argues, “[i]t is neither irrational, nor invidious . . . to assume that a black resident of a particular community is a Democrat if reliable statistical evidence discloses that 97% of the blacks in that community vote in Democratic primary elections.”<sup>143</sup> This is simply a prediction, grounded in a strong factual record. This is not to say that the prediction will always come true. More importantly, and as Justice Stevens explains, redistricters tread a very thin line; a mistake in this area could prove rather costly. He writes:

To the extent that a political prediction based on race is incorrect, the voters have an entirely obvious way to ensure

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incumbents in most elections”); Charles S. Bullock, *Redistricting and Congressional Stability, 1962–72*, 37 J. POL. 569 (1975) (concluding that redistricting has a very small impact in the reelection of incumbents). *But see* Alison Mitchell, *Redistricting 2002 Produces No Great Shakeups*, N.Y. TIMES, March 13, 2002, at 20A.

141. *See, e.g.*, GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* (1996); GARY C. JACOBSON & SAMUEL KERNELL, *STRATEGY AND CHOICE IN CONGRESSIONAL ELECTIONS 19–34* (2d ed. 1983); John Ferejohn, *On the Decline of Competition in Congressional Elections*, 71 AM. POL. SCI. REV. 166 (1977); Morris P. Fiorina, *The Case of the Vanishing Marginals: The Bureaucracy Did It*, 71 AM. POL. SCI. REV. 177 (1977).

In *Davis v. Bandemer*, for example, Judge Pell wrote in dissenting from the lower court’s opinion:

Most likely, under these circumstances, factors other than political gerrymandering caused the House and Senate race results to be skewed in relation to the base Democratic voting strength statewide. The personality of the particular candidates and the specific political issues of the day may explain the small disparity between percentages.

*Davis v. Bandemer*, 603 F. Supp. 1479, 1502 (S.D. Ind. 1984) (Pell, J., dissenting), *rev’d*, 478 U.S. 109 (1986).

142. This is not to say, to be clear, that incumbents will fail to achieve reelection, for incumbent reelection rates are close to one-hundred percent. It is to say instead that the crafting of district lines is a predictive enterprise and the assumptions in use are not always accurate. *See* BUTLER & CAIN, *supra* note 134, at 9 (“[P]artisan gerrymandering is, to say the least, an inexact science. In an era in which party loyalty has been steadily declining, it is hard to predict whether a change in district composition will necessarily lead to a change in partisan composition.”).

143. *Bush v. Vera*, 517 U.S. 952, 1031 (1996) (Stevens, J., dissenting).

that such irrationality is not relied upon in the future: Vote for a different party. A legislator relying on racial demographics to ensure his or her election will learn a swift lesson if the presumptions upon which that reliance was based are incorrect.<sup>144</sup>

In this vein, think also about what it means to respond to the general argument against incumbency protection with the view that constituents, not redistricters, should hold the fate of the election in their hands. Such an argument first presupposes a passive, uninformed electorate unable to make up its own mind; after all, the claim is that incumbents are entrenched beyond the power of any constituency to dislodge them.<sup>145</sup> It further presupposes a redistricting craftsmanship of the highest order for, on this argument, electoral outcomes are determined prior to the election itself. This general proposition takes a view of the American voter that I am unwilling, without more, to accept. More damning yet, this argument puts forth very little evidence. In looking to the recent redistricting histories of Texas, Virginia, and Indiana, to name a few, it becomes immediately obvious that those in charge of the redistricting process in the early 1990s were often unable to hold their advantage until the next census. Clearly, electoral control through redistricting is an uncertain proposition at best.

### *B. The Standard Elsewhere: Administrative Law and the APA*

The common understanding is that Justice Brennan's opinion for the Court in *Baker* did not provide standards even while remanding the case to the lower court for consideration.<sup>146</sup> The Court did intimate that standards were available; in fact, they were "well-developed and familiar."<sup>147</sup> Put simply, lower courts were directed to

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144. *Id.* at 1032 n.29 (Stevens, J., dissenting); see David Mayhew, *Congressional Redistricting: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970S, *supra* note 104, at 277 ("[P]arties with absolute control over districting tend to be very greedy. A controlling party normally concedes a minimum of very safe districts to the opposition and then tries to salvage as many as possible for its own adherents. In this later effort there is a tendency to spread electoral resources too thinly.").

145. Cf. Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1538, 1541 n.30 (1999) ("My assumption in this Article is that most citizens will continue to behave as civic slackers, despite the hopes of the more idealistic reformers."); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998) (contending that most individuals are civic slackers, disinterested in "substantive policy arguments and ideas").

146. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 258 (1991); see, e.g., Comment, *Baker v. Carr and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968, 969-70 (1963).

147. *Baker v. Carr*, 369 U.S. 186, 226 (1962).

determine whether the given discrimination reflected “no policy, but simply arbitrary and capricious action.”<sup>148</sup> This Article has argued that the Court was pointing lower courts towards rationality review.

This section takes the Court’s language seriously, particularly its reference to arbitrariness and capriciousness. This is precisely the language employed by the courts in the administrative law context. Before turning to the lower courts and their handling of post-*Baker* claims, then, this section looks for guidance in the Court’s administrative law jurisprudence. To be clear, I use this example simply as an illustration of the interaction between courts and policy-makers that I envision in the redistricting context, nothing more. On these terms, the analogy proves instructive.<sup>149</sup>

According to the Administrative Procedure Act (“APA”), reviewing courts shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>150</sup> The Supreme Court has made clear that this standard is quite narrow.<sup>151</sup> It is a deferential standard of review, designed to ensure that administrative agencies are given ample room to carry out their statutory duties. As such, agencies are presumed to have carried out their duties in a reasonable way. In turn, those who challenge an agency’s decision have the burden of showing that the agency behaved unreasonably, that is, that its action was “arbitrary, capricious, an abuse of discretion.”

Seen this way, it is immediately clear that judicial review of agency decisions will hinge on the reasons given for the agency’s actions. In essence, an agency must furnish a “rational connection between the facts found and the choice made.”<sup>152</sup> This is not to say that the court may substitute its judgment for the agency’s,<sup>153</sup> nor may the court invoke reasons for the agency’s action that the agency itself has not provided.<sup>154</sup> However, an agency’s decision need not be

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148. *Id.*

149. The analogy need not be taken too far, of course, and I do not intend to do so here. After all, in the administrative context, Congress established the level of review while delegating its own rule-making powers. No such external guidance exists in the redistricting context, other than the Court’s own doctrinal precedent. This is to say only that the analogy is not perfect in all respects, yet instructive all the same.

150. 5 U.S.C. § 706 (2000).

151. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

152. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

153. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

154. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).



completely clear, for the court will uphold the decision if the path taken by the agency may be reasonably discerned.<sup>155</sup> In turn, an agency rule is deemed arbitrary and capricious

[i]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>156</sup>

In this way, one may see the "arbitrary and capricious" standard in the administrative context as a way by which courts afford agencies the necessary room to carry out their duties while the courts retain a semblance of control. While courts will take a close look and scrutinize agency decisions, the arbitrary and capricious standard will ensure that decisionmaking remains in the hands of those whom Congress intended.

This approach to judicial review resonates with the approach taken in the redistricting context. Under APA rules, control of the decision-making process remains in agency hands. Similarly, the Supreme Court has often stated that redistricting remains in the hands of state legislatures.<sup>157</sup> In either context, then, the question is one of degree: how much review is acceptable in light of prior commitments about decision-making authority? In the administrative context, decision-making authority clearly remains with the agencies, whose decisions will be overturned only when the reasons provided in defense of the policies in question fail a rather moderate test. More specifically, the Court has interpreted the APA to ensure that the choice between conflicting policy interests remains with the agency.

In contrast, the Court has been much more intrusive in the redistricting context. Since the advent of *Reynolds v. Sims* and its progeny, federal courts have been quite aggressive when evaluating redistricting plans. It need not be this way. In keeping with the administrative analogy, federal courts may ask state legislatures to proffer reasons for the challenged districting plans.<sup>158</sup> These need not

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155. See *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945).

156. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

157. See *supra* note 88 and accompanying text.

158. See *Lisco v. McNichols*, 208 F. Supp. 471, 477-78 (D. Colo. 1962) ("We recognize that a statute is presumed constitutional . . . . The population statistics presented by plaintiffs and challenged by no one show the disparities [that] are of sufficient magnitude to make out a prima facie case of invidious discrimination which rebuts the presumption.

be good reasons, the best reasons, or even the reasons the Court would cite; rather, a reasonable connection must be established between the plan under attack and the reasons given for its implementation.<sup>159</sup> This was something, I argued previously, that the Tennessee legislature in *Baker v. Carr* could not do.

### III. THE LOWER COURTS AT WORK: REDISTRICTING AND RATIONALITY POST-BAKER

In reference to the post-*Baker* decisions *WMCA, Inc. v. Simon*<sup>160</sup> and *Scholle v. Hare*,<sup>161</sup> Alexander Bickel wrote that "[t]he rationality test led nowhere; and within the year the Supreme Court abandoned it."<sup>162</sup> This is the same test advocated in this Article, the test that the Court soon eschewed in *Gray v. Sanders* and subsequent cases.<sup>163</sup> Of

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Accordingly, the defendants [must demonstrate] some rational basis for these disparities."). The Maryland Court of Appeals noted,

[T]here is a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination. The State is, of course, to be allowed every reasonable latitude in such relationship, and any discrimination therein "will not be set aside if any state of facts reasonably may be conceived to justify it."

Maryland Comm. for Fair Representation v. Tawes, 180 A.2d 656, 668 (Md. 1962), *rev'd*, 377 U.S. 656 (1964) (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

Of note, this was exactly the approach proposed by Solicitor General Cox during the *Baker* litigation. See *Brief of the United States as Amicus Curiae*, *supra* note 14, at 339 ("State legislation dealing with legislative apportionment must be measured by tests of reasonableness like other state legislation."); *id.* ("Such legislation must be 'rooted in reason' and must not create classifications so arbitrary and unreasonable as to offend the guarantees of the Fourteenth Amendment."); see also *id.* at 347 ("If the disparity is gross and there is no alternative remedy provided by the state, the burden of providing a rational explanation should shift to the state. If the state has a reasonable justification, even a significant disparity should not be unconstitutional.").

159. See, e.g., *Brown v. Thomson*, 462 U.S. 835, 837 (1983) (upholding Wyoming's reapportionment plan with a maximum deviation of 89% due to its desire to allocate one representative to a county "the population of which is considerably lower than the average population per state representative"); *Mahan v. Howell*, 410 U.S. 315, 325 (1973) (upholding a state redistricting plan with 16.4% maximum deviation grounded on "the state's policy of maintaining the integrity of political subdivision lines"); *Abate v. Mundt*, 403 U.S. 182, 187 (1971) (upholding a maximum range of 11.9% on the basis of the justification provided—"the long tradition of overlapping functions and dual personnel in Rockland County government"—and "the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas").

160. 370 U.S. 190 (1962).

161. 369 U.S. 429 (1962).

162. Bickel, *supra* note 104, at 64; see Karlan & Levinson, *supra* note 93, at 1201 (explaining that Justice Brennan's assertion in *Baker* proved to be wrong, as the Court "developed a set of rules that were uniquely applicable to voting rights").

163. 372 U.S. 368 (1963); see *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

interest to me are the reasons why the Court did not pursue this test further, but shelved it without giving the courts a chance to develop an adequate response. According to Bickel, "the test led nowhere." Neither *Simon* nor *Scholle* made explicit use of it. In both cases, the Court vacated and remanded to the lower courts in order to decide the issue under *Baker*. In light of Justices Clark's and Stewart's respective concurrences in *Baker* and *Scholle*, one may sensibly conclude that the Court had in fact set out a standard, a rational basis standard.<sup>164</sup> Why the Court did not follow through with this standard is the central question of the Court's reapportionment revolution.

This Part turns to a variant of that question. At the onset, I must confess that I do not have a clear, definitive answer for the Court's apparent interpretive turn. One may say with some confidence that the change in Court composition allowed the Brennan camp to carry out its redistricting goals further than they were allowed to do in *Baker*.<sup>165</sup> This Part does not explore this particular proposition avenue. Instead, it looks to the Court's mandate in *Baker* as subsequently interpreted by the lower courts. This Part concludes that lower courts handled the difficult issues thrust onto their dockets with aplomb and much thoughtfulness. In so concluding, this Part implicitly questions the Court's subsequent move to the equipopulation principle, and particularly its severe application as seen in *Kirkpatrick v. Preisler*<sup>166</sup> and *Wells v. Rockefeller*.<sup>167</sup>

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164. See *Davis v. Bandemer*, 478 U.S. 109, 149 (1986) (O'Connor, J., concurring).

165. Cf. SHAPIRO, *supra* note 37, at 252.

166. 394 U.S. 526 (1969).

167. 394 U.S. 542 (1969); see Robert G. Dixon, Jr., *The Court, the People, and "One Man, One Vote,"* in REAPPORTIONMENT IN THE 1970S, *supra* note 104, at 7, 11 ("Wielding one man, one vote, like a meat-ax, the Court has not been content only to lop off extreme population malapportionment. It has come close to subordinating all aspects of political representation to one overriding element—absolute equality of population in all legislative districts."). Ward Elliot writes,

The Reapportionment Revolution does represent a triumph of administrative policy in the sense that it had fitted almost every state with wooden legs in the space of only a few years, but it is the triumph of Equal Representation for Equal Numbers only if you like wooden legs—and that must be regarded (as Andrew Hacker told us in 1965) as a question of aesthetics.

Ward Elliot, *Prometheus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474, 492 (1970); see also *Karcher v. Daggett*, 462 U.S. 725, 774 (1983) (White, J., dissenting) ("[N]o one can seriously contend that . . . an inflexible insistence of mathematical exactness will serve to promote 'fair and effective representation.' . . . Such sterile and mechanistic application only brings the principle of 'one man, one vote' into disrepute."); *Avery v. Midland County*, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting) (complaining that apportionment "is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic"); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION AND THE*

### A. *Tennessee, Inaction and Rationality*

This first section applies the “arbitrary and capricious” test to *Baker*’s facts. In returning to this particular context, I wish to address one of the most difficult questions raised by many critics. In essence, the issue is whether the Tennessee plan reflects a legislative policy or none at all. According to Justice Clark, it is the former. As he wrote in his concurring opinion, “If present representation has a policy at all, it is to maintain the *status quo* of invidious discrimination at any cost.”<sup>168</sup> Yet, the answer might be a lot more complex than that for, as Justice Harlan contends in his dissent, inaction is the same as action, and Tennessee’s policy is clearly aimed at the retention of rural representation.<sup>169</sup> Thus, how should a court distinguish incumbency protection from what went on in *Baker* and related cases? That is to say, how can one reconcile the argument that *Baker* was rightly decided with the position that incumbency protection is a legitimate state interest?

This section begins by looking to the *Baker* litigation on remand from the Supreme Court.<sup>170</sup> During a post-*Baker* pretrial conference post-*Baker*, the state Attorney General advised the district court that the Governor was preparing to call a special session of the Tennessee legislature to respond to the *Baker* ruling.<sup>171</sup> In this light, he moved for a stay of the proceedings in order to give the General Assembly time to act. The district court set June 11, 1962 as the date for the next hearing.<sup>172</sup> In the meantime, the General Assembly convened in

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WARREN COURT 92 (1970) (arguing that, “[e]xcept as an exercise in arithmetic,” no justification exists for the course the Court has taken); Robert Bork, *Comments to Chapter 4, in THE JUDICIARY IN A DEMOCRATIC SOCIETY* 110, 110 (Leonard J. Theberge ed., 1979) (“I don’t think *Baker v. Carr* was wrongly decided, except in the sense that it led eventually to the formulation of the one man, one vote doctrine.”); Michael M. Uhlmann, *The Supreme Court and Political Representation, in THE JUDICIARY IN A DEMOCRATIC SOCIETY, supra*, at 91–109 (offering a stinging critique of reapportionment cases, and specifically their one-person, one-vote standard). In light of its unintended consequences, some have gone as far as to label one person, one vote a constitutional “tragedy.” See Pamela S. Karlan & Daniel R. Ortiz, *Constitutional Farce, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 180, 183–86 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

168. *Baker v. Carr*, 369 U. S. 186, 258 (1962) (Clark, J., concurring).

169. See *id.* at 336 (Harlan, J., dissenting); see also Bickel, *supra* note 46, at 43 (“Rationality—the presence of *some* policy, the absence of ‘simply arbitrary and capricious action’—sounds good, but aside from temper tantrums, it chases its own tail. Most apportionments represent the rational pursuit of a policy if the Court is willing to allow the policy to be pursued.”).

170. *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962).

171. *Id.* at 343.

172. *Id.* at 343–44.

special session and enacted two separate reapportionment acts, for the state house and state senate respectively. The Governor approved both acts on June 7.<sup>173</sup>

In turning to its analysis of the relevant equal protection doctrine, the district court began with the widely accepted contention that the Supreme Court had not "specif[ied] exact standards or criteria" for examining the case.<sup>174</sup> Rather, the Court had intimated the existence of "certain guidelines" that would apply to the 1962 reapportionment.<sup>175</sup> This claim immediately proved to be a curious one, for the district court developed its test by looking not only to the majority opinion but to all three concurring opinions as well. In so doing, the court developed the following test: "Do the statutes establish classifications predicated upon a rational basis, or are they utterly arbitrary and lacking in rationality?"<sup>176</sup> This is, not surprisingly, Justice Clark's test.

Once developed, the court applied this test to both reapportionment acts. First, the court examined the Act reapportioning seats to the house of representatives. According to the court, the Act follows the Tennessee Constitution in reapportioning its seats in accordance with the ratio of qualified voters while also allowing one member in counties with two-thirds of this ratio.<sup>177</sup> "Such a state plan for distribution of legislative strength," the court concluded, "at least in one house of a bicameral legislature, cannot, in our opinion, be characterized as per se irrational or arbitrary."<sup>178</sup> As the court explained a few sentences later, "[w]e find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units."<sup>179</sup>

Second, the court turned to the Act reapportioning the state senate. This piece of legislation did not fare quite so well. Put simply, the court could not discern any sensible explanation for the adopted classifications. In reaching this conclusion, it is important to note that the district court looked carefully to the facts in question in

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173. *Id.* at 344.

174. *Id.*

175. *Id.*

176. *Id.* at 345.

177. *Id.*

178. *Id.*

179. *Id.* at 346.

its attempt, ultimately futile, to discern a rational redistricting plan.<sup>180</sup> To begin, the plan did not even attempt to reach equality or even substantial equality in population; neither did the plan create some semblance of equality in terms of district area.<sup>181</sup> Further, the plan could not be explained in terms of geography or demography.<sup>182</sup> Finally, the plan could not be explained on a theory of representation for governmental units or subdivisions.<sup>183</sup> To the court, this plan had to be classified under Justice Clark's "crazy quilt" standard.<sup>184</sup> It simply made no sense.<sup>185</sup>

In rejecting this plan as it did, the district court must have ultimately rejected a fairly powerful objection to the initial justiciability ruling in *Baker*. As Justice Frankfurter argued in his caustic dissent in *Baker*, "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."<sup>186</sup> Justice Harlan similarly argued that "the foremost apparent legislative motivation has been to preserve the electoral strength of the rural interests notwithstanding shifts in population."<sup>187</sup> On this view, legislatures may legitimately pursue the goal of incumbency protection. Thus the predicament: state legislatures may seek to protect incumbents, and Tennessee was attempting to do exactly that when refusing to reapportion its state.<sup>188</sup> How can *Baker* be justified?

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180. *Id.* (contending that the plan "is devoid of any standard or rational plan of classification which we are able to discern").

181. *Id.*

182. *Id.* at 347.

183. *Id.*

184. *Id.* at 346–47.

185. A quick look at the relevant numbers told the story. *Id.* at 347–48.

186. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting); see Bickel, *supra* note 46, at 43–44 (complaining that "[m]ost apportionments represent the rational pursuit of a policy if the Court is willing to allow the policy to be pursued," even in *Baker*).

187. *Baker*, 369 U.S. at 348 (Harlan, J., dissenting); cf. *Clark v. Carter*, 218 F. Supp. 448, 451 (E.D. Ky. 1963) ("That the Equal Protection Clause of the Constitution does not deny a State, in the establishment of Congressional Districts, the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses [is] no longer open to dispute.").

188. In protecting incumbents, Tennessee was also maintaining its existing advantage for rural counties. And in fact, these goals may not be understood independent of one another. Clearly, legislators were interested in their own political survival. This would have remained true even if the existing redistricting plan favored urban districts instead.

This is a difficult question, far more difficult than it may appear. It was difficult enough for the Court to ignore it altogether in *Baker*. In his contribution to this symposium, Guy Charles offers a possible way out of this quandary.<sup>189</sup> To be sure, one must concede that the Tennessee legislature was pursuing a very rational course of action. One encounters very little debate on this point. The problem raised by the legislators' chosen course of action was their exaltation of one particular value—incumbency protection—at the expense of all others. This they may not do. For a useful doctrinal referent, think of the recent racial gerrymandering cause of action begun by *Shaw v. Reno*.<sup>190</sup> It was in *Shaw* that the Supreme Court developed what has come to be known as the “expressive harms” doctrine. As interpreted by its leading theorist, Richard Pildes, a redistricting plan violates constitutional norms when the legislature subordinates all values in favor of its preferred value.<sup>191</sup> He labels this problem “value reductionism in public policy.”<sup>192</sup> This happens, he explains, when “policymakers have transformed a decision process that ought to involve multiple values—as a matter of constitutional law—and reduced it to a one-dimensional problem.”<sup>193</sup> With particular reference to the facts in *Shaw*, Professor Pildes interprets the Court's decision to implicate only those redistricting plans in which race is the dominant value in disregard of any other.<sup>194</sup> This is precisely what a legislature may not do.

It is exactly what went on in Tennessee prior to *Baker*. The legislature had refused to redistrict for quite some time, yet we can easily surmise the legislators' hesitancy. Plain and simple, their inaction can easily be attributed to their desire to remain in office. Their claim is a variant of modern incumbency protection claims. The difference between these modern claims and the claim in *Baker*, however, is that incumbency protection became the sole redistricting value in Tennessee. In this way, it may be said that the plan violated constitutional norms irrespective of the specific standard in question.

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

190. 509 U.S. 630 (1993).

191. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 500 (1993).

192. *Id.*

193. *Id.*

194. *Id.* In offering this view, I must emphasize that I do not take a position on its merits, at least not here.

More specifically, under the standard I have in mind, a reviewing court would look at the facts in *Baker* and evaluate the state interests in support of the plan. Tennessee did not proffer any. Rather, this was a classic lockup, whereby the rural interests refused to give up their preferred status in the legislature. Put more abstractly, as Justice Harlan does in his dissent in *Baker*, the state's action may be interpreted as pursuing a legitimate state interest, particularly the part about geographic representation. Difficulties arose when this value became the only value at issue. In refusing to redistrict for over fifty years, any defense to their redistricting plan lost saliency and one value overrode all others, implicating constitutional concerns.

This understanding of the values at stake and the doctrinal posture post-*Baker* received a clearer exposition in *Reynolds v. Sims*.<sup>195</sup> Prior to *Reynolds*, it is instructive to note that courts and commentators alike often pointed to population disparities as probative evidence of the arbitrariness of the redistricting plan under consideration.<sup>196</sup> This is to say, quite simply, that population always played a leading role in redistricting matters. *Reynolds* did not alter this reality but simply made explicit what had remained implicit up to that time. In this vein, *Reynolds* makes clear that redistricters have much flexibility in crafting the plans of their choice: "For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case."<sup>197</sup> Only when the plan fails to reflect a number of legitimate constitutional values, but one value is elevated above all others, will rationality review apply.

### B. *The Lower Courts Respond*

This second section moves away from Tennessee and looks to many of the cases decided in *Baker*'s wake. The focus here is largely descriptive; that is, if *Baker* issued no standard, yet courts went on to decide cases, what did these courts do? How did they decide the redistricting cases on their dockets? An examination of the lower courts' work unveils three general themes.

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195. 377 U.S. 533 (1964).

196. *Baker v. Carr*, 369 U.S. 186, 258-259 (Clark, J., concurring); see, e.g., *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962); *Scholle v. Hare*, 116 N.W.2d 350 (Mich. 1962); *Lewis*, *supra* note 19.

197. *Reynolds*, 377 U.S. at 578.



## 1. Looking for Common Threads

First, the lower courts showed a clear deference to the workings of the legislative process. In *Thigpen v. Meyers*,<sup>198</sup> for example, the District Court for the Western District of Washington explained: "Believing, as we do, that redistricting should be accomplished by the body constitutionally responsible therefor and that the sins of the fathers should not be visited upon the sons, we are deferring final action to afford [the state legislature] the opportunity of discharging its constitutional mandate."<sup>199</sup> The Connecticut District Court similarly declared: "We repeatedly have stated our hope and preference that the necessary redistricting of the Senate and reapportionment of the House be done by the General Assembly rather than by this Court. We still entertain that hope and preference."<sup>200</sup>

In taking this position, courts made clear that deference should not be interpreted as impotence. The same Connecticut court continued,

If confronted, however, with a persistent refusal on the part of the General Assembly to act, we certainly have the power, and may well be under a duty, affirmatively, by a plan formulated by this Court if necessary, to order a redistricting of the Senate and a reapportionment of the House. We devoutly hope it will not be necessary for us to exercise that power. If it becomes necessary, we will not hesitate.<sup>201</sup>

The *Thigpen* court similarly wrote that, "[i]f [the legislature] fails, we, ever conscious of our oath to uphold the Constitution of the

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198. 211 F. Supp. 826 (W.D. Wash. 1962).

199. *Id.* at 832; see also *Baker v. Carr*, 206 F. Supp. 341, 349 (M.D. Tenn. 1962) (expressing confidence in letting the Tennessee legislature enact a reapportionment plan).

200. *Butterworth v. Dempsey*, 229 F. Supp. 754, 792 (D. Conn. 1964) (per curiam). Another federal district court noted,

We remain of the same opinion that was expressed in the order setting the application for hearing, viz.: until the Legislature has had a further reasonable but prompt opportunity to comply with its duty under Sections 199 and 200 of the Constitution of Alabama, this Court should take no action not absolutely essential for the protection of the constitutional rights asserted in the complaint; and no ruling before the primary elections of May 1962 appears essential.

*Sims v. Frink*, 205 F. Supp. 245, 247 (M.D. Ala. 1962); see also *Moore v. Moore*, 229 F. Supp. 435, 438 (S.D. Ala. 1964) (per curiam) (contending that "[t]he election machinery of Alabama is presently in operation with respect to the election of congressional representatives" and that court decisions "demonstrate a feeling of restraint and a reluctance on the part of the judiciary to fashion specific remedies which should be fashioned by the legislative branch of government").

201. *Butterworth*, 229 F. Supp. at 792.

United States, will unhesitatingly take appropriate action to correct the inequity."<sup>202</sup>

Second, some courts used population as a basis for their decision. They did so in two ways. Some courts looked ahead to the adoption of the equipopulation principle. In *Moore v. Moore*,<sup>203</sup> for example, the District Court for the Southern District of Alabama initially held that the apportionment plan under review met constitutional proscriptions. On remand, however, the court soon changed its mind.<sup>204</sup> In contrast, other courts looked to the past, and particularly the federal codification of the equipopulation principle in the Reapportionment Act of 1911.<sup>205</sup> The District Court for the Southern District of Texas did exactly that in *Bush v. Martin*,<sup>206</sup> even while conceding that population was not the only legitimate redistricting parameter.<sup>207</sup>

Third, many courts applied a rationality test.<sup>208</sup> The language employed by many courts is particularly relevant in light of the conventional wisdom surrounding *Baker* and particularly its lack of

202. *Thigpen*, 211 F. Supp. at 832.

203. 229 F. Supp. 435 (S.D. Ala. 1964) (per curiam).

204. *Id.* at 438 ("However, in view of the recent pronouncements of the Supreme Court of the United States, we reach the clear conclusion that the so-called '9-8 plan' is unconstitutional, in that it violates Article 1, Sec. 2, of the United States Constitution and the equal protection clause of the Fourteenth Amendment.") (citations omitted).

205. 2 U.S.C. § 3 (1928) (expired upon enactment of Reapportionment Act of June 18, 1929, c. 28, § 22, 46 Stat. 21 (codified at 2 U.S.C. § 2a (2000))).

206. 224 F. Supp. 499, 514 (S.D. Tex. 1963).

207. *Id.* at 511 ("[A] number of other elements may well be open besides population [including] geography, area, economic, social, topographical, sociological or political factors.").

208. See, e.g., *Lisco v. Love*, 219 F. Supp. 922, 928 (D. Colo. 1963), *rev'd sub nom. Lucas v. Forty-Fourth Gen. Assembly of the State of Colo.*, 377 U.S. 713 (1964) (explaining that the Senate apportionment amendment recognizes other factors in addition to population); *Thigpen v. Meyers*, 211 F. Supp. 826, 831 (W.D. Wash. 1962) (contending that "[a]bsolute equality is not essential to [the validity of the challenged apportionment plan] under the equal protection clause, but a rational basis for the legislative distinctions is necessary"); *WMCA, Inc. v. Simon*, 208 F. Supp. 368, 375 (S.D.N.Y. 1962), *rev'd sub nom. WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (noting that the state constitution's provisions regarding Assembly Districts "do not appear arbitrary or irrational"); *Sanders v. Gray*, 203 F. Supp. 158, 168-69 (N.D. Ga. 1962) *vacated by* 372 U.S. 368 (1963) ("We make the test on a consideration of all relevant factors, and these include rationality of state policy... whether or not the system is arbitrary... whether or not the [challenged practice] has a historical basis in our political institutions, both federal and state."); *Watts v. Carter*, 355 S.W.2d 657, 658 (Ky. 1962) ("[W]e are unable to say that the solution chosen by the legislature was clearly arbitrary and unreasonable."); *Levitt v. Maynard*, 182 A.2d 897, 900 (N.H. 1962) (concluding that the Senate apportionment method does not violate the Equal Protection Clause because the court "cannot say that it is without rational basis").

guidance. A few examples will suffice. In *Germano v. Kerner*,<sup>209</sup> the District Court for the Northern District of Illinois looked specifically to the Court's holding in *Baker* and concluded that "the Court, limited by the narrow scope of the issues before it, instructed lower courts to scrutinize and review apportionment methods presented to them and in so doing determine the existence or non-existence of a rational policy or plan as distinct from an irrational, no-policy, invidiously discriminatory system."<sup>210</sup> The District Court for the Southern District of Texas reached a similar conclusion in *Bush v. Martin*.<sup>211</sup> In that case, the court explained its need to find a standard of equality in redistricting, and went on to explain:

We accept the approach articulated in a number of cases that the Supreme Court means to adopt the general guide of prohibiting 'invidious discrimination.' A good deal is wrapped up in this formula. An analysis of it involves subsidiary inquiries along the lines of whether the disparity is irrational. Shading off, or into, this standard is the problem of whether the disparity is arbitrary, capricious, wholly without reasonable foundation, and the like.<sup>212</sup>

This is the formulation, loose as it may be, found at the heart of the *Baker* opinion. Or so I argued previously. The *Bush* court then took its position to its logical conclusion, and its analysis is worthy of note. The court continued: "In the end it perhaps comes back to the question whether there have been actual factors, or perhaps whether such factors can now be discerned though not previously articulated in formal Governmental fashion, which sustain or at least explain or in some measure justify the particular wide arithmetical inequality."<sup>213</sup> This search for "formally undisclosed factors" was particularly pertinent here, as neither the Texas Constitution nor Texas law provided standards for congressional apportionment. The court then concluded, in language that captures the essence of the problem: "We do think, however, that it is a corollary to this that 'invidious

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209. 220 F. Supp. 230 (N.D. Ill. 1963), *rev'd*, 378 U.S. 560 (1964).

210. *Id.* at 235.

211. 224 F. Supp. 499 (S.D. Tex. 1963).

212. *Id.* at 510; *see* *Lisco v. Nichols*, 208 F. Supp. 471, 476 (D. Colo. 1962) (arguing that, because *Baker* did not provide standards, "the body of case law construing the Equal Protection Clause applies," and "[i]t is, of course, axiomatic that absolute equality between classes is not essential to validity under the Equal Protection Clause, but a rational basis for the legislative distinctions is necessary"); *Moss v. Burkhart*, 207 F. Supp. 885, 891 (W.D. Okla. 1962) ("An actionable deprivation results only from an invidious discrimination—a disparity without rationality.").

213. *Bush*, 224 F. Supp. at 510.

discrimination' is something more than numerical disparity. The problem, in short, is more profound than that of arithmetic."<sup>214</sup>

## 2. Examples

The previous section was intended to provide a general picture of the common responses to the Supreme Court's decision in *Baker*. This next section looks much more carefully at the reapportionment dynamics in three states where courts played a central role.<sup>215</sup> In particular, this section provides a much more detailed snapshot of the interaction between the Supreme Court in *Baker* and the lower courts in charge of implementing *Baker's* promise. In light of this Article's larger theme, it is fair to say that the lower courts did not disappoint.

### a. The Georgia Trilogy

The first case in what soon became known as *Baker v. Carr's* "prodigious progeny"<sup>216</sup> came from the state of Georgia. This was *Sanders v. Gray*,<sup>217</sup> a case that raised yet another challenge to the state's County Unit System.<sup>218</sup> The doctrinal climate post-*Baker* made *Sanders* a much better conduit through which to test the constitutionality of this system. The three-judge district court accepted the invitation.

The court began its analysis with a preliminary discussion about the history of the County Unit System as well as a review of prior litigation.<sup>219</sup> The court also restated the now-settled questions of jurisdiction, standing, and justiciability.<sup>220</sup> This was all perfunctory, of course, for the only issue in the case was, as before, whether the County Unit System violated the Equal Protection Clause. Put this way, it becomes immediately clear that this case raises exactly the

214. *Id.*

215. A note on my choices might prove helpful. I chose the example of Georgia due to the extent of the litigation there. Looking to Georgia provides telling contrasts about what a court might deem arbitrary in one context versus non-arbitrary in another. My choices of Michigan and New York are far more basic. I chose them only to follow the litigation that reached the Supreme Court soon after *Baker* to its ultimate conclusion.

216. Introduction, *Some Current Thinking on Voting Rights*, 61 MICH. L. REV. 643, 644 (1963).

217. 203 F. Supp. 158 (N.D. Ga. 1962), *vacated by* 372 U.S. 368 (1963).

218. For previous challenges, see *Hartsfield v. Sloan*, 357 U.S. 916, 916 (1958) (denying leave to file petition for writ of mandamus); *Cox v. Peters*, 342 U.S. 936, 936 (1952) (dismissing for lack of a substantial federal question); *South v. Peters*, 339 U.S. 276, 277 (1950) (per curiam) (affirming dismissal); *Cook v. Fortson*, 329 U.S. 675, 675 (1946) (dismissing appeal for injunctive relief).

219. *Sanders*, 203 F. Supp. at 161-66.

220. *Id.* at 166-68.

issue found at the heart of this Article. To wit: how did courts come to understand *Baker's* mandate?

The court in *Sanders* discussed a number of factors it deemed relevant in this analysis. The *Sanders* court approached this inquiry by offering its own reading of the doctrinal guidance provided by *Baker v. Carr*. To the court, *Baker* simply adopted the general test developed by Justice Douglas in *South v. Peters*: "Where nominations are made in primary elections, there shall be no inequality in voting power by reason of race, creed, color or other invidious discrimination."<sup>221</sup> Applying this test to the matter at hand thus hinged on the court's understanding of "invidious discrimination." The district court formulated the following test. First, it began generally by explaining that this test is comprised of "a consideration of all relevant factors, and these include rationality of state policy."<sup>222</sup> Second, the court would look to the arbitrariness of the system.<sup>223</sup> Third, it would consider whether the system has "a historical basis in our political institutions."<sup>224</sup> Fourth, and particularly relevant for purposes of court intervention, the court would examine the existence of a political remedy.<sup>225</sup> Finally, the court made clear its awareness of "the delicate relationship between the federal and state governments under the Constitution."<sup>226</sup>

In applying these factors to the facts in question, the court concluded that the County Unit System, "in its present form," violated the Equal Protection Clause.<sup>227</sup> It did so in two ways. First, it "fail[ed] to accord the unit of plaintiff a reasonable proportion of the whole."<sup>228</sup> Second, it "fail[ed] to accord the units representing a majority of the population a reasonable proportion of the whole."<sup>229</sup> In this particular case, population thus played a central role.

A second challenge arose in Georgia soon after *Sanders*, this time to the apportionment of the Georgia General Assembly. The case was *Toombs v. Fortson*.<sup>230</sup> In the face of a grossly malapportioned legislature, where disparities ranged from one representative for 1,876 persons to three representatives for 556,326

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221. *Id.* at 168 (quoting *South*, 339 U.S. at 281 (Douglas, J., dissenting)).

222. *Id.*

223. *Id.*

224. *Id.* at 169.

225. *Id.*

226. *Id.* at 170.

227. *Id.*

228. *Id.*

229. *Id.*

230. 205 F. Supp. 248 (N.D. Ga. 1962).

persons, the claim was, simply, that population must form the basis of representation.<sup>231</sup> In analyzing this claim, the district court applied the *Sanders* test, and in so doing concluded that the present reapportionment failed it. First, the court followed Justice Clark's lead in looking for a rational state policy that would justify the challenged plan. The court could not find one. Left to conjecture, the court speculated that "there is no policy but simply a reluctance of those with grossly disproportionate power over the legislative process to surrender such power." The court asserted, "This is not a rational, but rather an irrational, policy."<sup>232</sup> On this basis, the court further concluded that the plan was also arbitrary "in any sense of that term."<sup>233</sup> Second, the court rejected any historical support that might help legitimize the present apportionment system.

Third, the court asked the lockup question: whether the Georgia electorate may exact change without judicial intervention. The court answered this query in the negative. Like Tennessee, Georgia's constitution does not provide for the process of initiative or referendum. This did not mean that change could not happen, for the legislators might properly reapportion the state themselves. As in Tennessee, however, the court recognized the unlikely nature of this possibility. It explained,

To argue, as do the defendants here[,] that the plaintiffs should be remitted to the State Legislature to seek the redress which they claim is their constitutional right, would be to expect them to succeed in having those in a dominating position in the State Legislature voluntarily surrender their position. The record is barren as to the likelihood of this occurring.<sup>234</sup>

Finally, the court recognized the sensitive nature of the proposed action, whereby it would temporarily disrupt the political process in the state. It remained undaunted, however, for it recognized that the Supreme Court in *Baker* had demanded no less.<sup>235</sup>

A third challenge to electoral practices in Georgia, *Wesberry v. Vandiver*,<sup>236</sup> focused on congressional districting. In this case, the district court panel faced a reapportionment inertia of thirty years, during which the largest district in Georgia had grown to 823,680

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231. *Id.* at 250.

232. *Id.* at 254.

233. *Id.*

234. *Id.*

235. *Id.*

236. 206 F. Supp. 276 (N.D. Ga. 1962), *rev'd*, 376 U.S. 1 (1964).

people while the smallest had 272,154.<sup>237</sup> In looking at the raw numbers, the court began by conceding that "the statute here when enacted reflected a rational state policy to set up the congressional districts in Georgia with some reasonable relation to population."<sup>238</sup> The passage of time changed matters. As the court continued, "it now reflects a system which has become arbitrary through inaction when considered in the light of the present population of the Fifth District and as measured by any conceivable reasonable standard."<sup>239</sup> This finding did not lead the court to the expected outcome, however, for, on the question of remedies, the court stayed its hand. More specifically, the court alluded to its earlier decision in *Toombs v. Fortson* and in so doing expressed its hope that "the arbitrariness which we find to be present as the statute relates to the Fifth District and to the rights of plaintiffs will be corrected by the reapportioned Assembly."<sup>240</sup> In order to reach this view, the Court read *Baker* narrowly, as applying only to state apportionments. When it came to congressional apportionment, it determined that *Colegrove v. Green* remained the controlling precedent.

#### b. New York

A second example looks to the state of New York, and the case of *WMCA, Inc. v. Simon*.<sup>241</sup> In *Simon*, the lower court initially dismissed the complaint,<sup>242</sup> yet the Supreme Court vacated this judgment and remanded for consideration in light of its decision in *Baker*.<sup>243</sup> On remand, the lower court looked to *Baker*, as it had to, yet struggled to discern a workable standard. To its credit, the court made its struggle painfully clear: "[W]e are unable to premise an invalidity of the provisions of the state of New York upon the *Baker v. Carr* determination by reason of the absence of applicable indicia."<sup>244</sup> This was not in any way an understatement; soon after writing it, the court proceeded to quote from all three concurring opinions in *Baker* as well as from Justice Harlan's dissenting

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237. See *id.* at 279.

238. *Id.* at 282.

239. *Id.*

240. *Id.*

241. 208 F. Supp. 368 (D.C.N.Y., 1962), *rev'd sub nom.* *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

242. *WMCA, Inc. v. Simon*, 202 F. Supp. 741, 754 (S.D.N.Y. 1962), *rev'd sub nom.* *WMCA, Inc. v. Lomenzon*, 377 U.S. 633 (1964).

243. *WMCA, Inc. v. Simon*, 370 U.S. 190, 191 (1962).

244. *Simon*, 208 F. Supp. at 372.

opinion.<sup>245</sup> This helped little, for the court still remained uncertain about the proper doctrinal road as paved by *Baker*.

In order to develop a working test by which to analyze the reapportionment, the court had one final option. It looked to tests developed by other courts facing similar questions. In so doing, the *Simon* court concluded that tests for "invidious discrimination" had included the following: the now familiar "arbitrary [and capricious]" test; whether the reapportionment plan had a historical basis; whether the electorate had any other remedy; geography; and whether the court is asked to "invalidate solemnly enacted State Constitutions and laws."<sup>246</sup>

Based on these criteria, the court upheld the New York plan. First, the court concluded that the state provisions in question were not arbitrary.<sup>247</sup> Further, these provisions were "historic in character"<sup>248</sup> and sought to properly diffuse political power between urban and rural counties. Finally, the ten most populous counties in the state could control a constitutional convention and the provisions in question were "solemnly ratified"<sup>249</sup> by the voters of the state. For these reasons, the court concluded that the plaintiffs had failed to show the existence of "invidious discrimination."

### c. Michigan

The state of Michigan provides a final example. In *Scholle v. Hare*,<sup>250</sup> the Michigan Supreme Court considered its state's apportionment statute in light of *Baker v. Carr*. Previously, the court had concluded that the plan under consideration, and particularly its senatorial districts, lacked a "rational, reasonable, uniform, or even ascertainable nondiscriminatory legislative purpose."<sup>251</sup> No new information led the state court to change its collective mind. More specifically, the court held that under both the Fourteenth Amendment and the state's own pledge for the "protection of equal laws," the maximum deviation for the arrangement of state senatorial districts was two to one.<sup>252</sup> On this rendition, population remained a driving force; it just didn't require the subordination of all other redistricting values.

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245. See *id.* at 372-73.

246. *Id.* at 374.

247. *Id.* at 374-76.

248. *Id.* at 378.

249. *Id.* at 379.

250. 116 N.W.2d 350 (Mich. 1962).

251. *Id.* at 353.

252. See *id.* at 355-56.



## EPILOGUE: THE COURT STRIKES BACK

Two terms after deciding *Baker v. Carr*, the Court put an end to the experimentation. In *Reynolds v. Sims*,<sup>253</sup> the Court addressed a set of facts similar to those in *Baker* and *Colegrove*. The Alabama legislature had refused to draw new district boundaries since 1900. As a result, by 1960, the population variances were staggering, some reaching a ratio of forty-one to one in the state senate, sixteen to one in the state house.<sup>254</sup>

In response to these figures—figures, I must add, that the Court had seen before—the Court attempted to provide a working constitutional standard. Its language is worth quoting at length.

State legislatures are, historically, the fountainhead of representative government in this country.... But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.<sup>255</sup>

This is the language of an activist Court, no doubt. This is also the language of a Court committed to a majoritarian paradigm, whereby a majority of the people must control policy outcomes. I do not quibble with that conclusion. Rather, I am particularly interested in how the Court's language softened almost immediately, implicitly acknowledging the complexities of the task at hand:

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a

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253. 377 U.S. 533 (1964).

254. For example, Bullock County, with a population of 13,462, and Henry County, with a population of only 15,286, each had two seats in the state house, yet Mobile County, with a population of 314,301, had three seats, and Jefferson County, with 634,864 people, had seven representatives. *Id.* at 545–46.

255. *Id.* at 564–65.

practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.<sup>256</sup>

With this language, the Court signaled a propensity to step back and let the political branches take the lead in redistricting controversies. Clearly, the Court did not want to lead here and gave frequent reminders of that fact. Instead, it appeared to offer a map of the terrain and flexible parameters.<sup>257</sup>

This is a charitable rendition of the Court's holding in *Reynolds*, to be sure. More realistically, it may be said that the Supreme Court in *Reynolds* turned away from the promise of *Baker v. Carr*.<sup>258</sup> Its companion cases illustrate this proposition much too well. For example, the Court applied its population principle much more rigidly than lower courts did, and in the process overturned district court rulings in New York<sup>259</sup> and Colorado<sup>260</sup> as well as a ruling by the Maryland Court of Appeals.<sup>261</sup> In doing so, the Court rejected a number of possibilities a state may wish to see reflected in its reapportionment plans, including geographical considerations, traditions, or the balancing of urban and rural interests. The Court also rejected the federal analogy,<sup>262</sup> dismissed the issue of legislative inaction as irrelevant to the larger constitutional inquiry,<sup>263</sup> and similarly concluded that the availability of state remedies, such as the

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256. *Id.* at 577; see *Roman v. Sincock*, 377 U.S. 695, 710 (1964) ("[T]he proper judicial approach is to ascertain whether . . . there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.").

257. The Court also approached the reapportionment cases on a case-by-case, state-by-state basis. That is, the Chief Justice in *Reynolds* explained, that "[w]hat is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); see *Swann v. Adams*, 385 U.S. 440, 445 (1967) ("[A] variation from the norm as approved in one State has little bearing on the validity of a similar variation in another State.").

258. To be clear, I must underscore the fact that I do not object to the Court's handiwork in *Reynolds*, and particularly when considering its assurances about the flexibility of its new standard. Any disagreement I may have with this particular aspect of the Court's work comes later, when the equipopulation principle became a straight-jacket, during the 1969 term and later.

259. *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964).

260. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 739 (1964).

261. *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964).

262. See *Reynolds*, 377 U.S. at 571-76.

263. *Davis v. Mann*, 377 U.S. 678, 691 (1964).

initiative and referendum, in no way affected the constitutional analysis.<sup>264</sup>

In charting this course, the Supreme Court exalted population-based representation above all other possibilities. One may criticize this course of action in many ways, and the dissenting Justices, particularly Justice Clark and Justice Stewart, do so particularly well.<sup>265</sup> With the benefit of hindsight, it is easy to see that this doctrinal move has borne significant costs, both doctrinal and institutional.<sup>266</sup> This Article took these costs and criticisms to heart. In particular, it took the view that redistricting is far more complicated than a majority of the Court has understood it to be. The Court was right in entering the famed thicket, to be sure, yet its role must be far more passive than it has proven to be. In this vein, this Article argued that the Court got it exactly right in *Baker v. Carr*; in imposing a flexible standard—"arbitrary and capricious"—the Court demanded some care in the crafting of redistricting plans while also allowing much-needed flexibility. As we celebrate the fortieth anniversary of *Baker v. Carr*, it is perhaps time to rediscover its implicit promise. In light of modern redistricting debates, we should pay this great case much closer attention.

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264. See *Lucas*, 377 U.S. at 736-37.

265. See *id.* at 741-44 (Clark, J., dissenting); *id.* at 744-65 (Stewart, J., dissenting); see also *Reynolds*, 377 U.S. at 589-625 (Harlan, J., dissenting).

266. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 728 (1983) (rejecting an apportionment plan even though the difference between largest and smallest district was only .1384 percent); Karlan, *supra* note 51, at 256 (arguing that apportionment litigation may lead to "partisan activity" by judges).