



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 80

Number 4 *Baker v. Carr: A Commemorative
Symposium*

Article 12

5-1-2002

The Limits of Being Present at the Creation

Roy A. Schotland

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Roy A. Schotland, *The Limits of Being Present at the Creation*, 80 N.C. L. REV. 1505 (2002).

Available at: <http://scholarship.law.unc.edu/nclr/vol80/iss4/12>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE LIMITS OF BEING “PRESENT AT THE CREATION”

ROY A. SCHOTLAND*

Jesse Unruh was the first notable commentator on *Baker v. Carr*,¹ though he was not prone to publish. Soon after the case came down, I met that legendary figure at a conference on an unrelated subject. Hearing that I had worked on the case, he didn't hold back:

You damn fools, you think you're helping the cities. The cities were taking care of themselves; we can work things out with the agricultural areas—because they don't care what we do so long as it doesn't interfere with them. But you've shifted power to the suburbs—all they care about is keeping taxes down, and that means real trouble.²

Doubtless some observers will persist in believing that the *Baker* Court intended to “help the cities.” Instead, three convictions converged, one general and assumed, two specific and explicit. The first was a sense that courts are capable of dealing with a variety of problems, and that malapportionment fell within that category. The second conviction seemed well-established: unless the matter is beyond judicial competence, the Court will strike irrational official action as unconstitutional. And *Baker's* facts must have been designed by whatever gods preside over change in law: an

* Professor of Law, Georgetown University Law Center; Clerk for Justice William J. Brennan, Jr., O.T. 1961.

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

2. I do not claim to recall his precise words, but his substance and flavor were unforgettable. Unruh is famous for originating the phrase: “Money is the mother's milk of politics.” *Now is the Time for All Good Men*, TIME, Jan. 5, 1968, at 44, 44 (quoting Unruh). He was Speaker of California's Assembly (1961–69) and State Treasurer (1975–87).

In the original paper by Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299 (2002), “the suburbs” were merely mentioned; the authors now explain why they do not expect to explore suburban empowerment. *Id.* at 1317. In addition to the reasons they note, such exploration is difficult because “the suburbs” embraces so much more than it did at the time of *Baker*. Nonetheless, query the completeness of any evaluation that ignores the relative impacts on urban, suburban, and rural areas. Below, I note other aspects of their paper that make me reel in admiration for their imaginative, even creative approach—but with puzzlement about some of their implementation. See *infra* notes 23–31 and accompanying text.

apportionment plan that had not changed since 1901 was bound to be irrational, or as Justice Clark put it memorably, a “crazy-quilt.”³ Without that patent irrationality, I doubt Justice Stewart would have cast the fifth vote to reject the Frankfurter position. Justice Clark brought out the last conviction most plainly: as long as the federal courthouse door stayed closed to the plaintiffs’ claim, they would stay locked out of the representation to which they were entitled. Indeed, the fact that all other doors were closed was not the whole cause of Justice Clark’s switching his vote, but was most likely the *sine qua non* for his switch.⁴ Opening the courthouse door was easy in one regard: making clear that *Colegrove v. Green*⁵ was not a precedent.⁶ Justice Frankfurter had lacked a majority and had failed to take advantage of the later opportunities he had to produce a decision with a full opinion, instead of settling for mere *per curiam* affirmances.⁷ But beyond that simple step, ending the *Colegrove* era was hard.⁸ Richard Hasen, whose command of the literature is

3. 369 U.S. at 253–54 (Clark, J., concurring).

4. *Id.* at 258–59 (Clark, J., concurring).

5. 328 U.S. 549 (1946).

6. The Court in *Colegrove* had decided that apportionment was a nonjusticiable political question; the Frankfurter opinion said that federal courts will not enter this “political thicket.” *Id.* at 556. Until *Baker* came down, *Colegrove* had been treated as not merely a precedent but a mountainous barrier, although any reader could see it was not precedent because the opinion lacked a majority, let alone five votes: Justice Frankfurter had three votes, three Justices had dissented, and the result had been decided by Justice Rutledge, who wrote that there was a want of equity because it was too late to enjoin use of the apportionment in an imminent election. *Id.* at 564–66 (Rutledge, J., concurring).

We learned after *Baker* came down that Justice Rutledge had voted as he did with complete, conscious intent to keep the decision from being a precedent: he knew that if the case was held over and Justice Jackson returned from Nuremberg and Justice Vinson filled the then-vacant seat, Justice Frankfurter would have five votes. Justice Rutledge hoped that a later Court would be readier, facing a mere 3–1–3, to open the courthouse door, as his opinion so subtly urged. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 410–11 (1983). Justice Rutledge is the unsung hero of the reapportionment revolution.

7. See *Baker*, 369 U.S. at 208–09 n.29 (citing nine *per curiam* decisions). Frankfurter’s failure to take advantage of those opportunities is particularly striking for him: as a professor, it was he who had initiated scholarship about the Court.

8. See Richard Hasen, *The Benefits of “Judicially Unmanageable” Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1477, 1483 n.22 (2002) (citing sources).

Nor should we ever overlook how hard it may have been to get agreement to an opinion in *Reynolds v. Sims*, 377 U.S. 533 (1964), on state legislative districting. For brevity on that, we should note for students that *Reynolds* was argued a week before *Wesberry v. Sanders*, 376 U.S. 1 (1964) (invalidating a congressional districting statute), but not decided until four months after.

unmatched, recently noted with surprise just how hard overturning *Colegrove* had been.⁹

I hesitate to write about *Baker* at all because of an inescapable bias and a fear that any words of defense will be misread as meaning I think the *Baker* opinions flawless. Of course I do not think that. Great artists give us unflawed work, or at least work in which any flaws do not matter—or, what we mortals see as flaws, are not.¹⁰ Opinions do not rise to that level.

Having been invited late to this Symposium and having read fewer than all essays, I offer, (with deep appreciation for the invitation), only mini-comments on three of the many valuable contributions: the essays by Professors Persily,¹¹ Hasen,¹² and Gerken.¹³ But first, at risk of pedantry, may I suggest changing the Symposium's title to something like "*Baker* and its Progeny . . . (or "*Baker*, doughnuts, and holes"?). Most of the treatment seems to be about the progeny, as surely it should be. While of course everyone knows how far *Baker* went, what *Reynolds* did, and what was not done until after *Reynolds*, much of the treatment unduly merges reapportionment with districting, and "rigidity" with one person, one vote.¹⁴ The development from *Baker* to *Reynolds* and after is a rich

9. E-mail from Richard Hasen, Professor of Law and William M. Rains Fellow, Loyola Law School (Los Angeles), Roy Schotland (Feb. 20, 2000, 10:56:36 PST) (on file with North Carolina Law Review).

10. Classicists writing about "flaws" in Aeschylus drew this comment:

[S]uch criticisms prove only one thing, that those who make them have not fully understood what is going on. We expect one thing; Aeschylus gives us another. He needs no indulgence. He could write for the theater as intelligently as any dramatist and more powerfully than most. All we have to do is to understand what *he* thought his plays were about; then everything becomes clear . . .

H.D.F. KITTO, GREEK TRAGEDY 65 (3d ed. 1970).

11. Persily et al., *supra* note 2.

12. Hasen, *supra* note 8.

13. Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411 (2002).

Also, two words of applause for Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002). First, every time I teach *Davis v. Bandemer*, 478 U.S. 109 (1986), I attack Justice White's treatment of "virtual" representation, though I would have voted with him. Levinson capsulizes the attack better than I have seen, and I hope I will not be the only person always quoting him. Levinson, *supra*, at 1293-94. Second, I add this to Levinson's words of concern, *id.* at 1293-94, about under-representation of children: "On the day that Nelson Mandela was elected President of South Africa, my husband and I happily told our eight-year-old son Robert that this, indeed, was a day for celebration. At last, everyone in South Africa could vote. Without hesitation, Robert asked, 'Can the children vote, too?' " Suelly Scarnecchia, *Imagining Children's Rights*, 12 T.M. COOLEY L. REV. 1, 1 (1995).

14. There is no doubt as to the authors' awareness and intent, so perhaps I misread some of the phrasing. For example, Persily, when he writes, "One person, one vote, it was

example of what happens when courts grapple with the political process, and we ought not blur the steps of that development.

Before commenting on the three papers, I comment (fully aware of the risk of being defensive) on one criticism of the *Baker* opinions that seems to me literally nonsense, that is, having no sense of reality. I seek to bring out the ease of criticizing and the difficulty of deciding. For example, Michael McConnell (who knows better, having clerked for Justice Brennan) wrote awhile ago that *Baker* should have rested not on equal protection grounds, but rather on republican form of government grounds.¹⁵ However, that alternative would have brought a head-on confrontation with *Luther v. Borden*¹⁶ and *Pacific*

thought, would help prevent partisan gerrymandering,” seems to suggest the Justices are other-worldly. Compare Persily et al., *supra* note 2, at 1317, with *Gaffney v. Cummings*, 412 U.S. 735, 748–49 (1973) (“An unrealistic overemphasis on raw population figures, a mere nose count . . . may submerge [the] other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.”), and Persily et al., *supra* note 2, at 1332 (“[Did] *Baker* and its progeny [lead] to greater changes . . .”) (emphasis added). Note that Justice Brennan dissented. *Id.* at 754, 772 (Brennan, J., dissenting). I cannot avoid querying his dissent here and with the pages in *Reynolds* noted below.

There is also no doubt that *Reynolds* is too often not remembered as it was written. For example, Professor Hasen notes that “the Court left the states with just a bit of wiggle room,” and he quotes two sentences that are left out of his casebook’s current and prior editions. Hasen, *supra* note 8, at 1479; see DANIEL H. LOWENSTEIN & RICHARD HASEN, *ELECTION LAW* 116 (2d ed. 2001); DANIEL H. LOWENSTEIN, *ELECTION LAW* 74 (1st ed. 1995). Also omitted are the opinion’s two pages before those two sentences—pages that give much more than “just a bit of wiggle room.” For example:

Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. 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. 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. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Thus, we proceed to state there only a few rather general considerations which appear to us to be relevant . . .

Reynolds, 377 U.S. at 578 (citations omitted).

15. 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 [for example, ‘“judicial standards under the Equal Protection Clause are well developed and familiar,” and thus do not present justiciability problems’] was nonsense.”). He uses the word nonsense to express disagreement, even disdain; I use it both that way and also literally.

16. 48 U.S. 1, 42 (1849) (holding that enforcing the Republican Form of Government Clause of U.S. CONST. art. IV, § 4, presents a political question).

States v. Oregon.¹⁷ Even if one saw advantages in that alternative (I do not¹⁸), the reality was that Justice Stewart at that time was absolutely unwilling to overrule any precedent—and though *Baker* ended 6–2, it never would have reached that point but for Justice Stewart’s making it 5–4 against the Frankfurter position.¹⁹ “Had the

17. 223 U.S. 118, 151 (1912) (holding that whether citizen-initiated ballot propositions violated the Republican Form of Government Clause presented a political question).

18. Justice Frankfurter’s dissent in *Baker* argued that the equal protection claim was “in effect, a Guarantee Clause claim masquerading under a different label.” 369 U.S. 186, 297 (1962) (Frankfurter, J., dissenting). But as Carl Auerbach pointed out immediately after *Reynolds*, “to rest the *Reapportionment Cases* on the Guarantee Clause creates difficulties of its own.” Carl Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 85.

19. See Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 32 (1997). Professor Pushaw, like Professor McConnell, is in denial about the fact that a majority opinion might be crafted to be supported by a majority, and that one of the majority might refuse to join “unless”; here, “unless” was that *no* precedent was overruled. Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1173 (2002). Pushaw admits that for fifty years the Court had made decisions creating a blanket political question prohibition—precedent that included challenges to state apportionments. *Id.* at 1168–69. He says that starting with *Pacific States*, 223 U.S. at 118, those decisions had “misconstrued” *Luther v. Borden*, 48 U.S. at 42; evidently he is so sure that those decisions erred that he cannot imagine Justice Stewart could miss the error—or be unwilling to overrule fifty years of decisions. Pushaw even accuses Brennan of “intellectual dishonesty,” Pushaw, *supra* at 1175 n.60, because Brennan failed to see the cases as Pushaw does.

Pushaw’s own limitations in reading cases should cool his aggressiveness. I offer three examples. First, he attacks every opinion in *Bush v. Gore*, 531 U.S. 98 (2000), for the tiny point that they failed to cite *Baker*. Pushaw, *supra*, at 1167 n.7. I agree that they should have, but one cannot overlook the time constraints on that decision, and more importantly, one should not overlook the opinions’ truly interesting omission about the political question issue: The opinions made much of *McPherson v. Blacker*, 146 U.S. 1 (1892), the principal precedent about Article II. See 531 U.S. at 104 (per curiam); *id.* at 113 (Rehnquist, C.J., concurring); *id.* at 123 (Stevens, J., dissenting). But they wholly ignored that *McPherson*’s opening page addressed the political question, albeit summarily. 146 U.S. at 23–24. Second, he attacks *U.S. v. Nixon*, 418 U.S. 683 (1974), for rejecting “Nixon’s argument for nonjusticiability [which] had strong support in Article II and in practice” without noting the Court’s explicit emphasis on a key distinction: “The impediment that an absolute, unqualified [executive] privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions . . . under Article III.” *Nixon*, 418 U.S. at 707; Pushaw, *supra*, at 1183 n.113. Third, he attacks *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding legislative vetoes unconstitutional), as inconsistent with venerable precedent to the contrary, *Field v. Clark*, 143 U.S. 649 (1892) (refusing to allow a party to question the assurance by Congress and the President that a federal statute had been properly authenticated and enrolled). Pushaw, *supra*, at 1182 nn.108–10. Whatever one’s view of those cases, I marvel that anyone could fail to see the distinction between the old case that involved only the finality of official representations that the steps required to enact a law had been completed, and *Chadha*, involving Congress’s assertion that, *without completing* the steps of the enactment process, it could control executive branch action just as if it had completed the steps. The older case involved nothing but the finality of official representations, but *Chadha*

litigation proceeded under the Republican Form of Government Clause," writes McConnell, "it would have been quite different."²⁰ Different indeed: either no litigation at all, or not until—and unless—Justices came along willing to overrule what would, by then, have been a potent precedent "counter-*Baker*."

A second comment goes to much criticism of *Baker* and similar cases: of course it is far easier to open the door than to design the new domain. But should we never open such doors unless the design is in hand? Is Martin Shapiro all wrong when he writes that "judges . . . are often in a position to identify a wrong without being able to define *the right*"?²¹

involved both aggrandizement of Congress's power and encroachment on the executive. See, e.g., PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 138-39 (9th ed. 1995).

Last, he attacks *Baker* for "jettisoning federalism." Pushaw, *supra*, at 1172 n.79. True, *Baker* thrust federal judicial power into core state affairs. But that *strengthened* federalism:

Although there has been a continuing debate over the actual impact of reapportionment, it is obvious that urban areas had not been granted their fair share of legislative representation. . . . Increased urban representation naturally has led to a growing responsiveness on the part of state legislatures to the problems and interests of the cities and suburbs, which in turn has encouraged the national government to break some of the direct Washington-local government ties that originally had been justified by anti-urban legislatures. . . . The states can no longer be considered the weak links of the federal system. Indeed, they have become the new heroes of American federalism

ANN O'M. BOWMAN & RICHARD C. KEARNEY, *THE RESURGENCE OF THE STATES* 17, 40 (1986); see also *id.* at 2, 7 ("The states, in short, assumed a new relevance in the federal matrix."); *id.* at 13, 104; DAVID WALKER, *THE REBIRTH OF FEDERALISM* 249-83 (1995); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 *HASTINGS CONST. L.Q.* 483, 520-21 (1998). See generally *American Federalism: The Third Century*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* (1990) (providing an overview of events of American Federalism since 1974 that have set the stage for the most ambitious experiment in democratic self-government); see also generally *infra* note 27 (discussing comments of Abner Mikva).

20. McConnell, *supra* note 15, at 114.

21. Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 *UCLA L. REV.* 227, 228 (1985). Justice Brennan's former colleagues, the New Jersey Supreme Court, in 1960, unanimously agreed to take jurisdiction over reapportionment of the legislature. *Asbury Park Press, Inc. v. Woolley*, 161 A.2d 705, 716 (1960). Plaintiffs had sought an order declaring the existing apportionment (which was still pursuant to a 1941 statute, although the 1950 census had shown "substantial . . . changes") a violation of the state constitutional provision that required reapportioning among the counties after each census, "as nearly as may be according to the number of their inhabitants." *Id.* at 707. The court dismissed *Colegrove* simply: "[T]here no mandatory requirement of a state constitution for apportionment was involved." *Id.* at 710. The court listed decisions in fifteen states, going back into the nineteenth century, in which "the responsibility has been accepted," and cited an Oklahoma decision that had noted twenty-two such states as of 1938, with none contrary. *Id.* at 711. In 1956, Tennessee's high court had decided against "accepting the responsibility"—which made the *Baker* situation such a total lock-up. Kidd

Having made these pleas to be realistic, I now offer comments on three other contributions to this Symposium. On the Persily paper, I have a few questions about the exploration of life without *Baker*.

First, Persily writes, "Forty years after *Baker v. Carr*, we have finally begun to understand the early political effects of [one-person, one-vote]."²² If that is so and if what emerges from analyses is so often a hodge-podge (as Persily and his co-authors labeled it), does this suggest that Chief Justice Warren—whom the paper so rightly quotes at its opening—was right or wrong? Or is the position like Chou En-Lai's when asked what he thought of the French Revolution: "It's too early to say?"

Second, how right or wrong was Jesse Unruh? As noted above,²³ examination is needed, rather than mere passing mention of how "the suburbs" fared.

Third, as I said earlier,²⁴ the Persily effort to explore what I call "counter-*Baker*" is, for me, excitingly imaginative and potentially significant. I hope that the continuing work on this will examine more than the partisan impacts because, as the Essay notes, there are "two distinct ideas . . . partisan bias and electoral responsiveness."²⁵

Fourth, must not any consideration of "What if *Baker* never happened?" consider other kinds of impacts on state government and on federalism?²⁶

v. McCannless, 292 S.W.2d 40, 44 (Tenn. 1956) (citing *Baker*, 369 U.S. at 235, and finding "its holding rested on its state law of remedies").

The New Jersey court, because the 1960 census data would soon be available, "with[e]ld determination of the various problems presented (except, of course, that of our jurisdiction to hear the matter), in order that the Legislature may have an opportunity to consider adoption of a reapportionment act . . ." *Asbury Park*, 161 A.2d at 715. There can be no question that Justice Brennan was aware of that decision, but I do not recall discussion about it (although I had worked on it as a summer clerk for plaintiffs' counsel).

Thus, one could say that the New Jersey court led the way for *Baker*, a striking instance of state court independence, which Justice Brennan later so forcefully encouraged. See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (arguing that the trend of then-recent Supreme Court civil liberties decisions should prompt a reappraisal of the strategy of litigants not to rest such claims on state constitutional guarantees).

22. Persily et al., *supra* note 2 at 1351.

23. See *supra* note 2.

24. See *supra* note 2.

25. Persily et al., *supra* note 2, at 1318. It might be interesting to revisit the survey of 204 state officials published in 1952. Charles W. Shull, *Political and Partisan Implications of State Legislative Apportionment*, 17 LAW & CONTEMP. PROB. 417, 430-39 (1952).

26. Malapportionment was blamed for much of the "near eclipse of state government," in both the Eisenhower and Kennedy administrations by their Advisory Commissions on Intergovernmental Relations. Auerbach, *supra* note 18, at 49. Please forgive me for quoting myself: "*Baker v. Carr* ended an era in which the states had been

Fifth, given that, as the Essay indicates, *Baker* may be called in many respects “the mother of all political process cases,”²⁷ must not one consider the impact on law outside districting?²⁸ For example, is Abner Mikva wrong about *Baker*’s ability to claim the Voting Rights Act (“VRA”) as part of its progeny?²⁹ And if there were no *Baker*—which means in its place, a continued political question barrier to such matters—would the federal courts have been available to Congress to help implement the VRA?³⁰

The Hasen Essay makes a point that cannot be over-emphasized, in his imaginative “homage to judicial unmanageability” and affirmation of the value in uncertainty and experimentation.³¹ I believe that is exactly what *Reynolds* called for, explicitly even if not as engagingly as Hasen.³² As I read *Reynolds*, it sent Hasen’s “scouts” off on fruitfully different paths. I believe that openness to

so unresponsive to so many of their people that federalism was not working—because only Washington was responsive. For the vigor of our states today, and therefore of our federal system, thank Brennan.” Roy Schotland, Presentation in Panel, *Remembering a Constitutional Hero, Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.*, 43 N.Y.L. SCH. L. REV. 13, 22, 24 (1999). I there paraphrased Abner Mikva (who confirmed this paraphrase) on how much difference *Baker* made in state government:

How much today’s vigor of state governments owes to the reapportionment revolution is clear only when one recalls how limp those governments had been. The scene, even in as major a state as Illinois, was memorably captured by Judge Abner Mikva, describing his time as a legislator. He used to say that the hardest decisions he had to make as a state legislator came every Sunday night, when he had to decide what to pack to take to Springfield. Since he had no office at the state capitol, not even a desk with a lock, he’d have to carry there and back everything he expected to be working on.

Id. at 24 n.31.

27. Persily, *supra* note 2, at 1302.

28. Cf. Alan B. Morrison, *What if . . . Buckley were Overturned?*, 16 CONST. COMMENT. 347, 348 (1999) (examining the changes that would occur in First Amendment jurisprudence *outside* the context of campaign finance, if *Buckley* were overruled).

29. Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 U. ILL. L. REV. 683, 686–87.

30. Cf. *Holder v. Hall*, 512 U.S. 874, 891, 944 (1994) (Thomas, J., concurring) (arguing that the federal courts should not be available for Voting Rights Act districting cases because such matters are mired in politics).

31. Hasen, *supra* note 8, at 1485. Hasen persuasively praises the usually condemned attribute of “judicial unmanageability” and later urges that

[w]hen unsure of the correct direction, the leader’s best strategy might be to . . . send a few scouts out along different paths. . . . The leader, after receiving [information], can then make a more informed decision on the ultimate path to be taken. If the Court, as is likely, will remain in the political thicket, unmanageability may be one of the best tools available for finding the right paths.

Id. at 1503.

32. See *supra* note 8.

experimentation should have prevailed in, for example, *California Democratic Party v. Jones*.³³ And such openness is the keystone of the opinion that I wish had prevailed in Justice Souter's dissent in *Timmons v. Twin Cities Area New Party*.³⁴ If the courts pick up only two points in this Symposium, I hope they will be Hasen's and Gerken's.³⁵

Last, Gerken here,³⁶ and previously,³⁷ brilliantly recasts our approach to *Baker* and so much more than *Baker* by bringing out the reality and the potentially great gains of looking upon districting cases as involving not ordinary *individual* rights, but "aggregate" rights.³⁸ But on one point unnecessary to Gerken's work, I disagree with her. She refers repeatedly to "the Court's failure."³⁹ If there was a failure—and I do *not* agree that there was—was it the Court or was it the bar and academe? How much of the scholarship about these cases has included any look at the briefs and oral argument? Almost

33. 530 U.S. 567, 586 (2000). The Court in *Jones* protected the party leaderships, even the major parties', from the political process that the party leaders were unwilling to risk. They avoided the ballot proposition effort in which majorities of both major parties voted for the blanket primary; they avoided the legislature. Instead, they sought judicial intervention to stop the political process.

Perhaps the parties would have found ways to avoid injury from the blanket primary, or would have found that there was less injury than gain, or would have discovered that, like the parties in Washington and Alaska, this process was survivable. When majorities beat up minorities, judicial relief is needed. When majorities disagree with the party leaders' concept of parties and the party leaders' attitude toward turn-out—well, query.

34. 520 U.S. 351, 382–84 (1997) (Souter, J., dissenting) (arguing that there is no need for the majority's "'preservation of the two-party system' rationale" until there is some showing that fusion candidacies pose a substantial threat to that system).

35. For Hasen's point, see *supra* note 31. Gerken's point, *infra* note 36, is about the need for the Court to become more realistic about the limitations of its "individual-rights framework." Gerken, *supra* note 13, at 1463.

36. Gerken, *supra* note 13, *passim*.

37. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667 (2001).

38. Her work is exemplary because it can—and, I hope, will—help courts decide future cases. Such work is the opposite of what, decades ago, Fred Rodell described as typical of legal decisions and legal writing: "The law is the Killy-loo bird [which] insisted on flying backward because it didn't care where it was going but was mightily interested in where it had been." FRED RODELL, *WOE UNTO YOU, LAWYERS!* 20 (Pageant-Poseidon Ltd. 1972) (1939).

For example: Do any of the papers in this Symposium deal with how, in the new circumstances of the post-2000 districting, "retrogression" should be treated? A superb picture of the first notable post-2000 case is given by counsel for the defense. See Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002). Might not this Symposium be less "Commemorative" and more celebratory if we attend more to the districting decisions that lie ahead?

39. Gerken, *supra* note 13, at 1418, 1466.

no help was available to the *Baker* Court. The lower court had written a helpful opinion—a plea to end the *Colegrove* barrier.⁴⁰ Participating as an amicus, Solicitor General Cox, a convert to the cause, added value. But the plaintiffs offered little beyond rhetoric, and as I note in the next paragraph, academe had all but completely ignored this subject.

The best writing, nearly the only writing, was an article by that unique (but then new) media authority on the Court, Anthony Lewis.⁴¹ My point is not to criticize criticizing *Baker*, but to ask about what we scholars produce . . . and fail to produce. Even between *Baker* and *Reynolds*, scholars were silent or all but. Judges never have as much time for this or that aspect of a case as scholars can take, judges sometimes have less analytic ability than scholars, and judges rarely have layers of scholarship on which to build—especially when new domains are being opened. All of us, including judges, cultivate our gardens, but we ought to be more hesitant about putting down other people's seeming weeds.

In closing, I share two episodes, one from the day *Baker* came down, another from five years later. First, the dissenters didn't merely disagree, they believed that this door-opening would lead the federal courts to disaster—an inescapable politicization that would spread and undermine the federal courts' integrity, appearance of integrity, and thus the role of the third branch in constitutional law. That morning, Justice Harlan wore a black tie and looked so despondent that at robing before going on the bench, Justice Frankfurter (who had more experience with losing) and Justice Douglas tried to cheer him up—Justice Frankfurter saying, "John, it's not the end of the world." In the courtroom to hear the reading of the opinions was a friend of Justice Harlan friend who had known him since their elementary school days, and who said that she had

40. 179 F. Supp. 824, 826 (D.C. Tenn. 1959) ("In view of this array of decisions by our highest court, charting the unmistakable course which this court must pursue in the instant case, it is unnecessary to consider the decisions by lower federal courts. It is significant to point out . . . *Kidd v. McCanless* . . ."); see also *supra* note 6 (discussing *Colegrove*).

41. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1095–98 (1958) (arguing that Supreme Court action was the only effective means to correct malapportionment). In 1929, Zechariah Chafee wrote *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1031 (1929), which outlines the importance of congressional apportionment, the potential legal remedies for congressional failure to reapportion, and the best methods to produce equitable reapportionment. If there was other writing, it was not significant.

never seen him looking so ghastly. Justices Harlan and Frankfurter *meant it* about the lack of judicially manageable standards.⁴²

Standards are essential for all judicial action, although if we decide obscenity cases with analysis like “I know it when I see it,”⁴³ we do not jeopardize the judiciary. In contrast, if judicial review of districting suffers standardless subjectivity, there is danger that subjectivity degenerates to partisan preference; and if the courts are in fact or are justifiably seen as partisan, then their ability to perform their highest role is endangered.⁴⁴

The second episode captures a reaction to that fear in 1967. That spring, Harvard Law School had invited Justice Brennan to a full pomp-and-ceremony celebration of his ten years on the Court. People who are not “old-fashioned scholars [from] prior generations”⁴⁵ cannot feel (I choose the word deliberately) how deep and bitter was the hostility, even contempt, at Harvard and other schools—where Justice Frankfurter was the god—toward Chief Justice Warren and his close colleagues.⁴⁶ When Harvard invited Justice Brennan, one of his colleagues (*not* the Chief) urged him not

42. “[W]e will get into great difficulty and this Court will rue the results.” THE SUPREME COURT IN CONFERENCE (1940–1985), at 845 (Del Dickson ed., 2001) (quoting Justice Frankfurter in the Court’s conference in April 1961, after the first argument).

Justice Frankfurter also said in a note to Justice Stewart when the case was reargued that “the evil genii [were about] to be released by the decision.” SCHWARTZ, *supra* note 7, at 424. And “Harlan, usually the most restrained of the Brethren, argued with intense emotion . . .” *Id.* at 416.

As Carl Auerbach wrote in 1964, “I share Professor McCloskey’s view that ‘the Court’s future as a constitutional tribunal would be cast in grave doubt’ if the ‘public should ever become convinced that . . . judicial review is only a euphemism for an additional layer in the legislative process.’” Auerbach, *supra* note 18, at 1 (quoting Robert McCloskey, *The Supreme Court 1961 Term—Foreword: The Reapportionment Cases*, 76 HARV. L. REV. 54, 67 (1962)).

43. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

44. I am indebted to Guy-Uriel Charles for a discussion that helped sharpen this point. For Professor Charles’s contribution to this Symposium, see Guy-Uriel Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

45. Mark Tushnet’s delightful description fits me. I share his approach to political questions; on that, I find Samuel Issacharoff’s treatment of *Bush v. Gore* dispositive. Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001). I fear I disagree with my colleague Tushnet’s view on Bush’s standing; I treat that issue in teaching materials on the case, and further in a forthcoming piece. R.A. Schotland, *What Ever Happened to Due Process?*, 34 LOYOLA U. CHI. L.J. (forthcoming 2002); *Bush v. Gore: Law, or Statesmanship, or Abuse* (2001) (R.A. Schotland teaching materials for Election Law) (on file with author).

46. I remember hearing that the University of Chicago Law School’s outstanding Phil Kurland, encountering the Chief Justice at some event, had pointedly turned his back on him. I have no idea whether that did happen, but the existence of the tale says enough.

to go. But Justice Brennan being Justice Brennan, went. The highlight of that day was a talk by Dean Erwin Griswold (a High Priest), who said in substance: "In *Baker*, we thought you'd taken on what could not succeed, but to our surprise you've brought it off, and there's no denying that it is a great achievement. We all applaud you for it."⁴⁷

47. Again, I make no claim to recall his precise words, but the substance and flavor were unforgettable.