For more than a century, the Court had limited its jurisdiction in a variety of arenas, adhering to what became known as the political questions doctrine that some questions do not admit of resolution by the courts, and must be addressed by those serving in the "political branches" of government, the legislative and the executive. One area where it had consistently refused to issue rulings was in the question of legislative apportionment, the drawing of electoral district lines. The Supreme Court abandoned this line of precedent in the 1960s, sparking significant changes in the results of subsequent elections at both the state and federal levels. Justice Frankfurter's dissenting opinion explains why he thinks the courts must once again remove themselves from ruling on these sorts of questions. Can the Court's effectively resolve the results of disputed elections? Are they properly constituted to supervise the nation's election processes? Does the Constitution impose any limits on the courts in this area of law? Why might political actors—legislators and executive officers—prefer to have the courts involved in supervising elections? Is there a relationship between the position taken by the Court in Cooper v. Aaron and its subsequent decision to become involved in the process of reapportioning representation?

BAKER v. CARR

369 U.S. 186 (1962)

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation -- a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been, and now is, determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority -- possessed of neither the purse nor the sword -- ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical, and the assumptions are abstract, because the Court does not vouchsafe the lower courts -- state and federal -- guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is as devoid of reality as "a brooding omnipresence in the sky," for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court

to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and, at the same time, to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd -- indeed an esoteric -- conception of judicial propriety. One of the Court's supporting opinions, as elucidated by commentary, unwittingly affords a disheartening preview of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants) into which this Court today catapults the lower courts of the country without so much as adumbrating the basis for a legal calculus as a means of extrication. Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. The Framers of the Constitution persistently rejected a proposal that embodied this assumption, and Thomas Jefferson never entertained it.

Recent legislation, creating a district appropriately described as "an atrocity of ingenuity," is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that, in districting, at least substantial equality is a constitutional requirement enforceable by courts. Room continues to be allowed for weighting. This, of course, implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent -- aye, there's the rub. In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a statewide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers, carefully and with deliberate forethought, refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event, there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear sure to be disappointing to the hope. [...]

From its earliest opinions, this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. To classify the various instances as "political questions" is, rather, a form of stating this conclusion than revealing of analysis. Some of the cases so labelled have no relevance here. But from others emerge unifying considerations that are compelling.

1. The cases concerning war or foreign affairs, for example, are usually explained by the necessity of the country's speaking with one voice in such matters. While this concern alone undoubtedly accounts for many of the decisions, others do not fit the pattern. It would hardly embarrass the conduct of war were this Court

to determine, in connection with private transactions between litigants, the date upon which war is to be deemed terminated. But the Court has refused to do so. [...]

This may be, like so many questions of law, a matter of degree. Questions have arisen under the Constitution to which adjudication gives answer although the criteria for decision are less than unwavering bright lines. Often, in these cases, illumination was found in the federal structures established by, or the underlying presuppositions of, the Constitution. [...] But this is merely to acknowledge that particular circumstances may differ so greatly in degree as to differ thereby in kind, and that, although within a certain range of cases on a continuum, no standard of distinction can be found to tell between them, other cases will fall above or below the range. The doctrine of political questions, like any other, is not to be applied beyond the limits of its own logic, with all the quiddities and abstract disharmonies it may manifest.

2. The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States. The abstention from judicial entry into such areas has been greater even than that which marks the Court's ordinary approach to issues of state power challenged under broad federal guarantees. [...]

3. The cases involving Negro disfranchisement are no exception to the principle of avoiding federal judicial intervention into matters of state government in the absence of an explicit and clear constitutional imperative. For here the controlling command of Supreme Law is plain and unequivocal. An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. [...]

4. The Court has refused to exercise its jurisdiction to pass on "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon* [1923] The "political question" doctrine, in this aspect, reflects the policies underlying the requirement of "standing": that the litigant who would challenge official action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government -- a complaint that the political institutions are awry. What renders cases of this kind nonjusticiable is not necessarily the nature of the parties to them, for the Court has resolved other issues between similar parties; nor is it the nature of the legal question involved, for the same type of question has been adjudicated when presented in other forms of controversy. The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in nonjudicial forums, by which governments and the actions of governments are made and unmade. [...]

5. The influence of these converging considerations -- the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted -- has been decisive of the settled line of cases, reaching back more than a century, which holds that Art. IV, § 4, of the Constitution, guaranteeing to the States "a Republican Form of Government," Claims resting on this specific guarantee of the Constitution have been held nonjusticiable which challenged state distribution of powers between the legislative and judicial branches, state delegation of power to municipalities, state adoption of the referendum as a legislative institution, and state restriction upon the power of state constitutional amendment...

The starting point of the doctrine applied in these cases is, of course, *Luther v. Borden* [1849]. The case arose out of the Dorr Rebellion in Rhode Island in 1841-1842. Rhode Island, at the time of the separation from

England, had not adopted a new constitution, but had continued, in its existence as an independent State, under its original royal Charter, with certain statutory alterations. This frame of government provided no means for amendment of the fundamental law; the right of suffrage was to be prescribed by legislation, which limited it to freeholders. In the 1830's, largely because of the growth of towns in which there developed a propertied class whose means were not represented by freehold estates, dissatisfaction arose with the suffrage qualifications of the charter government. In addition, population shifts had caused a dated apportionment of seats in the lower house to yield substantial numerical inequality of political influence, even among qualified voters. The towns felt themselves underrepresented, and agitation began for electoral reform. When the charter government failed to respond, popular meetings of those who favored the broader suffrage were held and delegates elected to a convention which met and drafted a state constitution. This constitution provided for universal manhood suffrage (with certain qualifications), and it was to be adopted by vote of the people at elections at which a similarly expansive franchise obtained. This new scheme of government was ratified at the polls and declared effective by the convention, but the government elected and organized under it, with Dorr at its head, never came to power. The charter government denied the validity of the convention, the constitution and its government and, after an insignificant skirmish, routed Dorr and his followers. It meanwhile provided for the calling of its own convention, which drafted a constitution that went peacefully into effect in 1843.

Luther v. Borden was a trespass action brought by one of Dorr's supporters in a United States Circuit Court to recover damages for the breaking and entering of his house. The defendants justified under military orders pursuant to martial law declared by the charter government, and plaintiff, by his reply, joined issue on the legality of the charter government subsequent to the adoption of the Dorr constitution. Evidence offered by the plaintiff tending to establish that the Dorr government was the rightful government of Rhode Island was rejected by the Circuit Court; the court charged the jury that the charter government was lawful, and, on a verdict for defendants, plaintiff brought a writ of error to this Court.

The Court, through Mr. Chief Justice Taney, affirmed. After noting that the issue of the charter government's legality had been resolved in that government's favor by the state courts of Rhode Island -- that the state courts, deeming the matter a political one unfit for judicial determination, had declined to entertain attacks upon the existence and authority of the charter government -- the Chief Justice held that the courts of the United States must follow those of the State in this regard. It was recognized that the compulsion to follow state law would not apply in a federal court in the face of a superior command found in the Federal Constitution, *ibid.,* but no such command was found. The Constitution, the Court said -- referring to the Guarantee Clause of the Fourth Article -- ". . . as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department."

"Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue, and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

In determining this issue nonjusticiable, the Court was sensitive to the same considerations to which its later decisions have given the varied applications already discussed. It adverted to the delicacy of judicial intervention into the very structure of government. It acknowledged that tradition had long entrusted questions of this nature to nonjudicial processes, and that judicial processes were unsuited to their decision. The absence of guiding standards for judgment was critical, for the question whether the Dorr constitution had been rightfully adopted depended, in part, upon the extent of the franchise to be recognized -- the very point of contention over which rebellion had been fought.

". . . [I]f the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision." [...]

The present case involves all of the elements that have made the Guarantee Clause cases nonjusticiable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment, rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same -- unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation. We have been admonished to avoid "the tyranny of labels." Art. IV, § 4, is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable. Of course, if a controversy falls within judicial power, it depends "on how he [the plaintiff] casts his action," whether he brings himself within a jurisdictional statute. But where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another. [...]

Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote, and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful -- in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation -- ultimately, really, among competing theories of political philosophy -- in order to establish an appropriate frame of government for the State of Tennessee, and thereby for all the States of the Union.

In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. What Tennessee illustrates is an old and still widespread method of representation -- representation by local geographical division, only in part respective of population -- in preference to others, others, forsooth, more appealing. Appellants contest this choice, and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to

be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. *See Luther v. Borden, supra.* Certainly "equal protection" is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form." Indeed, since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican state. For a court could not determine the equal protection issue without, in fact, first determining the Republican Form issue, simply because what is reasonable for equal protection purposes will depend upon what frame of government, basically, is allowed. To divorce "equal protection" from "Republican Form" is to talk about half a question.

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment -- that it is, in appellants' words "the basic principle of representative government" -- is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today. Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution -- views which, in all honesty, cannot but give the appearance, if not reflect the reality, of involvement with the business of partisan politics so inescapably a part of apportionment controversies -- the Fourteenth Amendment, "itself a historical product," provides no guide for judicial oversight of the representation problem. [...]

Manifestly, the Equal Protection Clause supplies no clearer guide for judicial examination of apportionment methods than would the Guarantee Clause itself. 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.

Legislative responses throughout the country to the reapportionment demands of the 1960 Census have glaringly confirmed that these are not factors that lend themselves to evaluations of a nature that are the staple of judicial determinations or for which judges are equipped to adjudicate by legal training or experience or native wit. And this is the more so true because, in every strand of this complicated, intricate web of values meet the contending forces of partisan politics. The practical significance of apportionment is that the next election results may differ because of it. Apportionment battles are overwhelmingly party or intra-party contests. It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them. [...]

Although the District Court had jurisdiction in the very restricted sense of power to determine whether it could adjudicate the claim, the case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action. The judgment of the District Court, in dismissing the complaint for failure to state a claim on which relief can be granted, should therefore be affirmed.