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To: The Chief Justice
Mr. Justice Black
Mr. Justice Frankfurter
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker

From: Stewart, J.

Circulated: _____

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SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, *v.* Joe C. Carr, et al. | On Appeal From the United States District Court for the Middle District of Tennessee.

[March —, 1962.]

Mr. Justice Stewart, concurring.

The separate writings of my dissenting and concurring Brothers stray so far from the subject of today's decision as to convey, I think, a distressingly inaccurate impression of what the Court decides. For that reason, I think it appropriate, in joining the opinion of the Court, to emphasize in a few words what the opinion does and does not say.

The Court today decides three things and no more: (1) "that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint" (p. 17); (2) "that the appellants . . . have standing to maintain this suit" (p. 19); and (3) "that this challenge to an apportionment presents no nonjusticiable 'political question' " (p. 22).

The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary—without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. The Court does not say or imply that "state legislatures must be so structured as to reflect with approximate equality the voice of every voter." The Court does not say or imply that there is anything in the Federal Constitution "to prevent a State, acting not irrationally, from choosing any legislative structure it thinks best suited to

the interests, temper, and customs of its people." The Court most assuredly does not decide the question, "may a State weight the vote of one county or one district more heavily than it weights the vote in another?"

In *MacDougall* v. *Green*, 335 U. S. 281, the Court held that the Equal Protection Clause does not "deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." 335 U. S., at 284. In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan* v. *Maryland*, 366 U. S. 420, 425. In case after case arising under that Clause we have also said that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 581, 584.

Today's decision does not turn its back on these settled precedents. I repeat, the Court today decides only: (1) that the District Court possessed jurisdiction of the subject matter; (2) that the appellants have standing; (3) that the complaint presents a justiciable controversy. My Brother CLARK has made a convincing prima facie showing that Tennessee's system of apportionment is in fact utterly arbitrary—without any possible justification in rationality. But the merits of this case are not before us now. The defendants have not yet had an opportunity to be heard in defense of the State's system of apportionment; indeed, they have not yet even filed an answer to the complaint. As in other cases, the proper place for the trial is in the trial court, not here.