x No. 6 - October Term, 1961

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

[March , 1962.]

MR. JUSTICE CLARK, dissenting.

One emerging from the rash of contrating and conflicting opinions with their accompanying cloud of words may well entter into a mental darkness blind. At the risk of accentuating it I will add a few words.

First, one should set the argument as to the Guarantee Clause of Article IV, § 4 to one side for it is not invoked here. Second, Colegrove v. Green is not apposite since it had to do with action specifically committed to congressional discretion by the Constitution. This leaves only those cases where state procedures had either not been exhausted, Remmey v. Smith, 342 U.S. 916, or furnished the ground for state decision, such as Kidd v. McCanless, 352 U.S. 920. These are clearly distinguishable. And, lastly, cases such as South v. Peters, 339 U.S. 276 (1950) involving Georgia's unit system.*/ After today I take it that the cases have been overruled.

On the facts I take the finding of the District Court, not contested here, that "Tennessee is guilty of a clear violation of the state constitution and of the rights [federal] of the plaintiffs," appellants here. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters ~~that~~ elect 63 of the 99 members of the House. But this might not on its face be an "invidious discrimination," Williamson v. Lee Optical Co., 348 U.S. 483, ( ) for a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v Maryland, 366 U.S. 420 ( ). It is said that perhaps Tennessee in its apportionment law was but making an effort to give a desirable political balance between the rural and urban populations. But this cannot be for the discrimination is present between rural areas as well as urban ones. For example, Moore County has ~~g~~ two representatives with a population (2340) of only 1/12 of Rutherford County (25,316) with the same representation; Decatur County (5563) has the same representation as Carter (23,302) though the latter has four times the population; Gibson with some

30,000 people has five representatives while Blount County with about the same population has only 1.6 representatives; Fayette County (13,577) has the same number (3) of representatives as Sullivan (55,712); likewise Loudon (13,264), Houston (3084) and Anderson (33990) have like representation 1.25 each. This discrimination could not be called de minimus, nor, as I see it, as bearing any rational relation to permissible state policy. While mathematical equality is not required the standard used by the state must be more than the arbitrary and capricious mandate of the legislature. I conclude, as did the District Court, that the present apportionment rather than being a reasonable legislative judgment is an irrational legislative policy. But this is not enough. Do the people of Tennessee have any other practical recourse than to the courts?

It is said that one must not "assume that political power is a function exclusively of numbers . . . .," McDougall v. Green, 335 U.S. 281 (1948); that we must not "deny a state the power to assume a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses . . . ."

Id. p._____. But this is subject to the proviso, there recognized, "that the latter have practical opportunities for exerting their political weight at the polls not available to the former." I have searched diligently for such "practical opportunities" under Tennessee law. I find none. For sixty years efforts by the people to bring about a change have been to no avail. They have been rebuffed at the hands of the legislature; they have tried the constitutional convention route but, with the representation there being of the same ratio as that present in the legislature, it, too, has been fruitless; they have tried Tennessee courts with the same result and Governors have fought the tide only to be floundered. It is said that there is recourse in Congress and, perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task. I, therefore, conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government. But this is not enough for the courts to intervene.

(Insert to be added here)

The majority opinion concludes that this is true but gives the people no remedy. No standards are laid down for the guidance of the District Court. It is given no directive. Indeed, it is indicated that little or nothing may be required. I do not agree with this disposition. The record is entirely sufficient for decision now once the Court hurdles the technical difficulties. I would decide it now holding that the present apportionment violates the equal protection clause of the Fourteenth Amendment. The parties should then be directed to file suggestions as to the relief that should be granted not later than the opening of the October 1962 Term. Brown v. Board of Education, U.S. ( ).

There must be available some effective judicial remedy. It is true that Tennessee has no provision for the election of its General Assembly at large but it does not follow that other relief could not be fashioned.

FOOTNOTES

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*/ I do not consider the cases of Colegrove v. Barnett, 330 U.S. 804 ( ) and Tides Co. v. Board of Supervisors, 339 U.S. 940 both dismissed for want of a substantial federal question and without the citation of authority; Coleman v. Jordan, 343 U.S. 912, dismissed, citing Colegrove v. Green, supra, and MacDougall v. Green, supra; and, Radford v. Gary, 352 U.S. 991, affirmed on the merits, citing Colegrove v. Green, supra, and Kidd v. McCanless, supra. The cases cited in support of Coleman and Radford are clearly inapposite and only confuse our problem.