SUPREME COURT OF THE UNITED STATES

No. 6. -- October Term, 1961

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

[March , 1962.]

MR. JUSTICE CLARK, concurring. — ~~ret~~

One emerging from the rash of opinions with their accompanying cloud of words may well find himself suffering a mental blindness. The Court holds that the appellants have alleged a cause of action. However, it refuses to award relief here -- although the facts are undisputed -- and fails to give the District Court any guidance whatever. One dissenting opinion, in typical pedantry bursting with words that go through so much and conclude with so little, contemns the majority action as "a massive repudiation of the experience of our whole past." Another dissenting opinion, speaking with two voices, first correctly declares that the Constitution does not require legislative representation to reflect an equiponderance of electors, i.e., a system based on "bare numbers," and then process in an appendicle "Critique" to translate "relative voting power of the counties that are

(2)

And examination of the chart accompanying this opinion definitely reveals that the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions.

It is true that the apportionment policy incorporated in Tennessee's constitution is a rational one. However, the root of the trouble is not there. It is in the action of Tennessee's Assembly in allocating legislative seats to counties or districts created by it. ~~Had its action followed the correct guidelines of the constitution the result would have been a rational one but the frequency and magnitude of the inequalities bears but one conclusion.~~ Try as one may Tennessee's apportionment statute just cannot be made to fit the pattern cut by its constitution. The policy of the constitution, relied on by the dissenters, therefore, is of no relevance here. We must examine the policy of the Assembly. The frequency and magnitude of the inequalities in representation present there admit of no definite policy. This is not to say that some of the disparity cannot be explained but when one examines the whole chart it bears but one conclusion, namely that Tennessee's statute has no rational basis. At the risk of being accused of picking out a few of the horribles I shall allude to a series of examples that are taken from the chart.

This was the finding of the District Court.

- comparing the voting strength of counties of like population as well as contrasting that of the smaller with the larger counties -

As is admitted there is a wide disparity of voting strength as between the large and small counties. It is explained as being a permissive allocation of additional political strength to rural areas. However, this does not explain the glaring inequality in population, through the various population levels shown on the chart, between counties having the same Assembly representation. Some samples are: Moore County

present

go back to typing p. 1

Insert A

The examples alluded to in the following discussion are merely illustrative of the irrational apportionment spawned in Tenn. I fully agree that the policies outlined by the dissenters on page 20 of J. Harlan's Dissent are consistent with a rational scheme. However, such enumerated polices or any other policies * do not explain the frequency and instensity of the disparity shown by the chart and illustrated by the following examaples.

*

Inset B

The dissenters take issue with the disparities present in the applts proposed plan of reapportionment. This plan is based on the rationale of equal representation, a theory which I do no believe is const'lly required, however no one could say it is irrational. The fact that it produces isolated equalities does not render it a crazy-quilt, for there are other rationale supporting these deviations as pointed out by the dissenters themselves on page 20 of J. Harlan's dissent. There is no const'l requirement that just one rationale be employed. Moreover, there is no requirement that any one rationale be applied with mathematical certainty. The dissenters in intimating that I believe that isolated mathmatical discreptancies ipso facto belie the rationality of any particular apportionment are guilty of a fallacious caricature. One must look at the total picture and an examination of the image projected by the proposed apportion as shown by the chart on page___ strikes the viewer blind with its rationality.

Insert C

In view of the detailed study that the Court has given this problem it is unfortunate that a decision is not reached on the merits. The majority appear to hold, at least sub silentio, that an invidious discrimination is present but it remands to the three judge court for it to make that formal determination. It is true that Tennessee has not filed a formal answer. However, it has filed voluminous papers and made extended argument supporting its position. At no time has it been able to contradict the appellant's factual claims; it has offered no rational explanation for the present apportionment; indeed, it has indicated there are none known to it. In fact, the case proceeded to the point before the three judge court that it was able to find an invidious discrimination factually present, and the state has not contested that holding here. In view of all this background I doubt if anything will be gained by the State on the remand, other than time. Nevertheless, my position in litigation involving a state as a party has consistently been that we should move slowly, giving deference to its sovereignty to the end that its rights be fully protected. However, in fairness, I ~~did~~ do think that Tennessee was entitled to have my idea of what it faces on the facts and the trial court some light as to how it might proceed.

In my view the decision today is in keeping with the highest traditions of the Court. Its chief function being to protect national

rights, its division here supports the proposition for which our forebears fought and many died, namely fair representation in the affairs of government. That is the keystone upon which our government was founded and lacking which no republic can survive. Self-restraint and discipline in constitutional adjudication have no sanctity where as here national rights are so clearly infringed and have for scores of years cried out for recognition and sanction. National respect for the courts is more enhanced through their protection than by their condonation.

II

The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters 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, 489 (1955), 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, 426 (1961).

However an examination of the apportionment picture in Tennessee reveals a Topsy of gigantic proportions. This is shown in detail in the chart attached, which clearly demonstrates the crazy quilt the statute has sewn. In addition to the wide disparity of voting strength as between the large and small counties, as pointed out by the other opinions, there is a glaring inequality in population between counties having the same representation. For example: Moore County has a representation of two[5] with a population (2,340) of only one-eleventh of Rutherford County (25,316) with the same representation; Decatur County (5,563) has the same representation as Carter (23,302) though the latter has four times the population; Fayette County (population 13,577) has the same representation (3) as Sullivan County (population 55,712); likewise Loudon County (13,624), Houston (3,084),

5. "Total representation" indicates the combined representation in the state senate (33 members) and the state house of representatives (99 members) in the Assembly of Tennessee. Assuming a county has

[Footnote continued next page.]

and Anderson County (33,990) have the same representation, i.e., 1.25 each. But it is said that in this illustration all of the under-represented counties contain municipalities of over 10,000 population and they therefore should be included under the "urban" classification placing their disparity within a desirable political balance. But in so doing one is caught up in his own straight jacket for many counties have municipalities with a population exceeding 10,000, still the same invidious discrimination is present between them. For example:

County	Population	Representation
Carter	23,303	1.10
Maury	24,556	2.25
Washington	36,967	1.99
Madison	37,245	3.50

---

5. (Cont'd)
one representative, it is credited in this calculation with 1/99. Likewise, if the same county has one-third of a senate seat it is credited with another 1/99, and thus such a county, in our calculation, would have a "total representation" of two; if a county has one representative and one-sixth of a senate seat, it is credited with 1.5/99, or 1.50. It is this last figure that I use here in an effort to make the comparisons clear. The 1950 rather than the 1960 census of voting population is used. This avoids the charge that use of 1960 tabulations might not have allowed sufficient time for the state to act. However, the 1960 picture is more irrational than the 1950 one.

Likewise counties with no municipality of over 10,000 population suffer a similar discrimination:

County	Population	Representation
Grundy	6,540	0.95
Chester	6,391	2.00
Cumberland	9,593	0.63
Crockett	9,676	2.00
Coffee	13,406	2.00
Fayette	13,577	3.00

This could not be an effort to give a desirable political balance between rural and urban populations. Since discrimination is present between counties of like population the plan is neither consistent nor rational. It discriminates horizontally creating gross disparities between rural areas themselves and between urban areas themselves,[6] still maintaining the wide vertical disparity already pointed out as between rural and urban.

It is also insisted that the representation formulae used above (see fn. 5) is "patently deficient" because "it eliminates from consideration the relative voting power of the counties joined together in a single election district." This is a strange claim coming from those who rely entirely on the proposition that "the voice of every voter"

---

6. Of course this was not the case in the Georgia county unit system, South v. Peters, supra, or the Illinois initiative plan, MacDougall v. Green, supra, where recognized political units having independent significance were given minimum political weight.

need not have "approximate equality." Indeed, representative government, as they say, is not one of "bare numbers." The system of flotorial districts in our system has never been one where the flotorial representative is splintered between the counties of his district. His function is, as it always has been, to represent the whole district. To use a mathematical formulae--or as it otherwise is described, "a table of logarithms"--that carves up the representative (as is suggested 1/15 to Moore County) not only runs counter to the premise that representative government is not based on "bare numbers" but is contrary to our whole scheme of republican government.

However, I shall meet the charge on its own ground and, by use of its own "adjusted 'total representation' " formulae, show that it is locoed. For example, compare some urban areas of like populations, using that formulae:

County	Population	Representation
Washington	36,967	2.64
Madison	37,245	4.86
Carter	23,303	1.52
Greene	23,649	2.09
Maury	24,556	3.82
Coffee	13,406	2.14
Hamblen	14,090	1.18

And now, using the same formulae, compare some so-called "rural" areas of like population:

County	Population	Representation
Trousdale	3,351	1.10
Lewis	3,413	0.40
Stewart	5,238	1.57
Cheatham	5,263	0.72
Chester	6,391	1.36
Grundy	6,540	0.68
Smith	8,731	2.05
Unicoi	8,767	0.40

And, for counties with similar representation, but with gross differences in population, take:

County	Population	Representation
Sullivan	55,712	4.08
Maury	24,556	3.82
Blount	30,353	2.11
Coffee	13,000	2.14

These cannot be "distorted effects" for here the same formulae proposed by the dissenters is used and the result is even "a crazier" quilt.

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 one, not even the state nor the dissenters, have come up with any rational basis for Tennessee's apportionment statute.

No one--except the dissenters in their "adjusted total representation" formulae --contend that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational pattern to a state's districting. The discrimination here does not fit any pattern--as I have said, it is but a crazy quilt. Like the District Court, I conclude that "Tennessee is guilty of a clear violation of the State Constitution and of the [federal] rights of the plaintiffs."

joined together in single election districts" into its ~~charts~~ tables picturing populationwise the relative legislative representation districts. I believe it can be shown that this case is distinguishable from earlier cases dealing with the distribution of political power by a State, that here a patent violation of the Equal Protection Clause of the United States Constitution has been shown, and that an appropriate remedy may be formulated.

I.

I take the law of the case from MacDougall v. Green, 335 U.S. 281 (1948), which involved an attack under the Equal Protection Clause upon an Illinois election statute. The Court decided that case on its merits without hin-

Harlan

No one--except the dissenters in their "adjusted 'total representation'" formula--contend that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational pattern to a State's districting. The discrimination here does not fit any pattern--as I have said, it is but a crazy quilt. Like the District Court, I conclude that "Tennessee is guilty of a clear violation of the State Constitution and of the [federal] rights of the plaintiffs."

drance from the "political question" doctrine. Although the statute under attack was upheld, it is clear that the Court based its decision upon the determination that the statute represented a rational state policy. It stated:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to 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.*" *Id.*, at 284. (Emphasis supplied.)

The other cases upon which my Brethren dwell are all distinguishable or inapposite. The widely heralded case of *Colegrove* v. *Green*, 328 U. S. 549 (1946), was a case not only in which the Court was bob-tailed but in which there was no majority opinion. Indeed, even the "political question" point in MR. JUSTICE FRANKFURTER'S opinion was no more than an alternative ground.[1] Moreover, the appellants did not even make an equal protection argument.[2] While it has served as a Mother Hubbard to most of the subsequent cases, I feel it was in that respect ill-cast and for all of these reasons put it to one side.[3] Like-

[1] The opinion stated that the Court "could also dispose of this case on the authority of *Wood* v. *Broom* [287 U. S. 1]." *Wood* v. *Broom* involved only the interpretation of a congressional reapportionment Act.

[2] Similarly, the Equal Protection Clause was not involved in *Tedesco* v. *Board of Supervisors*, 339 U. S. 940 (1950).

[3] I do not read the later case of *Colegrove* v. *Barrett*, 330 U. S. 804 (1947), as having rejected the equal protection argument adopted here. That was merely a dismissal of an appeal where the equal protection point was mentioned along with attacks under three other constitutional provisions, two congressional Acts, and three state constitutional provisions.

The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters 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, 489 (1955), 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, 426 (1961).

However an examination of the apportionment picture in Tennessee reveals a Topsy of gigantic proportions. This is shown in detail in the chart attached, which clearly demonstrates the crazy quilt the statute has sewn. In addition to the wide disparity of voting strength as between the large and small counties, as pointed out by the other opinions, there is a glaring inequality in population between counties having the same representation. For example: Moore County has a representation of two[5] with a population (2,340) of only one-eleventh of Rutherford County (25,316) with the same representation; Decatur County (5,563) has the same representation as Carter (23,302) though the latter has four times the population; Fayette County (population 13,577) has the same representation (3) as Sullivan County (population 55,712); likewise Loudon County (13,624), Houston (3,084),

5. "Total representation" indicates the combined representation in the state senate (33 members) and the state house of representatives (99 members) in the Assembly of Tennessee. Assuming a county has

and Anderson County (33,990) have the same representation, i.e., 1.25 each. But it is said that in this illustration all of the under-represented counties contain municipalities of over 10,000 population and they therefore should be included under the "urban" classification, rationalizing as an attempt to effect placing their disparity within a desirable political balance. But in so doing one is caught up in his own straight jacket, for many counties have municipalities with a population exceeding 10,000, yet still the same invidious discrimination is present between them. For example:

County	Population	Representation
Carter	23,303	1.10
Maury	24,556	2.25
Washington	36,967	1.99
Madison	37,245	3.50

---

5. (Cont'd)
one representative, it is credited in this calculation with 1/99. Likewise, if the same county has one-third of a senate seat it is credited with another 1/99, and thus such a county, in our calculation, would have a "total representation" of two; if a county has one representative and one-sixth of a senate seat, it is credited with 1.5/99, or 1.50. It is this last figure that I use here in an effort to make the comparisons clear. The 1950 rather than the 1960 census of voting population is used. This avoids the to avoid the charge that use of 1960 tabulations might not have allowed sufficient time for the State to act. However, the 1960 picture is more irrational than the 1950 one. even

Likewise counties with no municipality of over 10,000 population suffer a similar discrimination:

County	Population	Representation
Grundy	6,540	0.95
Chester	6,391	2.00
Cumberland	9,593	0.63
Crockett	9,676	2.00
Coffee	13,406	2.00
Fayette	13,577	3.00

This could not be an effort to give a desirable political balance between rural and urban populations. Since discrimination is present between counties of like population, the plan is neither consistent nor rational. It discriminates horizontally creating gross disparities between rural areas themselves as well as between urban areas themselves,[6] still maintaining the wide vertical disparity already pointed out as between rural and urban.

It is also insisted that the representation formula used above (see fn. 5) is "patently deficient" because "it eliminates from consideration the relative voting power of the counties joined together in a single election district." This is a strange claim coming from those who rely ~~entirely~~ on the proposition that "the voice of every voter"

---

6. Of course this was not the case in the Georgia county unit system, South v. Peters, supra, or the Illinois initiative plan, MacDougall v. Green, supra, where recognized political units having independent significance were given minimum political weight.

need not have "approximate equality." Indeed, representative government, as they say, is not one of "bare numbers." The system of flotorial districts in our system has never been one where the flotorial representative is splintered between the counties of his district. His function is, as it always has been, to represent the whole district. To use a mathematical formula--or as it otherwise is described, "a table of logarithms"--that carves up the representative (as is suggested, 1/15 to Moore County) not only runs counter to the premise that representative government is not based on "bare numbers" but is contrary to our whole scheme of republican government.

However, I shall meet the charge on its own ground and, by use of its own "adjusted 'total representation'" formula, show that it is locoed. For example, compare some urban areas of like populations, using the Harlan formula:

County	Population	Representation
Washington	36,967	2.64
Madison	37,245	4.86
Carter	23,303	1.52
Greene	23,649	2.09
Maury	24,556	3.82
Coffee	13,406	2.14
Hamblen	14,090	1.18

And now, using the same formula, compare some so-called "rural" areas of like population:

County	Population	Representation
Trousdale	3,351	1.10
Lewis	3,413	0.40
Stewart	5,238	1.57
Cheatham	5,263	0.72
Chester	6,391	1.36
Grundy	6,540	0.68
Smith	8,731	2.05
Unicoi	8,767	0.40

And, for counties with similar representation, but with gross differences in population, take:

County	Population	Representation
Sullivan	55,712	4.08
Maury	24,556	3.82
Blount	30,353	2.11
Coffee	13,000	2.14

These cannot be "distorted effects" for here the same formula proposed by the dissenters is used and the result is even "a crazier" quilt.

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 one, not even the State nor the dissenters, have come up with any rational basis for Tennessee's apportionment statute.

wise, I do not consider the Guaranty Clause cases involving Art. I, § 4, of the Constitution, because it is not invoked here and it involves different criteria, as the Court's opinion indicates. Cases resting on various other considerations not present here, such as *Radford* v. *Gary*, 352 U. S. 991 (1957) (lack of equity); *Kidd* v. *McCanless*, 362 U. S. 920 (1956) (adequate state grounds supporting the state judgment); *Anderson* v. *Jordan*, 343 U. S. 912 (1952) (adequate state grounds); *Remmey* v. *Smith*, 342 U. S. 916 (1952) (failure to exhaust state procedures), are of course not controlling. Finally, the Georgia county unit system cases, such as *South* v. *Peters*, 339 U. S. 276 (1950), reflect the viewpoint of *MacDougall*, *i. e.*, to refrain from intervening where there is some rational policy behind the State's system.[4]

II.

The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters 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, 489 (1955), 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, 426 (1961). The claim in this regard is that Tennessee in its apportionment law was but making an effort to give a desirable political balance between the thinly populated counties and those having concentrated masses. But this cannot be, for discrimination is present between rural areas as well. For

[4] Georgia based its election system on a consistent combination of political units and population, giving six unit votes to the eight most populous counties, four unit votes to the 30 counties next in population, and two unit votes to each of the remaining counties.

wise, I do not consider the Guaranty Clause cases involving Art. I, §4, of the Constitution, because it is not invoked here and it involves different criteria, as the Court's opinion indicates. Cases resting on various other considerations not present here, such as Radford v. Gary, 352 U.S. 991 (1957) (lack of equity); Kidd v. McCanless, 362 U. S. 920 (1956) (adequate state grounds supporting the state judgment); Anderson v. Jordan, 343 U. S. 912 (1952) (adequate state grounds); Remmey v. Smith, 342 U.S. 916 (1952) (failure to exhaust state procedures), are of course not controlling. Finally, the Georgia county unit system cases, such as South v. Peters, 339 U.S. 276 (1950), reflect the viewpoint of MacDougall, i.e., to refrain from intervening where there is some rational policy behind the State's system.[4]

I I.

The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters 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, 489 (1955), 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, 426 (1961).

---

4. Georgia based its election system on a consistent combination of political units and population, giving six unit votes to the eight most populous counties, four unit votes to the 30 counties next in population, and two unit votes to each of the remaining counties.

Same as old ft note 4

It is true that the apportionment policy incorporated in Tennessee's constitution is a rational one. However, the root of the trouble is not there. It is in the action of Tennessee's Assembly in allocating legislative seats to counties or districts created by it. Try as one may, Tennessee's apportionment statute just cannot be made to fit the pattern cut by its constitution. This was the finding of the District Court. The policy of the constitution, relied on by the dissenters, therefore, is of no relevance here. We must examine the policy of the Assembly. The frequency and magnitude of the inequalities in representation present there admit of no definite policy. And examination of the ~~chart~~ table accompanying this opinion definitely reveals that the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions. This is not to say that some of the disparity cannot be explained, but when one examines the whole ~~chart~~ table--comparing the voting strength of counties of like population as well as contrasting that of the smaller with the larger counties--it leaves but one conclusion, namely that Tennessee's statute has no rational basis. At the risk of being

accused of picking out a few of the horribles I shall allude to a series of examples that are taken from the ~~chart~~ TABLE.

As is admitted there is a wide disparity of voting strength as between the large and small counties. ~~It is explained as being a permissible allocation of additional political strength to rural areas. However, this does not explain the glaring inequality in population present through the various population levels shown on the chart, between counties having the same Assembly representation.~~ Some samples are: Moore County has a total representation of two[5]

---

5. "Total representation" indicates the combined representation in the state Senate (33 members) and the state House of Representatives (99 members) in the Assembly of Tennessee. Assuming a county has one representative, it is credited in this calculation with 1/99. Likewise if the same county has one-third of a senate seat it is credited with another 1/99, and thus such a county, in our calculation, would have a "total representation" of two; if a county has one representative and one-sixth of a senate seat, it is credited with 1.5/99, or 1.50. It is this last figure that I use here in an effort to make the comparisons clear. The 1950 rather than the 1960 census of voting population is used to avoid the charge that use of 1960 tabulations might not have allowed sufficient time for the State to act. However, the 1960 picture is even more irrational than the 1950 one.

with a population (2,340) of only one-eleventh of Rutherford County (25,316) with the same representation; Decatur County (5,563) has the same representation as Carter (23,302) though the latter has four times the population; Fayette County (population 13,577) has the same representation (3) as Sullivan County (population 55,712); likewise Loudon County (13,624), Houston (3,084), and Anderson County (33,990) have the same representation, i.e., 1.25 each. But it is said that in this illustration all of the under-represented counties contain municipalities of over 10,000 population and they therefore should be included under the "urban" classification, rationalizing their disparity as an attempt to effect a desirable political balance. But in so doing one is caught up in his own straight jacket, for many counties have municipalities with a population exceeding 10,000, yet the same invidious discrimination is present between them. For example:

County	Population	Representation
Carter	23,303	1.10
Maury	24,556	2.25
Washington	36,967	1.99
Madison	37,245	3.50

Likewise counties with no municipality of over 10,000 population suffer a similar discrimination:

County	Population	Representation
Grundy	6,540	0.95
Chester	6,391	2.00
Cumberland	9,593	0.63
Crockett	9,676	2.00
Loudon	13,264	1.25.
~~Coffee~~	~~13,406~~	~~2.00~~
Fayette	13,577	3.00

This could not be an effort to give a desirable political balance between rural and urban populations. Since discrimination is present between counties of like population, the plan is neither consistent nor rational. It discriminates horizontally creating gross disparities between rural areas themselves as well as between urban areas themselves,[6] still maintaining the wide vertical disparity already pointed out as between rural and urban.

It is also insisted that the representation formula used above (see fn. 5) is "patently deficient" because "it eliminates

---

6. Of course this was not the case in the Georgia county unit system, South v. Peters, supra, or the Illinois initiative plan, MacDougall v. Green, supra, where recognized political units having independent significance were given minimum political weight.

from consideration the relative voting power of the counties joined together in a single election district." This is a strange claim coming from those who rely on the proposition that "the voice of every voter" need not have "approximate equality." Indeed, representative government, as they say, is not one of "bare numbers." The system of flotorial districts in our system has never been one where the flotorial representative is splintered between the counties of his district. His function is, as it always has been, to represent the whole district. To use a mathematical formula--or as it otherwise is described, "a table of logarithms"--that carves up the representative (as is suggested, 1/15 to Moore County) not only runs counter to the premise that representative government is not based on "bare numbers" but is contrary to our whole scheme of republican government.

However, I shall meet the charge on its own ground and by use of its own "adjusted 'total representation' " formula show that it is locoed. For example, compare some urban areas of like populations, using the Harlan formula:

County	Population	Representation
Washington	36,967	2.64
Madison	37,245	4.86
Carter	23,303	1.52
Greene	23,649	2.09
Maury	24,556	3.82
Coffee	13,406	2.14
Hamblen	14,090	1.18

And now, using the same formula, compare some so-called "rural" areas of like population:

County	Population	Representation
Trousdale	3,351	1.10
Lewis	3,413	0.40
Stewart	5,238	1.57
Cheatham	5,263	0.72
Chester	6,391	1.36
Grundy	6,540	0.68
Smith	8,731	2.05
Unicoi	8,767	0.40

And, for counties with similar representation but with gross differences in population, take:

County	Population	Representation
Sullivan	55,712	4.08
Maury	24,556	3.82
Blount	30,353	2.11
Coffee	13,000 406	2.14

These cannot be "distorted effects" for here the same formula proposed by the dissenters is used and the result is even "a crazier" quilt.

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 one, not even the State nor the dissenters, ~~have~~ has come up with any rational basis for Tennessee's apportionment statute.

No one--except the dissenters ~~in~~ as to the Harlan "adjusted 'total representation' " formula--contend that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational pattern to a State's districting. The discrimination here does not fit any pattern--as I have said, it is but a crazy quilt. Like the District Court, I conclude that "Tennessee is guilty of a clear violation of the State Constitution and of the [federal] rights of the plaintiffs."

11

Even if Blount's characterizing as "urban" this would be a distinction without any difference because it would then have a gross advantage over other urban counties.

counties with the same population. For example, Gibson and Blount with approximately the same populations have different representation, *i. e.*, five to the former and 1.60 to the latter.* Superimposed on this is the differing treatment the statute gives the respective smaller counties when compared with the larger. For example, take again Gibson and Blount; the former has almost three times as much political strength against the four larger counties as does the latter.

No one contends that mathematical equality among voters is required by the Equal Protection Clause. ~~Clearly this Court cannot deny "a proper diffusion of political initiative." *MacDougall v. Green, supra.*~~ But certainly there must be some rational pattern to a State's districting, not just a crazy quilt. I cannot discover any plausible justification for this discrimination. Indeed, it clearly does not fit any yardstick. Like the District Court, I conclude that "Tennessee is guilty of a clear violation of the state constitution and of the [federal] rights of the plaintiffs."

Discussion of const'l effect of discrimination placed in separate ¶ for emphasis, adding reference to D. Ct. conclusion and minor changes.

III.

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention into so delicate a field by this Court 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. The majority of the voters have been caught up in a legislative strait jacket. Tennessee has an "informed, civically militant electorate" and "an aroused popular conscience," but it does not "sear

*Bro Harlan attempts to explain this by saying that Maryville and Alcoa city are located in Blount which make it "urban." But this puts the [illegible] with Rutherford, Carter, Sullivan & Anderson likewise "urban" under such a formula.

the conscience of the people's representatives." This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result,[1] and Governors have fought the tide only to flounder. 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 in any State. We, therefore, must 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.

IV.

Finally, we must consider if there are any appropriate modes of effective judicial relief. The federal courts are, of course, not a forum for political debate, nor should they resolve themselves into state constitutional conventions or legislative assemblies. Nor should their jurisdiction be exercised in the hope that such a declaration, as is made today, may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief. To my mind this would be nothing less than blackjacking the Assembly into reapportioning the State. If judicial competence were lacking to fashion an effective decree, I would dismiss this appeal. However, like the Solicitor General of the United States, I see no such dif-

[1] It is interesting to note that state judges often rest their decisions on the ground that this Court has precluded adjudication of the federal claim. See *Scholle* v. *Hare*, 360 Mich. 1, 104 N. W. 63 (1960).

ficulty in the position of this case. One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination. Other possibilities are present and could be considered. The plan here suggested might at least release the strangle hold now on the Assembly and permit it to redistrict itself.

In this regard the appellants have proposed a plan based on the rationale of statewide equal representation. Not believing that numerical equality of representation throughout a state is constitutionally required, ~~that plan has no support here. Nevertheless,~~ the dissenters attack it by the application of the Harlan "adjusted 'total representation' " formula. The result is that some isolated inequalities are shown, but this in itself does not make the proposed plan irrational or place it in the "crazy quilt" category. Those, as the dissenters point out in attempting to support ~~supporting~~ the present apportionment as rational, are explainable. Moreover, there is no requirement that any plan have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both

I would not apply such a standard albeit a permissive one. Nevertheless,

magnitude and frequency can it be said that there is present an invidious discrimination.

In view of the detailed study that the Court has given this problem, it is unfortunate that a decision is not reached on the merits. The majority appears to hold, at least sub silentio, that an invidious discrimination is present, but it remands to the three judge court for it to make what is certain to be that formal determination. It is true that Tennessee has not filed a formal answer. However, it has filed voluminous papers and made extended arguments supporting its position. At no time has it been able to contradict the appellant's factual claims; it has offered no rational explanation for the present apportionment; indeed, it has indicated that there are none known to it. As I have emphasized, the case proceeded to the point before the three judge court that it was able to find an invidious discrimination factually present, and the State has not contested that holding here. In view of all this background I doubt if anything more can be offered or will be gained by the State on the remand, other than time. Nevertheless, not being able to muster a court to dispose of the

case on the merits I shall acquiesce in the decision to remand. However, in fairness, I do think that Tennessee is entitled to have my idea of what it faces on the record before us and the trial court some light as to how it might proceed.

As Chief Justice Rutledge said almost 170 years ago, the chief function of the Court is to protect the national rights. Its decision today supports the proposition for which our forebears fought and many died, namely that "to be fully conformable to the principle of right, the form of government must be truly representative." That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court.

~~CHART~~ Table I

9pt caps center =

Present total representation using Clark's formula

Present total representation using J. Hardin's formula

proposed total representation (appellants' plan) using J. Hardin's formula

County	1950 Voting Pop.	Total Rep. Schotland 1901	Prop.	Total Rep. Lewin 1901	Prop.	Total Rep. Combined 1901	Prop
Van Buren	2,039	.63	.62	.23	.13	.86	.75
Moore	2,340	2.00	.85	1.24	.24	3.24	1.09
Pickett	2,565	.70	.67	.21	.23	.91	.90
Sequatchie	2,904	.63	.83	.32	.17	.95	1.00
Meigs	3,039	.93	.80	.49	.17	1.42	.97
Houston	3,084	1.25	.75	.46	.23	1.71	.98
Trousdale	3,351	1.33	1.00	1.10	.12	2.43	1.12
Lewis	3,413	1.25	.80	.40	.26	1.65	1.06
Perry	3,711	1.50	.83	.72	.41	2.22	1.24
Bledsoe	4,198	.63	.62	.50	.24	1.12	.86
Clay	4,528	.70	.85	.38	.43	1.08	1.28
Union	4,600	.76	1.33	.36	.44	1.10	1.77
Hancock	4,710	.93	.83	.61	.51	1.54	1.34
Stewart	5,238	1.75	.77	1.57	.40	3.32	1.17
Cheatham	5,263	1.33	1.00	.72	.19	2.05	1.19
Cannon	5,341	2.00	1.08	1.42	.52	3.42	1.60
Decatur	5,230 563	1.10	.70	.92	.51	2.02	1.21
Lake	6,252	2.00	1.00	1.45	.42	3.45	1.42
Chester	6,391	2.00	1.10	1.36	.36	3.36	1.30
Grundy	6,540	.95	.83	.68	.45	1.63	1.27
Humphreys	6,588	1.25	1.00	1.39	.73	2.64	1.73
Johnson	6,649	1.10	2.00	.43	.44	1.53	2.44
Jackson	6,719	1.50	.67	1.42	.62	2.92	1.29
De Kalb	6,984	2.00	.75	1.57	.68	3.57	1.43
Benton	7,023	1.10	.83	.89	.67	1.99	1.50
Fentress	7,057	.70	.75	.62	.64	1.32	1.39
Grainger	7,125	.93	1.00	.93	.64	1.86	1.64
Wayne	7,176	1.25	.93	.68	.75	1.93	1.68
Polk	7,330	1.25	1.10	.68	.72	1.93	1.82
Hickman	7,598	2.00	.93	1.84	.80	3.84	1.73

County	Voting Pop.	Total Rep. Schotland 1901	Prop.	Total Rep. Lewin 1901	Prop.	Total Rep. Combined 1901	Prop.
Macon	7,974	1.33	.85	1.00	.61	2.33	1.46
Morgan	8,308	.93	.75	.59	.75	1.52	1.50
Scott	8,417	.76	.92	.67	.62	1.43	1.54
Smith	8,731	2.50	.85	2.05	.70	4.55	1.55
Unicoi	8,787	.93	1.08	.40	.61	1.33	1.69
Rhea	8,937	.93	.70	1.41	.21	2.34	.91
White	9,244	1.43	.85	1.69	.91	3.12	1.76
Overton	9,474	1.70	.75	1.80	.89	3.50	1.64
Hardin	9,577	1.60	1.00	1.60	.93	3.20	1.93
Cumberland	9,593	.63	.75	1.10	.87	1.73	1.62
Crockett	9,676	2.00	1.25	1.66	.63	3.66	1.88
Henderson, ±	10,199	1.50	.83	.79	.96	2.29	1.79
Marion	10,998	1.75	.83	1.75	.72	3.50	1.55
Marshall	11,288	2.50	.93	2.29	.84	4.79	1.77
Dickson	11,294	1.75	1.00	2.29	1.23	4.04	2.23
Jefferson	11,359	1.10	1.00	.87	.99	1.97	1.99
McNairy	11,601	1.60	1.00	1.75	1.12	3.35	2.12
Cocke	12,572	1.60	1.08	1.45	.88	3.05	1.96
Sevier	12,793	1.60	1.00	1.48	.68	3.08	1.68
Claiborne	12,799	1.43	.83	1.60	1.33	3.03	2.16
Monroe	12,884	1.75	1.10	1.69	1.30	3.44	2.40
Loudon	13,264	1.25	1.50	.27	.51	1.52	2.01
Warren	13,337	1.75	1.42	1.87	1.68	3.62	3.11
Coffee	13,406	2.00	1.42	2.32	1.68	4.32	3.11
Hardeman	13,565	1.60	1.60	1.87	1.12	3.47	2.72
Fayette	13,557	2.50	1.60	2.47	1.12	4.97	2.72
Haywood	13,934	2.50	2.00	2.53	1.69	5.03	3.69
Williamson	14,064	2.33	1.75	2.95	1.72	5.28	3.47
Hamblen	14,090	1.10	1.50	1.06	1.66	2.16	3.16
Franklin	14,297	1.75	1.60	1.99	1.72	3.74	3.32
Lauderdale	14,413	2.50	1.75	2.46	1.72	4.96	3.47
Bedford	14,732	2.00	1.75	1.44	1.75	3.44	3.50