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 Clark, concurring in part and dissenting in part.

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 not only refuses to expressly determine the constitutional issue and to award relief here—although the facts are undisputed—but it also fails to give the District Court any guidance whatever. A second opinion finds the issue a "political question" beyond the Court's competence. And another describes the complaint as merely asserting "bare allegations" that Tennessee's apportionment is "incorrect," "arbitrary," "obsolete," and mere conclusions of the pleader. I believe it can be shown that this case is distinguishable from earlier cases dealing with the distribution of political power, that here a clear violation of the Equal Protection Clause of the United States Constitution has been proved, and that the Court should proceed to formulate a remedy if such can reasonably be done.

I.

I take the law of the case from *MacDougall* v. *Green*, 335 U. S. 281 (1948). The Court decided that case,

involving an Illinois election statute, on its merits. There the Court held:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad 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 not only a case in which the Court was bob-tailed but in which there was no majority opinion. 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. Likewise, I do not consider the Guarantee Clause cases involving Art. I, § 4, of the Constitution because it is not invoked. *Remmey* v. *Smith*, 342 U. S. 916 (1952), in which state procedures had not been exhausted, and *Kidd* v. *McCandless*, 352 U. S. 920 (1956), which went off on state grounds, are neither controlling. Finally the Georgia County unit system cases, such as *South* v. *Peters*, 339 U. S. 276 (1950), reflect the policy announced in *MacDougall* to refrain from intervening where there is some rationale policy behind the State's system.[1] As has been previously stated, *MacDougall* did reach the merits and laid down the test of "proper diffusion" and "practical opportunities" for effecting a change. None of the cases appear in point unless they

[1] There the State based its election system on a consistent combination of geography and population, giving six unit votes to the eight largest counties, four unit votes to the 30 counties next in size, and two unit votes to each of the remaining counties.

stand for the proposition that sufficient time to consider the merits before the election was not present. See Annotation, 94 L. Ed. 839. The case seems to have been sported off and is, in my opinion, without value as a precedent.

II.

The facts are undisputed. 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." 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 (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 (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 rural and urban populations. But this cannot be for discrimination is present between rural areas as well. For example, Moore County has a representation of two [2] with a population (2,340) of only one-twelfth 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 pop-

[2] "Total representation" indicates the combined representation in the state senate and the state house of representatives in the Assembly of Tennessee, *i. e.*, there are 33 senators and 99 representatives. 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 would, in our calculation, have a "total representation" of two. It is this last figure that I use here in an effort to make the comparisons clear.

ulation; Gibson with some 30,000 people has a representation of five while Blount County with about the same population has only 1.6; 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. This discrimination on its face does not give a desirable balance between the rural and urban populations. It creates an invidious discrimination among the rural populations themselves. Likewise a comparison of the populations of each of the four large counties indicates a discrimination—albeit not so pronounced—among them. For example, Knox County has 25% more representation than Hamilton with only ~~9,000 (7%)~~ more people, while Shelby County has only ~~one-sixth~~ representation, than ~~more~~ Davidson, although the population of the former is almost 50% higher.

In addition to the wide disparity between the voting strength as between the large and small counties, as pointed out by the other opinions, there is a glaring inequality between 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. There are other numerous examples of wide disparity as between rural counties themselves. 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. Certainly there should be some rational pattern, not just a crazy quilt. I cannot find any rational standard in this discrimination. Indeed, it does not fit any yardstick. No one contends that mathematical equality is required, but the standard used must

be more than the blind impulse of the legislators. Instead of a reasonable legislative judgment the present apportionment is an irrational legislative policy.

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 was any other relief available to the people of Tennessee. Certainly this Court cannot deny "a proper diffusion of political initiative," *MacDougall* v. *Green, supra.* 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 straight jacket. Tennessee has an "informed, militant electorate" and "an aroused popular conscience," but it does not "sear 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,[3] and Governors have fought the tide only to be floundered. It is said that there is recourse in Congress and, perhaps that amy be, but from a practical standpoint this is without

[3] 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 (1960).

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 is lacking to fashion an effective decree, I would dismiss this appeal. However, like the Solicitor General of the United States, I see no such difficulty in the position of this case. By starting with the existing assembly districts it would be an easy matter to consolidate some and award the seats thus released to those counties suffering the most egregious discrimination. This might not be the ideal reapportionment, but it would at least release the strangle hold now on the Assembly and permit it to redistrict itself.

As I read the majority opinion it holds *sub silentio* that an invidious discrimination is present here. This being true, it strikes me that the Court should record that holding. The record is sufficient for such an adjudication. Indeed, the facts from which that decision follows are not seriously contested and are all before us.

My difference with the majority, therefore, narrows down to this: I would decide the case on the merits. Instead of remanding it for the District Court to deter-

mine the merits and fashion the relief, I would do that here. There is not need to delay the merits of the case any further. Indeed, as I say, it seems to be decided *sub silentio* anyway. On the relief I would set that down for argument at the opening of the next Term, October 1962. See *Brown* v. *Board of Education*, 347 U. S. 483, 485–486 (1954).