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 conclusory allegations that Tennessee's apportionment is "incorrect," "arbitrary," "obsolete," and "unconstitutional." 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 this Court should proceed to formulate a remedy.

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-

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-

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[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.

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.

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; 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 heavily and thinly populated counties. 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 7% (9,000) more people, while Shelby County has only 20% more representation than Davidson, although the population of the former is almost 50% higher.

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 between

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[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.

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."

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

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,[6] 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-

[6] 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 could be considered. The plan adopted might not result in the ideal reapportionment, but we could 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 determine the merits and fashion the relief, I would do that here. There is no need to delay the merits of the case any further as it has been before the Court for two Terms and fully argued twice. Indeed, as I say, it seems to be decided *sub silentio* anyway. On the relief, I would request counsel to submit plans and set the matter down for argument at the opening of the next Term, October 1962. See *Brown* v. *Board of Education*, 347 U. S. 483, 495–496 (1954).