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. For example, the Court holds that the appellants have alleged a cause of action. However, it not only refuses to award relief here--though the facts are undisputed--but also fails to give the District Court any guidance whatever. Another opinion describes the complaint as merely asserting "bare allegations" that Tennessee's apportionment is "incorrect," "arbitrary," "obsolete" and mere conclusions of the pleader. But, as I hope to show, the record indicates clearly that Tennessee's apportionment policy visits "a pernicious discrimination" on its electorate. Indeed, the policy is so bald-faced that the state at argument could not rationalize the state's legislative policy with any reasonable standard.

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." At p. 284.

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. In addition, it involved congressional apportionment which the Constitution specifically commits to congressional discretion. 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 Article 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 unit system cases, such as South v. Peters, 339 U.S. 276 (1950) are not apposite. There the Court refused to reach the merits. It did not exercise its equity powers, citing both Colegrove and McDougall, supra, and Wood v. Brown, 287 U.S. 1 (1932). In the latter case the Court never reached the justiciability of the controversy nor the right to relief in equity. The case involved congressional apportionment as did Colegrove. As has been previously stated, McDougall 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 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.

I I.

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 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; Fayette County (population 13,577) has the same number (3) representatives as Sullivan County (population 55,712); likewise Loudon County (13,624), Houston (3084) 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. For we find that there are only four large counties ranging from a population of 142,000 to 312,000 people. Still the smallest of these population-wise has only three representatives and the largest 7 1/2.

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, Tibson 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.

We now reach the question of what practical recourse the people of Tennessee have to correct this situation. 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 legiblative 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 rebussed at the hands of the Assembly; they have tried the constitutional convention route but, with the representation there being of the same ratio as that present in the Assembly 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 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 re-apportioning the state. If judicial competence is lacking to fashion an effective decree I would dismiss this appeal. However, like the Solicitor General

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*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).

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 re-apportionment 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 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. 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, 495-6 (1954).