EXTRA COPY

To: The Chief Justice
Mr. Justice Black
Mr. Justice Frankfurter
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart

From: Harlan, J.

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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.]

Dissenting opinion of Mr. Justice Harlan, whom Mr. Justice Frankfurter, and Mr. Justice Whittaker join.

The dissenting opinion of Mr. Justice Frankfurter, in which I join, demonstrates the abrupt departure the majority makes from judicial history by putting the federal courts into this area of state concerns—an area which, in this instance, the Tennessee courts themselves have refused to enter.

It does not detract from his opinion to say that the panorama of judicial history it unfolds, though evincing a common underlying principle of keeping the federal courts out of these domains, has a tendency, because of variants in expression, to becloud analysis in a given case. With due respect to the majority, I think that has happened here.

Once one cuts through the thicket of discussion devoted to "jurisdiction," "standing," "justiciability," and "political question," there emerges a straightforward constitutional issue which, in my view, is determinative of this case. Does the complaint disclose a violation of a federal constitutional right, in other words, a claim over which a United States District Court would have jurisdiction under 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983? The majority opinion does not actually discuss this basic question, but, as my Brother Clark observes, seems to decide

it "*sub silentio.*" *Ante,* pp. —. However, in my opinion, appellants' allegations, accepting all of them as true, do not, parsed down or as a whole, show an infringement by Tennessee of any rights assured by the Fourteenth Amendment. Accordingly, I believe the complaint should have been dismissed for "failure to state a claim upon which relief can be granted." Fed. Rules Civ. Proc., 12 (b)(6).

It is at once essential to recognize this case for what it is. The issue here relates not to a method of state electoral apportionment by which seats in the federal House of Representatives are allocated, but solely to the right of a State to fix the basis of representation in its *own* legislature. Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done, or failed to do, in this instance runs afoul of any such limitation, we need not reach the question of "justiciability," or any of the other considerations, which in such cases as *Colegrove* v. *Green,* 328 U. S. 549, led the Court to decline to adjudicate a challenge to a state apportionment affecting seats in the Federal House of Representatives.

In this case it is asserted that Tennessee has violated the Equal Protection Clause of the Fourteenth Amendment by maintaining in effect a system of apportionment that grossly favors in legislative representation the rural sections of the State as against its urban communities. Stripped to its essentials the complaint purports to set forth three constitutional claims of varying breadth:

> (1) The Equal Protection Clause requires that each vote cast in state legislative elections be given approximately equal weight.
>
> (2) Short of this, the existing apportionment of state legislators is so unreasonable as to amount to an arbitrary and capricious act of classification on the part of Tennessee Legislature.

(3) In any event, the existing apportionment is rendered invalid under the Federal Constitution because it flies in the face of the Tennessee Constitution.

For reasons given in MR. JUSTICE FRANKFURTER's opinion, *ante*, pp. 57–58, the last of these propositions is manifestly untenable, and need not be dealt with further. I turn to the other two.

I.

I can find nothing in the Federal Constitution which expressly or impliedly supports the view that state legislatures must be so structured as to reflect with approximate equality the voice of every voter. Not only is that proposition refuted by history, as shown by my Brother FRANKFURTER, but it strikes deep into the heart of our federal system. Its acceptance would require us to turn our backs on the regard which this Court has always shown for the judgment of state legislatures and courts on matters of essentially local concern.

In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government. It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that. To consider that we may ignore the Tennessee Legislature's judgment in this instance because that body was the product of an asymmetrical electoral apportionment, would in effect be to assume the very conclusion here disputed. Hence we must accept the present form of the Tennessee Legislature as the embodiment of the State's choice, or, more realistically, its compromise, between competing political philosophies.

The federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's internal conflict is desirable or undesirable, wise or unwise.

With respect to state tax statutes and regulatory measures, for example, it has been said that the "day is gone when this Court uses the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488. I would think it all the more compelling for us to follow this principle of self-restraint when what is involved is the freedom of a State to deal with so intimate a concern as the structure of its own legislative branch. The Federal Constitution imposes no limitation on the form which a state government may take other than committing to the United States generally the duty to guarantee to every State "a Republican Form of Government." And, as my Brother FRANKFURTER so conclusively proves (*ante,* pp. 42–50), no intention to fix immutably the means of selecting representatives for state governments could have been in the minds of either the Founders or the draftsmen of the Fourteenth Amendment.

In short, there is nothing in the Federal Constitution to prevent a State, acting not irrationally, from choosing any legislative structure it thinks best suited to the interests, temper, and customs of its people. I would have thought this proposition settled by *MacDougall* v. *Green*, 335 U. S. 281, in which the Court observed (at p. 283) that to "assume that political power is a function exclusively of numbers is to disregard the practicalities of government," and reaffirmed by *South* v. *Peters,* 339 U. S. 276. A State's choice to distribute electoral strength among geographical units, rather than according to a census of population, is certainly no less a rational deci-

sion of policy than would be its choice to levy a tax on property rather than a tax on income. Both are legislative judgments entitled to equal respect from this Court.

II.

The claim that Tennessee's system of apportionment is so unreasonable as to amount to a capricious classification of voting strength stands up no better under dispassionate analysis.

The Court has said time and again that the Equal Protection Clause does not demand of state enactments either mathematical identity or rigid equality. *E. g., Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522, 527–528, and authorities there cited; *McGowan* v. *Maryland,* 366 U. S. 420, 425–426. All that is prohibited is "invidious discrimination" bearing no rational relation to any permissible policy of the State. *Williamson* v. *Lee Optical Co., supra,* at 489. And in deciding whether such discrimination has been practiced by the State, it must be borne in mind that a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland, supra.* It is not inequality alone that calls for a holding of unconstitutionality; only if the inequality is based on an impermissible standard may this Court condemn it.

What then is the basis for the claim made in this case that the distribution of state senators and representatives is the product of capriciousness or of some constitutionally prohibited policy? It is not that Tennessee has arranged its electoral districts with a deliberate purpose to dilute the voting strength of one race, cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339, or that some religious group is intentionally underrepresented. Nor is it a charge that the legislature has indulged in sheer caprice by allotting representatives to each county on the basis of a throw of the dice, or of

some other determinant bearing no rational relation to the question of apportionment. Rather, the claim is that the State Legislature has unreasonably retained substantially the same allocation of senators and representatives as was established by statute in 1901, refusing to recognize the great shift in the population balance between urban and rural communities that has occurred in the meantime.

It is further alleged that even as of 1901 the apportionment was invalid, in that it did not allocate state legislators among the counties in accordance with the mathematical formula set out in Art. II, § 5, of the Tennessee Constitution. In support of this the appellants have furnished a Table which indicates that as of 1901 six counties were overrepresented and 11 were underrepresented. But that Table in fact shows nothing in the way of significant discrepancy; in the instance of each county it is only one representative who is either lacking or added. And it is further perfectly evident that the variations are attributable to nothing more than the circumstance that the then enumeration of voters resulted in fractional remainders with respect to which the precise formula of the Tennessee Constitution was in some instances slightly disregarded. Unless such *de minimis* departures are to be deemed of significance, these statistics certainly provide no substantiation for the charge that the 1901 apportionment was arbitrary and capricious. Indeed, they show the contrary.

Thus reduced to its essentials, the charge of arbitrariness and capriciousness rests entirely on the consistent refusal of the Tennessee Legislature over the past 60 years to alter a pattern of apportionment that was reasonable when conceived.

A federal District Court is asked to say that the passage of time has rendered the 1901 apportionment obsolete to the point where its continuance becomes vulnerable under the Fourteenth Amendment. But is not this matter one

that involves a classic legislative judgment? Surely it lies within the province of a state legislature to conclude that an existing allocation of senators and representatives constitutes a desirable balance of geographical and demographical representation, or that in the interest of stability of government it would be best to defer for some further time the redistribution of seats in the state legislature.

Indeed, I would hardly think it unconstitutional if a state legislature's expressed reason for establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities. A State may, after all, take account of the interests of its rural population in the distribution of tax burdens, *e. g.*, *American Sugar Rfg. Co.* v. *Louisiana*, 179 U. S. 89, and recognition of the special problems of agricultural interests has repeatedly been reflected in federal legislation, *e. g.*, Capper-Volstead Act, 42 Stat. 388; Agricultural Adjustment Act of 1938, 52 Stat. 31. Even the exemption of agricultural activities from state criminal statutes of otherwise general application has not been deemed offensive to the Equal Protection Clause. *Tigner* v. *Texas*, 310 U. S. 141. Does the Fourteenth Amendment impose a stricter limitation upon a State's apportionment of political respresentatives to its central government? I think not. These are matters of local policy, on the wisdom of which the federal judiciary is neither permitted nor qualified to sit in judgment.

The suggestion of my Brother FRANKFURTER that courts lack standards by which to decide such cases as this, is relevant not only to the question of "justiciability," but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case. Courts are unable to decide when it is that an apportionment originally valid becomes void because the factors entering into such

a decision are basically matters appropriate only for legislative judgment. And so long as there exists a possible rational legislative policy for retaining an existing apportionment, such a legislative decision cannot be said to breach the bulwark against arbitrariness and caprice that the Fourteenth Amendment affords. Certainly, with all due respect, the facile arithmetical argument contained in Part II of my Brother CLARK's separate opinion, *ante, pp.* —, provides no tenable basis for considering that there has been such a breach in this instance. (See the Appendix to this opinion.)

These conclusions can hardly be escaped by suggesting that capricious state action might be found were it to appear that a majority of the Tennessee Legislators, in refusing to consider reapportionment, had been actuated by self-interest in perpetuating their own political offices or by other unworthy or improper motives. Since *Fletcher* v. *Peck*, 6 Cranch 87, was decided many years ago, it has repeatedly been pointed out that it is not the business of the federal courts to inquire into the personal motives ot legislators. *E. g., Arizona* v. *California*, 283 U. S. 423, 455 & n. 7. The function of the federal judiciary ends in matters of this kind once it is found, as I think it must be here, that the state action complained of could have rested on some rational basis.

It is my view that the majority opinion has failed to point to any recognizable constitutional claim alleged in this complaint. Indeed, it is interesting to note that my Brother STEWART is at pains to disclaim for himself, and to point out that the majority opinion does not suggest, that the Federal Constitution requires of the States any particular kind of electoral apportionment, still less that they must accord to each voter approximately equal voting strength. Concurring opinion, *ante*, pp. —. But that being so, what, may it be asked, is left of this com-

plaint? Surely the bare allegations that the existing Tennessee apportionment is "incorrect," "arbitrary," "obsolete" and "unconstitutional"—amounting to nothing more than legal conclusions—do not themselves save the complaint from dismissal. See *Snowden* v. *Hughes,* 321 U. S. 1; *Collins* v. *Hardyman,* 341 U. S. 651. Nor do those allegations shift to the appellees the burden of proving the *constitutionality* of this state statute; as is so correctly emphasized by my Brother STEWART (*ante,* pp. —), this Court has consistently held in cases arising under the Equal Protection Clause that " 'the burden of establishing the *unconstitutionality* of a statute rests on him who assails it,' *Metropolitan Ins. Co.* v. *Brownell,* 294 U. S. 581, 584." (Emphasis added.) Moreover, the appellants do not suggest that they could show at a trial anything beyond the matters previously discussed in this opinion, which add up to nothing in the way of a supportable constitutional challenge against this statute. And finally, the majority's failure to come to grips with the question whether the complaint states a claim cognizable under the Federal Constitution—an issue necessarily presented by appellee's motion to dismiss—does not of course furnish any ground for permitting this action to go to trial.

Cutting to the heart of the matter, it will be found that this decision ultimately rests on the view that if the Court merely asserts authority in this field the States will act. This is constitutional adjudication not by reason but by wishful thinking, something that should be foreign to the role of this Court. Whether dismissal should have been for want of jurisdiction or, as is suggested in *Bell* v. *Hood,* 327 U. S. 678, 682–683, for failure to state a claim upon which relief could be granted, the judgment of the District Court was correct.

In conclusion, it is appropriate to say that one need not agree, as a citizen, with what Tennessee has done or failed

to do, in order to deprecate, as a judge, what the majority is doing today. Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.

I would affirm.

APPENDIX.

CRITIQUE OF THE ARITHMETICAL ARGUMENT MADE IN PART II OF THE SEPARATE OPINION OF MR. JUSTICE CLARK (*ante*, pp. —).

As I understand my Brother CLARK he does not contend that the Equal Protection Clause guarantees every state voter a vote of approximately equal weight for the State Legislature. It appears to be conceded that the State Legislature may be intentionally structured "to give a desirable political balance between rural and urban populations." *Ante*, p. —. However, it is claimed that such a policy is not disclosed by the present Tennessee apportionment since "discrimination is present between rural areas as well." *Ibid.* This conclusion rests on the following premises:

(1) That Rutherford, Carter, Blount, Sullivan and Anderson Counties are all "rural areas" and must be grouped, for the purpose of apportionment, in the same class as Moore, Decatur, Gibson, Fayette, Loudon and Houston Counties;

(2) That the correct formula for determining "total representation" of any given county is the one explained in footnote 2 of his opinion (*ante*, p. —);

(3) That no rational policy " 'reasonably may be conceived to justify' " the retention in Tennessee of the apportionment devised by the 1901 statute.

Each of these premises is, I think, demonstrably erroneous.

I.

"RURAL AREAS."

Where the line defining any legislatively created class should be drawn is as much a legislative judgment as is the creation of the class itself. Consequently, for purposes of the Equal Protection Clause, the limit of judicial examination is reached once a court finds some reasonable

basis for establishing the line where the legislature has drawn it.

It appears from the record that the four most heavily populated municipalities in Tennessee are Memphis (Shelby County), Nashville (Davidson County), Chattanooga (Hamilton County), and Knoxville (Knox County)—each having a population of 100,000 or more. But it is surely an oversimplification to consider all counties other than those in which these cities are located to be "rural areas," as is now obviously being suggested. A pattern of apportionment that is aimed at distributing sufficient political power to the less densely populated areas of the State in order to protect agricultural interests might permissibly be as concerned with the excessive electoral strength of municipalities of 10,000 population as with that of the larger metropolitan centers.

Is it not relevant, then, in deciding whether the present Tennessee apportionment is the result of "blind impulse" and an "irrational legislative policy" to note that all the allegedly underrepresented "rural areas" cited by my Brother CLARK contain municipalities of over 10,000 population according to a 1950 census,[1] and that none of the supposedly overrepresented counties have municipalities of similar size? In fact, the five named counties, along with the other four already mentioned, in which the very large urban centers are located, are the sites of more than half of Tennessee's 23 cities of over 10,000 population. Hence an urban-rural classification that would group these among the "urban" would hardly seem to be irrational.[2]

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[1] Murfreesboro, Rutherford County (pop. 16,017); Elizabethton, Carter County (pop. 10,754); Maryville, Blount County (pop. 10,723); Bristol, Sullivan County (pop. 17,800); Kingsport, Sullivan County (pop. 24,540); Oak Ridge, Anderson County (pop. 27,387). Tennessee Blue Book, 1960, pp. 143–149.

[2] This might serve to explain the disparity between Gibson and Blount Counties, both of which have approximately equal voting

II.

"TOTAL REPRESENTATION."

As appears from my Brother CLARK's opinion, a county's "total representation" is computed by adding (1) the number of "direct representatives" the county is entitled to elect; (2) a fraction of any other seats in the Tennessee House which are allocated to that county jointly with one or more others in a "floterial district" (a multicounty representative district); (3) triple the number of senators the county is entitled to elect alone; and (4) triple a fraction of any seats in the Tennessee Senate which are allocated to that county jointly with one or more others in a multicounty senatorial district. The fractions used for items (2) and (4) are computed by allotting to each county in a combined district an equal share of the House or Senate seat, *regardless* of the voting population of each of the counties that make up the election district.[3]

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populations. In addition, Gibson is essentially an agricultural county while Blount is the location of the City of Alcoa, where the Aluminum Company of America has located the largest aluminum smelting and rolling plant in the world.

[3] This formula is not clearly spelled out in the opinion, but it is necessarily inferred from the figures that are presented. Fayette County, for example, is said to have a "total representation" of three. It elects one direct representative (value of 1.00), another representative in a two-county district (value of .50), and a senator in a two-county senatorial district (*i. e.*, half a senator, which trebled results in a value of 1.50). Knox County is said to have "25% more representation than Hamilton." Knox County elects (1) three direct representatives (value 3.00); (2) one representative from a two-county district (value .50); (3) one direct senator (value 3.00); and (4) one senator in a four-county district (value .75). "Total representation" therefore is 7.25. Hamilton County elects (1) three direct representatives (value 3.00); (2) no joint representatives; (3) one direct senator (value 3.00); and (4) no joint senators. Its "total representation" is 6.00. Since Knox's is 1.25 more than Hamilton's 6.00, it is said to have "25% [20.83%?] more representation."

This formula is patently deficient in that it eliminates from consideration the relative voting power of the counties that are joined together in a single election district. As a result, the formula unrealistically assigns to Moore County one-third of a senator, in addition to its direct representative, although it must be obvious that Moore's voting strength in the Eighteenth Senatorial District is almost negligible. Since Moore County could cast only 2,340 votes of a total eligible vote of 30,478 in the senatorial district, it should in truth be considered as represented by one-fifteenth of a senator. Assuming, *arguendo*, that any "total representation" figure is of significance, Moore's "total representation" should be 1.20, not 2.

My Brother CLARK points to four sets of counties that have the same "total representation," but that differ markedly in voting population according to the 1950 census. But if these figures are corrected to reflect the proportionate voting strengths of the counties in multi-county districts, the "total representation" figures no longer support the conclusion that the apportionment pattern is a "crazy quilt."

TABLE 1.[4]

County	(1950) *Voting population*	*Uncorrected "total representation"*	*Adjusted "total representation"*
Moore	2,340	2.000	1.200
Rutherford	25,316	2.000	3.000
Decatur	5,563	1.100	.773
Carter	23,302	1.100	1.517
Fayette	13,577	3.000	[5] 2.540
Sullivan	55,712	3.000	4.112
Loudon	13,624	1.250	[6] .274
Houston	3,084	1.250	.433
Anderson	33,990	1.250	[6] 1.307

[*Footnotes are on p. 15*]

Gibson	29,832	5	same
Blount	30,353	1.60	2.12
Knox	140,559	7.25	8.97
Hamilton	131,971	6	same
Shelby	312,345	15	16.82
Davidson	211,930	12.5	12.97

The distorted effects to which the undiluted formula leads becomes even more apparent if it is applied to the same counties under the scheme of apportionment urged by the appellants, which is purportedly one that would be based on a fair reflection of population distribution.

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[4] This table reflects the representation of the various counties under the existing apportionment of senators and representatives. Moore and Rutherford Counties both have one direct representative and are joined with two neighboring counties in the Eighteenth and Twelfth Senatorial Districts, respectively. Decatur and Carter Counties do not elect any direct representatives, but they each join with one adjacent county in a "floterial district." Decatur and four other counties comprise the Twenty-sixth Senatorial District; Carter and four others constitute the First Senatorial District. Fayette and Sullivan Counties each elect one direct representative and also join in a "floterial district" with an adjacent county. Fayette and one other county form the Thirty-first Senatorial District, and Sullivan together with one of its neighbors elect the state senator from the Second Senatorial District. Loudon, Houston, and Anderson Counties each choose representatives as members of two-county "floterial districts." Loudon and Anderson join with two other counties in the Sixth Senatorial District; Houston and three others form the Twenty-third Senatorial District.

[5] Although Fayette County theoretically elects one representative as a member of a two-county district (with Shelby County) in addition to the direct representative assigned to it, the "floterial" representative is, in fact, equivalent to an eighth direct representative for Shelby County. Fayette's 13,577 votes are obviously insignificant in comparison with Shelby's 312,345. Official Tennessee publications list eight direct representatives from Shelby County, and there are apparently no elections held for the Twenty-seventh Floterial District. See, *e. g.*, Tennessee Blue Book, 1960, pp. 31–55, 196–198.

[6] The apparent underrepresentation of Loudon and Anderson Counties is due to Loudon's participation with Knox County in a "floterial district" and to the combination in the Sixth Senatorial District of Knox, Loudon, Anderson, and one other county. Since Knox has a substantially larger voting population than any of its neighbors, it dominates both of these multicounty districts.

TABLE 2.[7]

County	*Voting population*	*Uncorrected "total representation"*
Moore	2,340	1.600
Rutherford	25,316	2.250
Decatur	5,563	.830
Carter	23,302	3.000
Fayette	13,577	1.600
Sullivan	55,712	4.000
Loudon	13,624	1.500
Houston	3,084	.750
Anderson	33,990	2.500

Would not one be forced to conclude, by an application of my Brother CLARK's formula, that it could only be a "crazy quilt" pattern that would distribute to Moore County, with a voting population of 2,340, almost twice the electoral strength of Decatur County, with a voting

[7] This table reflects the apportionment suggested by the appellants in Exhibits "A" and "B" attached to their complaint. It is said to be a "fair distribution" which accords with the Tennessee Constitution and in which each of the election districts represents approximately equal voting population. Under this distribution, Moore County still elects one direct representative, but it joins with four other counties in a senatorial district. Rutherford County elects one direct representative, joins with a neighboring county in a "floterial district," and is one member of a four-county senatorial district. Decatur County combines with two others in a "floterial district" and with five others in a senatorial district. Carter County elects one direct representative, it and a neighboring county constitute a "floterial district," and the two of them together form a senatorial district. Fayette County elects one direct representative and joins with four others in a senatorial district. Sullivan County is allotted two direct representatives. It also combines with an adjacent county to form a "floterial district" and to constitute a senatorial district. Loudon County is one member of a two-county "floterial district" and of a three-county senatorial district. Houston County is in a four-county "floterial district" and in a six-county senatorial district. Anderson would elect one direct representative, join with one neighbor in a "floterial district," and combine with two neighbors in a senatorial district.

population of 5,563, and more electoral strength than is assigned to Loudon County, with a voting population of 13,624? And would one not be compelled to reason that only an "irrational legislative policy" could result in Carter County (voting population 23,302) having 20% *more* "total representation" than Anderson County (voting population 33,990)?

III.

SUPPOSED IRRATIONALITY OF MAINTAINING THE STATUS QUO.

Rigidity of an apportionment pattern may be as much a legislative policy decision as is a provision for periodic reapportionment. In the interest of stability, a State may write into its fundamental law a permanent distribution of legislators among its various election districts, thus forever ignoring shifts in population. Indeed, several States have achieved this result by providing for minimum and maximum representation from various political subdivisions such as counties, districts, cities, or towns. See Harvey, Reapportionments of State Legislatures—Legal Requirements, 17 Law & Contemp. Probs. (1952), 364, 368–372.

It is said that one "cannot find any rational standard" in what the Tennessee Assembly has failed to do over the past 60 years. But surely one need not search far to find rationality in the Assembly's continued refusal to recognize the growth of the urban population that has accompanied the development of industry over the past half decade. The existence of slight disparities between rural areas does not overcome the fact that the foremost apparent legislative motivation has been to preserve the electorate strength of the rural interests notwithstanding shifts in population. And I understand it to be conceded by at least some of the majority that this policy is not rendered unconstitutional merely because it favors rural voters.

IV.

Not only does this "Total Representation" approach rest on faulty mathematical foundations, but it wholly ignores all other factors justifying a legislative determination of this kind. Those which have been suggested in this critique are but representative of the wide variety of permissible legislative considerations that may enter into a state electoral apportionment. In failing to take any of such matters into account, my Brother CLARK's arithmetical argument has, I submit, unwittingly served to bring into bas-relief the very reasons that support the view that this complaint does not state a claim on which relief can be granted. For in order to warrant holding a state electoral apportionment invalid under the Equal Protection Clause, a court, in line with well established constitutional doctrine, must find that *none* of the permissible policies and *none* of the possible formulas on which it might have been based could rationally justify certain individual inequalities. Once the electoral apportionment process is recognized for what it is—the product of legislative give-and-take and of compromise between policies that often conflict—these constitutional principles put the appellants out of court.

The disparities in electoral strength among the various counties in Tennessee, both those relied upon by my Brother CLARK and others, may be accounted for by various economic,[8] political,[9] and geographic [10] considerations.

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[8] For example, it is primarily the eastern portion of the State that is complaining of malapportionment (along with the Cities of Memphis and Nashville). But the eastern section is where industry is principally located and where population density, even outside the large urban areas, is highest. Consequently, if Tennessee is apportioning in favor of its agricultural interests, as constitutionally it was entitled to do, it would necessarily reduce representation from the east.

[*Footnotes 9 and 10 are on p. 19*]

No allegation is made by appellants that the apportionment is the result of any other forces than are always at work in any legislative process, and the record, briefs, and arguments in this Court themselves attest to the fact that the appellants could put forward nothing further at a trial.

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[9] For example, sound political reasons surely justify limiting the legislative chambers to workable numbers; in Tennessee, the House is set at 99 and the Senate at 33. It might have been deemed desirable, therefore, to set a ceiling on representation from any single county so as not to deprive others of individual representation. The proportional discrepancies among the four counties with large urban centers may be attributable to a conscious policy of limiting representation in this manner.

[10] For example, Moore County is surrounded by four counties each of which have sufficient voting population to exceed two-thirds of the average voting population per county (which is the standard prescribed by the Tennessee Constitution for the assignment of a direct representative), thus qualifying for direct representatives. Consequently Moore County must be assigned a representative of its own despite its small voting population because it cannot be joined with any of its neighbors in a multicounty district.