substantial changes throughout

To: The Chief Justice
Mr. Justice Black
Mr. Justice Frankfurt
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart
file
From: Clark, 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.]

Mr. Justice Clark, concurring.

CLASHING OF VIEWS

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~~ proceeds in an appendicle "~~Critique~~" to translate the "relative voting power of the counties that are joined together in single election districts" into its tables ~~picturing population wise the~~ of 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 hindrance 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 argu-

[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.

ment.[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] Likewise, I do not consider the Guaranty Clause cases ~~involving~~ based on 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*, 352 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

[2] Similarly, the Equal Protection Clause was not ~~involved~~ invoked 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.

[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.

in Tennessee's Constitution, which is premised on the theory of state-wide numerical equality of representation with certain enumerated qualifications, is a rational one. On a county-by-county comparison, a districting plan based thereon naturally will have disparities in representation due to the qualifications. But this to my mind does not raise constitutional problems, for the basic policy is reasonable.

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).

Tennessee's in ~~the~~ Constitution, for admittedly its policy was not followed. The discrimination lies

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~~ the present districting admit of no ~~definite~~ policy. And examination of Table I 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 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 Table I.

As is admitted there is a wide disparity of voting strength as between the large and small counties. Some samples are: Moore County has a total representation of two[7] with a population (2,340) of only one-eleventh of

[7] "Total representation" indicates the combined representation in the State Senate (33 members) and the State House of Representa-

6] It is suggested that the districting is not unconstitutional since it is established by a statute that was constitutional when passed some 60 years ago. But "a statute [constitutionally] valid when enacted may become invalid by change in the conditions to which it is applied." Nashville, C. & St. L. R. Co. v. Walters, 294 U.S. 405, 415 (1935).

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 (13,264), 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 ~~strait 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

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tives (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.

Likewise counties with no municipality of over 10,000 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
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,[8] 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 n. 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 on the proposition that "the voice of every voter" need not have "approximate equality." Indeed, representative government, as they say, is not necessarily one of "bare numbers." The use of floterial districts in our political system is not ordinarily based on the theory that the floterial representative is splintered between the counties of his district. His function is to represent the whole district. However, I shall meet the charge on its own ground and by use of its own "adjusted 'total representation'" for-

[8] 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.

mula 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	8,787	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	13,406	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, has come up with any rational basis for Tennessee's apportionment statute.

No one—except the dissenters advocating the HARLAN "adjusted 'total representation' " formula—contends 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."

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,[9] 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 ~~present~~ Solicitor General of the United States, I see no such difficulty 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~~ might be more effective.

[9] 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).

But the plan here suggested ~~might~~ would 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 state-wide equal representation. Not believing that numerical equality of representation throughout a State is constitutionally required, I would not apply such a standard albeit a permissive one. 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 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 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 factu-

Supreme Court of the United States

Memorandum

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As John Rutledge (later Associate Justice acting Chief Justice) said 175 years ago in the course of the Constitutional Convention, a chief ~~XXXXXXX~~ function of the Court is to secure the national rights.[10]

—foot note—

[10] 1 Farrand, The Records of the Federal Convention of 1787, 124

ally 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, a 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.

TABLE I.

County	*1960 voting population*	*Present total representation using J. Clark's formula*	*Present total representation using J. Harlan's formula*	*Proposed total representation (appellant's plan), using J. Harlan's formula*
Van Buren	2,039	.63	.23	.13
Moore	2,340	2.00	1.24	.24
Pickett	2,565	.70	.21	.23
Sequatchie	2,904	.63	.32	.17
Meigs	3,039	.93	.49	.17
Houston	3,084	1.25	.46	.23
Trousdale	3,351	1.33	1.10	.12
Lewis	3,413	1.25	.40	.26
Perry	3,711	1.50	.72	.41
Bledsoe	4,198	.63	.50	.24
Clay	4,528	.70	.38	.43
Union	4,600	.76	.36	.44
Hancock	4,710	.93	.61	.51
Stewart	5,238	1.75	1.57	.40
Cheatham	5,263	1.33	.72	.19
Cannon	5,341	2.00	1.42	.52
Decatur	5,563	1.10	.92	.51
Lake	6,252	2.00	1.45	.42
Chester	6,301	2.00	1.36	.21
Grundy	6,540	.95	.68	.45
Humphreys	6,588	1.25	1.39	.72
Johnson	6,649	1.10	.43	.44
Jackson	6,719	1.50	1.42	.62
De Kalb	6,984	2.00	1.57	.68
Benton	7,023	1.10	.89	.67
Fentress	7,057	.70	.62	.64
Grainger	7,125	.93	.93	.64
Wayne	7,176	1.25	.68	.75
Polk	7,330	1.25	.68	.72
Hickman	7,598	2.00	1.84	.80
Macon	7,974	1.33	1.00	.61
Morgan	8,308	.93	.59	.75
Scott	8,417	.76	.67	.62
Smith	8,731	2.50	2.05	.70
Unicoi	8,787	.93	.40	.61

County	*1950 voting population*	*Present total representation using J. Clark's formula*	*Present total representation using J. Harlan's formula*	*Proposed total representation (appellant's plan), using J. Harlan's formula*
Rhea	8,937	.93	1.41	.21
White	9,244	1.43	1.69	.91
Overton	9,474	1.70	1.80	.89
Hardin	9,577	1.60	1.60	.93
Cumberland	9,593	.63	1.10	.87
Crockett	9,676	2.00	1.66	.63
Henderson	10,199	1.50	.79	.96
Marion	10,998	1.75	1.75	.72
Marshall	11,288	2.50	2.29	.84
Dickson	11,294	1.75	2.29	1.23
Jefferson	11,359	1.10	.87	.99
McNairy	11,601	1.60	1.75	1.12
Cocke	12,572	1.60	1.45	.88
Sevier	12,793	1.60	1.48	.68
Claiborne	12,799	1.43	1.60	1.33
Monroe	12,884	1.75	1.69	1.30
Loudon	13,264	1.25	.27	.51
Warren	13,337	1.75	1.87	1.68
Coffee	13,406	2.00	2.32	1.68
Hardeman	13,565	1.60	1.87	1.11
Fayette	13,557	2.50	2.47	1.11
Haywood	13,934	2.50	2.53	1.69
Wiliamson	14,064	2.33	2.95	1.72
Hamblen	14,090	1.10	1.06	1.66
Franklin	14,297	1.75	1.99	1.72
Lauderdale	14,413	2.50	2.46	1.72
Bedford	14,732	2.00	1.44	1.75
Lincoln	15,092	2.50	2.71	1.78
Henry	15,465	2.83	2.75	1.78
Lawrence	15,847	2.00	2.23	1.81
Giles	15,935	2.25	2.23	1.81
Tipton	15,944	3.00	1.68	1.13
Robertson	16,456	2.83	2.63	1.85
Wilson	16,459	3.00	3.02	1.21
Carroll	16,472	2.83	2.89	1.81
Hawkins	16,900	3.00	1.92	1.81
Putnam	17.071	1.70	2.50	1.87

County	*1960 voting population*	*Present total representation using J. Clark's formula*	*Present total representation using J. Harlan's formula*	*Proposed total representation (appellant's plan), using J. Harlan's formula*
Campbell	17,477	.76	1.41	1.93
Roane	17,639	1.75	1.27	1.27
Weakley	18,007	2.33	2.64	1.84
Bradley	18,273	1.25	1.67	1.93
McMinn	18,347	1.75	1.96	1.93
Obion	18,434	2.00	2.29	1.93
Dyer	20,062	2.00	2.35	2.35
Sumner	20,143	2.33	3.56	2.55
Carter	23,303	1.10	1.50	2.56
Greene	23,649	1.99	2.06	2.67
Maury	24,556	2.25	3.82	2.85
Rutherford	25,316	2.00	3.01	2.39
Montgomery	26,284	3.00	3.73	3.05
Gibson	29,832	5.00	5.00	2.86
Blount	30,353	1.60	2.11	2.18
Anderson	33,990	1.25	1.35	3.63
Washington	36,967	1.99	2.64	3.44
Madison	37,245	3.50	4.85	3.69
Sullivan	55,712	3.00	4.08	5.56
Hamilton	131,971	6.00	6.00	15.10
Knox	140,559	7.25	8.16	15.20
Davidson	211,930	12.50	12.92	21.56
Shelby	312,345	15.00	16.85	31.55