

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 appear to hold, at least sub silentio, that an invidious discrimination is present but it remands to the three judge court for it to make that formal determination. It is true that Tennessee has not filed a formal answer. However, it has filed voluminous papers and made extended argument 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 there are none known to it. In fact, the case proceeded to the point before the three judge court that it was able to find an invidious discrimination factually present, and the state has not contested that holding here. In view of all this background I doubt if anything will be gained by the State on the remand, other than time. Nevertheless, my position in litigation involving a state as a party has consistently been that we should move slowly, giving deference to its sovereignty to the end that its rights be fully protected. However, in fairness, I did think that Tennessee was entitled to have my idea of what it faces on the facts and the trial court some light as to how it might proceed.

In my view the decision today is in keeping with the highest traditions of the Court. Its chief function being to protect national

rights, its division here supports the proposition for which our forebears fought and many died, namely fair representation in the affairs of government. That is the keystone upon which our government was founded and lacking which no republic can survive. Self-restraint and discipline in constitutional adjudication have no sanctity where as here rational rights are so clearly infringed and have for scores of years cried out for recognition and sanction. National respect for the courts is more enhanced through their protection than by their condonation.

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