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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.

[February —, 1962.]

Memorandum 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 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 undertakes to do little more than assume that the complaint does state a cause of action. However, in my opinion, appellants' allegations, accepting all of them as true, do not show, parsed down or as a

whole, 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 consideratitons, 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 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 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 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 decision 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 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, but may be thought to be unreasonable now.

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 its tax burden, *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 not qualified or permitted 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.

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 motives of 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. Certainly the complaint's allegations that this Tennessee apportionment was "incorrect, arbitrary, obsolete and unconstitutional" do not entitle these appellants to a trial. These characterizations are no more than conclusions of law, and the appellants do not suggest that they could show at a trial anything beyond the matters already discussed in this memorandum. Accordingly, 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 condone, as a citizen, 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 as the last refuge for the correction of all injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint in constitutional adjudication, will view the decision with deep concern.

I would affirm.