

*Baker v. Carr*

**Dissenting opinion of MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins.**

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 state 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 steadfast 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 [369 U.S. 186, 331] 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 does not actually discuss this basic question, but, as one concurring Justice observes, seems to decide it "sub silentio." Ante, p. 261. 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., Rule 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 issues of "justiciability" or "political question" 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 the absence of a controlling Act of Congress. See also *Wood v. Broom*, [287 U.S. 1](#).

The appellants' claim in this case ultimately rests entirely on the Equal Protection Clause of the Fourteenth Amendment. It is asserted that Tennessee has violated the Equal Protection Clause by maintaining in effect a [369 U.S. 186, 332] 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 the Tennessee Legislature, which is offensive to the Equal Protection Clause.

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

For reasons given in MR. JUSTICE FRANKFURTER'S opinion, ante, pp. 325-327, 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 Equal Protection Clause or elsewhere 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 basically local concern. [369 U.S. 186, 333]

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 political 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 generally committing to the United States the duty to guarantee to every State "a Republican Form of Government." And, as my Brother FRANKFURTER so conclusively proves (ante, pp. 308-317), no intention to fix immutably the [\[369 U.S. 186, 334\]](#) 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 electoral 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 a 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 [[369 U.S. 186, 335](#)] 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 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 [369 U.S. 186, 336] 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. [369 U.S. 186, 337] *Tigner v. Texas*, [310 U.S. 141](#). Does the Fourteenth Amendment impose a stricter limitation upon a State's apportionment of political representatives 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. 253-258) 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 of legislators. E. g., *Arizona v. California*, [283 U.S. 423, 455](#) & n. 7. The function of the federal judiciary ends in [\[369 U.S. 186, 338\]](#) matters of this kind once it appears, as I think it does here on the undisputed facts, that the state action complained of could have rested on some rational basis. (See the Appendix to this opinion.)

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, p. 265. But that being so, what, may it be asked, is left of this complaint? 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, p. 266), 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 Casualty Ins. Co. v. Brownell*, [294 U.S. 580, 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 appellees' motion to dismiss - [\[369 U.S. 186, 339\]](#) does not of course furnish any ground for permitting this action to go to trial.

From a reading of the majority and concurring opinions one will not find it difficult to catch the premises that underlie this decision. The fact that the appellants have been unable to obtain political redress of their asserted grievances appears to be regarded as a matter which should lead the Court to stretch to find some basis for judicial intervention. While the Equal Protection Clause is invoked, the opinion for the Court notably eschews explaining how, consonant with past decisions, the undisputed facts in this case can be considered to show a violation of that constitutional provision. The majority seems to have accepted the argument, pressed at the bar, that if this Court merely asserts authority in this field, Tennessee and other "malapportioning" States will quickly respond with appropriate political action, so that this Court need not be greatly concerned about the federal courts becoming further involved in these matters. At the same time the majority has wholly failed to reckon with what the future may hold in store if this optimistic prediction is not fulfilled. Thus, what the Court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication. Whether dismissal of this case should have been for want of jurisdiction or, as is suggested in *Bell v. Hood*, [327 U.S. 678, 682](#) -683, for failure of the complaint 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 [369 U.S. 186, 340] 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 TO OPINION OF MR. JUSTICE

HARLAN.

#### THE INADEQUACY OF ARITHMETICAL FORMULAS AS MEASURES OF THE RATIONALITY OF TENNESSEE'S APPORTIONMENT.

Two of the three separate concurring opinions appear to concede that the Equal Protection Clause does not guarantee to each state voter a vote of approximately equal weight for the State Legislature. Whether the existing Tennessee apportionment is constitutional is recognized to depend only on whether it can find "any possible justification in rationality" (ante, p. 265); it is to be struck down only if "the discrimination here does not fit any pattern" (ante, p. 258).

One of the concurring opinions, that of my Brother STEWART, suggests no reasons which would justify a finding that the present distribution of state legislators is unconstitutionally arbitrary. The same is true of the majority opinion. My Brother CLARK, on the other hand, concludes that "the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions" (ante, p. 254), solely on the basis of certain statistics presented in the text of his separate opinion and included in a more extensive Table appended thereto. In my view, that analysis is defective not only because the "total representation" formula set out in footnote 7 of the opinion (ante, p. 255), rests on faulty mathematical foundations, but, more basically, because the approach taken wholly [369 U.S. 186, 341] ignores all other factors justifying a legislative determination of the sort involved in devising a proper apportionment for a State Legislature.

In failing to take any of such other matters into account and in focusing on a particular mathematical formula which, as will be shown, is patently unsound, my Brother CLARK'S opinion 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 could 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 particular inequalities.

#### I.

At the outset, it cannot be denied that the apportionment rules explicitly set out in the Tennessee Constitution are rational. These rules are based on the following obviously permissible policy determinations: (1) to utilize counties as electoral units; (2) to prohibit the division of any county

in the composition of electoral districts; (3) to allot to each county that has a substantial voting population - at least two-thirds of the average voting population per county - a separate "direct representative"; (4) to create "floterial" districts (multicounty representative districts) made up of more than one county; and (5) to require that such districts be composed of adjoining counties. 1 Such a framework unavoidably [369 U.S. 186, 342] leads to unreliable arithmetic inequalities under any mathematical formula whereby the counties' "total representation" is sought to be measured. It particularly results in egregiously deceptive disparities if the formula proposed in my Brother CLARK'S opinion is applied.

That formula computes a county's "total representation" 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"; (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. 2 [369 U.S. 186, 343]

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 (ante, p. 255), 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 1.23, not 2. 3

The formula suggested by my Brother CLARK must be adjusted regardless whether one thinks, as I assuredly do not, that the Federal Constitution requires that each vote be given equal weight. The correction is necessary simply to reflect the real facts of political life. It may, of course, be true that the floterial representative's "function [369 U.S. 186, 344] is to represent the whole district" (ante, p. 256). But can it be gainsaid that so long as elections within the district are decided not by a county-unit system, in which each county casts one vote, but by adding the total number of individual votes cast for each candidate, the concern of the elected representatives will primarily be with the most populous counties in the district?

## II.

I do not mean to suggest that any mathematical formula, albeit an "adjusted" one, would be a proper touchstone to measure the rationality of the present or of appellants' proposed apportionment plan. For, as the Table appended to my Brother CLARK'S opinion so conclusively shows, whether one applies the formula he suggests or one that is adjusted to reflect proportional voting strength within an election district, no plan of apportionment consistent with the principal policies of the Tennessee Constitution could provide proportionately equal "total representation" for each of Tennessee's 95 counties.

The pattern suggested by the appellants in Exhibits "A" and "B" attached to their complaint is said to be a "fair distribution" which accords with the Tennessee Constitution, and under which each of the election districts represents approximately equal voting population. But even when tested by the "adjusted" formula, the plan reveals gross "total representation" disparities that would make it appear to be a "crazy quilt." For example, Loudon County, with twice the voting population of Humphreys County would have less representation than Humphreys, and about one-third the representation of Warren County, which has only 73 more voters. Among the more populous counties, similar discrepancies would appear. Although Anderson County has only somewhat over 10% more voters than Blount County, it would have [369 U.S. 186, 345] approximately 75% more representation. And Blount would have approximately two-thirds the representation of Montgomery County, which has about 13% less voters. [4](#)

### III.

The fault with a purely statistical approach to the case at hand lies not with the particular mathematical formula used, but in the failure to take account of the fact that a multitude of legitimate legislative policies, along with circumstances of geography and demography, could account for the seeming electoral disparities among counties. The principles set out in the Tennessee Constitution are just some of those that were deemed significant. Others may have been considered and accepted by those entrusted with the responsibility for Tennessee's apportionment. And for the purposes of judging constitutionality under the Equal Protection Clause it must be remembered that what is controlling on the issue of "rationality" is not what the State Legislature may actually have considered but what it may be deemed to have considered.

For example, in the list of "horribles" cited by my Brother CLARK (ante, p. 255), all the "underrepresented" counties are semiurban: all contain municipalities of over 10,000 population. [5](#) This is not to say, however, that the [369 U.S. 186, 346] presence of any such municipality within a county necessarily demands that its proportional representation be reduced in order to render it consistent with an "urban versus rural" plan of apportionment. Other considerations may intervene and outweigh the Legislature's desire to distribute seats so as to achieve a proper balance between urban and rural interests. The size of a county, in terms of its total area, may be a factor. [6](#) Or the location within a county of some major industry may be thought to call for dilution of voting strength. [7](#) Again, the combination of certain smaller counties with their more heavily populated neighbors in senatorial or "floterial" districts may result in apparent arithmetic inequalities. [8](#)

More broadly, the disparities in electoral strength among the various counties in Tennessee, both those relied upon by my Brother CLARK and others, may be [369 U.S. 186, 347] accounted for by various economic, [9](#) political, [10](#) and geographic [11](#) considerations. No allegation is made by the appellants that the existing 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.

By disregarding the wide variety of permissible legislative considerations that may enter into a state electoral apportionment my Brother CLARK has turned a highly complex process into an elementary arithmetical puzzle. [369 U.S. 186, 348] It is only by blinking reality that such an



analysis can stand and that the essentially legislative determination can be made the subject of judicial inquiry.

#### IV.

Apart from such policies as those suggested which would suffice to justify particular inequalities, there is a further consideration which could rationally have led the Tennessee Legislature, in the exercise of a deliberate choice, to maintain 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 Legislature has failed to do over the past 60 years. But surely one need not search far to find rationality in the Legislature'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 electoral 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 [369 U.S. 186, 349] rendered unconstitutional merely because it favors rural voters.

Once the electoral apportionment process is recognized for what it is - the product of legislative give-and-take and of compromise among policies that often conflict - the relevant constitutional principles at once put these appellants out of the federal courts.