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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 6

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ON REARGUMENT [1]

OPINIONS BELOW

The opinion of Judge Miller of the District Court for the Middle District of Tennessee on convening a three-judge district court (R. 88) is reported at 175 F. Supp. 649. The opinion of the three-judge district court (R. 214) is reported at 179 F. Supp. 824.

JURISDICTION

The order of the three-judge district court dismissing the complaint was entered on February 4, 1960 (R. 220–221). Notice of appeal to this Court was filed on March 29, 1960 (R. 310). Probable jurisdiction was noted on November 21, 1960 (R. 314). The jurisdiction of this Court rests on 28 U.S.C. 1253.

[1] This brief replaces the original brief on the merits filed by the United States.

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to consider claims of denial of equal protection under the Fourteenth Amendment, with respect to the right to vote, resulting from malapportionment of State legislatures.

2. Whether rights under the Fourteenth Amendment are violated by gross and unreasonable malapportionment of State legislatures.

3. Whether, in the circumstances of this case, the district court should be permitted to exercise its equitable discretion to consider the merits of appellants' claims.

STATEMENT

This action was brought on May 18, 1959, in the District Court for the Middle District of Tennessee by certain of the appellants (hereinafter referred to as the "original plaintiffs"), citizens of and qualified voters in the State of Tennessee (R. 3), on their own behalf, on behalf of all qualified voters in their respective counties (R. 6), and on behalf of all Tennessee voters who were similarly situated (R. 6). The action was brought against appellees, the Tennessee Secretary of State, the Attorney General of Tennessee, the Tennessee Co-Ordinator of Elections, and the Members of the Tennessee State Board of Elections in their representative capacities (R. 4–5). The complaint asserted rights under 42 U.S.C. 1983[2] (R. 1–2), which provides for suits in equity or other proper proceedings to redress deprivations of federal

[2] This provision originated as Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13.

constitutional rights under color of State authority, and claimed that the district court had jurisdiction under 28 U.S.C. 1343(3)[3] (R. 2).

The complaint alleged that the Constitution of Tennessee (Article II, Sections 4, 5, and 6) provides for a maximum of 99 members of the House of Representatives and 33 members of the Senate and directs the General Assembly[4] to allocate, at least every ten years, the Senators and Representatives among the several counties or districts "according to the number of qualified voters in each" (R. 7–8). The complaint further alleged that, despite these mandatory requirements, no reapportionment had been made by the legislature since the Act of 1901[5] (R. 10); that, although many demands had been made upon the legislature to reapportion in accordance with the command of the State constitution (R. 14), and although many bills had been introduced in the legislature to accomplish this purpose (R. 15; R. 32–38; see also Ex. 2 to Intervening Complaint, R. 126–160), the appor-

[3] That section grants federal district courts jurisdiction over civil actions commenced to redress any deprivations, under color of state authority, of federal constitutional or statutory rights. The plaintiffs also asserted rights under 42 U.S.C. 1988 (R. 1–2), which provides that state law may be applied by federal district courts in cases involving civil rights (including cases arising under 42 U.S.C. 1983) if federal law is inadequate to provide a remedy.

[4] The General Assembly is the official name of the legislature of the State of Tennessee. Tenn. Const., Art. II.

[5] Tenn. Code Ann., Sections 3–101, to 3–109. The complaint was later amended to include the allegation that the Act of 1901 was in violation of the State constitution when drawn because it was passed without the enumeration of voters required by the State constitution (R. 86–87).

tionment of seats in the legislature remained as fixed by the Act of 1901 (R. 9–10). Another allegation was that, during the period intervening between the Act of 1901 and the year 1950, the population of the State of Tennessee grew from 2,021,000 to 3,292,000, but the growth had been very uneven between counties (R. 10). As a result, it was alleged, the counties in which the original plaintiffs resided were entitled to additional representatives (R. 11–12, 21; Ex. B, R. 22), but were denied this right because the distribution of legislative seats was not in accordance with the number of voters in each of the counties and districts (R. 12; Ex. C, R. 24; Ex. D, R. 26). It was alleged that, under the existing apportionment, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate" (R. 13; Ex. E, R. 28), and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives" (R. 13; Ex. F, R. 30).

The complaint asserted that, when all the inequalities in Tennessee electoral districts were taken together, the result was to prevent the Tennessee General Assembly, as presently composed, "from being a body representative of the people of the State of Tennessee" (R. 13), and that a minority ruled in Tennessee by virtue of its control of both Houses of the General Assembly, contrary to the Tennessee Constitution, and "to the philosophy of government in the United States and all Anglo-Saxon jurisprudence in which the legislature has the power to make law only

because it has the power and duty to represent the people"[6] (R. 13). As a result of the inequality of representation, it was alleged, there had been continuous and systematic discrimination by the legislature against the original plaintiffs and others similarly situated with respect to the allocation of the burdens and benefits of taxation (R. 16–18). The complaint concluded that the original plaintiffs, "and others similarly situated, suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment," in violation of their right to the equal protection of the laws required by the Tennessee Constitution,[7] and that, "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * *", they were denied the due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 12, 19).

The complaint requested that a district court of three judges be convened pursuant to 28 U.S.C. 2281, and that the three-judge court (1) declare unconstitutional, as violative of the equal protection and due process clauses of the Fourteenth Amendment, "the present legislative apportionment of the State of Tennessee"; (2) declare the reapportionment Act of 1901 and the implementing provisions of the Tennessee Code violative of the State constitution and the Fourteenth Amendment; (3) restrain the appellees from

[6] Tenn. Const., Art. I, Section 1, states that "all power is inherent in the people."

[7] Tenn. Const., Art. I, Section 5; Art. II, Sections 4–6; Art. XI, Sections 8, 16.

holding elections for members of the Tennessee legislature under the districts as established by the 1901 Act until such time as the legislature reapportioned the districts in accordance with the Tennessee Constitution; and (4) direct the appellees to hold the next elections for members of the Tennessee legislature on an at-large basis, with the thirty-three candidates for the State Senate receiving the highest number of votes declared elected to the State Senate, and the ninety-nine candidates for the House of Representatives receiving the highest number of votes elected to the House (R. 19–20).

On June 8 and 12, 1959, the appellees filed motions to dismiss the complaint for lack of jurisdiction over the subject matter, failure to state a claim upon which relief could be granted, and failure to join indispensable parties (R. 46–47). On June 17, 1959, appellees filed a motion to dismiss the action without assembling a three-judge court, upon the ground that no substantial federal question was raised (R. 48). This motion was denied on July 31, 1959, by Judge Miller of the district court (R. 94). Judge Miller's opinion stated that he was "not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration" (R. 90), or that the decision in *Colegrove* v. *Green,* 328 U.S. 549, necessarily "close[d] the door to relief in the present case"[8] (R. 90). Judge Miller said further that there

[8] In *Colegrove*, the Court sustained the dismissal of an action by qualified voters to restrain the holding of congressional elections in Illinois under the provisions of an Illinois law deter-

were 'differences between [*Colegrove*] and the present [case] that may ultimately prove to be "significant" (R. 91), and observed that "[t]he situation is such that if there is no judicial remedy there would appear to be no * * * remedy at all" (R. 91). Since in cases involving legislative reapportionment "[i]t can certainly be said that generally there has been no unanimity of opinion among the justices of the Supreme Court either as to the result to be reached or as to the grounds for refusing intervention," Judge Miller stated that "a court of equity should at least be willing from time to time to re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen" (R. 93–94). Accordingly, pursuant to 28 U.S.C. 2284, he sent notice of the pendency of the action to the Chief Judge of the Court of Appeals of the Sixth Circuit (R. 94), and on August 10, 1959, a three-judge court was convened (R. 94–95).

On February 4, 1960, after other appellants, including Mayor Ben West of the City of Nashville, Tennessee,[9] and the City of Chattanooga, Tennessee,

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mining congressional districts. Judge Miller referred to the fact that, in *Colegrove*, the Illinois legislature, in failing to redistrict, had not violated any specific provision of its own constitution, and that there was ample power in Congress to redistrict the state if existing districts had become inequitable.

[9] West's intervening complaint asserted that the district court had jurisdiction under 28 U.S.C. 1343(4) as well as 28 U.S.C. 1343(3) (R. 103).

had been allowed to intervene as plaintiffs (R. 97, 99), and had filed complaints in intervention (R. 98, 100), the three-judge court entered an order dismissing the complaint on the grounds that the court lacked jurisdiction of the subject matter and the complaint failed to state a claim upon which relief could be granted (R. 220). Prior to entering this order, the court rendered an opinion asserting that "the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment" (R. 216). For this reason, the court declared that it had "no right to intervene or to grant the relief prayed for" (R. 220).

The case came to this Court on direct appeal and this Court noted probable jurisdiction (364 U.S. 898). After briefing and oral argument the Court set the case for reargument on October 9, 1961 (366 U.S. 907).

SUMMARY OF ARGUMENT

Appellants claim that their rights under the Fourteenth Amendment are denied by the arbitrary and unreasonable apportionment of their State legislature. They assert that they, as a geographical class, have been the victims of a gross discrimination which has gravely diluted the value of their franchise. The court below dismissed the complaint on the ground that the case involves a political question and that therefore it was without jurisdiction, citing *Colegrove* v. *Green,* 328 U.S. 549.

The view that legislative malapportionment raises exclusively political questions seems to rest upon (1) doubt as to whether the fair allocation of legislative seats is sufficiently amenable to rational analysis to be suitable for judicial review and (2) doubts concerning the effectiveness of judicial remedies. We submit that, although there is wide scope for the play of political considerations in the area of legislative apportionment, the interests deserving constitutional recognition are sufficiently identifiable to permit the rational analysis requisite for constitutional adjudication. We further submit that the remedies available to federal courts are sufficient to preclude a hard-and-fast rule denying jurisdiction. We believe that the legislative apportionment in Tennessee is so grossly discriminatory as to violate the Fourteenth Amendment and that judicial relief is available against this violation. Neither question, however, requires a final decision at this stage, for the dismissal—for want of jurisdiction and not for failure to state a substantive cause of action—can be affirmed only if some rigid doctrine deprives the federal courts of jurisdiction to redress any malapportionment, however gross and however susceptible to a judicial remedy it may be. It is sufficient for the federal courts to assume jurisdiction that the complaint state a colorable claim under the Fourteenth Amendment and that a judicial remedy appears merely possible. If it is later shown that no judicial remedy can in fact be fashioned, the court can exercise its equitable discretion to dismiss.

I

The complaint in this case sufficiently alleges a violation of complainants' rights under the Fourteenth Amendment to be within the jurisdiction of the district court.

A. The Fourteenth Amendment is violated by an arbitrary and unreasonable apportionment of seats in a State legislature.

1. This Court has repeatedly invalidated discriminations against a class of voters based on race. The prohibitions of the Fourteenth Amendment are not confined to discriminations based on race, but extend to arbitrary and capricious action against other groups. Thus, a geographical classification may be so irrational as to violate the Fourteenth Amendment.

Although a wide discretion is left to the States, State legislation with respect to legislative apportionment nevertheless must conform to the Fourteenth Amendment. It must be "rooted in reason" *Griffin* v. *Illinois,* 351 U.S. 12, 21 (Mr. Justice Frankfurter concurring), *i.e.,* it must not create classifications so arbitrary as to violate the equal protection clause. Similarly, the due process clause prohibits malapportionment so gross as to deprive persons of a fair share in choosing their own government, for this would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' " (*Palko* v. *Connecticut,* 302 U.S. 319, 325).

2. The merits of a challenge to the constitutionality of a legislative apportionment under the Fourteenth Amendment are amenable to reasoned analysis and

judicial determination. While the Amendment's guarantees do not lend themselves to mathematical formulas, the starting point must be *per capita* equality of representation, a fundamental American ideal. Since, however, political power is not a function of numbers alone, other desiderata may also be recognized, such as political subdivisions and geographic areas.

Where a malapportionment is challenged under the equal protection or due process clause, the initial step is to inquire whether it has any asserted justification or any coherent purpose beyond the perpetuation of past political power. If none can be asserted and the discrimination is gross, the apportionment violates the Fourteenth Amendment. If a justification were asserted, further inquiry would be required in order to determine whether this justification resulted in a reasonable classification and violated no "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." This process of adjudicating the constitutionality of a State legislative apportionment does not call for the exercise of a different function or require the Court to proceed in a different manner than in the resolution of other due process and equal protection issues.

3. The need for constitutional protection is urgent, because malapportionment is subverting responsible State and local government. Malapportionment in State legislatures is markedly more severe than Congressional malapportionment, and is becoming increasingly worse. It has had the widespread

consequence of disabling the States from meeting burgeoning urban needs.

B. Tennessee's legislative apportionment, as described in the complaint, violates the equal protection and due process clauses of the Fourteenth Amendment. The complaint alleges that a minority of 37 percent of the voting population control twenty of the thirty-three members of the Senate, and a minority of 40 percent of the voting population controls sixty-three of the ninety-nine members of the House of Representatives. No justification for so gross a departure from the basic ideal of political equality has even been suggested by the appellees. Thus, this case is hardly distinguishable from *Gomillion* v. *Lightfoot,* 364 U.S. 339, where this Court struck down a State attempt to draw the boundary lines of a political subdivision because the State showed no rational justification to rebut the plaintiffs' claim of racial discrimination.

C. It is unnecessary, however, to determine whether the complaint states a cause of action in order to hold that the district court had jurisdiction. "[I]f the bill * * * makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U.S. 271, 273. The only exceptions to this doctrine are where the federal claim is patently frivolous or made solely to obtain federal jurisdiction. Whatever its ultimate merit, the complaint here is squarely founded on the Fourteenth Amendment and presents a substantial claim.

II

The district court had, and should have exercised, jurisdiction over this action to redress an unconstitutional apportionment. General jurisdiction is clearly conferred by 28 U.S.C. 1343 which gives the district courts jurisdiction of any civil action to secure redress for a violation of constitutional rights under color of State authority. Appellants have standing to bring this action for they seek to vindicate personal rights. This Court has recognized that voters have standing to assert either that they have been denied the right to vote entirely or that they must vote pursuant to an invalid State apportionment of Congressional Representatives.

A. The constitutional issue is not a political question beyond the jurisdiction of the federal courts.

1. The Court has never held that apportionment cases necessarily raise non-justiciable questions. Rather, it has passed on the merits of apportionment systems. *E.g., Smiley* v. *Holm,* 285 U.S. 355. *Colegrove* v. *Green, supra,* does not hold to the contrary. Admittedly, three Justices would have held there that apportionment of Representatives is a political question beyond the power of federal courts to decide, but a majority of the participating Justices (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that the federal courts do have such power. Mr. Justice Rutledge, whose vote in this respect was dispositive of the case, concluded that, under *Smiley* v. *Holm,* 328 U.S. at 565, "this Court has power to afford relief in a case of this type * * *."

In no subsequent apportionment case does this Court appear to have held that the federal courts lack power to adjudicate the constitutionality of apportionment systems. In *South* v. *Peters,* 339 U.S. 276, the Court stated that the "[f]ederal courts consistently refuse to exercise their equity powers * * *"—not that no power exists. In a series of later cases, the Court has refused to entertain the issue of malapportionment on the merits without indicating the basis of its decision. And, just last term, in *Gomillion* v. *Lightfoot, supra,* the Court held that the power of a State to fix boundaries of its political subdivisions cannot be exercised in such a way as to deprive a person of his right to vote because of race.

2. In any event *Colegrove* v. *Green* is distinguishable from the present case, both because of important distinctions and because its rationale has been undermined by subsequent developments.

Colegrove dealt with apportionment of Congressional districts. The opinion of Mr. Justice Frankfurter states that the power of Congress to consider Congressional apportionment is exclusive, relying on the power of the House of Representatives to judge the qualifications of its own members under Article I, Section 5, and of Congress to regulate the holding of elections under Article I, Section 4. Article I, Sections 4 and 5, are obviously not relevant here. Congressional power to enact "appropriate legislation" under the Fourteenth Amendment is not comparable since this Court has always dealt with any violation of the Fourteenth Amendment without awaiting im-

plementing legislation beyond the general statute conferring jurisdiction.

The Civil Rights Acts of 1957 and 1960, both enacted subsequent to *Colegrove,* also show that the election process is not to be regarded as exclusively political in nature. In both Acts Congress emphasized the national policy of relying on the judiciary as the organ through which the right to vote is to be made fully effective.

Another important factor on which reliance was placed in the opinion of Mr. Justice Frankfurter in the *Colegrove* case was the difficulty of finding an effective and appropriate remedy. But, as we will see, there is every reason to believe that appropriate judicial remedies can be applied in the present case.

3. *Luther* v. *Borden,* 7 How. 1, and similar cases are distinguishable because here the complainants do not challenge the legitimacy of any previously chosen legislature or the validity of any of its enactments. Nor is there even any need to decide upon the legitimacy of the present legislature. Although the Supreme Court of Tennessee expressed the fear that sustaining a legal challenge to the existing apportionment act would leave Tennessee without a legislature to enact a new apportionment act (*Kidd* v. *McCanless,* 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920), the Court in this case need simply hold that future elections under the existing apportionment act would be invalid. This Court, moreover, is not

bound by State court decisions concerning the legal consequences of a federal decree.

III

The exercise of sound equitable discretion requires the federal courts to retain jurisdiction and adjudicate the merits of the present controversy. There are compelling circumstances to invoke the chancellor's conscience.

1. The merits of this case can be adjudicated without intruding into the legislative or political process. There is no need here to consider whether there is any rational and constitutional justification for Tennessee's grossly unequal apportionment. For Tennessee has offered no basis for making its apportionment other than the equal representation required by its constitution; and the present apportionment is grossly unequal. In these circumstances, the constitutional question is no harder for a court to answer than other constitutional questions which the courts have been adjudicating for decades.

2. The seriousness of the wrong calls for judicial action. It is only a slight exaggeration to say that one-third of the voters of Tennessee rule the other two-thirds in the enactment of legislation.

3. The complainants have no judicial remedy outside of the federal courts because they have exhausted their remedies in the State courts. They have no political remedies in Tennessee, moreover, as shown by the history of inaction, the improbability that the Tennessee legislators will vote to surrender their power, and the fact that only the legislature can call a constitutional convention.

4. Effective judicial relief can be provided here without overstepping the limits of appropriate judicial action. The Tennessee constitution provides guidelines for proper apportionment. In order to achieve a more equitable apportionment, only a few changes, which are clearly indicated by the rules laid down by the Tennessee constitution, need be made in each house. Alternatively, the court could order an election at large or one of several other remedies. But it is unlikely that it would even be necessary for the court to order any relief. Recent cases show that State legislatures often reapportion themselves when faced with the likelihood of judicial action. Since there are excellent political reasons for a legislature to prefer reapportioning itself, a judicial determination that the existing apportionment is unconstitutional, reserving action as to the proper remedy, is very likely to result in prompt legislative action.

ARGUMENT

This case involves the most basic right in a democracy, the right to fair representation in one's own government. According to the complaint—and at this stage of the case the allegations of the complaint must be accepted as true—the Tennessee legislature has not been reapportioned since 1901, contrary to the explicit terms of the State constitution, which requires reapportionment every ten years. The result is gross discrimination against voters in several parts of the State. A single vote in Moore County is worth nineteen votes in Hamilton County in electing members of the State House of Representatives. A vote in

Stewart or Chester County has almost eight times the weight of a vote in Shelby or Knox County. Thirty-seven percent of the voting population elects sixty percent of the State Senate—twenty of thirty-three members. Forty percent of the voters elects sixty-three percent of the House of Representatives—sixty-three of ninety-nine members.

This discrimination, principally against urban voters, has at least two consequences. *First,* these voters are deprived of the fundamental right to share fairly in choosing their own government. *Second,* the extreme underrepresentation of urban voters has resulted in discrimination by the State legislature against urban areas in the State's exercise of its governmental powers. In Tennessee, as in many other States, the underrepresentation of urban voters has been a dominant factor in the refusal of the State to meet the growing problems of the cities.

The court below, although it agreed that there was "a clear violation * * * of the rights of the plaintiffs" (R. 219), dismissed the bill upon the ground that "federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment" (R. 216), citing *Colegrove* v. *Green,* 328 U.S. 549, and later cases. The central issue upon this appeal, therefore, is whether the claim that a legislative malapportionment is so gross as to violate the due process or equal protection clause of the Fourteenth Amendment presents a justiciable question. We submit that the complainants' claim is justiciable; that *Colegrove* v. *Green*

does not support the dismissal for want of jurisdiction; and that the court below should retain jurisdiction and adjudicate the merits.

The view that legislative malapportionment raises exclusively political questions appears to rest, at bottom, upon (1) doubt as to whether the fair allocation of legislative seats is sufficiently amenable to rational analysis to be suitable for judicial review and (2) misgivings concerning the effectiveness of judicial remedies. We propose to demonstrate that, although there are wide areas for compromise and all kinds of political considerations may enter into legislative apportionment, the interests deserving constitutional recognition are sufficiently identifiable and the relevant factors are sufficiently articulatable to permit the kind of rational analysis requisite for constitutional adjudication. We also submit that, although jurisdiction must sometimes be declined in the exercise of equitable discretion, the courts have sufficient ability to provide effective relief, without intruding into the sphere of political judgments, to preclude laying down any hard and fast exclusionary rule based upon the supposed inappropriateness of judicial remedies.

These two questions, which we believe determine the justiciability of a constitutional attack upon a legislative malapportionment, parallel the two basic issues which must ultimately be decided in the present litigation, *viz.*—

> 1. Whether the malapportionment of the Tennessee legislature violates rights of the

complainants secured by the Fourteenth Amendment.

2. Whether judicial relief is available against the alleged violation.

Although both questions are present, neither requires a final decision at this stage of the case. The district court's opinion indicates that it dismissed the bill for want of jurisdiction without any real consideration of whether it substantively stated a cause of action (R. 220). The decree can be affirmed only if some rigid doctrine deprives the federal courts of jurisdiction to redress a malapportionment, however gross and however susceptible to a judicial remedy it may be.

It is permissible but not necessary to decide whether the malapportionment alleged in the complaint violates the Fourteenth Amendment. The court below did not rule upon the point. We submit that the complaint states a cause of action. If this Court has doubt but agrees that the claim is justiciable, it would be proper to reverse and remand for consideration of the merits by the three-judge court. Certainly the complainant states a colorable claim under the Fourteenth Amendment, and it is well settled that "[i]f the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not"—at least when not patently frivolous. *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U.S. 271, 273–274.

Similarly, it is not necessary to decide now on a particular remedy for Tennessee's malapportionment. If, as we contend, the federal courts have power to hear such cases, subject to the exercise of their equi-

table discretion to dismiss if it should appear that an appropriate decree could not be fashioned, then the decision below must be reversed; for in the present case there is every likelihood that the lower court can give appropriate relief. Whether the probability can be realized, should be left to the future.

In the argument which follows we present first the contention that the malapportionment of the Tennessee legislature violates the equal protection and due process clauses of the Fourteenth Amendment. Our primary purpose is to show in the context of an actual controversy that both the substance of such constitutional claims and also the available criteria for decision are of such a character as to render the claims amenable to judicial consideration. In the second part of this brief we deal with other alleged obstacles to the exercise of jurisdiction, with special emphasis upon the availability and effectiveness of judicial remedies. Thus, both branches of the argument, despite their other aspects, center upon the justiciability of a claim that a legislative malapportionment is so gross as to violate the Fourteenth Amendment.

I

THE COMPLAINT SUFFICIENTLY ALLEGES A VIOLATION OF COMPLAINANTS' RIGHTS UNDER THE FOURTEENTH AMENDMENT TO BE WITHIN THE JURISDICTION OF THE DISTRICT COURT

A. THE FOURTEENTH AMENDMENT IS VIOLATED BY AN ARBITRARY AND UNREASONABLE APPORTIONMENT OF SEATS IN A STATE LEGISLATURE

1. *The right to be free from gross discrimination in the selection of a State legislature is a federal right protected by the Fourteenth Amendment.*

Appellants allege in their complaint that "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * * [they] and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment * * *" (R. 12; see also R. 10, 19). They assert that the State legislature, despite an explicit command in the State constitution, has failed to reapportion State legislative districts since 1901 (R. 9–10, 86). As a result, they allege, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate * * *" and 40 percent of the voters elects sixty-three of the ninety-nine members of the House (R. 13). They claim that they thereby "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment * * *" (R. 12). The complaint and the supporting papers thus assert a claim of discrimination against Tennessee voters based on their geographic location.

The right to be free from hostile or capricious discrimination by a State in defining the class of persons entitled to vote, as well as in the exercise of the franchise, is a federal right protected by the Fourteenth Amendment. The Court has repeatedly invalidated discriminations against a class of voters on the basis of race. *E.g., Nixon* v. *Herndon,* 273 U.S. 536; cf. *Smith* v. *Allwright,* 321 U.S. 649; *Gomillion* v. *Lightfoot,* 364 U.S. 339. And, ever since *Munn* v. *Illinois,* 94 U.S. 113, it has been clear that prohibitions in the

Fourteenth Amendment are not confined to discrimination based on color, but extend to arbitrary and capricious action against other groups. Thus, it would obviously violate the due process and equal protection clauses for a State to deny the franchise to persons who had ever visited the Soviet Union or to women who bobbed their hair.[10]

A geographical classification may also be so irrational as to violate the Fourteenth Amendment. No one would defend the constitutionality of giving one twenty-fifth of a vote to citizens in the eastern half of a State and one vote to those in the western half. The case is exactly the same when a statute gives one representative to each of the populous counties in the eastern half and twenty-five representatives to the sparsely populated counties in the west. The statute which arbitrarily provides such disproportionate representation must therefore be equally unconstitutional. There is no merit to appellees' distinction be-

[10] In this context it seems unnecessary to distinguish between the due process and equal protection clauses. The liberty protected by the due process clause, of course, includes the right to vote. In *Bolling* v. *Sharpe*, 347 U.S. 497, 499, this Court held that gross discrimination constitutes a denial of due process:

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Thus, it appears that malapportionment can so grossly discriminate against urban voters that it violates due process.

tween the denial of voting rights and the distortion of their weight in the legislative chambers. In *United States* v. *Classic,* 313 U.S. 299, the Court held that a qualified voter had a constitutional right to have his vote counted in a primary election for the House of Representatives without dilution by fraudulent tabulations. Similarly, in *United States* v. *Saylor,* 322 U.S. 385, the Court ruled that a qualified voter had a constitutional right to have his vote counted in the election of a Senator without dilution by the stuffing of ballot boxes. In both these cases the essence of the wrong was the improper devaluation of votes.

Of course, a wide range of discretion is left to the States in choosing units of representation. So long as the State legislature fairly represents the people of the State, there can be no violation of the Constitution. It does not follow, however, that merely because some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed. State legislation dealing with legislative apportionment must be measured by tests of reasonableness like other State legislation. Such legislation must be "rooted in reason" (*Griffin* v. *Illinois,* 351 U.S. 12, 21 (Mr. Justice Frankfurter concurring)), *i.e.,* it must not create classifications so arbitrary and unreasonable as to offend the equal protection clause of the Fourteenth Amendment. The due process clause protects rights "found to be implicit in the concept of ordered liberty" (*Palko* v. *Connecticut,* 302 U.S. 319, 325); which are "of the very essence of a scheme of ordered liberty" (*ibid.*); which, if abol-

ished, would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" *Snyder* v. *Massachusetts,* 291 U.S. 97, 105) (302 U.S. at 325); and which "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (*Hebert* v. *Louisiana,* 272 U.S. 312, 316 (302 U.S. at 328). Certainly, the right to have a fair share in the choosing of one's own government is "of the very essence of a scheme of ordered liberty" and is a fundamental principle of liberty and justice lying "at the base of all our civil and political institutions." When a State arbitrarily and unreasonably apportions its legislature so as to deny the real meaning of the right to vote, *i.e.,* effective participation in democratic government, both the equal protection and due process clauses are violated.

2. *The merits of a challenge to the constitutionality of a legislative apportionment under the Fourteenth Amendment are amenable to reasoned analysis and judicial determination.*

It is unnecessary and unwise to attempt to formulate precise tests for determining when a legislative apportionment violates the Fourteenth Amendment. The Amendment's fundamental guarantees do not lend themselves to mathematical formulas. The line must be pricked out case by case. It may be useful, however, since the basic issue is *res nova,* to suggest some of the factors which would ultimately have to be weighed in deciding whether an apportionment act violates the equal protection or due process clause of the Fourteenth Amendment. Their analysis shows

that legislative apportionment, although it involves many compromises, is properly rooted in reason; that judicial review of the merits of a questioned apportionment is not dissimilar to review of other classifications; and that the challenge to a particular apportionment is therefore susceptible to constitutional adjudication.

(a) *Numerical Equality.*—Surely the starting point must be *per capita* equality of representation. Political equality is one of the fundamental ideals of American life. Any serious departure from apportionment according to population (whether persons or qualified voters)—certainly any departure affecting both houses of the legislature—is subject to question, although the divergence might also be shown to have a rational justification. Since exact numerical equality of population within legislative districts is impossible to achieve, all that the principle requires, in this context, is "that equality in the representation of the state which an ordinary knowledge of the population and a sense of common justice would suggest" (*Ragland* v. *Anderson,* 125 Ky. 141, 158, 100 S.W. 865, 869).[11]

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[11] Among yardsticks proposed for measuring permissible variations have been evaluation of the relative deviation above or below the average population of all districts in the State, and the relative excess of the largest over the smallest districts in the State. See Note, *Constitutional Right to Congressional Districts of Equal Population,* 56 Yale L.J. 127, 138, note 45 (1946); Tabor, *The Gerrymandering of State and Federal Legislative Districts,* 16 Md. L. Rev. 277, 293, note 78 (1956); Celler, *Congressional Apportionment—Past, Present, and Future,* 17 Law & Contemp. Prob. 268, 274–275 (1952).

The following chart lists comparative population figures in certain cases where legislative reapportionment acts have been

The extent to which the right of equal representation is ingrained in our constitutional system is evidenced by the fact that more than four-fifths of the State constitutions make apportionment according to population or qualified voters the basic principle for choosing at least one branch of the State legislature. Thus, thirteen States provide for apportionment in both houses based largely on population (meaning either people or voters).[12] Another twelve States apportion in this manner, except that in one house each county or town is guaranteed at least one seat.[13] Nineteen States, although they provide other bases for choosing the representatives in one branch, call for apportionment of the other according to population either with or without the stipulation that each county or town shall have at least one seat.[14]

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invalidated by State courts. Of course, the test under any particular State constitution may not be the same as under the Fourteenth Amendment.

	Largest district	Smallest district
Ragland v. *Anderson*, 125 Ky. 141, 100 S. W.865 (1907)	53, 263	7, 407
Stiglitz v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931)	128, 595	39, 210
State v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892)	38, 801	6, 823
Baird v. *Board of Sup'rs*, 138 N.Y. 95, 33 N.E. 827 (1893)	102, 805	31, 685
Attorney General v. *Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581 (1916)	6, 182	1, 957
Giddings v. *Blacker*, 93 Mich. 1, 52 N.W. 944 (1892)	91, 420	39, 727
Williams v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906)	116, 033	52, 731

[12] Colorado, Indiana, Kentucky, Massachusetts, Minnesota, Nebraska (unicameral), Oklahoma, Oregon, South Dakota, Tennessee, Washington, West Virginia, Wisconsin.

[13] Alabama, Iowa, Maine, Missouri, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Utah, Wyoming.

[14] Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Louisiana, Michigan, Montana, Nevada, New Hampshire, New Jersey, North Dakota,

We are not unmindful of the warning that, "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government" (*MacDougall* v. *Green,* 335 U.S. 281, 283). Historical practice shows the existence of other desiderata (see pp. 28–31 below), the due recognition of which may call for some departure from apportionment according to population; and a State has wide discretion in evaluating the opposing interests and making an accommodation. Our argument on this point is simply that the other desiderata are capable of the kind of rational statement and analysis which is required for constitutional adjudication. If the State can point to neither rhyme nor reason for a discriminatory apportionment, save that it is an anachronism, the apportionment should be held to violate the Fourteenth Amendment.[15]

(b) *Criteria Justifying Some Inequality in Apportionment.*—Historically, the claim of political subdivisions to representation regardless of size has been an important reason for departing from the strict rule of apportionment according to population. Early in our history the town or county was often

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South Carolina, Vermont. In six States the State constitution or statute does not expressly base apportionment in at least one house on population. In Kansas, Mississippi, New Mexico, and Virginia there is no indication as to the method of apportionment. The Maryland and Delaware constitutions specifically prescribe the number of representatives for each district.

[15] This proposition seems sufficient for the present case since Tennessee offers no justification for its gross malapportionment. See pp. 45–47 below. In other situations it might be necessary to go on and determine whether the reasons given by the State are sufficient justification. See p. 33 below.

a dominant unit of government, and the colonial assembly and later the State legislature were composed of representatives from these entities. Since it was the town or county that was being represented, in a very real sense, and not the people directly, it was natural to guarantee each unit at least one representative in one, and sometimes both, of the branches of the legislature. Such provisions are still found in the constitutions of twenty-seven States.[16] In eight of these States enough weight has been attached to the county or town as a unit to provide that each such subdivision should have the same representation in one branch of the legislature.[17] The federal Constitution contains a similar compromise between the claims of the States and direct representation of the people.

The interest in geographical distribution of political power is also advanced by granting some representation to each town, county, or other political subdivision. Constitutional statecraft often involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality in voting rights would be achieved if an entire State legislature were elected at large but the danger is too great that the remote and less populated sections would be neglected or that, in the event of a

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[16] Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont.

[17] Arizona, Connecticut, Idaho, Nevada, New Jersey, New Mexico, South Carolina, Vermont.

conflict between two parts of the State, the more populous region would elect the entire legislature and in its councils the minority would never be heard.

Due recognition of geographic and other minority interests is also a comprehensible reason for reducing the weight of votes in great cities. If seventy percent of a State's population lived in a single city and the remainder was scattered over wide country areas and small towns, it might be reasonable to give the city voters somewhat smaller representation than that to which they would be entitled by a strictly numerical apportionment in order to reduce the danger of total neglect of the needs and wishes of rural areas. It would probably be unconstitutional even under these circumstances, however, to apportion both houses of the legislature in such a way that both houses were controlled by representatives chosen by the rural thirty percent of the State's population.[18]

Other factors have also been considered in allocating legislators, such as the share of a district in the cost of State government. In New Hampshire seats in the Senate are apportioned in the ratio of direct taxes paid.

Some inequality can be justified, not only on the basis of the deliberate systems of apportionment discussed above, but also as the result of population

[18] This problem seems to have been taken into account in the Texas Constitution. Seats in the lower house are apportioned according to population but no county may have more than seven representatives unless its population exceeds 700,000, in which event it is allocated one representative for each additional 100,000 people. Evidently, the purpose was to prevent one or two heavily populated counties from dominating the State.

shifts since the last apportionment. The expense, unsettling effects, and legislative time required make it impracticable for legislatures to reapportion at every session. In determining what is an excessive hiatus between apportionments, the historic requirements for reapportionment contained in State constitutions all over the country again show the considered judgment of the community. The constitutions of forty-three States require the apportionment or redistricting of one or both houses of the legislature at least once every ten years. None suggests a 40, 50, or 60-year interval.

(c) *Other Considerations in Determining Constitutionality.*—When a legislature is unequally apportioned, there are at least two other facts to be considered in determining whether the inequality is gross enough to violate the Fourteenth Amendment. First, gross malapportionment in a unicameral legislature or in both houses of a bicameral legislature is obviously harder to justify than a system of representation which is based on population in one house, and, in the other, apportions representatives upon some other basis. This compromise between opposing desiderata is found in the constitutions of the United States and a number of States. Conversely, the most serious instances of malapportionment are those which permit minorities to rule both branches of the legislature.

Second, the availability of other methods of expressing the popular will is relevant in the event that the legislature is not apportioned in accordance with population. For example, complaints of under-

representation in a State legislature may be less serious in a State which provides for legislation by referenda initiated by a reasonable number of voters. Under such a system, the majority of the population can pass legislation and, indeed, can reapportion the legislature itself. On the other hand, such a remedy would hardly be sufficient if a minority of the people were seriously underrepresented. The availability of a constitutional correction is also material. If a convention could be called by petition or some other expression of popular will, the availability of this remedy would perhaps offset a measure of inequality in the apportionment. On the other hand, the unfairness is the greater if only the malapportioned legislature can call a constitutional convention, as in Tennessee. Tenn. Const., Art. XI, Section 3.

The foregoing illustrations, taken from State constitutions, do not exhaust the list of factors which might be taken into account in apportioning a State legislature or in judging the constitutionality of a particular apportionment under the Fourteenth Amendment. A study of State constitutions does show, however, that the acceptable bases for any serious departure from the basic ideal of political equality are amenable to identification and articulation. Consequently, where a serious malapportionment is challenged under the due process or equal protection clause, the initial step is to inquire whether it has any asserted justification or coherent purpose beyond the perpetuation of past political power. This was the process suggesetd by the Court in *Gomillion* v. *Light-*

foot, 364 U.S. 339, 342, where an analogous question of State districting was involved (see pp. 47–48 below). If no justification can even be asserted, as in this case, and the discriminations and inequities are gross, the apportionment violates the Fourteenth Amendment.

In a case in which a comprehensible justification for the departure from the principle of equal representation was asserted, the Court would have to go farther and determine whether this justification was sufficient, *i.e.,* resulted in a reasonable classification and violated no "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." This issue necessarily turns on matters of judgment and degree. The apportionment of representatives in the ratio of the value of real property, for example, may be offered as a justification, but there is ground to inquire whether it is any longer consistent with those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana,* 272 U.S. 312, 316. Similarly, the desire to give historic subdivisions a minimum of one representative per unit in one house may be a sufficient justification for a small departure from the rule of equal representation in proportion to the population to satisfy the requirements of the Fourteenth Amendment; but the larger the departure became, the less adequate the justification would be.[19]

[19] This issue should be resolved in the light of current conditions and not merely by reference to historical practice. At the time most State constitutions were adopted the population was more evenly distributed than today, so that guaranteeing

Judgments upon the relative value of divergent interests, the art of compromise and accommodation, and the practicalities of political manipulation are the responsibility of the political branches of government. The constitutional limitations implicit in the due process and equal protection clauses leave a wide area for legislative discretion. Cf. *MacDougall* v. *Green,* 335 U.S. 281, 284. But free recognition of the breadth and importance of this aspect of a State's political power does not require exaltation of the power into an absolute. Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339, 342. The Court can and should afford citizens important protection of the right to vote under the Fourteenth Amendment by invalidating those discriminations which are so arbitrary and capricious as to lack any rational foundation. The process of adjudicating the constitutionality of a State legislative apportionment does not call for the exercise of a different function or require the Court to proceed in a different manner than in the resolution of many other issues of due process and equal protection.

Moreover, the need for constitutional protection here is infinitely greater. Arbitrary and capricious action affecting the fundamental right to vote goes to the

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each county or town a seat did not work the same discrimination against urban voters that it may cause today in a legislature with a limitation upon the number of members. Furthermore, towns and counties no longer have their historic separateness. Their importance has diminished, and even though history and common acceptance also have their claims, the methods of representation which once were fair and reasonable may now have less to commend them.

heart of our government. In *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152, note 4, Mr. Justice Stone raised the question "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." See also *Minersville School Dist.* v. *Gobitis,* 310 U.S. 586, 599–600 (overruled on other grounds in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642). Writing specifically of legislation affecting the right to vote, Judge Cooley stated (2 Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1370):

> All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.

Arbitrary regulation of the right to vote, even more than restrictions upon freedom of communication, destroys the essential pre-conditions of alert democracy. Those who are denied the right to vote or who are grossly under-represented cannot protect their franchise by voting. There is, therefore, a special reason for the courts to exert all the power they possess for the vindication of these constitutional rights.

3. *The need for constitutional protection is urgent because malapportionment of State legislatures is subverting responsible State and local government.*

The dangers of arbitrary and capricious malapportionment defeating the fundamental right to vote are not merely theoretical. The disparities between State legislative districts, through selfishness or indifference, are constantly increasing, almost always to the disadvantage of growing cities. The consequences cast doubt upon the workability of State government and threaten to affect the balance of the federal system. The current conditions infecting legislative apportionment in some of our States are much more serious than the malapportionment of Congressional districts in 1946 at the time of the decision in *Colegrove* v. *Green,* 328 U.S. 549.

In 1946 the disparity between the most and least populous Congressional districts in Illinois was approximately eight to one. Illinois had then, by far, the most badly apportioned Congressional districts of any State in the country. Only one other State had a more than four to one disparity (Ohio), another State had a more than three to one disparity in Con-Dakota), and eleven other states had more than two to one disparities. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green, supra,* 328 U.S. at 557–559. Similarly, in 1950, only one State had a more than three to one disparity in Congressional districts (South Dakota), and nine others had a more than two to one disparity. In Tennessee both in 1946 and 1950, the rate was slightly less than two to one.

In contrast, the situation in most State legislatures

is considerably worse. Figures derived from the 1950 federal census show that in Kansas, Delaware, Florida, Vermont, and Connecticut, majorities in the lower chamber of the State legislature represented only 22½ percent, 19½ percent, 17 percent, 12½ percent, and 9½ percent of the population, respectively. 106 Cong. Rec. 13828 (daily ed.). In Tennessee, according to the complaint, only 40 percent of the voters elect 63 of the 99 members of the lower house and 37 percent of the voters elect 20 of the 33 members of the upper house (R. 13). The smallest population per representative is 3,948, the largest 75,134, a ratio of 19 to 1.[20]

It is not accidental that the malapportionment of the State legislatures is considerably greater throughout the country (including Tennessee) than the malapportionment of Congressional districts, serious as the latter also is. For in most States periodic reapportionment of Congressional districts is virtually assured by law.[21] The result is that there was no ap-

[20] The record shows that the 2,340 qualified voters (as contrasted to total population) of Moore County are entitled to one representative in the Tennessee House of Representatives while the 312,345 voters of Shelby County elect only seven (R. 231, 234). This is a disparity of approximately 20 to 1.

[21] Every ten years the House is automatically reapportioned. The new apportionment is calculated by the executive department and transmitted to Congress. The report based on the 1960 census is Message from the President, H. Doc. No. 46, 87th Cong., 1st Sess. (January 12, 1961). Each State is then notified of the number of Representatives to which it is entitled. 46 Stat. 26 (1929), as amended, 2 U.S.C. 2(a). If the State loses one or more Representatives, it is required either to reapportion or to elect all its Representatives at large. The latter alternative has rarely been adopted, particularly by states with more than two Representatives. If the State gains one or more Representatives, it can either reapportion or elect the

preciable worsening of the malapportionment of Congress from 1928 to 1950 despite marked changes of population. In 1928, three States had a disparity between Congressional districts of more than three to one and nine others of over two to one. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green, supra,* 328 U.S. at 557–559. In 1946, one State had a disparity of over eight to one, another of over four to one, another over three to one, and eleven others of over two to one. *Ibid.* And in 1950 only one State had a disparity of over three to one, and but nine others had a disparity of over two to one.

The situation is becoming markedly worse, however, in the State legislatures. There has been no pressure, comparable to that which has led to the reapportionment of Representatives by Congress to force legislative action. The only major exception is where State courts have assumed jurisdiction (which has been frequent) and provided an effective remedy (which is less so). See Lewis, *Legislative Apportionment and the Federal Courts,* 71 Harv. L. Rev. 1057, 1066–1070. In States such as Tennessee in which the State courts have refused to act (see *Kidd* v. *McCan-*

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added Representatives at large. Again, the latter alternative has rarely beeen followed by the larger States. The 1960 census will result in nine states gaining and sixteen states losing one or more Representatives. In addition, five states will have only one Representative and two states elect at present their only two Representatives at large. See Message of the President, H. Doc. No. 46, 87th Cong., 1st Sess., pp. 1, 2; Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 81.

less, 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920), the State legislatures have generally refused to obey the provisions in their own constitutions or statutes requiring regular reapportionment. Although the constitutions of forty-three States require reapportionment or redistricting [22] of one or both houses of the legislature every ten years (including Tennessee) or more frequently, in 1958 twenty-three of the then forty-eight States had not reapportioned for periods ranging from ten years to half a century or more. See Lewis, *op. cit. supra,* p. 1060; Alaska Const., Art. VI, Sections 3, 5–7; Hawaii Const., Art. III, Section 4. See also 106 Cong. Rec. 13831–13833 (daily ed.) for tabular analyses of the requirements of State constitutions. Alabama, Connecticut, Delaware, Maryland, New Jersey, South Carolina, and Vermont, in addition to Tennessee, had apportionments and legislative districts which were over fifty years old. At least twenty-seven legislatures had not been touched for more than twenty-five years. Merry, *Minority Rule: Challenge to Democracy,* Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.). The result has been in Tennessee, as elsewhere, that as population has shifted, particularly toward urban centers, State legislative malapportionment has become drastically worse.

In our country's early history, the average citizen looked to the State legislature for initiative and wisdom in the formulation of public policy on domestic

[22] Reapportionment requires only a reevaluation of the number of legislators allotted each district, while redistricting requires that the districts themselves be redrawn.

issues. U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 38. Only thirty years ago Mr. Justice Brandeis singled out as an important characteristic of our federal system the fact that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (dissenting opinion). The State legislatures, however, have in very large part failed to adapt themselves to modern problems and majority needs, and this failure has resulted in public cynicism, disillusionment, and loss of confidence. A primary reason for the failure of the States to respond is that in many States a majority of the people, even a large majority, do not control the legislature. The dictation of legislative action by a minority of the citizens has tended to stifle civic responsibility at the very time when novel problems are pressing upon the country.

More specifically, the most glaring consequence of malapportionment of State legislatures is the gross underrepresentation of urban interests. As cities have grown more rapidly than rural areas, the existing apportionments, when not changed by the legislatures, have tended to create an increasing imbalance in legislative representation discriminating against urban areas.[23] As early as 1928, H. L. Mencken, in his characteristically caustic manner, commented

[23] See Baker, *Rural Versus Urban Political Power* (1955), pp. 16–17, note a, for a table showing the extent of urban underrepresentation in the state legislatures.

upon the inequities of this situation. "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern Shore counts as much as the votes of twelve Baltimoreans." Mencken, *A Carnival of Buncombe,* 160 (Moos ed., 1956) (reprinted from the Baltimore Evening Sun, July 23, 1928, p. 15, col. 4 (financial ed.). Then, in a rare note of optimism, he added: "But that can't last. It is not only unjust and undemocratic; it is absurd."[24] *Ibid.* One may dislike Mencken's prejudice against rural citizens, yet recognize the inequity. Mencken proved a better wit than a prophet, for the same complaint and prognosis were echoed thirty years later by President (then Senator) Kennedy (Kennedy, *The Shame of the States,* New York Times Magazine, May 18, 1958, pp. 12, 37):

> [T]he apportionment of representation in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and proportionate voice in government to which they are entitled.

The malapportionment of State legislatures not only subverts democratic principles generally, but it also has the effect of precluding the States from meeting burgeoning needs resulting from the transformation of the basic character of our society from

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[24] It may not be entirely coincidental that the Tennessee House recently voted down a bill to repeal the "Monkey Law," which prohibits teaching about evolution. Washington Post, March 4, 1961, p. A3, col. 7.

predominantly rural to predominantly urban.[25] See U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 3. It is widely agreed that the pressing domestic problems stemming from the metropolitan population explosion—housing, urban renewal and slum clearance, education, transportation, juvenile delinquency, water and air pollution—are not being adequately met. *Id.* at 38; *The Exploding Metropolis,* written by the Editors of *Fortune* (1957), p. 1. The failure is reflected not merely in unresponsiveness to special urban needs and lack of sympathy for the urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. This action takes such forms, as the complaint here alleges, as systematically discriminatory taxation of underrepresented, generally urban, areas as contrasted with overrepresented rural areas; far greater per capita spending by the State in overrepresented rural areas than in the urban areas (R. 16–18; see also R. 229–254);[26] and the denial even of the urban areas' pro-

[25] In 1900, at least sixty percent of all Americans lived on farms or in small rural communities, and less than forty percent were city dwellers. Today approximately seventy percent of the people live in urban or suburban areas and the rural population has diminished to about thirty percent. Merry, *Minority Rule: Challenge to Democracy*, Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.)

[26] Nor is this situation limited to Tennessee. In Colorado, for example, the legislature allows Denver only $2.3 million a year in school aid for 90,000 children, but gives adjacent Jefferson County, a semi-rural area, $2.4 million for 18,000 pupils. Strout, *The Next Election Is Already Rigged*, Harper's (November 1959), reprinted at 106 Cong. Rec. 13840 (daily ed.). In Penn-

portionate share of matching funds provided by the federal government (R. 119–120). In addition, the State legislatures have frequently refused to give populous urban centers adequate authority to enable them to solve pressing local problems themselves.

Another result of the States' neglect of the reapportionment problem is that urban governments now tend to by-pass the States and enter directly into cooperative arrangements with the national government in such areas as housing, urban development, airports, and water pollution facilities. This multiplication of national-local relationships reinforces the debilitation of State governments by weakening the States' control over their own policies and their authority over their own political subdivisions. The 1955 Report of the U.S. Commission on Intergovernmental Relations (The Kestnbaum Commission, whose members were appointed by the President) cautioned (p. 40) that "the ultimate result * * * may be a new government arrangement that will break down the constitutional pattern which has worked so well up to now." After hearings on the Kestnbaum study extending over a period of three years, the House Committee on Government Operations emphasized in its final report that "there is a strong national interest in encouraging vigorous and responsible State and local government." H. Rep. No. 2533, House Committee on Government Operations, 85th Cong., 2d Sess., p. 47.

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sylvania, the legislature pays $8 per day for the care of indigent patients to each non-sectarian hospital in the state—except Philadelphia's city-owned General Hospital, which must provide such services at an annual cost of $2.5 million. *Ibid.*

Constitutional adjudication under the Fourteenth Amendment cannot correct all the problems of malapportionment. The States have broad discretion, and within that area the only remedy is an enlightened citizenry. But broad discretion is not the equivalent of absolute and arbitrary power. Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339, 342. The Fourteenth Amendment reaches at least those egregious cases in which geographical or other discrimination imposed by a minority lacks a rational foundation. And while the urgency of the need cannot confer jurisdiction upon the federal courts, it should carry a potent appeal for the exercise of existing jurisdiction.

B. THE TENNESSEE LEGISLATIVE APPORTIONMENT, AS DESCRIBED IN THE COMPLAINT, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

Although Article II, Section 6, of the Tennessee constitution requires the legislature to allocate the ninety-nine seats in the House of Representatives and thirty-three seats in the Senate among the several counties or districts "according to the number of qualified voters in each," no apportionment has been made for sixty years. Between 1901 and 1950, according to the complaint, the population grew from 2,021,000 to 3,292,000. The 1960 federal census puts the population of Tennessee at 3,567,089. The growth was uneven between counties. The areas around Memphis, Nashville, Chattanooga, and Knoxville and Oak Ridge grew much faster than other parts of the State. Judged by the 1950 census, the complaint alleges, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate" (R. 13; Ex. E, R.

28), and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives" (R. 13; Ex. F., R. 30). In Moore County 2,340 qualified voters elect one representative to the lower house, while the 312,345 qualified voters of Shelby County elect only seven (R. 231, 234). The result, in substance, is that a citizen of Shelby County is allowed only one-nineteenth of a vote in relation to each Moore County voter. And the discrimination is gross all over the State.

It would seem too plain for argument that this arbitrary and capricious discrimination against the voters in growing counties violates the due process and equal protection clauses of the Fourteenth Amendment—unless the Court is to hold, contrary to our contention, that the Fourteenth Amendment places no restriction whatever upon the apportionment powers of a State. So gross a departure from the basic ideal of political equality, affecting both branches of the legislature, requires some rational justification. None has been suggested by the appellees; indeed, it is hard to see how any could be suggested because the Tennessee constitution requires the apportionment among districts to be made "according to the number of qualified voters in each." *Prima facie,* therefore, the complainants have made out their case.

In referring to the Tennessee constitution we do not suggest that petitioners have a federal right to have the Tennessee legislature apportioned according to the State constitution. The requirements of the Tennessee constitution are significant, coupled

with the passage of sixty years from the last apportionment, because they go far to show that there is no rational basis whatever for the present allocation of seats in the Tennessee legislature. The present allocation cannot be supported upon the only ground permissible under the State constitution. The constitution forbids the use of another method. The malapportionment results chiefly from the changes in the distribution of the population during the passage of sixty years. It is fair to infer, at least in the absence of any other explanation, that the continued use of the 1901 apportionment results from the indifference of the incumbents or their determination to retain unwarranted power, and not from any rational policy.

Nashville, C. & St. L. Ry. v. *Browning,* 310 U.S. 362, presented a different question. There the State authorities had classified the property of public utilities differently from all other property for purposes of taxation, and had taxed it at a higher rate in alleged violation of the State constitution. But the differentiation was made deliberately—"all the organs of the State are conforming to a practice, systematic, unbroken for more than forty years" (310 U.S. at 369)—and the classification, whether it violated the Tennessee constitution or not, had a widely understood, rational foundation. The *Browning* case might be applicable here if the present apportionment of the Tennessee legislature is later shown to be rooted in reason. The present record shows no justification. Even in argument, none has been suggested.

The Tennessee apportionment is not supported by any of the considerations which have sometimes led the framers of other State constitutions to compromise the principle of numerical equality among legislative districts. The present Tennessee apportionment cannot be supported in either branch of the legislature as a rational effort based on political subdivisions or geography or as an attempt to balance rural and city representation. Under an apportionment according to population the urban voters would not elect a majority in either house of the legislature—more nearly one third—and their votes would be split among four areas in quite different parts of the State. There is no suggestion that the apportionment can be defended on the basis of contributions to the cost of State government. The discrimination infects both houses of the legislature. It results not from recent developments of which the legislature may take account, but from sixty years of inaction. The majority has no other remedy such as the direct referendum. Thus, not only is there no justification for the denial of equal representation which the State authorities are in a position to assert; the apportionment cannot be supported upon any of the bases which other States have applied to their legislatures.

On the merits, therefore, and on this record the present case is hardly distinguishable from *Gomillion* v. *Lightfoot,* 364 U.S. 339. In *Gomillion* the complaint alleged a claim of racial discrimination. "Against this claim," the Court pointed out (p. 342), "respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. The

respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions * * *. We freely recognize the breadth and importance of this aspect of the State's political power. To exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions * * *."

In the present case the complaint amply alleges a claim of gross geographical discrimination. Against this claim the appellees have never suggested, either in their briefs or in oral argument, any countervailing purpose which the Tennessee apportionment is designed to achieve. We recognize the breadth and importance of the State's political power to apportion representation in its legislature, but we submit that to exalt this power into an absolute is to misconceive the reach and meaning of the Fourteenth Amendment. It is unsound to distinguish *Gomillion* from the present case on the ground that it arose under the Fifteenth Amendment. The Fourteenth Amendment protects the right to vote (*Nixon* v. *Condon,* 286 U.S. 73) and arbitrary geographical distinctions are scarcely less invidious than discriminations based upon race.

C. THE JURISDICTION OF THE DISTRICT COURT MAY BE SUSTAINED WITHOUT DETERMINING WHETHER THE COMPLAINT STATES A CAUSE OF ACTION

Although we believe that the appellants have alleged sufficient facts to show violation of both the equal protection and due process clauses of the Fourteenth

Amendment, we also recognize that the question is so novel and so complex that this Court might well conclude that it should not be determined, even to the extent of ruling on the pleadings, without a full and detailed examination of the merits by the three-judge district court. If there be doubt whether the complaint states a cause of action, it would be not only proper, but perhaps advisable, to remand the cause without resolving this constitutional issue.

The court below dismissed the complaint for want of jurisdiction. We show in Point II, below, that this ruling was in error. Appellees also moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Although the district court commented that this case involves a "clear violation" of the rights of appellants (R. 219), it granted the motion to dismiss the complaint for failure to state a claim upon which relief could be granted because it found that it lacked jurisdiction to provide a remedy. Thus, this Court has not received the benefit of full consideration of the constitutional question on its merits by the court below.

The dismissal for want of jurisdiction, if erroneous, can properly be reversed without consideration of the merits. As Justice Holmes said in *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U.S. 271, 273. "[I]f the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Bell* v. *Hood,* 327 U.S. 678, is squarely in point. There plaintiffs' right of recovery was contingent upon the scope of the protection afforded by the Fourth and Fifth Amendments, so that recovery would be had if

the amendments were construed in one way but denied if construed in another. The Court held that there was jurisdiction without resolving the constitutional issue, saying (*id.* at 682):

> Jurisdiction therefore is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. * * * Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

The only exceptions to this doctrine are cases in which the federal claim is patently frivolous, or is immaterial and made solely for the purpose of obtaining federal jurisdiction over a State cause of action. *E.g., Water Service Co.* v. *City of Redding,* 304 U.S. 252; *Norton* v. *Whiteside,* 239 U.S. 144. The present case does not fit either exception. Whatever its ultimate merit the complaint is squarely founded upon the Fourteenth Amendment, and it presents a substantial claim.

II

THE DISTRICT COURT HAD, AND SHOULD HAVE EXERCISED, JURISDICTION OVER THIS ACTION TO REDRESS AN UNCONSTITUTIONAL MALAPPORTIONMENT

The general jurisdictional statute, 28 U.S.C. 1343, provides that the district courts of the United States shall have original jurisdiction over a—

> civil action authorized by law to be commenced by any person:
>
> * * * * *

> (3) To redress the deprivation, under color of any State law * * * of any right, privilege or immunity * * * secured by the Constitution of the United States * * *.

See also 42 U.S.C. 1983, derived from the Civil Rights Act of April 20, 1871, 17 Stat. 13, which specifically authorizes suits in equity as well as other appropriate forms of redress.

The present case falls squarely within the foregoing jurisdiction. The complaint seeks to redress the deprivation by State officials of rights, relating to the elective franchise, which are secured by the due process and equal protection clauses of the Fourteenth Amendment. The violation of the Fourteenth Amendment asserted by the appellants is a private wrong directly affecting themselves and large numbers of other Tennessee voters. In *Ex parte Yarbrough*, 110 U.S. 651, this Court held that once the State has defined the class of persons entitled to vote (in that case, for a member of Congress) the right of any member of the class to vote is protected by the Constitution. That right is enforceable in the courts. *Nixon* v. *Herndon,* 273 U.S. 536; cf. *Wiley* v. *Sinkler,* 179 U.S. 58. If the denial of the right to cast a ballot is of a sufficiently "private" character to give the victim standing to sue for relief, a denial of the right to cast an effective ballot cannot logically be treated as a "public" wrong so as to deprive the victim of standing. Thus, federal jurisdiction is also sustained by such precedents as *Smith* v. *Allwright,* 321 U.S. 649, and *Gomillion* v. *Lightfoot,* 364 U.S. 339.

The standing of private persons to bring an action in federal courts to challenge an illegal apportionment was recognized in *Smiley* v. *Holm,* 285 U.S. 355. There, a unanimous Court reviewed the merits of, and granted relief in, a suit by a Minnesota "citizen, elector and taxpayer" (*id.* at 361) to enjoin the holding of a Congressional election pursuant to a State redistricting statute which violated the federal requirement that redistricting be carried out by the State's lawmaking power, including the approval of the governor. Similarly, in *Koenig* v. *Flynn,* 285 U.S. 375, the Court reviewed on the merits a suit brought by "citizens and voters" (*id.* at 379) of New York for a writ of mandamus to New York's Secretary of State to compel him to certify that Representatives were to be selected according to districts defined in a resolution of the State legislature. See also *Leser* v. *Garnett,* 258 U.S. 130; *Hawke* v. *Smith* (No. 1), 253 U.S. 221; *Stiglitz* v. *Schardien,* 239 Ky. 799, 40 S.W. 2d 315.

It plainly follows that the court below had jurisdiction unless some special judge-made rule relating to the justiciability of claims of malapportionment deprived the court of its normal statutory power to remedy the violation, under color of State law, of rights secured by the Fourteenth Amendment.

In discussing this central question it is essential to observe at the beginning the distinction between (i) a hard-and-fast rule denying jurisdiction over the subject matter, which would exclude from the federal courts all legal attacks upon unjust legislative representation, and (ii) an application of the doctrine that

a court of equity *may* decline to intervene in any particular case when it cannot frame a suitable remedy or its intervention would be contrary to the public interest. The distinction has significant legal and practical consequences:

A denial of jurisdiction over the subject matter excludes all malapportionment cases from judicial consideration as a category without regard to the seriousness of the constitutional wrong or the ability of the court to grant effective relief in the particular case. The complaint must be dismissed at the outset. On the other hand, taking jurisdiction of the subject matter, examining the merits and then asking whether equity can usefully intervene permits flexible treatment according to the necessities of the particular case. In some cases an injunction might issue. Other cases might have to be dismissed upon the ground that, whatever the wrong, there was no judicial remedy; but at least the court would have looked to the merits, appraised the degree of the wrong and the urgency of the need for judicial action as well as the difficulties, and determined whether the court could contribute to a solution, instead of disabling itself at the outset because of general misgivings about the effectiveness of its decrees.

The difference, in short, is between judicial power and equitable discretion. We submit that this Court has never held, and should not hold now, that the federal courts lack the power to deal with an unconstitutional legislative apportionment, however gross and easily remedied. On the other hand, we fully recognize the doctrine of equitable discretion, which may

sometimes call for the dismissal of an apportionment case without consideration of the merits. We shall show, however, that the exercise of sound equitable discretion under the circumstances of the present case requires, at least for the present, the retention of jurisdiction and the conduct of further proceedings upon the merits.

A. THE CONSTITUTIONAL ISSUE IS NOT A POLITICAL QUESTION BEYOND THE JURISDICTION OF THE FEDERAL COURTS

1. *The decisions of this Court show that the court below had jurisdiction.*

This Court has already sustained federal jurisdiction over legal controversies concerning apportionment. It has never held that the judiciary lacks power to deal with such cases. On the contrary, it has considered the merits of apportionment systems in several cases and has granted relief in some of them. Thus, in *Smiley* v. *Holm,* 285 U.S. 355, the Court held that the existing Minnesota apportionment of United States Representatives did not meet federal requirements because the governor had refused to approve the bill, and accordingly the Court ordered an election-at-large. The Court also held a State apportionment law invalid (the governor had vetoed it) and ordered an election-at-large in *Carroll* v. *Becker,* 285 U.S. 380. In *Koenig* v. *Flynn,* 285 U.S. 375, the Court affirmed a decision of a State court holding that, in the absence of a valid districting statute (the governor had not approved the resolution of the State legislature) to conform to the increase in Representatives allotted to the State by Congress, the additional Representatives must be elected at large. And the

Court also took jurisdiction in *Wood* v. *Broom,* 287 U.S. 1, which involved the Reapportionment Act of 1911. There the Court, deciding the merits, refused to apply the Act—which required that Congressional election districts be of contiguous and compact territory and, as nearly as practicable, of equal population—because it applied only to districts formed under the 1911 Act and not to those formed under the Apportionment Act of 1929. Although the concurring opinion of Justices Brandeis, Stone, Roberts, and Cardozo is too short for one to be sure of their reasoning, it spoke only of a dismissal "for want of equity." That phrase suggests that under traditional equity principles an injunction should not issue, not that the courts are without jurisdiction to consider the merits because a nonjusticiable political issue is involved.

Colegrove v. *Green,* 328 U.S. 549, does not hold to the contrary. Mr. Justice Frankfurter, joined by two other Justices, would have held that State apportionment of Representatives is a political question beyond the power of the federal courts to decide, but a majority of the Justices participating (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that federal courts have the power to adjudicate the validity of the system of apportionment under attack. Mr. Justice Rutledge, whose vote was dispositive of the case, concluded that under *Smiley* v. *Holm, supra,* "this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable"; but, he said, the power should be employed "only in the most compelling circumstances" (*id.* at 565). Since such

circumstances were absent because of the shortness of time before the election, he decided that "the case is one in which the Court may properly, and should, decline to exercise its jurisdiction" [27] (*id.* at 566).

Shortly after the *Colegrove* case, the scope of the Court's decision became even more clear. In *Cook* v. *Fortson,* 329 U.S. 675, 678, involving the Georgia county unit system, Mr. Justice Rutledge described the actual ruling in the earlier case:

> A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied. I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion.[28]

In *Cook* v. *Fortson* Mr. Justice Rutledge would have postponed consideration of the issue of jurisdiction to the argument, even though he admitted that the order on appeal might "have become moot in part." *Id.* at 677. The Court, however, dismissed the bills, citing *United States* v. *Anchor Coal Co.,* 279 U.S. 812, which involved the dismissal as moot of a bill seeking an injunction.

The Court in *MacDougall* v. *Green,* 335 U.S. 281, passed on the merits of the claim that an Illinois

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[27] At this point Mr. Justice Rutledge quoted in a footnote from *American Federation of Labor* v. *Watson,* 327 U.S. 582, 593: "The power of a court of equity to act is a discretionary one * * *."

[28] For a discussion of the equitable discretion aspect of the *Colegrove* decision, see pp. 68–85 below.

statute requiring a candidate of a new political party to obtain a specified number of signatures on his nominating petitions in fifty of the 102 counties in the State was unconstitutional. Mr. Justice Rutledge, in a separate opinion, stated that "this case is closely analogous to *Colegrove* v. *Green*" and "[e]very reason existing in *Colegrove* * * * which seemed to me compelling to require this Court to decline to exercise its equity jurisdiction and to decide the constitutional questions is present here. * * * As in *Colegrove* * * * I think the case is one in which * * * this Court may properly, and should, decline to exercise its jurisdiction in equity." *Id.* at 284, 286–287. No member of the Court suggested that the Court was without jurisdiction or power to consider the issue.

In *South* v. *Peters,* 339 U.S. 276, 277, the Court again recognized that the question is not one of judicial power but of its proper exercise. The decision was embodied in a single sentence: "Federal courts consistently *refuse to exercise* their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions" (emphasis added). None of the cases cited in support of this conclusion held that the issue involved was not justiciable. Reliance was placed on *MacDougall* v. *Green,* in which, as we have seen, the Court passed on the merits of a State election issue; *Colegrove* v. *Green,* in which a majority of the Court held that the federal courts have power to consider the merits of apportionment cases; and *Wood* v. *Broom,* in which the Court took jurisdiction but

four Justices said the bill should be dismissed "for want of equity"[29] (see p. 55 above).

In no subsequent apportionment case has this Court held, so far as we can determine, that the federal courts lack power to adjudicate the constitutionality of apportionment systems. In *Cox* v. *Peters,* 342 U.S. 936, involving an attack on Georgia's county unit laws, and *Remmey* v. *Smith,* 342 U.S. 916, involving a suit to compel reapportionment of the Pennsylvania legislature, the appeals were simply dismissed for want of a substantial federal question, without citation of authority. In *Anderson* v. *Jordan,* 343 U.S. 912, the Court dismissed the appeal on the authority of *Colegrove* v. *Green, MacDougall* v. *Green, and Wood* v. *Broom* (the opinion of the Court). As we have seen, in the latter two cases the Court considered the issues on the merits. In *Kidd* v. *McCanless,* 352 U.S. 920, involving an attack upon the same Tennessee apportionment law now before the Court, the appeal was dismissed on the authority of *Colegrove* v. *Green* and *Anderson* v. *Jordan.* In *Radford* v. *Gary,* 352 U.S. 991, involving an attack on the Oklahoma apportionment laws, this Court affirmed the district court's dis-

[29] The Court in *South* v. *Peters* also cited as authority "cf. *Johnson* v. *Stevenson,* 170 F. 2d 108 (C.A. 5th Cir., 1948)." In that case, the court of appeals held that 8 U.S.C. (1946 ed.) 43, which is the same statute as is involved here, did not provide a remedy, as a matter of substance, for fraudulent returns in a Senate primary election: "We have here no question of votes excluded contrary to the Constitution, but only of frauds and illegalities under the Texas law" (*id.* at 111). And, significantly, the court emphasized that the plaintiff did "not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it" (*ibid.*).

missal of the action, citing *Colegrove* v. *Green* and *Kidd* v. *McCanless.* And in *Hartsfield* v. *Sloan,* 357 U.S. 916, without citation of authority, the Court denied a motion for leave to file a petition for a writ of mandamus to compel the convening of a three-judge court to pass on the validity of the Georgia county unit laws.[30]

Gomillion v. *Lightfoot,* 364 U.S. 339, which was decided only last term, makes it plain that a case is not removed from the domain of judicial review merely because the unconstitutional discrimination is accomplished by an exercise of the State's power to control its political subdivisions. The precise holding was that the Fifteenth Amendment prevents a State from fixing the boundaries of its municipalities in such a way as to deprive a citizen of his right to vote because of his race. But surely a case is not the more justiciable because it involved racial discrimination and

[30] Where the Court has rejected attacks on apportionment systems without citation, it is of course impossible to know the basis of the decision. But such action is just as compatible with a determination that the case clearly does not present "compelling circumstances" necessary for federal judicial relief as with a holding of lack of power. Where the Court has cited *Colegrove* v. *Green*, the reason for this reliance is also not entirely clear. As we have seen, four of the seven Justices voting in that case upheld the power of the Court to consider the merits. The citation of the *Colgrove* decision to support rejection of attacks on state apportionment must therefore, we believe, mean reliance on the only holding of the prevailing majority in that case, *i.e.*, that an injunction was not justified in the circumstances. It cannot be assumed that the Court intended to settle this important issue of federal judicial power in accordance with the view of the minority of the Court in *Colegrove* v. *Green* by citing *Colegrove* in *per curiam* decisions, without the benefit of full briefing or oral argument.

arises under the Fifteenth, instead of the Fourteenth, Amendment. The victims of the discrimination are no less identifiable in the present case.

In the *Gomillion* case, the Court distinguished *Colegrove* v. *Green* on the ground that *Colegrove* involved legislative inaction causing dilution in voting strength, in contrast to affirmative legislative action to deprive Negroes of their right to vote. The distinction between legislative action and inaction does not go to the power of the federal courts to hear the case, but at most to the appropriate remedy. In the instant case, as in *Gomillion,* the suit is one to enjoin State officials from taking affirmative action, in the future, which would deprive the complainants of their constitutional rights. The character of the controversy is not changed nor its justiciability altered by the vintage of the legislation under which the State officials propose to act. The distinction is important only because it *may* affect the remedy. In *Gomillion* it was possible to fall back upon the old law establishing Tuskegee's boundary if the enforcement of the new statute were enjoined. In *Colegrove* v. *Green* the Court would have been left at large if the challenged apportionment were invalidated. But there might well be another acceptable basis of allocation upon which to fall back in an apportionment case. Suppose that the Tennessee legislature were to enact a valid statute apportioning legislative seats among the counties in exact proportion to the qualified voters and that, a month later, the legislature passed another law making the present apportionment. The remedy

would be obvious and easy to administer but the case would be neither more nor less justiciable than it is today. In another apportionment case the old law might not be available to fall back upon as a remedy but there might be other simple and effective forms of relief. For example, the State constitution might provide that the legislature should decennially apportion seats in the lower house with one representative from the smallest county and representatives from each of the other counties in direct ratio to the number of eligible voters with no limitation upon the size of the legislature. If the legislature failed to make the apportionment for sixty years despite radical shifts in population, a court could easily adjudicate the constitutional question and grant relief.

The lesson to be drawn from *Colegrove* v. *Green, Gomillion* v. *Lightfoot* and these examples, we submit, is that the propriety of judicial action in this class of cases must be analyzed in terms not of jurisdictional power, but of equitable discretion. There is no jurisdictional bar to adjudicating the constitutional issue. The propriety of exercising equitable jurisdiction depends upon the court's ability to frame fair and effective judicial relief. In *Colegrove* v. *Green* an effective decree could not be devised within the limits of the judicial function before the election without risking still greater unfairness. In *Gomillion* the remedy was plain. We shall show below that in the present case there is every reason to believe that suitable relief can be granted if the complainants prove their case.

2. *Colegrove v. Green is distinguishable from the present case.*

Even if the views expressed by Mr. Justice Frankfurter in *Colegrove* v. *Green* had prevailed, the precedent would not control the present case both because of important distinctions and because its rationale has been undermined by subsequent developments.

(a) *Colegrove* v. *Green* dealt with the apportionment of Congressional districts. The opinion relies heavily upon the power of the House of Representatives to judge the qualifications of its own members under Article 1, Section 5, and of Congress to regulate the time, place, and manner of holding elections under Article 1, Section 4 (328 U.S. at 554):

> The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility.

Article 1, Sections 4 and 5, are obviously not relevant to the apportionment of the legislature.

It may be suggested that the Congress has a comparable power to deal with the unconstitutional apportionment of a State legislature under its power to enforce the Fourteenth Amendment "by appropriate legislation" (Amend. XIV, Sec. 5). This Court has always dealt with any violation of the Fourteenth Amendment whenever presented by an actual case or controversy without awaiting implementary legislation beyond the general statute conferring jurisdiction to remedy deprivations of Fourteenth Amendment rights under color of State law (see pp. 50–51 above). It is unlikely that Congress could

legally or practically do more to secure the fair apportionment of State legislatures. The power of Congress to implement the Amendment is "by appropriate legislation," which may well impliedly exclude Congressional "adjudication" of the validity of any particular malapportionment. As a practical matter the most that Congress could be expected to do is to enact legislation, phrased in the general terms of the Fourteenth Amendment, which directed the courts to deal with violations of the constitutional standard. Judicial adjudication and relief is the nub of the bills recently introduced in Congress to remedy the evils of the malapportionment of State legislatures. S.J. Res. 215, S. 3781, and S. 3782, 86th Cong., 2d Sess. (1960).

(b) The Civil Rights Acts of 1957 and 1960, both enacted subsequent to the decision in *Colegrove* v. *Green,* also show that the election process is not now to be regarded as exclusively political in nature. The 1957 Civil Rights Act included a provision expressly conferring jurisdiction upon the federal district courts to hear actions "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" 28 U.S.C. 1343(4) (emphasis added). Congress thereby made clear that, in its view, questions involving "political" rights, "including the right to vote," were "meet for judicial determination." Cf. *Colegrove* v. *Green, supra,* 328 U.S. at 552. The 1960 Act specifically authorized the federal courts to consider applications for registration for voting under certain circumstances, so as to afford complete judicial protection against discrimination. 74 Stat. 90. Congress thereby

emphasized, once again, the national policy of relying on the judiciary as the organ through which the right to vote is to be made fully effective. Both acts express the intent of Congress and the national consensus that, whatever disagreement may exist as to other civil rights, (1) the right to vote should be afforded federal protection to the fullest possible extent, and (2) its protection should principally take the form of judicial action.

(c) In *Colegrove* v. *Green,* Mr. Justice Frankfurter also placed much reliance upon the difficulty of finding an effective and appropriate judicial remedy for the alleged wrong. If the court invalidated the existing apportionment, new districts would have had to be laid out on the map of Illinois without any guidance save the need for twenty-five districts with compactness of territory and approximate equality of population. Not only were there a wide number of theoretical possibilities from which the court would have had to choose without guidance, but also the choice would be one which is usually made with an eye to purely political considerations and which would almost surely affect the balance of political power in the Illinois Congressional delegation if not in the Congress itself. The only alternative would have been to order an election at large, a form of relief which might well have created more inequities than it cured. See 328 U.S. at 565–566. But this is not a reason for adopting a rule that the federal courts have no jurisdiction in any apportionment controversy. In the first place, it seems plain that in many such cases there would be no problem in

devising an appropriate judicial remedy. Second, several courts have found judicial remedies which effectively terminated at least the most serious aspects of a malapportionment. *E.g., Asbury Park Press, Inc.* v. *Woolley,* 33 N.J. 1, 161 A. 2d 705; *Magraw* v. *Donovan,* 159 F. Supp. 901 (D. Minn.); see Lewis, *Legislative Apportionment and the Federal Courts, op. cit., supra,* pp. 1066–1068. Third, there is every reason, as we show at pp. 74–85 below, to believe that appropriate judicial remedies can be applied in the present case.

3. *Luther v. Borden, 7 How. 1, and similar cases are distinguishable from the case at bar.*

Luther v. *Borden,* 7 How. 1, was an effort to have the federal courts determine the legitimacy of two rival governments, both of which claimed the right to rule Rhode Island during the Dorr Rebellion. Plaintiff brought an action of trespass against defendants who justified the entry upon the ground that they were privileged under the authority of the charter government. Plaintiff replied that the charter government was illegal and therefore the justification failed. This Court upheld the ruling of the lower courts that "the inquiry proposed to be made belonged to the political power and not to the judicial." *Id.* at 30. A similar decision was rendered in *Pacific Telephone Co.* v. *Oregon,* 223 U.S. 118, where plaintiffs sought to enjoin the collection of an Oregon tax upon the ground that the State government which sought to levy the tax was unconstitutional under Article IV, Section 5, because it was not republican in form. The bill was dismissed for want of jurisdiction.

These cases are clearly distinguishable from the present controversy for at least two reasons.

(a) In both *Luther* v. *Borden* and the *Pacific Telephone* case the attack was upon the legitimacy of the entire State government. The point clearly appears from the opinion of Chief Justice White in the latter case (223 U.S. at 150):

> Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court * * *.

In international law the recognition or nonrecognition of the legitimacy of a foreign government is a political decision. In *Luther* v. *Borden* this Court applied the rule of international law that the recognition or non-recognition of the legitimacy of a foreign government is a political decision to relations between the United States and its constituent states. 7 How. at 44; see also the dissenting opinion of Mr. Justice Woodbury, *id.* at 56–57. The Court pointed out that the Constitution treats the issue as a political question. When the Senators and Representatives from a State seek admission to Congress and when the President is called upon to suppress an insurrection, or when Congress is called upon to execute the guarantee of a republican form of government, it is

a political arm that determines the status of the State government. *Id.* at 42–44.

The case at bar involves no question concerning the legitimacy of the government of Tennessee. The bill seeks to prevent the election officials from conducting future elections in a manner which deprives the complainants of their rights under the Fourteenth Amendment. Complainants do not challenge the legitimacy of any previously chosen legislature or the validity of any of its enactments. This case is therefore as different from *Luther* v. *Borden* and subsequent cases in the same line of authorities as are the decisions in *Nixon* v. *Condon,* 286 U.S. 73, *Smith* v. *Allwright,* 321 U.S. 649, and similar cases.

(b) One of the major elements in the decision in *Luther* v. *Borden* was the fear that sustaining a legal challenge to the legitimacy of a purported government would leave people of the State without an authority to govern their affairs. 7 How. at 38. The Supreme Court of Tennessee expressed the fear that the same consequences might follow from sustaining the bill for a declaratory judgment in *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920. The Tennessee court determined that to hold the 1901 Apportionment Act unconstitutional would leave Tennessee without a legislature because there was no previous apportionment act to fall back on; therefore no legislature would be in existence which could pass a new apportionment act. If relief is ultimately granted here, however, the court need not determine the validity of 1901 Apportionment Act as of the time of its

enactment or even of the decree, but need determine only that the application of the Act in the next election would be unconstitutional; and although the reasoning behind such a determination might lead to the inference that constitutional rights had been ignored in past elections, the decree would not adjudicate that question.

Kidd v. *McCanless, supra,* does not require a contrary conclusion. The Tennessee court seems to have assumed that it was required to pass on the validity of the present legislature and did not consider whether its decree could be limited to future elections. In the present case it is possible to grant only prospective relief. This Court is not bound, moreover, by any State decisions concerning the legal consequences of a federal decree. The consequences to follow, like the remedy, would depend upon federal law. *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173, 176; *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395.

B. THE EXERCISE OF SOUND EQUITABLE DISCRETION REQUIRES THE FEDERAL COURTS TO RETAIN JURISDICTION AND ADJUDICATE THE MERITS OF THE PRESENT CONTROVERSY

The power of a court of equity is discretionary. Even when the court has jurisdiction of the subject matter and there is no adequate remedy at law, it may stay its hand in the public interest, or because a balance of convenience requires the denial of equitable relief, or even because a suitable decree could not be framed and enforced without entangling the court in non-judical functions. *Pennsylvania* v. *Williams,* 294 U.S. 176, 185; *American Federation of Labor* v. *Watson,* 327 U.S. 582. A clear illustration in the field of private litigation is the ancient rule that even

though the complainant prove the making and nonperformance of a construction contract under circumstances in which there is no adequate remedy at law, nevertheless the court will deny specific performance if the administration of a decree would require the court to entangle itself in planning and building the project. *Errington* v. *Aynsly,* 2 Dick. 692; Pomeroy, *Specific Performance of Contracts* (3d ed.), Section 312.

This doctrine of equitable discretion underlies the position taken by Mr. Justice Rutledge in *Colegrove* v. *Green,* 328 U.S. 549, 564. He indicated that the difficulty of framing a suitable decree and the possible damage to the public interest from interfering in an imminent election were sufficient reasons for the Court to decline to exercise its jurisdiction. See also *MacDougall* v. *Green,* 335 U.S. 281. And it was on this ground that the four concurring Justices voted to have the bill dismissed in *Wood* v. *Broom,* 287 U.S. 1.

In the present case the equities require the district court to retain the bill and adjudicate the merits. The seriousness of the wrong, the need for judicial assistance, the absence of other available relief, and a high probability that the court can frame an adequate remedy if the Tennessee legislature continues to refuse to act, present compelling circumstances to invoke the chancellor's conscience.

1. *The merits of the present case can be adjudicated without intruding into the legislative or political process.*

In protecting voting rights the due process clause condemns arbitrary and capricious discrimination.

"To assume that political power is a function exclusively of numbers" may misjudge "the practicalities of government" (*MacDougall* v. *Green,* 335 U.S. 281, 283), but an apportionment which denies qualified voters political equality must be founded in some rational consideration. In addition to the desirability of numerical equality a rational and fair-minded man might take into account factors such as geography, existing governmental subdivisions, and history. After some foundation for a particular apportionment is assembled, the Court must determine whether this justification has the rationality required by the Fourteenth Amendment. See pp. 32–34 above.

In the present case one does not reach the latter question. The only basis of apportionment prescribed by the Tennessee constitution is equality of representation in relation to voter population. It is not suggested that any other factor or standard has been taken into account by the Tennessee legislature in allowing the 1901 apportionment to continue. Thus, the only question is whether an apportionment which overrepresents some voters and underrepresents others in the ratio of 19 to 1 can be said to be "rooted in reason" where the only basis suggested for the apportionment is equality of representation per voter population. This question is no harder for a court to answer than other constitutional questions which the courts have been adjudicating for decades.

2. *The seriousness of the wrong calls for judicial action.*

The complaint shows that roughly one-third of the State's voters elect a majority of the Senators, and

that one-third elects a majority of the representatives even under the 1950 census. The imbalance is worse today. Thus, it is only a slight exaggeration to say that one-third of the voters of Tennessee rule the other two-thirds in the enactment of legislation. A vote for the State House of Representatives in Moore County has nineteen times the weight of a vote in Hamilton County. A vote in Stewart or Chester County has almost eight times the weight of a vote in Shelby or Knox County. The discrimination runs against the cities.

We pointed out earlier in general terms the dangerous consequences of arbitrary interference with voting rights. See pp. 39–44 above. The practical consequences in Tennessee are described at length in the pleadings and in appellants' brief. They show that the State legislature has systematically imposed a discriminatorily larger proportion of State taxes on underrepresented areas but returned a smaller proportion of State funds and of federal grants to Tennessee on a matching basis.

The problem is not peculiar to Tennessee. Underrepresentation of urban voters, as we have shown at pp. 35–44 above, is more serious with regard to elections for the State legislature than to congressional elections; itself promotes Congressional malapportionment; and has seriously undermined responsible State and local government, particularly by causing the State legislatures to ignore pressing urban needs. The urgency of the situation cannot enlarge the jurisdiction of the federal courts but it demonstrates that

judicial action which is clearly within the power of the federal judiciary should not be withheld because some undefined practical political realities might be supposed to tip the balance of convenience. In these circumstances, we believe that the federal courts should exercise their equitable discretion to consider the merits of allegations that gross malapportionment of a State legislature violates the Fourteenth Amendment.

3. *Complainants have no remedy outside the federal courts.*

The citizens of Tennessee who suffer from discrimination under the alleged malapportionment have already exhausted their remedies in the State courts. In *Kidd* v. *McCandless,* 200 Tenn. 273, 292 S.E. 2d 40, appeal dismissed 352 U.S. 920, the Supreme Court of Tennessee refused to consider on its merits the constitutionality of continued use of the 1901 Apportionment Act. Had this step not been taken the principles of equitable abstention might dictate that the district court hold the case until the parties repaired to the appropriate State court for resolution of the State issues—for example, in order to avoid the necessity of deciding a federal constitutional issue or to give the State courts an opportunity to decide, authoritatively, undecided issues of State law. See, *e.g., Railroad Commission* v. *Pullman Co.,* 312 U.S. 496; *American Federation of Labor* v. *Watson,* 327 U.S. 582. Although the federal courts have generally refused to apply the abstention doctrine in civil rights cases, (*e.g., Lane* v. *Wilson,* 307 U.S. 268; *Browder* v. *Gayle,* 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903),

the procedure has considerable attractiveness in cases of State legislative malapportionment because it would avoid federal involvement and interference in the basic framework of State government. See, *e.g.*, *Matthews* v. *Rodgers,* 284 U.S. 521, 525; *Railroad Commission* v. *Pullman Co., supra,* 312 U.S. at 500; *Martin* v. *Creasy,* 360 U.S. 219, 224. But in the present case the decision already rendered by the Supreme Court of Tennessee makes it plain that delaying federal action to permit relitigation of the questions in the State courts would lead to an unnecessary proliferation of actions without foreseeable benefit.[31]

It is equally plain that the complainants have no political remedies in Tennessee. The violation of the State constitution has continued for half a century. The discrimination against complainants and persons similarly situated, which violates the Fourteenth Amendment, has become worse with legislative inaction in the face of changing conditions. The 50 representatives elected by the one-third of the voting population who control the lower house of the legislature are not likely to vote to surrender their power. Seventeen of the 50 could not go back to the next session if a fair apportionment bill were enacted. Significantly sixty percent of the voters elect only 36 of the 99 members of the House and no reappor-

[31] "The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together'. In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before." Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).

tionment bill since 1901 has received more than 36 votes in the House; and sixty-three percent of the voters elect only 13 of 33 members of the Senate and no reapportionment bill since 1901 has received more than 13 votes in that body (R. 28–31).

Complainants cannot circumvent the legislature by calling a constitutional convention because in Tennessee only the legislature could call the convention. Tenn. Const., Art. XI, Section 3. Tennessee has no provision for a popular referendum.

Congress may have the power under Section 5 of the Fourteenth Amendment to pass general legislation correcting malapportionment of State legislatures which violate that Amendment. But as a practical matter this remedy is unrealistic. Congress has steadily refused to act in this area. Were it to intervene, it could hardly do more than reiterate the general standards of the Fourteenth Amendment and provide a judicial remedy. It cannot be expected to deal with the specific problem in Tennessee and, as we have shown at pp. 50–51 above, it has already conferred the necessary general jurisdiction upon the federal courts to redress violations of constitutional rights under color of State law. Thus, as Judge Miller stated below (R. 91), "[t]he situation is such that if there is no judicial remedy there would appear to be no practicable remedy at all."

4. *There is every likelihood that the district court can frame effective relief without overstepping the limits of judicial action.*

One of the major barriers to the exercise of equity jurisdiction in some apportionment cases is the ex-

treme difficulty of framing an effective remedy which is confined within the proper limits of the judicial function. In *Colegrove* v. *Green,* 328 U.S. 549, those members of the Court who rejected the suggestion of an election at large were faced with the problem of remapping the Illinois Congressional districts with no guidance except a blank sheet and the figures on population. This appeared to be a hopeless task and is one which, under American traditions, is extremely political.

There is no such difficulty in the present case because the Tennessee constitution provides more precise guidelines (Tenn. Const., Art. II, Section 4–6): (i) Seats in both houses of the legislature are required to be apportioned according to voter-population. (ii) So far as possible the apportionment is to be by counties. (iii) A county may not be split into two or more districts. (iv) Where two or more counties are merged into a single district they must be adjacent. These requirements, together with the principle that judicial relief should be held to the minimum necessary to vindicate constitutional rights, greatly reduce the number of possible apportionments. In the instant case the district court could fairly start with the existing representative and senatorial districts and, using these principles, the court could readily eliminate the existing unconstitutional discriminations with a minimum of directions to the election officals.

The existing senatorial districts are shown on the map opposite R. 24. Thirty-three senators must be chosen. Using the 1950 census as if it were current,

each district would ideally have 60,000 voters. The Eighth district (Hamilton County) has one senator for 130,000 voters. The 32nd and 33rd Districts (Shelby County), the 16th and 17th Districts (Davidson County), and the 5th District (Knox County), are also grossly underrepresented. There are other districts which have less than half the ideal number of voters, and in several cases they are adjacent. By combining the following adjacent overrepresented districts and allowing them to choose only one senator, seats could be made available for the grossly underrepresented urban areas:

(1) Combine the 13th and 14th districts into a single district with 56,658 voters and give the seat released to Hamilton County which would then have two senators with 65,000 voters for each.

(2) Combine the 18th and 19th districts into a single district with one senator for 56,858 voters and give the seat released to Davidson County, which would then have three senators for 212,000 voters, or about 70,000 voters per senator.

(3) Combine the 21st and 23rd districts into a district with 53,129 voters, and give the seat released to Knox County.

(4) Combine the 24th and 27th districts and give the seat to Shelby County.

(5) Finally, take Tipton County out of the 30th district and add it to the 29th. The 29th district would then have just about 60,000 voters. Shelby County would then constitute the 30th, 32nd, and 33rd senatorial districts and an additional seat would be added taken from the 24th and 27th. This would give

Shelby four seats for 312,000 voters or one senator for each 78,000 voters instead of 1 for each 109,000 voters as it is today.

By ordering the defendants to conduct the next election of State Senators in accordance with the existing Tennessee election laws, subject to these five changes, the district court could eliminate the worst of the current injustices in the apportionment of State Senators. None of the proposed changes involves splitting an existing district. No new lines have to be put on the map. The merged districts would be made up of two compact continuous areas. Most of the districts and nearly all the boundary lines laid out by the Tennessee legislature would be preserved intact. And while the court might not achieve quite as fair an apportionment of the State Senate as the legislature could make, the most egregious wrongs would be corrected.

The same observations apply to the Tennessee House of Representatives. By ordering the election conducted in accordance with the present election laws but combining ten pairs of grossly over-represented counties one could give a much fairer representation to the areas around Memphis, Nashville, Knoxville, and Chattanooga and thereby eliminate most of the injustice in the present apportionment (see the existing House districts on the map opposite R. 26):

(1) Combine Lake and Obion Counties in 1 district.

(2) Combine Crockett and Haywood Counties in 1 district.

(3) Combine Hardeman and Chester Counties in 1 district.

(4) Combine McNary and Hardin Counties in 1 district.

(5) Combine Williamson and Cheatham Counties in 1 district. (Williamson loses its separate representative and Robertson has a separate representative but no part in district 18.)

(6) Combine Dickson and Hickman Counties in 1 district.

(7) Combine Moore and Coffee Counties in 1 district.

(8) Combine Warren and Cannon Counties in 1 district.

(9) Combine Jackson and Smith Counties in 1 district.

(10) Combine White and DeKalb Counties in 1 district.

Four of the representatives saved would be given to Shelby County, two to Knox County, two to Davidson County, and two to Hamilton County.

We do not suggest that this is an ideal solution or even that it is free from substantial flaws. We outline it for the sole purpose of showing concretely the practicability of granting the complainants greater protection by easily administered judicial relief. If the court is forced to proceed to a final decree, the suggested decree would not be complex. Framing it would involve no nice choices. No political considerations could enter into the decision. There is no wholesale remapping of the existing districts. And, there is nothing nonjudicial or extra-judicial about such relief.

A federal court should be slow, however, to enter even this type of decree; and there is reason to be-

lieve that it would never become necessary. Legislative inaction is encouraged by the courts' declining jurisdiction. A ruling sustaining the judicial power to adjudicate the constitutionality of an apportionment on the merits would stimulate legislative action not only in Tennessee but elsewhere. This is particularly true when the assertion of jurisdiction is coupled with a judicial admonition which focuses public attention upon the problem. There are excellent political reasons for a legislature to prefer reapportioning itself over reapportionment by a court. Thus, in *Magraw* v. *Donovan,* 159 F. Supp. 901 (D. Minn.) a suit attacking the apportionment of the Minnesota legislature was referred to a three-judge court. That court stated (163 F. Supp. 184, 187):

> Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes * * * It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to "heed the constitutional mandate to redistrict."

At the 1959 session, the legislature enacted a new apportionment act and the litigation was dismissed. 177 F. Supp. 803. See also *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii), discussed in Lewis, *op. cit. supra,* pp. 1088–1089. There is even reason to believe that the Illinois Congressional districts were reapportioned after the decision in *Colegrove* v. *Green*

because the political leaders feared that a new suit would bring judicial intervention; the original bill was dismissed by a four to three division in this Court and the decisive vote of Mr. Justice Rutledge stemmed partly from his reluctance to interfere in an imminent election. See Lewis, *op. cit. supra,* p. 1088.

If the Tennessee legislature failed to act following the assertion of jurisdiction, the district court might proceed to adjudicate the merits and, if it found a violation of the federal Constitution, enter an interlocutory decree reserving final action in order that the legislature should have the opportunity to act and the court to receive evidence as to the appropriate remedy. A judicial determination that the present mode of apportionment is illegitimate, even without any remedial implementation, is bound to have a profound effect upon a legislature. The concept of legitimacy has a power of its own. Governing bodies do not lightly reject an authoritative declaration by a constitutional organ of government to the effect that a challenged course of action is unlawful.

The efficacy of this procedure is illustrated by *Asbury Park Press, Inc.* v. *Woolley,* 33 N. J. 1, 161 A. 2d 705, where the New Jersey Supreme Court held that it had "[t]he authority and the duty" to act in cases of malapportionment. 161 A. 2d at 710. After citing numerous cases in which other courts had accepted this same responsibility,[32] the court held (161 A. 2d at 711):

[32] See *Magraw* v. *Donovan,* 159 F. Supp. 901 (D. Minn.); *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii); *Shaw* v. *Adkins,* 202 Ark. 856, 153 S.W. 2d 415; *Armstrong* v. *Mitten,* 95 Colo. 425, 37 P. 2d 757; *Moran* v. *Bowley,* 347 Ill. 148, 179

> From the foregoing it is manifest that the triunity of our government is not invaded by acceptance of this litigation for decision. If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The lawmaking body cannot by inaction alter the constitutional system under which it has its own existence.

Despite recognition of its power to act, the court did not order any particular relief. Instead, it retained jurisdiction of the cause from the date of decision, June 6, 1960, until the legislature had time to reapportion under the 1960 census figures. The court assumed that the legislators would act pursuant to their

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N.E. 526; *Brooks* v. *State*, 162 Ind. 568, 70 N.E. 980; *Denney* v. *State*, 144 Ind. 503, 42 N.E. 929; *Parker* v. *State*, 133 Ind. 178, 32 N.E. 836, rehearing denied, 33 N.E. 119; *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315; *Ragland* v. *Anderson*, 125 Ky. 141, 100 S.W. 865; *Merrill* v. *Mitchell*, 257 Mass. 184, 153 N.E 562; *Donovan* v. *Suffolk County Apportionment Com'rs*, 225 Mass. 55, 133 N.E. 740; *Attorney General* v. *Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581; *Williams* v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749; *Board of Sup'rs of County of Houghton* v. *Blacker*, 92 Mich. 638, 52 N.W. 951; *Giddings* v. *Blacker*, 93 Mich. 1, 52 N.W. 944; *State ex rel. Barrett* v. *Hitchcock*, 241 Mo. 433, 146 S.W. 40; *Rogers* v. *Morgan*, 127 Neb. 456, 256 N.W. 1; *In re Sherill*, 188 N.Y. 185, 81 N.E. 124; *People ex rel. Baird* v. *Board of Sup'rs*, 138 N.Y. 95, 33 N.E. 827; *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 564; *State ex rel. Lamb* v. *Cunningham*, 83 Wis. 90, 53 N.W. 35; *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724; see also *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105; Annotation, 2 A.L.R. 1337.

oath of office to uphold the State constitution. 161 A. 2d at 712. When the legislature took no action, the State court stated that it itself would act at 5 p.m. on February 1, 1961. The Governor thereupon convened a special session of the legislature and, at 3:13 p.m. on February 1, the legislature passed a reapportionment statute. The New Jersey Supreme Court, at 5 p.m., issued this statement (New York Times, February 2, 1961, p. 1, col. 2, p. 16, col. 5):

> We are informed that the legislature has adopted an apportionment bill which the Governor has signed. Litigation, accordingly, appears to be moot and hence the prepared opinion will not be filed.

Since one cannot be sure that another legislature would take the same action under similar circumstances, a district court would naturally be reluctant to assert jurisdiction without reason to believe that it could enter a fair and effective final decree. In appraising the potentialities of judicial intervention, however, it is only realistic to recognize the effectiveness of the interlocutory orders which can be entered at various stages of the proceeding and may dispense with the necessity of entering a final decree.

In the present case the district court would be free to choose among several forms of ultimate relief. Besides the remedy suggested above, the court might direct an election at large, following the course taken in other State and federal cases. See, *e.g., Smiley* v. *Holm,* 285 U.S. 355; *Carroll* v. *Becker,* 285 U.S. 380; *Brown* v. *Saunders,* 159 Va. 28, 166 S.E. 105. In *Kidd* v. *McCanless,* 200 Tenn. 273, 277, 292

S.W. 2d 40, 42, appeal dismissed, 352 U.S. 920, the Tennessee Supreme Court stated that "[t]here is no provision of law for election of our General Assembly by an election at large over the State;"[33] but a federal court, in effectuating a federal right, is not restricted to the remedies provided by State law. *Deitrick* v. *Greaney,* 309 U.S. 190, 200; *D'Oench, Duhme & Co.* v. *F.D.I.C.,* 315 U.S. 447, 455–456; *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173, 176.

Another alternative is suggested by the opinions in *Asbury Park Press, Inc.* v. *Woolley, supra,* 33 N.J. 1, 161 A. 2d 705, 714. After an enumeration of qualified voters, existing patterns of over or underrepresentation would become apparent. In those cases where overrepresentation exists, a district court could order that the value of the vote of each representative or senator be reduced by the amount necessary to offset the overrepresentation. In other words, in overrepresented counties or districts, representatives and senators would be entitled to fractional, rather than full votes. Similarly, legislators from underrepresented districts would receive more than one vote each.

There are two other possibilities which involve neither remapping Tennessee nor an election at large. The election officials might be ordered to retain the existing districts, to call for the election of one representative from each district in the group with the

[33] In *Brown* v. *Saunders*, the Virginia Supreme Court ordered an election at large despite the fact that the Virginia Constitution did not provide for such an election.

smallest population—perhaps those with 8,000 voters or less in electing representatives—and then to assign every other existing district a number of senators or representatives in the same ratio to one that its population bears to 8,000 without limiting the total number elected to either house. The figures would have to be rounded off to the nearest whole number. If it seemed preferable, although it would make the legislature very large, the existing senatorial districts could be retained with the new apportionment of seats but seats in the lower house might be allocated to the counties in proportion to the population.

These last solutions would override the provision of the Tennessee constitution limiting the total number of senators to 33 and representatives to 99. The objection is not fatal. By hypothesis the constitutional requirement of apportionment according to population is now being disregarded. If one constitutional requirement or the other must yield until the Tennessee legislature is prepared to act, the limit on the size of the legislature is obviously the less important.

The foregoing discussion of remedies is neither definitive or complete. We seek merely to show that there is no basis for assuming that the federal court would be helpless even if it were to find that complainants were being deprived of rights under the Fourteenth Amendment. We do not seek to show that any particular form of relief is practicable or desirable. On the contrary, we submit that this case should be approached, like other cases of alleged constitutional violation, by ascertaining whether the fed-

eral courts have jurisdiction over the issue presented. If they have jurisdiction, the constitutional issue should then be adjudicated. If a constitutional violation is found, then the question of a remedy should next be considered. We do not think the premise that the federal courts possess no appropriate remedies can be accepted at this early stage in the proceedings. In other cases under the Fourteenth Amendment the courts have found new and appropriate remedies among their broad and flexible equitable powers to prevent violations. The fact that in this area devising a proper remedy may call for a delicate and resourceful exercise of federal judicial power does not affect the court's jurisdiction or call for refusal to act.

In sum, there is urgent need for relief against an apparently unconstitutional malapportionment—relief which, in our submission, the federal court has power to grant and only it can give. Assuming that plaintiffs prove their case, there is great likelihood that a court of equity can devise an effective remedy to safeguard their constitutional rights. Under such circumstances the bill ought not to be dismissed at this early stage of the controversy without either determining the merits or fully investigating, after a hearing, the potentialities of effective relief.

CONCLUSION

For the foregoing reasons, we submit that the three-judge court had jurisdiction, and that this is an appropriate case for the federal courts to exercise their equitable discretion and consider the alleged violation

of the Fourteenth Amendment. We urge, therefore, that the judgment below be reversed and the case remanded to the three-judge court for consideration of the case on the merits.

Respectfully submitted.

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