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.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

On oral argument of this cause, April 19-20, 1961 (No. 103, October term 1960), the Court asked a number of questions. Appellants believe that written answers or materials covering practically all of the points are found in appellants' brief and reply brief filed February 21 and April 6, 1961, respectively, and in the brief of the Solicitor General for the United States as amicus curiae filed March 14, 1961.

However, because of the form which two of the

items took, it may be useful to reorient some of the material in direct response thereto, in aid of the forthcoming reargument of the case in October, 1961.

I

The question was asked, of what bearing on the federal constitutional right asserted by appellants are the provisions of the Tennessee Constitution (providing equality in voting rights, proportionate representation in both houses of the legislature, and the scheme of decennial reapportionment to assure such equality)?[1]

The pertinent provisions of the Tennessee Constitution constitute part of the facts and legal background in determining, in relation to the Fourteenth Amendment, the intended meaning of voting rights in Tennessee, the extent of the violation of those rights, and the standard or measure for remedial action in restoring the rights violated.

Appellants asserted their federal rights under the Fourteenth Amendment, with particular stress on the guarantee of equal protection of the laws with respect to appellant's voting rights under the laws of Tennessee. This federal guarantee is one against invidious discrimination by the state in the provision for such voting rights and their exercise by appellants.

The right to vote is a right which springs from state law, but subject to federal oversight in assuring that the citizens are equally protected in the operation of the state law. In understanding the voting

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[1] The answering materials and pertinent cases in appellants' brief of February 21, 1961, are at pp. 23-34.

right created and judging the equality of operation of the state law, the courts examine the totality of state action. This includes state constitutional provisions where such exist.

Thus, where the organic law of the state (as here) provides for all of its citizens (who meet certain age and residence requirements) equal voting rights in a system of proportional representation for both houses of the legislature, the voting rights in that state have taken on a measured meaning, which is obviously within the parameters of the Fourteenth Amendment, though that Amendment did not compel adoption of that particular measure and might allow some other reasonable measure, if changed by appropriate action.

But, the people of the state having organically provided in this manner for voting rights and what is meant by "equality" therein, a gross distortion (as here), begun and maintained by the state legislature, which excessively favors some voters by diluting the votes of appellants and others similarly situated, is outside any legislative discretion conferred by the state constitution, and at the same time makes unreasonable classifications of voters which violate the equal protection guaranty of the Fourteenth Amendment. The violation of the Fourteenth Amendment would be demonstrable by its grossness without the aid of the state constitutional provisions, if these did not exist. But because they exist, the state constitutional provisions assist in demonstrating that on its face the inconsistent legislative action (Act of 1901) is discriminatory, unequal treatment.

By the same token, these state constitutional provisions provide the courts with a yardstick which save

the courts the more difficult judgment of determining in the case of this state (as distinct from cases which might arise in other states) how much of a departure from mathematical equality the Fourteenth Amendment permits, and what is a suitable standard for compliance in judging remedial action to be taken by the state.

It was suggested in oral argument by Mr. Justice Frankfurter that a tax case involving the Tennessee constitutional provision respecting uniformity of taxation (*Nashville C&S Ry.* v. *Browning,* 310 U.S. 362) indicated that it would make no difference in dealing with the discrimination alleged here whether Tennessee had written something into its constitution or not. The state constitutional provision in *Browning,* Tenn. Const. Art. 2, sec. 28, provided in pertinent part that "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State".

The Court held that this provision (which, it may be noted, confers discretion to classify) did not stand in the way of state administrative (or legislative) action classifying and distinguishing railroad property from other property for purposes of taxation, and such action did not offend the equal protection clause of the Fourteenth Amendment, for it was not charged that the state had singled out the railroad company from among other railroad corporations for special invidious treatment.

Thus, the *Browning* case merely illustrates the classic interpretation of the equal protection clause which does not require rigid uniformity in the appli-

cation of the state taxing power to all persons and corporations, but admits of state taxing action grounded upon reasonable classifications of such persons and corporations and the kinds of property involved.

The case supports the proposition that where persons within the classifications are treated unequally, a violation of equal protection under the Fourteenth Amendment does occur. This is the situation here. There is no rational basis for distinguishing rural votes from urban votes on a 10 to 1 or 20 to 1 ratio in state-wide elections for representatives of a legislature which purports to represent the qualified voters in proportion to their numbers. Arguably, the Fourteenth Amendment might, under some hypothetical and differing set of facts of which we are not aware, admit of such classification because of an alleged rational or reasonable basis for it. But the provisions of the Tennessee Constitution, which are part of the existing facts, make it clear to the legislature and to the courts that there is no rational, reasonable basis for such a classification of voters and voting rights in Tennessee; that there is but a single class of voters in state-wide elections, and the attempt to treat some in the class less favorably than others results in a violation of the equal protection clause of the Fourteenth Amendment.

II

It was argued by appellees that appellants' action seeks enforcement of the guaranty of a republican form of government in Tennessee, and that if the Federal District Court were to declare the 1901 Tennessee Apportionment Act unconstitutional, this would be of

necessity a determination that the government of Tennessee is and has been operating unconstitutionally, that all of the past acts of the legislatures since 1901 would fail, and there would be a current lack of legislation under which to operate the state government.

This is another way of stating the *in terrorem* argument that the state would be destroyed, made by the Tennessee Supreme Court in refusing to give the necessary relief in *Kidd* v. *McCanless,* 200 Tenn. 282.[2]

It is most important to remember that this suit is grounded upon the Fourteenth Amendment, not Article IV section 4 of the Constitution; and that the complaint does not challenge the existence or validity of the past or present governments or legislatures of Tennessee, or the incumbency of any legislator to sit and act. The attack and relief sought is against the continued use in the future of the Act of 1901 as the basis for choosing members of succeeding legislatures.

The distinctions are important, for if as was suggested at the oral argument, appellees would draw on *Luther* v. *Borden,* 7 How. 1, as support to deny jurisdiction or its exercise here, it cannot be overlooked that the inquiry, as proposed by the plaintiff in that case, was whether the so-called charter government of Rhode Island, which declared martial law and caused injury to plaintiff's civil rights, was in legal existence during that period, or whether a competing state government was lawfully in existence. The Court said that if it entered upon the inquiry as proposed by the plaintiff, and decided that the charter government had

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[2] This argument, and the place of the *Kidd* case in this lawsuit, are dealt with at pp. 42-44 of appellants' brief of February 21, 1961.

no legal existence during the past period of time, then the laws passed by the legislature during that time were nullities. The Court decided that the question of which of two competing state governments was the lawful government was for the political department of the federal government (the President and the Congress) and not for the courts; and that Art. IV, section 4, of the Constitution, guaranteeing to each state a republican form of government, had placed the function of recognition with Congress and not with the courts.

This lawsuit, which invokes the guaranties of the Fourteenth Amendment in protecting from invidious discrimination the individual voting rights of appellants by declaring invalid or enjoining for future use the Tennessee Apportionment Act of 1901, seeks relief of a nature which is a commonplace in judicial tradition and which looks to the future rather than the past.

It is fundamental that the courts will judge jurisdiction by the complaint of the party who brings the suit, "on how he casts his action", and not on the answer or claims of the defendant. *Pan American Petroleum Corporation* v. *Delaware,* 366 U.S. 656, 662 (1961). Under this rule, in the light of the complaint before the District Court and this Court, the claims of the appellees that this is a suit to enforce a republican form of government in Tennessee and to declare invalid the government of Tennessee and all of its laws since 1901, are irrelevant and of no value in reaching a determination that on the complaint made the federal courts have jurisdiction over the subject matter

set forth and jurisdiction to grant the relief actually requested by appellants.

Respectfully submitted,

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