IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 6.

CHARLES W. BAKER et al.,
Appellants,

vs.

JOE C. CARR, Secretary of State, State of Tennessee; GEORGE F. McCANLESS, Attorney General of Tennessee; JERRY McDONALD, Coordinator of Elections, State of Tennessee; and

DR. SAM COWARD, JAMES ALEXANDER, and HUBERT BROOKS, Members of the State Board of Elections, State of Tennessee,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLEES.

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The appellees, supplementing their brief and argument, respectfully show the following:

I.

THE QUESTIONS ARE INTERDEPENDENT.

The appellants and the Solicitor General, while insisting that the appeal is well founded, have clearly demonstrated both in their briefs and in their oral arguments that they

are opposed to this Court deciding the issues presented on appeal. Their objective is not to have this Court decide the case but to have this Court remand the case.

It must be remembered that the case is before this Court for the purpose of determining whether the three-judge District Court erred in the action taken by it. Before this Court can decide the issues and the action to be taken, it must first determine the exact questions adjudicated by the District Court and whether that adjudication was erroneous.

The District Court defined the issues as follows:

> "The action is presently before the Court upon the defendants' motion to dismiss predicated upon three grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted; and third, that indispensable party defendants are not before the Court" (R. 216).

Thus, it will be noted that that court understood it was to determine (1) whether it had jurisdiction of the subject matter, (2) whether the complaint stated a claim *upon which relief could be granted*, and (3) whether all necessary party defendants were before the court.

Contrary to the contention of the appellants and the Solicitor General, the District Court decided, not one, but two of the issues before it. That court said:

> "Being of the opinion that the Court has no right to intervene or to grant the relief prayed for, it is unnecessary to discuss the further ground of the motion that the action must fail because of the non-joinder of indispensable parties as defendants" (R. 220).

If the District Court was of the opinion that it had left undecided only the third ground of the motion to dismiss, it necessarily was of the opinion that it had decided the first and second grounds of the motion. That this is the correct view clearly appears from the order entered by the District Court:

> ". . . in conformity with said per curiam opinion the first two grounds of defendants' motion to dismiss (1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted, are sustained, defendants' motion to dismiss is granted, and the complaint is hereby dismissed" (R. 220-221).

Therefore, the District Court held (1) that it had no jurisdiction of the subject matter and (2) that the complaint failed to state a claim upon which relief could be granted.

What then, must this Court do? It must examine the District Court's reasons for its action.

Contrary to the appellants' assertion, the District Court did not find or hold that the appellants' rights under the Fourteenth Amendment had been violated. The rights referred to by the District Court were state rights. The Court said this:

> ". . . With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees" (R. 219).

The District Court did not hold that there was a violation of a federal right. It held just the opposite: that the complaint failed to state a claim upon which relief could be granted.

The District Court based its decision on two points. First, it held this:

> "The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt 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. Colegrove v. Green, 328 U. S. 549; Cook v. Fortson and Turman et al. v. Duckworth, 329 U. S. 675; Colegrove v. Barrett, 330 U. S. 804; McDougal et al. v. Green, 335 U. S. 281; South et al. v. Peters, 339 U. S. 276; Remmey v. Smith, 342 U. S. 916 (fol. 283); Anderson v. Jordan, 343 U. S. 912; Kidd v. McCanless et al., 352 U. S. 920; Radford v. Gary, 352 U. S. 991" (R. 216).

The District Court also held this:

> ". . . the remedies suggested by the plaintiffs are neither feasible nor legally possible" (R. 217-218).

What does this mean? It means simply this:

> (1) The jurisdiction of the District Court depends upon whether the complaint alleges a federal right which can be enforced.
>
> (2) Whether the complaint alleges a federal right which can be enforced depends upon whether the District Court has jurisdiction to enforce that right.

As this Court said in *Equitable Life Assurance Society v. Brown*, 187 U. S. 308:

> ". . . the Federal question upon which the jurisdiction depends is also the identical question upon which

the merits depend . . . the two questions are therefore absolutely coterminous.'' 187 U. S. 315.

Thus, this Court cannot determine one of the questions without determining the other.

What does this mean?

It means that this Court cannot decide that the District Court has jurisdiction of the general subject matter and then remand the case for a trial to determine whether the complaint alleges a cause of action and whether that cause of action can be proved.

It means that this Court must not only determine the question of jurisdiction. It must also determine whether the complaint states a claim upon which the Federal District Court can grant relief.

The appellees respectfully insist that the complaint, when tested under the applicable rules, fails to state a claim upon which relief can be granted.

II.

THE COURT MUST DETERMINE WHETHER THE COMPLAINT IS SUBSTANTIAL.

The appellants have insisted that the complaint is not patently frivolous, that the allegations must be accepted by this Court as true, and that the case should be remanded to the District Court for trial.

In so contending, the appellants misconceive the issue and seek to misapply the applicable rules.

The Court, in *Radovich v. National Football League*, 352 U. S. 445, referred to *Hart v. B. F. Keith Vandeville*

Exchange, 262 U. S. 271, and stated that the test to be applied is whether the claim is wholly frivolous.

The rule stated in *Hart v. B. F. Keith Vaudeville Exchange,* is this:

> "The jurisdiction of the District Court is the only matter to be considered on this appeal. This is determined by the allegations of the bill, and usually if 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." 262 U. S. 273.

The appellees urge that the decisions of this Court require the Court, in determining whether the complaint is wholly frivolous, to look to see whether the complaint states a claim that could be well founded.

In *Equitable Life Assurance Society v. Brown,* 187 U. S. 308, the Court said:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this Court.' "

The Court then continued as follows:

> "Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy,

the motion to dismiss will prevail. *New Orleans Waterworks Co. v. Louisiana,* 185 U. S. 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited." 187 U. S. 311.

This Court has held that jurisdiction cannot be established by the mere assertion that there is a federal question. In *Newburyport Water Co. v. Newburyport,* 193 U. S. 561, the Court said:

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit." 193 U. S. 576.

Thus, the Court must look to see whether the allegations in the complaint state such a claim that, if well founded, is within the jurisdiction of the District Court.

The appellees urge that the appellants' assertion that there is a federal right is nothing more than the statement of a legal conclusion. The allegations of the complaint are not substantial.

III.

THE COMPLAINT FAILS TO STATE A SUBSTANTIAL CLAIM.

The appellants seek to circumvent the rules for testing the sufficiency of complaints by making allegations that are completely theoretical. This Court will not permit a party to make a federal question by merely alleging that

there is a federal question. If such procedure should be permitted, the question of jurisdiction would be determined by the parties and not by the Court.

A. **The Issues Do Not Involve Personal Rights.**

What is the right which the appellants seek to enforce in this action? The complaint avers that:

> ". . . the plaintiffs as citizens of the United States and the State of Tennessee, have the right conferred by the Constitution of the State of Tennessee to have the entire membership of the Tennessee Legislature reapportioned and elected on the basis of the 1950 Federal Census" (R. 8).

And why do the appellants say that they have this right?

> ". . . this distortion . . . of electing representatives to the General Assembly prevents it, as it is now composed, from being a body representative of the people of the State of Tennessee. . . . contrary to the philosophy of government in the United States. . . ." (R. 13).

These are not allegations regarding a personal right. If the appellants possess this right, do not all citizens of Tennessee have the same right?

Clearly the appellants cannot aver that private and individual rights have been abridged when the complaint shows on its face that the rights are not private and individual.

In his most recent brief the Solicitor General states:

> "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" (p. 45).

The allegation of a violation of a personal right is wholly unfounded.

B. **The Question Is Governmental in Character.**

The Court must accept, as did the District Court, that the question is:

> "The question of distribution of political strength for legislative purposes. . . ." (R. 216).

The appellants, in their brief on the merits, pages 12 to 14, state that the basis of their complaint is this:

> ". . . the systematic use by the controlling minority of its powers . . . to derive special advantages at the expense of the under-represented majority of the people in such matters as the distribution of state funds."
>
> . . . . . .
>
> "These discriminatory distribution formulas in turn limit the counties in which appellants reside in the share they may obtain of federal aid for highway construction. . . ."

The Solicitor General, in his initial brief, pages 54 and 55, states the problem in this manner:

> "The malapportionment of state legislatures has the specific effect of precluding the states from meeting the burgeoning needs resulting from the transformation of the basic character of our society from predominantly rural to predominantly urban. . . . The failure is reflected not merely in unresponsiveness to special urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. . . ."

These governmental problems should be contrasted with the issues in the cases cited by the appellants to sustain

the jurisdiction of this Court. *United States v. Cruikshank*, 92 U. S. 542; *Nixon v. Herndon*, 273 U. S. 536; *Terry v. Adams*, 345 U. S. 461; *Cooper v. Aaron*, 358 U. S. 1.

Do the allegations in the complaint state a violation of personal and individual rights? Or do they state a violation of public and governmental rights?

C. The Claim of Discrimination Is Not Well Founded.

The question of the distribution of political strength for legislative purposes concerns all of the citizens wherever located within the state.

The complaint avers that there is:

> ". . . a purposeful and systematic plan to discriminate against a geographical class of persons and deny them the equal protection of the law. . . ." (R. 12).

The prohibitions against discrimination relate to personal and individual rights. Here the right is the right:

> ". . . to have the entire membership of the Tennessee Legislature reapportioned. . . ." (R. 8).

Who composes the class? Obviously, it is composed of all of the citizens of Tennessee.

The allegation that the alleged discrimination is purposeful and systematic is nothing more than a formal averment. It is without substance.

There cannot be purposeful and systematic discrimination when the appellants themselves insist that the alleged discrimination is due (1) to the passage of time and (2) to shifts in population. This is what the appellants aver:

> ". . . The population of the State of Tennessee in 1900, based on the Federal Census of that year, was

2,021,000, while the population in 1950, based on the Federal Census of that year, was 3,292,000, and that the growth of the various counties of the State during this fifty year period has been very uneven" (R. 10).

The Solicitor General, in his present brief, says this:

". . . The malapportionment results chiefly from the changes in the distribution of the population during the passage of sixty years" (p. 46).

If this is how the alleged discrimination came into being, could the discrimination be purposeful and systematic?

This is a question of law for this Court and not a question of fact for the District Court to determine.

D. **The Alleged Injury Is Without Color of Merit.**

The alleged injury is without substance. The injury, the appellants say, is this:

"That the General Assembly of Tennessee, for a number of years, has denied to plaintiffs and other similarly situated the equal protection of the laws by unjustly discriminating against large segments of the population of the State in the allocation of the burdens of taxation and in the unequal and unjust distribution of funds derived by the State through the exercise of the taxing power . . ." (R. 16).

The appellants do not, and cannot, point to a single Tennessee statute that imposes a discriminatory tax on any of them. Actually, they say that the discrimination is against,

". . . large segments of the population of the State. . . ."

Even this allegation is without "color of merit" because, as the appellees have previously demonstrated, the

state tax rate and the method of collection is the same in each of the ninety-five counties.

Likewise, there is no discrimination in the distribution of tax funds. Discrimination connotes some legal right which has been breached. There is no legal or constitutional requirement that the State return to a city or county an amount of tax funds equal to that collected in that city or county.

These alleged evils, the appellants say, are due to inadequate representation of the urban areas in the legislative halls. How can this be so?

For instance, the appellants, in the complaint, aver that Chapter 14, Public Acts of 1959, the General Education Act of 1959, was the result of the systematic plan of discrimination (R. 17). The truth of the matter is, as plainly shown by the record, that all thirty-three members of the state senate voted for the measure, and that ninety-one of the ninety-nine members of the lower house voted for the law (R. 211-212).

If the case should be remanded for trial, and the appellants proved the allegation that state tax funds are inequitably distributed to the appellants' cities and counties, would this constitute a legal injury? Obviously, the alleged injury is theoretical. If there is an injury, it is not to the appellants; it is to their cities and counties. If the injury is to the appellants' cities and counties, it is not a personal and private injury.

The allegations as to the alleged injury are without substance.

E. The Decree, If Entered, Would Be an Empty Form.

The appellants ask the Court to require the appellees to take certain action which they aver will result in relief. The complaint alleges:

> "That the defendants, or their successors in office, unless prevented by this Court, will perform their duties as they and their predecessors in office have performed those duties for over fifty years under the unconstitutional Act of 1901, and the rights of these plaintiffs and all other qualified voters of Tennessee similarly situated, can be protected only by decree of this Court declaring the Act of 1901, together with all Acts amending it, to be unconstitutional, and by enjoining the defendants from holding another unconstitutional election in 1960, or thereafter, . . ." (R. 18).

The appellees do not hold elections. Suppose the case is remanded for trial and the District Court grants an injunction? What duties of the appellees will be thus enjoined? There are none that would affect the holding of the election.

As Mr. Justice Holmes said in *Giles v. Harris,* 189 U. S. 475, 488, all that the appellants could get would be an "empty form."

F. Action by the District Court Would Not Assure Reapportionment.

The insistence of the appellants that action by the District Court would result in reapportionment is theoretical. The District Court said this:

> ". . . Furthermore, even if a legislature should be constituted as the result of an election at large, the Court would have no control over it and would have no means of compelling such a legislature to redistrict the state in accordance with the constitutional mandate" (R. 218).

Suppose a legislature should be elected at large, and suppose that legislature redistricted the state pursuant to

the constitutional provisions? Would the legislature thus differently constituted distribute state tax funds in a different manner?

To say that any legislative body will vote in any particular manner on any measure, is to speculate.

The complaint is not well founded. It is so lacking in substance as to be without "color of merit." As this Court said in *Equitable Life Assurance Society v. Brown*, 187 U. S. 308:

> ". . . it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted. . . ." 187 U. S. 314-315.

The complaint does not state a claim upon which relief can be granted.

IV.

ACTION BY THE DISTRICT COURT WOULD CONSTITUTE AN UNWARRANTED INTRUSION INTO THE POLITICAL AFFAIRS OF THE STATE.

In insisting that the District Court may grant appropriate relief, the appellants ignore (1) the principle of separation of powers and (2) the dual system of government in the United States.

This Court has held that whether a state adheres to the principle of separation of powers is a question solely for that state. In *Dreyer v. Illinois*, 187 U. S. 71, the Court said:

> "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and

separate, . . . is for the determination of the state.'' 187 U. S. 84.

In holding that it could not grant relief, the District Court said:

''. . . Such a remedy would constitute . . . an unwarranted intrusion into the political affairs of the state'' (R. 218-219).

''. . . An election at large, directed by the Court, would indeed inject the Court into a 'political thicket'. . . .'' (R. 218).

The Constitution of Tennessee, Article II, Section 2, provides that:

''No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.''

The appellees emphasize that the courts of Tennessee having followed the constitutional requirement consistently. In *Richardson v. Young*, 122 Tenn. 471, the Supreme Court of Tennessee said:

'' 'It is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct, as it is expressly declared it shall be by the constitution (article 2, secs. 1 and 2). *The most responsible duty devolving upon this court is to see that this injunction of the constitution shall be faithfully observed.*' '' (Emphasis supplied.) 122 Tenn. 492.

This thread is woven into the very fabric of the state government.

The courts of Tennessee, in passing on the validity of legislation will not consider whether the law is dictated by a wise or foolish policy or whether it will ultimately redound to the public good. "These are considerations solely for the Legislature." *Petition of Carter*, 188 Tenn. 677, 681. Nor will the courts consider the motive of the Legislature. *Cosmopolitan Life Insurance Co. v. Northington*, 201 Tenn. 541, 558.

The eligibility of a member of the Legislature to sit is solely a question for that body under the Constitution of Tennessee. The courts are without jurisdiction to pass on the question. *State ex rel. v. Shumate*, 172 Tenn. 451.

The courts of the state will not issue writs of mandamus to force public officials to perform discretionary duties. In *Peerless Const. Co. v. Bass*, 158 Tenn. 518, the Supreme Court of Tennessee said:

> "The writ of mandamus will lie to control only ministerial acts of public officers, and not to control official judgment or discretion. . . ." 158 Tenn. 524.

The Tennessee courts will not enforce a purely political right. The Supreme Court of Tennessee, in *Jared v. Fitzgerald*, 183 Tenn. 682, refused to entertain a suit by citizens on behalf of themselves *and the general public*, to vindicate the public's right to have the primary election laws properly administered.

Where an administrative body is required to make a decision, the Tennessee courts will not set the decision aside if there is any material evidence to support it. In *S. E. Greyhound Lines v. Dunlap*, 178 Tenn. 546, the Supreme Court, at page 555, said:

> ". . . Many of the cases dealing with certiorari are cases which arise from inferior judicial tribunals and in such cases it is entirely proper for the courts to

> substitute their judgment for the judgment of the lower judicial tribunal, but it does not follow that the court should substitute its judgment for the judgment of an administrative body, *being another constitutional branch of government.*" (Emphasis supplied.)

The holding of the State Supreme Court in *Maxey v. Powers,* 117 Tenn. 381, is of particular significance. There an attack was made on a legislative act *redistricting a county.* In holding that the question was political and solely for the Legislature, the Court said:

> "The general rule is that where one of the departments of the State is vested with a power, to be exercised when and in such manner as those charged with its exercise may consider expedient and proper in its discretion, the action of the department cannot be interfered with by any other department. *This is especially so in matters of a political character.*" 117 Tenn. 392-393.
>
> . . . . . .
>
> "The general assembly had the exclusive and absolute power to lay off Knox County into civil districts. How it should execute this power was for it to determine." (Emphasis supplied.) 117 Tenn. 398.

Can there be any doubt that the State of Tennessee adheres to the constitutional principle of separation of powers?

Reapportionment in Tennessee is a legislative function.

The judges composing the District Court, which sustained the motion to dismiss, are Tennesseans. They are familiar with the Constitution of Tennessee. They unanimously agreed that:

> ". . . Such a remedy would constitute the clearest kind of judicial legislation and an unwarranted in-

trusion into the political affairs of the state'' (R. 218-219).

To say, as do the appellants and the Solicitor General, that the question is not legislative and not political, is to close their eyes to one of the basic constitutional principles upon which the governments of the State of Tennessee and the United States are founded.

Action by the District Court would constitute an unwarranted intrusion into the political affairs of the State of Tennessee.

It follows that this Court should adhere to the doctrine of judicial self-limitation.

V.

THE DOCTRINE OF JUDICIAL SELF-LIMITATION SHOULD BE APPLIED.

The appellants and the Solicitor General attempt to emphasize the alleged difference between the question of whether the District Court has jurisdiction of the subject matter and the question of whether such jurisdiction should be exercised. They assert that the first question is one for this Court. They contend that the second question must be determined by the District Court.

The reason for this insistence is to have this Court remand the case, not for the purpose of trial and the entry of a decree, but for the purpose of forcing the General Assembly of Tennessee to take action. This is nothing less than an effort on the part of the appellants to have this Court authorize the District Court to coerce the Tennessee Legislature.

In their brief on the merits the appellants, on page 39, say:

> "By assuming and retaining jurisdiction and providing the legislature an opportunity to reconsider and correct the inequalities in voting and representation the court does not assume legislative tasks. The same is true at the point when the court expressly decides on the merits, if it is so required, that the apportionment is invalid. In the first case, on a prima facie showing, and in the second case, on a full showing and finding, the court simply exposes the deficiency in relation to constitutional requirements, and in effect remits the matter to the legislature for further action and revision, just as the court remands an erroneous order of an administrative agency for further action."

The District Court has held that whether the question is one of jurisdiction or whether it is one pertaining to the subject matter, the District Court cannot intervene. That Court said:

> ". . . the federal rule . . . 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.*" (Emphasis supplied.) (R. 216).

The District Court also said:

> ". . . the remedy in this situation does not lie with the courts" (R. 219).
>
> ". . . the remedies suggested by the plaintiffs are neither feasible nor legally possible" (R. 217-218).

Therefore, the question for this Court is not merely one of jurisdiction; it is also one of the exercises of that jurisdiction.

Actually, the question is whether this Court will continue to adhere to the doctrine of judicial self-limitation. This is true because this Court is committed to that doctrine:

> ". . . 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." *South v. Peters*, 339 U. S. 276, 277.

Why is the doctrine applied? Is it because of a lack of jurisdiction, or is it because the exercise of such jurisdiction in certain instances is inimical to a proper functioning of the government generally?

In *Ware v. Hylton*, 3 Dall. 199, the Court said:

> "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice." 3 Dall. 260.

Thus, the question may involve considerations of policy or may be of such a nature that courts are not competent to deal with it.

In *Kentucky v. Dennison*, 24 How. 66, the Court held that it would not enforce the provisions of Article IV, Section 2, of the Constitution, requiring a state to deliver a fugitive from justice to a sister state. The Court said this:

> "The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United State with this power. Indeed, such a power would place every state under the control and dominion of

the general government, even in the administration of its internal concerns and reserved rights." 24 How. 107.

Again, in *Mississippi v. Johnson,* 4 Wall. 475, the Court held that it could not enforce the constitutional requirement that the laws be faithfully executed. The Court said:

"An attempt on the part of the Judicial Department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'absurd and excessive extravagance.'

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation but to restrain such action under legislation alleged to be unconstitutional. *But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.*" (Emphasis supplied.) 4 Wall. 475.

In both *Kentucky v. Dennison* and *Mississippi v. Johnson,* the Constitution imposed duties, but the Court found that it could not require the performance of those duties.

Mr. Chief Justice Hughes, in *Coleman v. Miller,* 307 U. S. 433, stated that the test is this:

"In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." 307 U. S. 454-455.

Why has this Court applied the doctrine of judicial self-limitation in reapportionment cases?

The answer is clear. The question involves the constitutional guaranty of a republican form of government under Article IV, Section 4, and this Court has held that the question is governmental and political in nature.

In *Luther v. Borden*, 7 How. 1, the Court said that Congress must necessarily determine the question of whether a state government is republican in form. The Court said:

> "For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." 7 How. 42-43.

To insist, as do the appellants, that the Court is not barred from considering the question because it is political, is to disregard and brush aside the clear distinction which this Court has made between rights which are personal in nature and rights which are governmental in nature.

Perhaps no clearer distinction has ever been made than that of Mr. Chief Justice White in *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, when he said:

> "Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state." 223 U. S. 150.

The Chief Justice continued as follows:

> "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, not for the purpose of testing judicially some exercise of power, assailed on

> the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, *but to demand of the state that it establish its right to exist as a state, republican in form.*" (Emphasis supplied.) 223 U. S. 150-151.

Thus, this Court will look to see whether the assault is actually made against an alleged unconstitutional law or whether it is the state itself that is assailed.

In the case now before the Court the answer is clear.

The appellants bring the suit on behalf of all of the citizens of Tennessee (R. 4). And for what purpose?

> ". . . the plaintiffs as citizens of the United States and the State of Tennessee, have the right conferred by the Constitution of the State of Tennessee to have the entire membership of the Tennessee Legislature reapportioned and elected on the basis of the 1950 Federal Census" (R. 8).

And why do the appellants say that they have this right?

> ". . . this distortion . . . of electing representatives to the General Assembly prevents it, as it is now composed, from being a body representative of the people of the State of Tennessee . . . contrary to the philosophy of government in the United States. . . ." (R. 13).

The alleged right is not a personal right. It is political and governmental in nature.

The Court should continue to adhere to the doctrine of judicial self-limitation. The concept of healthy federalism requires that it do so.

VI.

THE CONCEPT OF HEALTHY FEDERALISM REQUIRES THAT FEDERAL EQUITY POWERS NOT BE EXERCISED.

The concept of healthy federalism contemplates that there will be a minimum of conflicts in the increasingly difficult and delicate field of state and federal relationships.

There are many sound reasons why equity should stay its hand, and particularly in this case.

This Court has repeatedly held that it will not intervene in cases of this type. *Colegrove v. Green*, 328 U. S. 549; *Turman v. Duckworth*, 329 U. S. 675; *Cook v. Fortson*, 329 U. S. 675; *South v. Peters*, 339 U. S. 276; *Cox v. Peters*, 342 U. S. 936; *Remmey v. Smith*, 342 U. S. 916; *Anderson v. Jordan*, 343 U. S. 912; *Kidd v. McCanless*, 352 U. S. 920; *Radford v. Gary*, 352 U. S. 991.

The appellants now ask the Court to disregard what the District Court termed "this array of decisions by our highest court" (R. 216).

During the long history of this Court, it has been concerned with the dignity and importance of the individual human being.

Is this such a case?

No. All of the injuries alleged in the complaint are governmental in nature. The alleged discrimination is against "large segments of the population." It involves formulas for the distribution of state tax funds. It concerns the alleged failure of counties "to contribute to their own educational systems". In short, it involves the internal operation of the government of the State of Tennessee.

The question presented is whether the citizens of the State of Tennessee enjoy the republican form of government.

There are no allegations of the violation of any personal rights.

As Mr. Chief Justice White said in *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, the suit is a

> ". . . demand of the state that it establish its right to exist as a state, republican in form." 223 U. S. 150-151.

This proposition cannot be refuted.

In his brief (March, 1961) the Solicitor General uses these phrases:

> ". . . the burden of providing a rational explanation should shift to the state" (p. 69).
>
> ". . . If the state has a reasonable justification. . . ." (p. 69).
>
> ". . . Another possible justification . . . might be. . . ." (p. 70).
>
> ". . . But if the disparity . . . is gross, the burden should be imposed on the state to provide some explanation of the disparity in terms of a valid governmental purpose" (p. 71).

Thus, as Mr. Chief Justice White said, the assault is "on the state as a state."

If the case is a case of the Federal judiciary sitting for the purpose of requiring the State of Tennessee, as a state, to justify its existence, is it not a case where equity should stay its hand?

And the Court is asked to enter this field, this state political field, without any authorization and without any signposts to point the way.

On what basis will the Court enter this governmental wilderness?

The alleged right concerns representation in a state legislative body. The Constitution does not expressly authorize action by the Court. The Fourteenth Amendment does not mention the republican form of government or legislative representation. Congress has not entered the field.

If the government of the United States must enter the field, would it not be conducive to healthy federalism for the people to authorize the step through their elected representatives in Congress? The appellees respectfully suggest that political and governmental issues should be decided in the political forum.

In his initial brief, the Solicitor General says this:

> ". . . While Congress has the power to act under the Fourteenth Amendment, this remedy is also unrealistic" (p. 15).
>
> ". . . Congress has the power under Section 5 of the Fourteenth Amendment to pass legislation correcting malapportionment to state legislatures which violate the Amendment" (p. 58).

Is it not more appropriate under our democratic form of government for Congress to enact remedial legislation than for this Court to legislate judicially?

The very nature of the question of what constitutes a republican form of government under Article IV, Section 4, of the Constitution, requires action by Congress. It requires such action because there must be a definition of the republican form of government. It requires such action because this Court cannot determine when there has been a departure from the norm until the norm has been established.

The appellees' insistence that there must be a standard is not argumentative; it is admitted by the Solicitor General. In his brief (March, 1961) he admits that:

> ". . . exact numerical equality of population is . . . impossible. . . ." (p. 67).
>
> ". . . *at some point* malapportionment of state legislatures becomes so gross and discriminatory that it violates the Fourteenth Amendment" (p. 16).

At what point does lack of numerical equality become gross discrimination?

An enumeration of the elements suggested by the Solicitor General emphasizes the desolate wilderness he would have this Court enter.

He urges that the Court consider the "disparity between districts"; whether the state affords the people another "reasonable remedy"; whether the disparity between districts has any "reasonable justification"; and the "amount of time since the last apportionment."

How disproportionate must the representation be before there is real "disparity between districts"? How can the Court tell whether the state affords the people another "reasonable remedy" and when a remedy is "reasonable"? Is the ability to amend the state constitution a "reasonable remedy" and, if so, will the Court in each case determine the degree of difficulty in the amending process? How may the Court determine whether the disparity between districts has a "reasonable justification" and when a justification is "reasonable"? Would the reasonableness of the justification depend on the number of cities in the state and the size of those cities or would it depend on the geography of the state? How much time must elapse since the "last apportionment"? Would it be any period beyond

the limit set in the state constitution or would it be not more than five years beyond the constitutional limit?

It is this controversial field that the appellants and the Solicitor General would have the Court enter.

It is precisely this type of situation Mr. Chief Justice Hughes referred to in *Coleman v. Miller*, 307 U. S. 433, 454-455, when he spoke of:

> ". . . the lack of satisfactory criteria for a judicial determination. . . ."

Does not healthy federalism require that Congress settle these difficult and delicate questions? Should the Federal courts bear the responsibility of requiring each state to justify its "right to exist as a state, republican in form" without a yardstick of some type?

On the question of relief, it is evident that what is here sought by the appellants and the Solicitor General is, not a judicial determination of rights, but action by this Court which will result in coercing a state legislature. This proposition is incontrovertible.

In their brief on the merits, the appellants urge that:

> ". . . History has shown that assertion and retention of jurisdiction by a court (federal or state) has provided the necessary spur to legislative consideration . . . and has produced the necessary corrective action. . . ." (pp. 20-21).

In his brief (March, 1961) the Solicitor General says this:

> "Action by the state legislature is even more likely if the federal court . . . reserves action 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" (p. 36).

Thus, the appellants and the Solicitor General urge the Court to authorize the District Court to participate in a political stratagem involving the legislative branch of a sovereign state of the Union.

And why do the appellants and the Solicitor General urge this type of action? It is because the constitutional principle of separation of powers prohibits direct action against the legislature and it is sought to circumvent this prohibition by coercive action. In short, this is not the type of case in which judicial relief can be granted.

This Court should repel the suggestion.

It must be remembered that the Union came into being as the result of grants of power from the several sovereign states. It must also be remembered that the Tenth Amendment is still in force and effect.

The concept of healthy federalism requires that the courts of the Union not be used to coerce the legislative branches of the several state governments.

If the citizens of the United States wish to abandon the principle of separation of powers and also our dual system of government, they should do so by the amending process.

CONCLUSION.

The case is before the Court on the merits. Does the complaint state a claim upon which relief can be granted or does it fail to state a claim upon which relief can be granted? The District Court has held that no claim is stated under the Constitution of the United States (R.

220-221). The District Court based its decision upon "this array of decisions" by this Court (R. 216).

The issue is now squarely before this Court.

On the one hand, the appellants and the Solicitor General urge the Court to depart from its precedents and enter the state political arena. The appellees, on the other hand, urge the Court to continue to adhere to sound principles of constitutional law which have not yet been found wanting.

The Court must weigh the alternatives.

The Constitution of Tennessee can be amended. Congress can enact remedial legislation. These are the traditional processes of a democratic government. Is it better to employ these procedures or is it better for this Court to legislate judicially?

If this Court is to enter the field of state legislative apportionment, should it not do so in a case where the violation of personal rights is clear and not theoretical and where there is a possibility of granting relief without coercing a state legislature?

In his latest brief, the Solicitor General states that:

> ". . . This multiplication of national-local relationships reinforces the debilitation of State governments by weakening the State's control over its own policies and its authority over its own political subdivisions" (p. 43).

The appellees urge that nothing could weaken the state's control over its own policies more effectively than for this Court to authorize the District Court to enter a decree holding that the government of the State of Tennessee is operating illegally.

What should this Court say to the citizens of Tennessee?

Surely there can be no better answer than that given by Mr. Justice Douglas in *Williamson v. Lee Optical of Oklahoma,* 348 U. S. 483, when he said:

> ". . . We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, 94 U. S. 113, 134, 24 L. Ed. 77, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.' " 348 U. S. 488.

The appeal should be dismissed.

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Certificate of Service.

I, Jack Wilson, Assistant Attorney General of Tennessee, one of the attorneys for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on ..... day of ....., 1961, I served copies of the within Brief for Appellees on Charles

W. Baker et al., appellants, by mailing said copies in a duly addressed envelope, postage duly prepaid, to their counsel of record, namely:

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