Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. MORSE. I yield.

Mr. DOUGLAS. Is it not true that no man can become a member of the ADA unless he agrees that he is not a believer in any totalitarian philosophy, including the Communist philosophy?

Mr. MORSE. The Senator from Illinois is correct. As a member of ADA and one of its officers, I am proud of the progressive legislation we have sponsored in the Congress of the United States, carrying out the primary obligation we have as Senators, which is to translate into legislation the general welfare clause of the Constitution, which seeks to promote the welfare of all of our people.

AMENDMENT OF FOREIGN ASSISTANCE ACT OF 1961

The Senate resumed the consideration of the bill (H.R. 11380) to amend further the Foreign Assistance Act of 1961, as amended, and for other purposes.

Mr. PROXMIRE. Mr. President, once again, I shall try to finish this speech. Since last Wednesday, I have been yielding the floor. I shall try very hard today to complete my speech today.

Mr. DOUGLAS. Mr. President, will the Senator yield with the understanding that I shall not propose an amendment, but merely ask a question?

Mr. PROXMIRE. I yield.

Mr. DOUGLAS. Does not the Senator from Wisconsin believe that the burden of providing a quorum expeditiously should be on the proponents of the amendment?

Mr. PROXMIRE. That has always been true in the Senate. It was certainly true as recently as the civil rights controversy, in which we were locked in debate which lasted for many months. The Senator from Illinois [Mr. DOUGLAS] and others who were in favor of the civil rights bill, made sacrifices to be present. They were on the floor. Quorums were usually developed in 15 or 20 minutes, and often less time than that.

Mr. DOUGLAS. How long did it take to develop a quorum today?

Mr. PROXMIRE. Today was much better than yesterday. It took probably 35 minutes. Yesterday, it required 50 minutes. The Senate was unable to provide a quorum on Thursday, Friday, or Saturday. I suspect, if the opposition cannot produce a quorum more promptly, that after tomorrow it will be progressively more difficult to obtain a quorum as time goes on and we approach closer to the election. It may take a time certain for a vote to insure rounding up the troops. The leadership has sent telegrams to Senators and asked them to return. In spite of that request, those who favor the Dirksen amendment and oppose our position are not putting in an appearance.

The Senator from Illinois has stressed the fact that almost all of the discussion on the bill has been on the side of those of us who oppose the Dirksen amendment—and with good reason. The overwhelming preponderance of constitutional experts agree that the Dirksen amendment would be an unconscionable action against the Supreme Court.

Dean Rostow, of the Yale Law School, has said it would knock out the linchpin of the Constitution, and destroy the judicial power.

That argument has not been answered by those who favor the Dirksen amendment. The argument they make is that if the U.S. Senate is based on some other basis than population, being based on States, we could have one body of a State legislature that would be based on a similar principle.

Mr. President, I have tried to bell that cat. I have called direct attention to the authorities, the Founding Fathers, Madison, Hamilton, Jay, Wilson, and the others who spoke so eloquently on this matter at the time of the Constitutional Convention.

I believe that we have been able to show in great detail that our Founding Fathers unanimously agreed on the one-man, one-vote principle. It was only when the pistol was pointed at their heads and they had no choice except, on the one hand, no union or a compromise of the principles in which they believed deeply, that they accepted the compromise.

We should be aware of the fact that at that time the States were sovereign in a very genuine and real sense. Today the counties, cities, towns, and other administrative agencies are not sovereign in any sense.

Mr. ANDERSON. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. ANDERSON. Does the Senator see any comparison between the 32 counties of New Mexico being bumped together into a State and the States of the Union coming first under a confederacy, and finally a constitution, and a situation in which the representatives of the State in the Senate were originally regarded as something like Ambassadors? Is there any comparison?

Mr. PROXMIRE. No. The Senator from New Mexico is correct. No one pretends that the countries have any element of sovereignty. They can be expanded, reduced in size, or even abolished by the State. Counties have been totally abolished in some States.

There is no basis for saying that a county is an entity, having any kind of existence at all, which requires representation in the State legislature.

Mr. ANDERSON. In the formation of counties in many of the States, does the Senator from Wisconsin see anything comparable to what happened in the formation of the Federal Government? I think, for example, of the establishment of a county in New Mexico. The county was referred to by three or four different names as it went along. At the first formation of the county, it was called Pyramid. Pyramid County consisted of an area which later became Hidalgo County. But, in the process, it was called four or five different names. The legislature did not want to provide a name at that time. There had been a commitment made for the formation of a county. The legislature, in its despair, kept changing the name of the county. At one time, to show what sincere interest there was in it, they placed the names of three permanent members of the press table in a hat and decided that the name to be drawn out of the hat would determine the name of the county. It would be called either Smith County, Lyon County, or Anderson County. Those at the press table were highly pleased that there was so much interest in the press table, and so little interest in the county.

I do not believe there is anything comparable to the effort to bring my State into the Union and the effort to bring another county into a State. I think they are wholly different. I am glad that the Senater from Wisconsin has recognized that.

Mr. PROXMIRE. The Senator from New Mexico is eminently correct. It is particularly important that he stressed the formation of the Federal Government. The formation of the Federal Government was the result of the coming together of independent States. Those independent States provided some kind of coalition in the Articles of the Confederacy. But it was limited. The States reserved to themselves the right to tax. They reserved to themselves virtually all of the genuine rights of sovereignty. There has been no such coalition of counties to form a State in the history of our country. In every case the States were admitted, except for the Thirteen Original States. And then the States decided what kind of counties they should have, what names the counties should have, what size they should be, and how they fitted the convenience of the particular States.

The States in the Midwest were formed pursuant to the Northwest Ordinance. In 1787, the same year in which the Constitution was adopted, the Founding Fathers said that those States should always have proportional relationship in their legislatures.

Today at lunch, a distinguished Senator, who I believe will speak later, pointed out that in his State, a Federal enabling act admitted the State on the stipulation that its legistlature be based on population.

Mr. ANDERSON. I have noticed the names applied to counties in my State. I realize that it required special means to establish them. One county was called Catron County. It was named after Thomas Catron, who was a U.S. Senator from that State. I recognize that the Democrats retired him to private life for a time. But he was a U.S. Senator from that State for a period of time. The legislature, in trying to pick a name, named the county after him. They interested him in trying to help it along.

It was a long time before another county came along. There was not too much interest in it. It was called Harding County, after the President of the United States. I believe that, if they had waited a few years, they would have named it something quite different from that. Harding County had a good many people at the time it was established.

It had something like 1,200 people. I noticed the other day in the newspaper that 1,200 people have an equivalent vote to the population of Bernalillo County, which has 275,000 people. I believe that the principle of legislative apportionment goes badly to pot when we recognize that 1 county with a population of 1,280 and another county a population of 275,000 people have equal representation.

It is that very thing which has caused people to believe that perhaps this system is not perfectly established. I believe that the principle that the State of Wisconsin and other States have been working on in an effort to bring about a greater degree of true apportionment is correct.

I commented the other day that the State of Michigan had done a wonderful job in the organization of districts. It started with districts which were widely different in size. It ended with districts containing from 205,000 to 207,000 people. If it can be done there, it can be done elsewhere.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. DOUGLAS. The change in Michigan was made largely in accordance with court orders.

Mr. PROXMIRE. That is correct. That is exactly why, if we really believe in one-man-one-vote, if we really believe in population representation, we must support the right of the courts to intervene and protect the basic right of the individuals to have an equal vote.

Mr. ANDERSON. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. ANDERSON. Mr. President, does the Senator believe that the evidence from Michigan is fairly good evidence that the courts work out pretty good arrangements? I used it as an example of how an almost perfect arrangement was made in creating districts containing from 205,000 to 207,000 people. They are almost alike in size. I believe that an acceptable plan has been worked out.

Mr. PROXMIRE. Yes, indeed. The experience in Wisconsin was exactly the same. The Supreme Court of the State of Wisconsin apportioned our State legislature and has done so very equitably—within 1, 2, or 3 percent of the population—throughout the State. It is an excellent apportionment.

Mr. ANDERSON. Does that not show that the courts can do a pretty good job?

Mr. PROXMIRE. Yes, indeed.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. DOUGLAS. Did not the Wisconsin Supreme Court act on the basis of the guidelines laid down by the U.S. Supreme Court?

Mr. PROXMIRE. The Wisconsin Supreme Court, I believe, acted under the constitution of the State of Wisconsin, recognizing that, since 1848, our State has had that principle written into it. I am sure that in most States the changes made were made under the guidelines of the U.S. Supreme Court. If it had not been for the U.S. Supreme Court, there would not have been a real opportunity to have that kind of apportionment brought about.

I should like to make a statement about the helpful remarks of the able and eminent Senator from New Mexico [Mr. ANDERSON]. The Senator from New Mexico made a real contribution in reference to the transient, fleeting, temporary, and tentative nature of the counties throughout our country, when he pointed to the example of a group of newspapermen coming together, put names into a hat, and draw a name out of the hat, to decide what the name of a county should be.

There is a casual attitude toward counties throughout the country. There cannot be any pretense that they should be recognized by having equal ambassadors to their State governments.

So the analogy does not apply.

Mr. President, yesterday, at some length, I pointed out how strongly the father of our Constitution, James Madison, felt about equality of representation. James Madison has been greatly revered on the floor of the Senate by the distinguished Senators from Virginia and others, who feel very strongly—and rightly—that he is one of the great architects of our Republic. Many Senators have been contending for a special monument to him in Washington. He is rightly called the father of our Constitution. He came down as hard as a man possibly could on the side of equal representation, saying that no other principle could be justified.

Last Wednesday we were discussing the attitude of Alexander Hamilton. I should like to refer to No. 22 of the Federalist papers, because, of course, the Federalist papers were the great documents that were written by Hamilton, Madison, and Jay to justify and explain the Constitution. I doubt if any great document has ever had more able or clearer exposition than the Constitution has had, thanks to the Federalist papers. Alexander Hamilton, more than anyone else, is viewed by conservatives as their proper ancestor.

He, more than anyone else, gave the philosophical justification of conservatism.

Alexander Hamilton, also a brilliant man, felt very deeply about this principle. In No. 22 of the Federalist papers Alexander Hamilton attacked at some length equality of representation by the States, which means that he favored equality of representation by the people. If the States had equal representation, obviously the smaller States would be given equal representation with the larger States, and under those circumstances the people in the smaller States would have more representation than those in the larger ones.

On December 14, 1787, Hamilton wrote:

> The right of equal suffrage among the States is another exceptionable part of the confederation. Every idea of proportion, and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware, an equal voice in the national deliberations with Pennsylvania or Virginia, or North Carolina. Its operation contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America.

It is interesting to note that this was the only philosophical argument that the brilliant Hamilton could find to oppose his argument and his strong feeling that even the Federal Government should have equal representation of all Americans, whether they lived in a large or a small State. I should like to repeat:

> Sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America.

Nobody pretends—and I think we have established the point very clearly—that the counties are sovereign in any sense or ever have been anywhere. So that argument cannot be made against equal representation in State legislatures. It was made, and it was obviously made with some effect in establishing our Constitution.

Hamilton went on to answer even that argument that States are sovereign and should have equal representation by saying:

> But this kind of logical legerdemain will never counteract the plain suggestions of justice and commonsense. It may happen that this majority of States is a small minority of the people of America; and two-thirds of the people of America, could not long be persuaded, upon the credit of artificial distinctions and syllogistic subleties, to submit their interests to the management and disposal of one-third.

At least in our distinctions—distinctions of some substance when one is talking about equal State representation in the Federal Government—there is a syllogistic subtlety. But there is no syllogistic sense at all in providing equal representation for towns, as in New Hampshire, or counties, as in many of the other States.

Hamilton went on to state:

> The larger States would after awhile revolt from the idea of receiving the law from the smaller. To acquiesce in such a privation of their due importance in the political scale, would be not merely to be insensible to the love of power, but even to sacrifice the desire of equality.
>
> It may be objected to this, that not seven but nine States, or two-thirds of the whole number must consent to the most important resolutions; and it may be thence inferred, that nine States would always comprehend a majority of the inhabitants of the Union. But this does not obviate the impropriety of an equal vote between States of the most unequal dimensions and populousness; nor is the inference accurate in point of fact; for we can enumerate nine States which contain less than a majority of the people; and it is constitutionally possible, that these nine may give the vote.
>
> But this is not all; what at first sight may seem a remedy, is in reality a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number. Congress from the nonattendance of a few States have been frequently in the situation of a Polish Diet, where a single veto has been sufficient to put a stop to all their movements. A sixtieth part of the Union which is about

the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations.

Then Hamilton went on to say—and this is one of those refinements which in practice is in effect the reverse of what is expected of it in theory—

This is one of those refinements which in practice has an effect, the reverse of what is expected from it in theory. In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of the greatest importance, there is commonly a necessity for action. The public business must in some way or other go forward. If a pertinacious minority can control the opinion of a majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence tedious delays—continual negotiation and intrigue—contemptible compromises of the public good. And yet in such a system, it is even happy when such compromises can take place: For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness—sometimes border upon anarchy.

This was the strong, clear injunction of Alexander Hamilton against permitting one body of even the Federal Legislature to be founded on some basis other than equal population representation. Hamilton, together with Madison and the other proponents of our Constitution, did give in so far as the Federal Constitution is concerned, because there were so many differences in analogy between them when compared to State governments.

Hamilton described, in No. 32 of the Federalist Papers, the balance between the States and the Federal Government under the proposed Constitution, as shown in the Federalist at pages 199–200:

An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial Union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.

In Federalist Paper No. 35, James Madison similarly described the new system, in the following words:

The House of Representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the Government is National not Federal. The Senate on the other hand will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the Government is Federal, not National.

* * * * *

The proposed Constitution therefore is in strictness neither a National nor a Federal constitution, but a composition of both. In its foundation, it is Federal, not National; in the sources from which the ordinary powers of the Government are drawn, it is partly Federal, and partly National; in the operation of these powers, it is National, not Federal; in the extent of them again, it is Federal, not National; and finally, in the authoritative mode of introducing amendments, it is neither wholly Federal, nor wholly National.

Most of us—with some prominent exceptions—are highly pleased with the Federal aspects of our Government. We feel that there is a real value in having the States in a position to intervene between the massive, military, financial power of the Central Federal Government and the individual. That certainly has a strong basis in the rights of the individual citizen. However, I have not heard anyone argue that there should be a Federal system within a State. Nobody has contended it. Indeed, although we have 50 States, and although we have had many years of experience with States that have had all kinds of representation in their State legislatures, and there has been ample time to develop this theory with regard to the States, no advocate has arisen, and no article has been written, to show that the States should be organized on this basis. It would be ridiculous to so argue, in view of the fact that the real power that must be watched, that must be limited, is that of the Federal Government, and that the real part of our society which must have power also to do a job would be weakened and be rendered unable to act if it had to cope with divisions within the State operations.

Madison repeated, in Federalist Paper No. 40, that the States continued to be independent sovereigns under the new Constitution. This is certainly an important distinction as compared with counties. He said, in Federalist Papers, No. 40:

We have seen that in the new Government as in the old, the general powers are limited, and that the States in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

The 10th amendment of the Constitution would be the real reliance for that position taken by Madison.

Likewise, in No. 45, Madison said:

The States will retain under the proposed Constitution a very extensive portion of active sovereignty.

This is important to document, because once again, no pretense has been made that counties or towns have a right to sovereignty; but Madison, in Federalist Paper No. 45, said that the States do have the element of sovereignty. I quote him:

The State governments may be regarded as constituent and essential parts of the Federal Government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures.

It is true that since that time there has been an amendment to the Constitution which has changed the method of selecting Senators, and that Senators are elected by direct popular vote. Nevertheless, this was the theory. This was another element recognizing the authority and power of the States. Said Madison:

Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures. Thus each of the principal branches of the Federal Government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing toward them. On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the Federal Government, and very little if at all, to the local influence of its members.

In Federalist Paper No. 54 Madison explained the basis for the apportionment of the House of Representatives in the following words:

It is not contended that the number of people in each State ought not to be the standard for regulating the proportion of those who are to represent the people of each State. * * * [T]he rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection.

* * * * *

It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation.

This proposition seemed to Madison, Hamilton, and John Jay, the writers of the Federalist Papers, to be so self-evident that this is the entire discussion devoted to the basic principle of apportioning one of the two houses of the legislature in their detailed exposition of the proposed Constitution.

I challenge any Senator who opposes our position or who favors the Dirksen amendment to show a phrase in the Federalist Papers supporting the principle behind the Dirksen amendment, that both houses of the State legislatures should not be based on population. There is no such statement in the Federalist papers. We in this country are very fortunate to have the magnificent document, the Federalist Papers, which, more than any other exposition of the Constitution, clearly, simply, and convincingly settle the meaning of the Founding Fathers. Talk about the legislative history we make there. The Federalist Papers have given us the definitive legislative history of our Constitution. In this very history it is clear that all the Founding Fathers were unanimously on the side of the principle of one-man, one-vote, in our State legislatures.

In contrast, Madison apparently felt compelled to explain the apportionment

of the Senate at length in No. 62—the Federalist, pages 416–417:

The equality of representation in the Senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion. If indeed, it be right that among a people thoroughly incorporated into one Nation, every district ought to have a proportional share in the Government; and that among independent and sovereign States bound together by a simple league, the parties however unequal in size, ought to have an equal share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.

Mr. President, this is in a compound republic. As I said before, no one is arguing that our States are compound republics. They are far from it. They are anything but that. No Founding Father or other philosopher argued that there should be a Federal system within the States.

To continue:

But it is superfluous to try by the standards of theory, a part of the Constitution which is allowed on all hands to be the result not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government with powers equal to its objects, is called for by the voice, and still more loudly by the political situation of America.

This was the pistol pointed at the heads of our Founding Fathers.

A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States. The only option then for the former lies between the proposed government and a government still more objectionable. Under this alternative the advice of prudence must be, to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

In this spirit it may be remarked, that the equal vote allowed to each State, is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard by every possible expedient against an improper consolidation of the States into one simple republic.

And in No. 58 Madison summarized the difference in functions between the House and Senate:

One branch of the legislature is a representation of citizens; the other of the States. (Id. at 392.)

That last quotation simply and concisely expresses all the difference between our Federal Government, on the one hand, and State governments, on the other.

There are no States within States. If one branch of a State legislature should represent citizens, both should represent citizens.

It is also instructive to read some of the postconvention materials which illustrate some of the strong reservations about the Senate, as well as the reasons for the creation of a body in which the States are equally represented.

George Mason, who did not sign the proposed Constitution, wrote on a draft of the Constitution as one of his reasons for this action that the Senate had "the power of altering all money bills, and of originating appropriations of money, and the salaries of the officers of their own appointment, in conjunction with the President of the United States, although they are not the representatives of the people or amenable to them." (II Farrand 638.)

Pierce Butler, a delegate to the convention from South Carolina, wrote to Weedon Butler on October 8 describing the proposed Constitution (III Farrand 102–103):

"We, in many instances took the Constitution of Britain, when in its purity, for a model and surely we could not have a better. We tried to avoid what appeared to us the weak parts of ancient as well as modern republics. View the system then as resulting from a spirit of accommodation to different interests, and not the most perfect one that the deputies could devise for a country better adapted for the reception of it than America is at this day, or perhaps ever will be. It is a great extent of territory to be under one free government. We have, as you will see, taken a portion of power from the individual States, to form a General Government for the whole to preserve the Union. The General Government to consist of two branches of legislature and an executive to be vested in one person for 4 years, but eligible again—the first branch of the legislature to be elected by the people of the different States, agreeable to a ratio of numbers and wealth, to serve for 2 years. The second to consist of two Members from each State, to be appointed by the legislature of the States to serve for 6 years. The powers of the General Government are so defined as not to destroy the sovereignty of the individual States.

It was the clear understanding of our Founding Fathers that there was only one reason why the Senate does not represent the people of American on an equal basis. This was that the General Government shall not destroy the sovereignty, the identity, of the States themselves.

In October 1787, a pamphlet was printed defending the Constitution which consisted largely of a speech written by Charles Pinckney of South Carolina which was intended to have been made to the Convention on May 29. He attached the weakness of the Constitution, including as one cause (III Farrand 108):

"The inequality of the principle of Representation, where the largest and most inconsiderable States have an equal vote in the affairs of the Union."

Because of the many defects in the existing system, he proposed that the Convention (ibid.):

"Consider the subject de novo. That they will pay no further attention to the Confederation, than to consider it as good materials, and view themselves as at liberty to form and recommend such a plan, as from their knowledge of the temper of the people, and the resources of the States, will be most likely to render our Government firm and united. This appears to me, far more proper than to attempt the repair of a system, not only radically defective in pricinciple, but which, if it was possible to give it operation, would prove absurd and oppressive."

Pinckney stated that (id. at 109–110):

"The first important alteration is, that of the principle of representation, and the distribution of the different powers of government. In the Federal councils, each State ought to have a weight in proportion to its importance; and no State is justly entitled to a greater. A representation is the sign of the reality. Upon this principle, however abused, the parliament of Great Britain is formed, and it has been universally adopted by the States in the formation of their legislatures."

This observation by Pinckney back in 1787, once again underlines and affirms the argument I have been making; namely, that at the time of the adoption of the Federal Constitution the State legislatures were constituted strictly on the basis of population.

Unfortunately, some Senators do not seem to appreciate or recall this. At any rate, they have been making contrary arguments on the floor of the Senate.

Following the adoption of the Constitution, Pinckney observed that this principle, that each person, each voter, should have an equal vote has been universally adopted by the States in the formation of their legislatures.

Those who attack the Supreme Court, in connection with Reynolds against Sims, and call this a new, radical innovation apparently have forgotten what our Founding Fathers had said on this point.

One of the columnists, publishing his column in last night's Washington Star, in his usual intemperate and unfortunate observations on the Federal Government, brought his name-calling, which is largely confined to Members of the Senate, to apply to the Supreme Court. He argued that this Supreme Court action was a radical departure from past practice.

Obviously he has not read the Federalist papers. If he has, he has forgotten what was written in the Federalist papers, and also the observations of the other Founding Fathers. The Federalist papers make it clear that these Supreme Court decisions were no radical departure by the Supreme Court; indeed, the Supreme Court affirmed an ancient procedure, which is older than the Constitution itself.

It is a principle that has been affirmed over and over again. Every person in America, black or white, rich or poor, rural or urban, should have equal representation in their State legislature. There is no basis whatsoever in principle for saying that city people cannot be trusted, that suburbanites cannot be trusted, or that when a person leaves a farm and comes to the city, he leaves his vote behind. There is no such principle in our history or in the observations of the great men who formed our Constitution.

Pinckney goes on to say:

The abuse of this equality—

That is the equality of having each person equally represented—

has been censured as one of the most dangerous corruptions of the English Constitution; and I hope we shall not incautiously contract a disease that has been consuming them. Nothing, but necessity, could have induced Congress to ratify a Confederation upon other principles. It certainly was the opinion of the first Congress, in 1774, to acquire materials for forming an estimate of the comparative importance of each State; for, in the commencement of that session, they gave as a reason, for allowing each

colony a vote, that it was not in their power, at that time, to procure evidence for determining their importance.

In other words, they did not have a census. They did not know accurately the population of the Colonies. They had no provision for determining accurately enough where the people were, so that they could give each Colony proportional representation. Continuing:

"This idea, of a just representation, seems to have been conformable to the opinions of the best writers on the subject, that, in a confederated system, the members ought to contribute according to their abilities, and have a vote in proportion to their importance. But if each must have a vote, it can be defended upon no other ground, than that of each contributing an equal share of the public burdens: either would be a perfect system. The present must ever continue irreconcilable to justice.

"The Senate, I propose to have elected by the house of delegates, upon proportionable principles, in the manner I have stated, which, though rotative, will give that body a sufficient degree of stability and independence. The districts, into which the Union are to be divided, will be so apportioned, as to give to each its due weight, and the Senate, calculated in this, as it ought to be in every government, to represent the wealth of the Nation."

This method of representation was based on Pinckney's view as to the proper relationship of the new National Government and the States (id. at 112):

"I apprehend the true intention of the States in uniting, is to have a firm National Government, capable of effectually executing its acts, and dispensing its benefits and protection. In it alone can be vested those powers and prerogatives which more particularly distinguish a sovereign state. The members which compose the superintending Government are to be considered merely as parts of a great whole, and only suffered to retain the powers necessary to the administration of their State systems. The idea which has been so long and falsely entertained of each being a sovereign state, must be given up; for it is absurd to suppose there can be more than one sovereignty within a government. The States should retain nothing more than that mere local legislation, which, as districts of a General Government, they can exercise more to the benefit of their particular inhabitants."

This idea has persisted ever since the founding of our Constitution: That there is an element of sovereignty within the States and is affirmed in the 10th amendment to the Constitution, and so stated over and over again, which was the only argument given for composing the Senate as it has been composed, with every State, large and small, having equal representation, and disregarding the principle of equal representation for every American citizen.

I continue:

In concluding, Pinckney comments on the proposed constitution and states as one of his two objections to it the composition of the Senate. (Id. at 127.)

In a letter explaining why he had not signed the proposed constitution, Elbridge Gerry wrote that (III Farrand 128–129):

"As the convention was called for 'the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and the several legislatures, such alterations and provisions as shall render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union.' I did not conceive that these powers extend to the formation of the plan proposed: but the convention being of a different opinion, I acquiesced in it, being fully convinced that to preserve the Union, an efficient government was indispensably necessary; and that it would be difficult to make proper amendments to the Articles of Confederation

"The Constitution proposed has few if any Federal features; but is rather a system of national government. Nevertheless, in many respects, I think it has great merit, and, by proper amendments, may be adapted to the 'exigencies of government, and preservation of liberty.'"

I should not say "national"; I should say, in the words of Madison, that this is the Federal aspect of our Republic, not the national aspect.

Perhaps Luther Martin best conveyed the difference between State government, which represents the people, and National Government, which represents States:

From December 28, 1787, to February 8, 1788, Luther Martin's "Genuine Information" was printed in the Maryland Gazette and Baltimore Advertiser. It consisted of an expanded version of the speech he made to the Maryland House of Delegates on November 29. Martin stated that the believers in a Federal system were (III Farrand 179–186):

"For taking our present Federal system as the basis of their proceedings, and, as far as experience had shown us that there were defects, to remedy those defects; as far as experience had shown that other powers were necessary to the Federal Government to give those powers. They considered this the object for which they were sent by their States, and what their States expected from them.

* * * * *

Those who advocated [inequality of representation in the first branch] urged, that, when the Articles of Confederation were formed, it was only from necessity and expediency that the States were admitted each to have an equal vote; but that our situation was now altered, and therefore those States who considered it contrary to their interest, would no longer abide by it. They said, no State ought to wish to have influence in government, except in proportion to what it contributes to it; that, if it contributes but little, it ought to have but a small vote; that taxation and representation ought always to go together; that if one State had 16 times as many inhabitants as another, or was 16 times as wealthy, it ought to have 16 times as many votes; that an inhabitant of Pennsylvania ought to have as much weight and consequence as an inhabitant of Jersey or Delaware; that it was contrary to the feelings of the human mind; what the large States would never submit to; that the large States would have great objects in view, in which they would never permit the smaller States to thwart them; that equality of suffrage was the rotten part of the constitution, and that this was a happy time to get clear of it. In fine, that it was the poison which contaminated our whole system, and the source of all the evils we experienced.

"This, Sir, is the substance of the arguments, if arguments they may be called, which were used in favor of inequality of suffrage. Those who advocated the equality of suffrage, took the matter upon the original principles of government; they urged, that all men, considered in a State of nature, before any government is formed, are equally free and independent, no one having any right or authority to exercise power over another, and this without any regard to difference in personal strength, understanding, or wealth. That, when such individuals enter into government, they have each a right to an equal voice in its first formation, and afterwards have each a right to an equal vote in every matter which relates to their government. That, if it could be done conveniently, they have a right to exercise it in person. Where it cannot be done in person, but for convenience representatives are appointed, to act for them, every person has a right to an equal vote in choosing that representative; who is instructed to do for the whole, that which the whole, if they could assemble, might do in person, and in the transaction of which, each would have an equal voice."

This is an extremely interesting analysis by Luther Martin, because it recalls to mind quite vividly the gross distortions that now exist in California, where the county of Los Angeles, with a population of 6 million, has 1 State senator, while another county, having a population of 13,000, has 1 State senator. That means that if everyone in that area of California were to attend a gigantic assembly, Los Angeles citizens, in effect, would be permitted to have only 1 citizen in 500 vote, whereas in the other county everybody, all citizens, would be allowed to vote.

Perhaps the inequality which Luther Martin shows so vividly in analyzing the Constitution can be demonstrated with regard to the States.

The remarkable thing, to me, is that what exercised our Founding Fathers so much was that a representative of Delaware and Rhode Island might have 16, 17, or 18 times the influence that a representative of Pennsylvania or New York might have. Now we have a situation within the States in which a citizen of one county may have a thousand times the influence—that is not an exaggeration—in electing the members of a State legislature that another citizen has.

Mr. DOUGLAS. Mr. President, will the Senator from Wisconsin yield?

Mr. PROXMIRE. I yield.

Mr. DOUGLAS. My own State of Illinois certainly is not the worst State in the Union in this matter, but I introduced material into the RECORD yesterday which showed that in one senatorial district there were only 54,000 people, and in another senatorial district there were 570,000 people. One person in the smallest district had more than 10 times the voice of a person in the registered district, or 1 person was equal to more than 10 persons in the largest district. I illustrated other examples of a district with 57,000, 59,000 and 67,000 on the one hand, and districts having over 400,000 and 505,000 on the other. Interestingly enough, it was the suburban districts which had the biggest population and were, therefore, the most underrepresented.

Mr. PROXMIRE. That is a dramatic and immediate illustration of the kind of unfortunate injustice which the Supreme Court has contended against, and which it has endeavored to correct patiently, slowly, gradually, over a period of many years. The Senator from Illinois has been at great pains to say that for more than 60 years most States have been malapportioned so that the Supreme Court has not acted precipitately but gradually.

Luther Martin goes on to say:

That, if we were to admit, because a man was more wise, more strong, or more wealthy, he should be entitled to more votes than another it would be inconsistent with the freedom and liberty of that other—

Luther Martin reported the deliberations of our Founding Fathers at the time the Constitution was being set up, and he has been acknowledged to be an honest, fair, and objective reporter—

and would reduce him to slavery. Suppose, for instance, 10 individuals in a state of nature, about to enter into government, 9 of whom are equally wise, equally strong, and equally wealthy, the 10th is 10 times as wise, 10 times as strong, or 10 times as rich; if, for this reason, he is to have 10 votes for each vote of either of the others, the 9 might as well have no vote at all; since, though the whole 9 might assent to a measure, yet the vote of the 10th would countervail, and set aside all their votes.

Mr. DOUGLAS. Mr. President, will the Senator from Wisconsin yield?

The PRESIDING OFFICER (Mr. McINTYRE in the chair). Does the Senator from Wisconsin yield to the Senator from Illinois?

Mr. PROXMIRE. I yield.

Mr. DOUGLAS. This is precisely what the oil millionaire, H. L. Hunt, proposes. He has written a book in which he states that people should have votes in proportion to their wealth.

Mr. PROXMIRE. The examples he has given, if votes are in proportion, cannot even be justified on the basis of taxes and wealth, on the wisdom of individuals, their strength, the work they have done, or the experience they have had. There is no basis for this discrimination whatsoever. They happen to live in an area which, because people have left it, is given more influence than another, or they are disadvantaged because they happen to live in an area which is attractive and progressive, and into which people have moved.

Luther Martin goes on to say:

Having thus established these principles, with respect to the rights of individuals in a state of nature, and what is due to each, on entering into government (principles established by every writer on liberty), they proceeded to show, that States, when once formed, are considered, with respect to each other, as individauls in a state of nature; that, like individuals, each State is considered equally free and equally independent, the one having no right to exercise authority over the other, though more strong, more wealthy, or abounding with more inhabitants. That, when a number of States unite themselves under a federal government, the same principles apply to them, as when a number of individual men unite themselves under a State government.

There we have a beautiful, clear, and simple explanation of how to justify the U.S. Senate. Although the States are artifical creatures, they have a real identity, real sovereignty, and we have treated them equally. But no one—no author of the Dirksen amednment, no strongest supporter of the Dirksen amendment, or author of the Tuck bill, for that matter—has ever argued that there is anything like such sovereignty and identity, or any need for the equality of justification, for equality within the States, the counties, or any other governmental body.

Luther Martin goes on to say:

That every argument which shows one man ought not to have more votes than another, because he is wiser, stronger, or wealthier, proves that one State ought not to have more votes than another, because it is stronger, richer, or more populous. And, that by giving one State, or one or two States, more votes than the others, the others thereby are enslaved to such State or States, having the greater number of votes, in the same manner as in the case before put, of individuals, when one has more votes than the others. That the reason why each individual man in forming a State government should have an equal vote, is because each individual, before he enters into government, is equally free and independent. So each State, when States enter into a Federal Government, are entitled to an equal vote; because, before they enter into such Federal Government, each State was equally free and equally independent.

That argument cannot be made for towns and it cannot be made for counties. It can be made only for individual persons, or, in the case of federated governments consisting of individual States and nations, it can be made, perhaps, on the basis of their identity as individual States or nations.

Luther Martin goes on to say:

"That the 13 States are 13 distinct political individual existences, as to each other; that the Federal Government is, or ought to be, a government over these 13 political individual existences, which form the members of that Government; and that, as the largest State, is only a single individual of this Government, it ought to have only one vote; the smallest State, also being one individual member of this Government, ought also to have one vote.

"It was denied that the equality of suffrage was originally agreed to [in the confederation] on principles of necessity or expediency; on the contrary, that it was adopted on the principles of the rights of men and the rights of States, which were then well known, and which then influenced our conduct, although now they seem to be forgotten."

When the large States threatened that they would never agree to a system of equal representation, Martin said that the small States answered (III Farrand 186):

"That slavery was the worst that could ensue, and we considered the system proposed to be the most complete, most abject system of slavery that the wit of man ever devised, under the pretence of forming a government for free States."

He described the issue whether there should be one or more legislative bodies as a conflict between those in favor of National and Federal Government (id. at 191–193):

"Those who were for two branches in the legislature, a House of Representatives and a Senate, urged the necessity of a second branch, to serve as a check upon the first, and used all those trite and commonplace arguments which may be proper and just, when applied to the formation of a State government, over individuals variously distinguished in their habits and manners, fortune and rank * * *. But, on the other side, it was urged, that none of those arguments could with propriety be applied to the formation of a Federal Government over a number of independent States."

Luther Martin was an accurate, widely accepted reporter of the debates at the time of the constitutional convention.

He said that the arguments made in favor of equal State representation, not popular representation, in the U.S. Senate, were strictly based on the notion that States had an individual, separate, sovereign identity, and that they rose or fell upon the acceptance of that theory. That was the only theory and the only principle. There was no argument that there was some reason to provide area representation or anything of that kind.

Luther Martin goes on to say:

It is the State governments which are to watch over and protect the rights of the individual, whether rich or poor, or of moderate circumstances, and in which the democratic and aristocratic influence or principles are to be so blended, modified, and checked, as to prevent oppression and injury—

The argument of those who contend for the Senate to be organized as it is—

that the Federal Government is to guard and protect the States and their rights, and to regulate their common concerns; that a Federal Government is formed by the States, as States, that is, in their sovereign capacities, in the same manner as treaties and alliances are formed; that sovereignties, considered as such, cannot be said to have jarring interests or principles, the one aristocratic, and the other democratic.

It was urged, that the Government we were forming was not in reality a Federal, but a National Government; not founded on the principles of the preservation, but the abolition or consolidation of all State governments; that we appeared totally to have forgot the business for which we were sent, and the situation of the country for which we were preparing our system—that we had not been sent to form a government over the inhabitants of America, considered as individuals; that as individuals, they were all subject to their respective State governments, which government would still remain, though the Federal Government should be dissolved.

Whereas it was urged, that the principles on which a Federal Government over States ought to be constructed and ratified, are the reverse; that instead of the legislature consisting of two branches, one branch was sufficient, whether examined by the dictates of reason, or the experience of ages; that the representation, instead of being drawn from the people at large, as individuals, ought to be drawn from the States as States, in their sovereign capacity; that, in a Federal Government, the parties to the compact are not the people, as individuals, but the States, as States; and that it is by the States as States, in their sovereign capacity, that the system of government ought to be ratified, and not by the people, as individuals.

It was further said, that, in a Federal Government over States equally free, sovereign, and independent, every State ought to have an equal share in making the Federal laws or regulations, in deciding upon them, and in carrying them into execution; neither of which was the case in this system, but the reverse; the States not having an equal voice in the legislature, nor in the appointment of the executive, the judges, and the other officers of government. It was insisted, that, in the whole system, there was but one Federal feature—the appointment of the Senators by the States in their sovereign capacity, that is, by their legislatures, and the equality of suffrage in that branch; but it was said, that this feature was only Federal in appearance.

Mr. Martin went on to say:

In a State government, I consider all power flowing immediately from the people in their

individual capacity, and that the people, in their individual capacity, have, and ought to have the right of choosing delegates in a State legislature, the business of which is to make laws, regulating their concerns, as individuals, and operating upon them as such; but in a Federal Government, formed over free States, the power flows from the people, and the right of choosing delegates belongs to them only mediately through their respective State governments which are the members composing the Federal Government, and from whom all its power immediately proceeds; to which State governments, the choice of the Federal delegates immediately belongs.

I repeat the first part of that statement by Luther Martin. After years of reporting on the origins of our Federal Constitution, the debate led up to the adoption of our Federal Constitution. Luther Martin makes this notation, which is so crucial:

In a State government, I consider all power flowing immediately from the people in their individual capacity, and that the people, in their individual capacity, have, and ought to have the right of choosing delegates in a State legislature, the business of which is to make laws.

It is the people in their individual capacity who can elect a member of a State legislature in proportion to the one man-one vote principle. The Federal Government is, in part at least, a federation of independent and sovereign States. The Federal Government has Senators who represent States—not individuals, but States.

A look at the conventions which ratified the Constitution further illustrates the ideas of the Senate as a body representing the sovereign States. I believe that this is one of the clearest and best evidences that we have that at the time of the adoption of the Constitution, not only in the debate that went on when it was ratified, by the delegates to the Constitutional Convention, but also in its actual ratification by the individual, independent States, was this concept of individual State sovereignty. This was the only reason that the one man-one vote principle was abridged in adopting our Federal Constitution.

I continue to read:

In the Massachusetts Convention, various delegates emphasized the sharp distinction between the function of the Senate and the House of Representatives. Fisher Ames, later a Congressman, stated that (II, "The Debates in the Several State Conventions on the Adoption of the Federal Constitution" (Elliot editor, 2d ed., 1854, p. 11): "The Senators will represent the sovereignty of the States. The representatives are to represent the people."

Christopher Gore similarly remarked (id. at 18): "The Senate represents the sovereignty of the States; the House of Representatives the people of the United States."

And E. Pierce said (id. at 22): "[T]he Federal Represenatives, who are to form the democratical part of the general government, are to be a check on the representatives of the sovereignty, the Senate * * *."

In the debate on the constitution of the Senate, Fisher Ames defended the provision that Senators serve for 6 years (II Elliot 46): "The Senators represent the sovereignty of the States; in the other house, individuals are represented. * * * [Senators] are in the quality of ambassadors of the States * * *."

Did anyone propose that a member of a State legislature represented the government of a country, town, or any other administrative convenience? Of course not.

I continue to read:

"If they would be brought by that means more immediately under the influence of the people, then they will represent the State legislatures less, and become the representatives of individuals. This belongs to the other house. The absurdity of this, and its repugnancy to the Federal principles of the Constitution, will appear more fully, by supposing that they are to be chosen by the people at large. If there is any force to the objection to this article, this would be proper. But whom in that case, would they represent?—Not the legislatures of the States, but the people. This would totally obliterate the Federal features of the Constitution."

Continuing this debate, Rufus King, a delegate to the Congress under the Confederation and to the Federal convention, noted (id. at 47):

"[A]s the Senate preserved the equality of the States, their apportionment is equal."

In the debate on article I, section 4, which gives Congress power to regulate Federal elections, George Cabot, later a U.S. Senator, stated (II Elliot 25–26): "[A] free and equal representation is the best, if not the only foundation upon which a free government can be built; and, consequently, that the greatest care should be taken in laying it. * * * I consider the democratic branch of the national government, the branch chosen immediately for the people, as intended to be a check on the Federal branch, which latter is not an immediate representation of the people of America, and is not chosen by them, but is a representation of the sovereignty of the individual States, and its members delegated by the several State legislatures * * *."

Immediately thereafter Theophilus Parsons, a leading attorney, said (id. at 26–27): "In the Congress, not only the sovereignty of the States is represented in the Senate, but, to balance their power, and to give the people a suitable and efficient check upon them, the Federal Representatives are introduced into Congress. The legislatures of the several States are the constituents of the Senate, and the people are the constituents of the Representatives * * *. [A State legislature] might make an unequal and partial division of the States into districts for the election of Representatives or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the fourth section provides a remedy, a controlling power in a legislature, composed of Senators and Representatives of 12 States, without the influence of our commotions and factions, who will hear impartially and preserve and restore to the people their equal and sacred rights of election."

Continuing the debate on this provision, Dr. Charles Jarvis argued (id. at 29): "The right of election, founded on the principle of equality, was, he said, the basis on which the whole superstructure was erected; this right was inherent in the people; it was unalienable in its nature, and it could not be destroyed without presuming a power to subvert the Constitution, of which this was the principal; and by recurring to the 2d section, it would appear that 'representatives and direct taxes shall be apportioned among the several States according to their respective numbers'; it equally appeared that 30,000 inhabitants were entitled to send a representative, and that wherever this number was found, they would have a right to be represented in the Federal Legislature."

Judge Francis Dana, who was a Member of the Congress under the Confederation and who was chosen to attend the Federal Convention but was unable to do so, also defended article I, section 4: "The Legislature of Rhode Island has lately formed a plan to alter their representation to corporations, which ought to be by numbers. Look at Great Britain, where the injustice of this mode is apparent. Eight-tenths of the people there have no voice in the elections. A borough of but two or three cottages has a right to send two representatives to Parliament, while Birmingham, a large and populous manufacturing town, lately sprung up, cannot send one. The Legislature of Rhode Island is about to adopt this plan, in order to deprive the towns of Newport and Providence of their weight, and that thereby the legislature may have a power to counteract the will of a majority of the people."

Rufus King immediately agreed with Dana in support of article I, section 4 (id. at 50–51): "In Connecticut, they do not choose by numbers, but by corporations. Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations, each town sending two, except latterly, when a town was divided. The same rule is about to be adopted in Rhode Island. The inequality of such representation, where every corporation would have an equal right to send an equal number of representatives, was apparent. In the Southern States, the inequality was greater. By the constitution of South Carolina, the city of Charleston has a right to send 30 representatives to the general assembly; the whole number of which amounts to 200. The back parts of Carolina have increased greatly since the adoption of their constitution, and have frequently attempted an alteration of this unequal mode of representation; but the members from Charleston, having the balance so much in their favor, will not consent to an alteration; and we see that the delegates from Carolina in Congress have always been chosen by the delegates of that city. The representatives, therefore, from that State will not be chosen by the people, but will be the representatives of a faction of that State."

Later in the debate, two speakers emphasized that most American legislatures were apportioned on the basis of population. John Coffin Jones said (II Elliot 75): "[T]he people of the United States are an enlightened, well-informed people, and are, therefore, not easily imposed on by designing men. Our right of representation, concluded Mr. J., is much more just and equitable than the boasted are of Great Britain, whose representatives are chosen by corporations or boroughs * * *."

Similarly, James Bowdoin, a Member of the Congress under the Confederation and former Governor, remarked that (id. at 127): "The equality of representation is determined in nearly all the States by numbers; so it is in the Federal Constitution."

It was, as far as the House of Representatives is concerned. As I pointed out, the Senate was a necessary, and at the same time was considered by many to be an unfortunate, but necessary compromise, which could be justified on the basis of a Federal system protecting the rights of individuals within the States.

Continuing to read:

In the Connecticut convention, Oliver Wolcott a delegate to the Continental Congress and later Governor, defended the proposed constitution. In doing so, he said (II Elliot 202): "The Senate, a constituent branch of the general legislature, without whose assent no public act can be made, are appointed by the States, and will secure the rights of the several States. The other branch of the legislature, the Representatives, are to be

elected by the people at large. They will therefore be the guardians of the rights of the great body of the citizens."

Similarly, during the New York convention, Melancton Smith, a delegate to the Continental Congress, said (II Elliot 311): "[A]s the Senators are the representatives of the State legislatures, it is reasonable and proper that they should be under their control."

Alexander Hamilton described the conflict over representation in Congress (id. at 236): "On the other hand, the small States, seeing themselves embraced by the Confederation upon equal terms, wished to retain the advantages which they already possessed. The large States, on the contrary, thought it improper that Rhode Island and Delaware should enjoy an equal suffrage with themselves. From these sources a delicate and difficult contest arose. It became necessary, therefore, to compromise, or the Convention must have dissolved without effecting anything."

Robert Lansing likewise said (id. at 272): "When the subject of the apportionment of representatives came forward, the large States insisted that the equality of suffrage should be abolished. This the small States opposed contending that it would reduce them to a state of subordination. There was such a division that a dissolution of the Convention appeared unavoidable, unless some conciliatory measure was adopted."

Later in the Convention, Lansing described the nature of the Senate (id. at 289): "I believe it was undoubtedly the intention of the framers of this Constitution to make the lower house the proper, peculiar representative of the interests of the people; the Senate, of the sovereignty of the States."

That refrain runs over and over in the constitutional debates and during the ratification of the Constitution by the various States. It was Lansing who said that the Senate represented the sovereignty of the States.

Continuing to read:

Patrick Henry, the great orator of the Revolution and former Governor, was one of the leading opponents of the Constitution at the Virginia Convention. One of his principal objections to the Constitution involved representation in Congress (III Elliot 46–47): "[The Constitution] says that there shall not be more Representatives than 1 for every 30,000. Now, sir, how easy is it to evade this privilege. 'The number shall not exceed 1 for every 30,000.' This may be satisfied by one Representative from each State. Let our numbers be ever so great, this immense continent may, by this artful expression, be reduced to have but 13 Representatives * * *. When population increases, and a State shall send Representatives in this proportion, Congress may remand them, because the right of having 1 for every 30,000 is not clearly expressed. * * * [W]e may fairly conclude that they may restrain the number to one from each State. Perhaps the same horrors may hang over my mind again."

Later in the debate, he similarly contended (id. at 324): "The honorable gentleman was pleased to say that the representation of the people was the vital principle of this Government. I will readily agree that it ought to be so. But I contend that this principle is only nominally, and not substantially, to be found there."

Continuing:

"We contended with the British about representation. They offered us such a representation as Congress now does. They called it a virtual representation. If you look at that paper, you will find it so there. Is there but a virtual representation in the Upper House? The States are represented, as States, by two Senators each. This is virtual, not actual. They encounter you with Rhode Island and Delaware. This is not an actual representation. What does the term 'representation' signify? It means that a certain district—a certain association of men—should be represented in the Government, for certain ends. These ends ought not to be impeded or obstructed in any manner. Here, sir, this populous State has not an adequate share of legislative influence. The two petty States of Rhode Island and Delaware, which, together are infinitely inferior to this State in extent and population, have double her weight, and can counteract her interest. I say that the representation in the Senate, as applicable to States, is not actual. Representation is not, therefore, the vital principle of this Government. So far it is wrong."

A man as eminent as the great Governor of Virginia, considered perhaps the most eloquent orator of our Revolutionary period, opposed the Constitution and opposed it strictly on the basis of the fact that the U.S. Senate was not organized on a one-man, one-vote basis.

I think that those who contend that this principle is not a deep, proven, or basic constitutional principle should recognize how very strongly our Founding Fathers felt about it, and those who accepted the principle in the Constitution did so with the greatest reluctance.

Continuing to read:

Another opponent of the Constitution, William Grayson, a former Member of the Continental Congress and later to be a U.S. Senator, similarly argued (III Elliot 280): "A democratic branch marked with strong features of aristocracy, and an aristocratic branch with all the impurities and imperfections of the British House of Commons, arising from the inequality of representation and want of responsibility. There will be plenty of Old Sarums —a rotten borough— if the new Constitution should be adopted. Do we love the British so well as to imitate their imperfections? We could not effect it more than in that particular instance. Are not all defects and corruptions founded on an inequality of representation and want of responsibility?"

A few moments later, Grayson said (id. at 281): "But the British House of Commons are corrupted from the same cause that our representatives will be: I mean from the Old Sarums among them—from the inequality of the representation."

William Grayson, later to be a U.S. Senator, and an opponent of the Constitution, said, in speaking of the Congress:

The people are represented according to their numbers. In the upper House, the States are represented in their political capacities. Delaware or Rhode Island has as many representatives here as Massachusetts. Why should the Senate have a right to intermeddle with money, when the representation is neither equal or just?

In defending the need for congressional control over Federal elections provided in article I, section 4, James Madison said:

Elections are regulated now unequally in some States, particularly South Carolina, with respect to Charleston, which is represented by 30 Members.

William Richardson Davie, a delegate to the National Convention, described its proceedings to the North Carolina ratifying convention. As to Congress, he stated:

The House of Representatives are immediately elected by the people. The Senators represent the sovereignty of the States; they are directly chosen by the State legislatures, and no legislative act can be done without their concurrence.

James Iredell, one of the initial members of this Court, was one of the leading supporters of the proposed Constitution at the North Carolina convention. In doing so, he defended the balance of the new Federal system:

Thus, then, the general Government is to be taken care of, and the State governments to be preserved. The former is done by a numerous representation of the people of each State, in proportion of its importance. The latter is effected by giving each State an equal representation in the Senate. The people will be represented in one house, the State legislatures in the other * * *. The House of Representatives * * * will represent the immediate interests of the people. * * * The respectability of their constituents, who are the free citizens of America, will add great weight to the representatives * * *.

Throughout these justifications and rationalizations for the U.S. Senate, we can see the distinction made, emphasized, and underlined that Senators represent sovereign States, with the individuality of the sovereign States; and that they were selected—until a constitutional amendment in this century—by the State legislatures. There is no analogy whatsoever between a Federal Congress, one branch of which is representative of the people, and the State legislatures.

Subsequently Mr. Iredell said:

It is true that it would be very improper if the Senate had authority to prevent the House of Representatives from protecting the people. It would be equally so if the House of Representatives were able to prevent the Senate from protecting the sovereignty of the States.

Richard Dobbs Spaight, a delegate at the Federal convention, explained the reason that the Senate was required to concur in treaties:

[I]t was thought better to put that power into the hands of the Senators as representatives of the States—that thereby the interest of every State was equally attended to in the formation of treaties—but that it was not considered as a legislative act at all.

Davie likewise defended this requirement, saying that it was "indispensable to give to the Senators, as representatives of States, the power of making, or rather ratifying, treaties. Although it militates against every idea of just proportion that the little State of Rhode Island should have the same suffrage with Virginia, or the great Commonwealth of Massachusetts, yet the small States would not consent to confederate without an equal voice in the formation of treaties."

It is interesting that, even though the burden of my remarks has to do with the distinction between Federal and State bodies, intruding in this debate by the Founding Fathers is the principle that the Supreme Court will defend and protect the rights of individual American citizens from an unconstitutional abridgement of that right by acts of Congress or of the State legislatures:

Charles Pinckney, a delegate at Philadelphia, described the proceedings in the South Carolina convention. Concerning the question of representation, he said that (IV Elliot 256–257): "The degree of weight which each State was to have in the Federal council became a question of much agitation. The larger States contended that no government could long exist whose principles were founded in injustice; that one of the most serious and unanswerable objections to the present system was the injustice of its tendency in allowing each State an equal vote, notwithstanding their striking disparity. The small ones replied, and perhaps with reason, that, as the States were the pillars upon which the general government must ever rest, their State governments must remain; that, however they may vary in point of territory or population, as political associations they were equal; that upon these terms they formally confederated, and that no inducement whatsoever should tempt them to unite upon others * * *."

Mr. President, I pause here to point out again that what the Senator from Illinois [Mr. DOUGLAS] said some time ago about how the creation in our Constitution of a Senate that would not be composed on the basis of population resulted only from the fact that a pistol was pointed at the heads of the Founding Fathers to make them choose between that plan and no Union at all, has been confirmed by what Mr. Pinckney stated:

After much anxious discussion—for, had the convention separated without determining upon a plan, it would have been on this point—

This was the issue then. This was the point that divided the Convention and the Founding Fathers more than any other point. It was the point on which they felt most deeply. During this debate, which has been led by the senior Senator from Illinois, and in which many of us have joined, this same principle has been at issue. It is the principle which divided the Constitutional Convention and which made it so difficult for the Constitutional Convention to arrive at a decision.

This is such an important principle that we are willing at great inconvenience to contend against the Dirksen proposal, because of the principle on which we feel so deeply.

Of course, there is another principle which is even more precious than that. We feel that the Supreme Court of the United States must be preserved in its capacity to review an act of Congress as to its constitutionality, and in its capacity to defend individual constitutional rights. If we do not protect this principle, our freedoms do not mean very much.

As Charles Pinckney said:

"A compromise was effected, by which it was determined that the first branch be so chosen as to represent in due proportion the people of the Union; that the Senate should be the representatives of the States, where each should have an equal weight."

Charles Cotesworth Pinckney, another delegate to the Federal Convention, likewise stated (id. at 282–283): "As we have found it necessary to give very extensive powers to the Federal Government both over the persons and estates of the citizens, we thought it right to draw one branch of the legislature immediately from the people, and that both wealth and numbers should be considered in the representation."

Pinckney supported the provisions concerning Congress (id. at 304): "[I]n the general Constitution, the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually; the Senate will be elected by the State legislatures, and represent the States in their political capacity" * * *.

Having indicated the strong conflict existing between State sovereignty and national unity at the time our Constitution was drafted, and the compromises this conflict resulted in, I should now like to examine some of the arguments made for using the Federal analogy in State legislatures by reading from a pamphlet entitled "Reapportionment and the Federal Analogy," written by Robert B. McKay. I shall read only the high spots:

The issue, now sharply drawn, may be stated as follows: Since the U.S. Senate provides equal representation for all States regardless of population, while the House of Representatives provides representation according to population, is not a similar arrangement permissible by analogy in State legislatures? The contention is that, since the national governmental structure has proved reasonably satisfactory, and since the system was approved by the framers of the Constitution, a similar formula should be acceptable in State legislatures.

The argument has a surface appeal that has led to uncritical acceptance of the analogy without noting the reasons for which application of that scheme might be inappropriate in the State legislative forum. Typical of the unreasoned acceptance of this too-easy argument is the statement of Mr. Justice Harlan in his dissent in *Baker*.

Mr. President, this is the cornerstone and the only philosophical reference which those who support the Dirksen amendment have made. They constantly come back to the argument of Justice Harlan, who said:

It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the U.S. Senate is proof enough of that (369 U.S. at 333).

Mr. President, I wish Justice Harlan, before he had written those words, had studied the amicus curiae memorandum which was prepared by the Department of Justice to assist the Court in making its decision. It was prepared in October 1963. It is true that the Reynolds against Sims decision was rendered later. However, this amicus curiae certainly answered any contention that there is any analogy. It answered it chapter and verse. There is no analogy, and the debates in the constitutional convention and the writings of the Founding Fathers and the Federalist Papers prove that there is no analogy.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield to the Senator from Illinois.

Mr. DOUGLAS. Not only was equality of representation of States, regardless of population, put into the Constitution under article I at the point of a pistol and under the threat by the small States that otherwise they would not join and, indeed, would make treaties with foreign powers, but the small States determined to rivet that provision into the Constitution in article V. Article V, in its concluding passage provides:

Provided, That no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses of the ninth section of the first article—

That dealt with the slave trade—

and that no State without its consent, shall be deprived of its equal suffrage in the Senate.

There is no limitation. The one reason why this provision has never been changed is that it is the one feature of the Constitution which cannot be changed.

We of the big States have suffered under the principle of equality of representation of the States in the Senate. States of less than a quarter of the population have a majority of the Members in the U.S. Senate, and control this body.

The residents of the larger States pay the major share of the taxes. Representatives of the smaller States determine where the money is to go.

We of the larger States bear a heavy burden and a heavy cross. We accept it, because this is the price of continued union, just as the big States accepted it originally.

The mere fact that it has continued through all this time is not proof that it is the ideal system. Even if it is due to the fact that the small States got this provision in perpetuity when they made it the price of admission to the Union, we do not approve of it. We acquiesce in it because we want to preserve the Union, but it is a heavy price that we pay. Certainly it is not an example which should be copied by any government.

Mr. PROXMIRE. The Senator from Illinois makes a very strong and logical argument, but I do not "buy" it. I believe we ought to be aware of the fact that those of us who oppose the Dirksen amendment do not depend on that argument. Those of us who feel that the Federal Government was based on a wise principle which has worked well do not rely on the argument that every State should have representation in the Senate based only on its population. We can still contend, as I contend—and as I believe perhaps most Senators contend—that each State should have equal representation, that each State should have two Senators in the Senate, and at the same time contend that this principle should not apply to State governments, because there is an analogy and no comparison.

Mr. MAGNUSON. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. MAGNUSON. Mr. President, I may be able to contribute a little to this discussion along the lines which the Senator from Illinois and the Senator from Wisconsin have been discussing. The States came into the Union under an enabling act. I have looked up the enabling act of February 27, 1889, which provided for the admission of North Dakota, South Dakota, Montana, and my own State of Washington. Under the provisions laid

down by the enabling act to allow the people of my area and those of other areas to become States, the enabling act passed by Congress provided, in section 3:

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States, and the qualifications for delegates to such convention shall be such as by the laws of said Territories, respectively, persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of such counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the Governor, the chief justice, and the secretary of said Territories; and the Governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of said Territories regulating elections therein for delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions, respectively, shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this Act, upon the ratification or rejection of the constitutions.

Surely the people of my territory, when they sought to enter the Union, were, by the enabling act passed by Congress, directed to do exactly as I have just read. The apportionment was to be "in proportion to the population in each of such counties and districts, as near as may be" ascertained.

Mr. PROXMIRE. That is a most valuable contribution and is most appropriate. As I understand, Washington, Montana——

Mr. MAGNUSON. North Dakota and South Dakota entered the Union under this enabling act, the Act of 1889.

Mr. PROXMIRE. At that time the clear provisions of the enabling act were that the State legislatures should be based on population—one man, one vote.

Mr. MAGNUSON. That is the way I interpret it. In effect, that is what the language provides. This was a part of the contract the people of the territories made with the Federal Government in order to become States.

Mr. PROXMIRE. In what year was that?

Mr. MAGNUSON. That was in 1889.

Mr. PROXMIRE. Seventy-five years ago our predecessors in Congress thought that this principle was true. They felt that new States should have representation in their legislatures based on the principle of one man, one vote.

The contribution just made by the Senator from Washington reminds us once again of how the States of the Northwest Territory were to be organized. That great ordinance also provides clearly that all States to be carved out of the Northwest Territory—and those States today include Wisconsin, Illinois, Michigan, Indiana, Ohio—must provide for their people representation in the State legislatures based on population, and must do so in perpetuity. There is no question about it. Those who adopted the Northwest Ordinance were among the same Founding Fathers who adopted our Federal Constitution. This shows how strongly they felt about each person having one vote.

Mr. MAGNUSON. In addition, the States to which I have referred were required, first, to have an assembly to establish the legislative body. The enabling act further provided that even the assemblies that would establish the legislative bodies in those States had to be selected according to population, as nearly as possible.

Mr. PROXMIRE. So not only the State legislatures, but also the assemblies that would establish the legislatures, were required to have equal or equitable representation.

Mr. MAGNUSON. Yes.

Mr. PROXMIRE. To return to the argument by Justice Harlan, who was the lone dissenter in the case of Baker against Carr, Justice Harlan said:

"The existence of the U.S. Senate is proof enough of that."

But the answer is not as delusively simple as Mr. Justice Harlan suggests. Indeed, careful analysis of the issue suggests an exactly opposite conclusion; namely, that the Federal analogy is not relevant in determining whether a State apportionment plan is or is not consistent with the equal protection clause of the 14th amendment. Uncritical application of that standard may well lead into constitutional error.

* * * * *

The arguments favoring the application of the Federal system to the States were summarized by Judge O. Bowie Duckett of the Circuit Court for Anne Arundel County, Md., in his opinion in *Maryland Committee for Fair Representation* v. *Tawes* (May 24, 1962):

"Such an arrangement protects the minorities. It prevents hasty, although popular, legislation at the time. It is based upon history and reason and helps to protect the republican form of government guaranteed by article IV, section 4, of the U.S. Constitution. It preserves the checks and balances of the State government which has worked so well under the Federal. Moreover, there would be little advantage in having a bicameral legislature if the composition and qualifications of the members were similar."

The arguments above stated are essentially three: (1) The Federal experience, as developed through history, is sufficient precedent. ((2) Two houses, differently constituted, operate to restrain hasty and ill-considered legislation. (3) If not differently constituted, the two houses would not serve the separate functions for which established. Each argument deserves examination and, it is believed, rejection.

CONSTITUTIONAL CONVENTION AND THE "GREAT COMPROMISE"

The egalitarian ideal of fairness in political representation was emphatically stated in the Declaration of Independence and frequently thereafter during the late 18th and early 19th centuries. Thomas Jefferson, writing in 1819, was characteristically eloquent: "Equal representation is so fundamental a principle in a true republic that no prejudices can justify its violation because the prejudices themselves cannot be justified."

Yet during those early years not even the most ardent exponents of political equality contemplated the wide diffusion of the franchise which we take for granted today. There was no thought that women should be entitled to vote and few doubted that ownership of property, or even religious tests, might be proper qualifications for voting eligibility. Certainly few thought it odd that the Constitution provided for the election of Senators by State legislators without any direct participation by the people and that the President should also be chosen indirectly through the medium of electors to be appointed in each State "in such manner as the legislature thereof may direct." Yet over the years all these concepts have been challenged as fundamentally inconsistent with the democratic ideal.

Surely no State would today justify limitations on the franchise based on these 18th-century notions, now long rejected.

In this 18th-century context of limited recognition of a popular base for the exercise of the franchise, it would not have seemed strange if the framers of the proposed Constitution had all been agreed upon a plan for nonequal representation in both houses.

There were many abridgments and compromises with the notion of purely democratic representation. It was pointed out that women did not have any vote. Senators were chosen by State legislatures and not by the direct vote of the people. That was a situation which my own predecessor in this chair, some time removed, old Bob La Follette, had a great deal to do with correcting.

The fact that most people did not have a voice in electing their Senators and could do so only indirectly through their State legislatures, was a defect which led to corruption, and the reason why the Senate was known as the millionaires club or the rich man's club.

Also, at the time of the founding of the Constitution, the most powerful office, the Presidency, was selected not directly by the people but determined by the electors who at that time considered themselves, to a considerable extent, to be independent of the vote which had been registered in the presidential election. It was only at a later time that it became clear that electors were bound, in some cases legally but in all cases morally, to vote in accordance with the popular vote in the State from which they were chosen.

There were many compromises with the principle which we now consider to be a truism, a platitude, that if we have a democracy, the people should have a direct vote in the selection of public officials.

At the same time, Mr. McKay points out that there was no difference of opinion on the right the people should have to equal representation in their State legislatures.

As he writes:

Yet the exact opposite was the proposal which most of the delegates originally favored and would ultimately have adopted but for the intransigent opposition of the small States. The Virginia plan proposed by Edmund Randolph, based on what he called the "Republican principle," provided for a popularly elected first branch of the Congress which was then to choose the second from nominees proposed by the State legislatures. Significantly, a favorable vote was actually cast at one time for representation in both Houses to be proportional to population (except that five slaves were to be counted as three freemen).

Nevertheless, the opposition of the smaller States, although less than a majority, demonstrated that a viable instrument of Government could be achieved only by partial relinquishment of the principle of equality. In this lay the genesis of what has come to be called the "Great Compromise" or, as it is sometimes described, the "reluctant" compromise. Max Farrand has said:

"The important feature of the compromise was that in the upper House of the legislature each State—

Not each person—

should have an equal vote. The principle of proportional representation in the lower House was not a part of the compromise, although the details for carrying out that principle were involved." (The Framing of the Constitution of the United States, p. 105 (Yale paperbound 1962).)

Some proponents of the Federal analogy as a justification for representational imbalance in State legislatures have sought support in the Federalist. But such reliance is largely misplaced. It must be remembered that those papers were conceived and published as political tracts designed to persuade New York voters to ratify the Constitution in the form agreed upon at the Convention. Even without discounting for that special pleading, it is interesting to observe the almost apologetic support given to the abandonment of the principle of equality of representation. Thus in No. 62 (probably Madison):

I have quoted this before but I wish to quote it briefly at this time—

"A government founded on principle, more consonant to the wishes of the larger States is not likely to be obtained from the smaller States. The only option, then, for the former lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice."

History subsequent to the Constitutional Convention further supports the proposition that the Federal analogy should not be extended to State legislative bodies. As already indicated, indirect election of Senators and the President had been incorporated into the original Constitution. Madison, in The Federalist, No. 45, specifically endorsed such indirect election as a proper way of reducing the influence of the people as a whole in choice of the leaders of the National Government. But these and other nondemocratic restrictions upon voting rights were not destined to survive. No portions of the Constitution were more altered by amendment or in practice in the 18th and 19th centuries than those provisions relating to franchise, a clear reflection of the inconsistency of some of the original provisions with the growing demand for more truly representative government.

This would tend to confirm what the Senator from Illinois has been contending, that this nondemocratic provision in the Constitution might well have been amended in the course of the 18th or 19th centuries, as were the other nondemocratic provisions in the Constitution, were it not for the provision in the Constitution that makes an amendment of representation in the Senate unconstitutional in effect, because every State must give consent to it.

Continuing to read:

Section 1 of the 14th amendment, calling upon the States to provide equal protection of the laws and due process, reflected sentiment for limitation of State action that was unfair or unequal. That its potential impact upon the composition of State legislatures was not specifically contemplated in 1868 does not, under familiar principles of constitutional doctrine, foreclose its application to such cases where the inequality or unfairness is later demonstrated. The point is that the 14th amendment does require equality as to all kinds of State action. The fact that inequality, as a matter of political necessity, was built into the national Congress is thus no longer relevant in explaining similar inequalities adopted by States that are forbidden to create invidious discriminations.

It is most important for us to recognize, because frankly, at first I had some reservations about the 14th amendment interpretation. The point is that the 14th amendment requires equality as to all kinds of State action. Election of the State legislature is perhaps the most important kind of State action. Equality of action under the 14th amendment to the Constitution should be recognized.

Mr. METCALF. Mr. President, will the Senator from Wisconsin yield?

Mr. PROXMIRE. I yield.

Mr. METCALF. While it is true that in our federal system of government we are a group of affiliations of sovereign States, and the Senate analogy would not carry down to the States; it would be even more important to require equal one-man-one-vote representation from State legislatures than even in the Congress of the United States; is that not correct? At least it would be equally important, would it not?

Mr. PROXMIRE. I believe that is true. There was a very clear historical reason for the Federal Government to have a U.S. Senate with two Senators for each State, inasmuch as it was created by sovereign, independent States. They treated themselves and considered themselves as having sovereignty. Later—not at the time of the adoption of the Constitution, but later—the 10th amendment to the Constitution was adopted, which reserved to the States all powers not specifically given to the Federal Government.

This opposition deserves recognition. A strong argument can be made, which I would accept—the Senator from Illinois [Mr. DOUGLAS] would not—that the States therefore should be recognized on an equal basis in one branch of the legislature. It is a wise provision in our Constitution. But, no counties ever got together to form a State. That was not the way in which they were formed anywhere.

The distinguished senior Senator from Washington [Mr. MAGNUSON] pointed out that when the State of Montana came into the Union, it came in under an enabling act, the same enabling act that covered Washington, North Dakota, and South Dakota. It required equal representation in the State legislature.

Mr. METCALF. When the State of Montana came into the Union, it adopted a constitution which contained a provision that each county should have one senator and no county should have more than one senator. A great Governor of the State of Montana, 75 years ago, when the constitution was adopted, pointed out that that was a provision that violated the Constitution of the United States. That was Gov. Joseph K. Toole. He was the first Governor of the State of Montana. He stated that a republican form of government requires equal representation. Then he said that if there were 200 in one county and 200,000 in another county, that would not be equal representation, and that that was a violation of the Constitution of the United States.

So this is not a new matter. This is not a matter that has just recently arisen through the Supreme Court of the United States. They were talking about it back at that time, concerning how the States of Washington, Montana, and North and South Dakota came into the Union.

Mr. PROXMIRE. That is a very valuable contribution. Those who oppose the Supreme Court decision, oppose it on the ground that the Court has proposed some radical innovation. They ask, "Who ever heard of this? It is a strange, radical innovation."

As was pointed out, we have gone to some time and trouble to show that the Founding Fathers overwhelmingly established that proposition.

Mr. METCALF. As we go through the minutes of the Constitutional Convention of 1787, and as we go through the Federalist Papers that were written by those great Founding Fathers, we find, running throughout those great documents, the position that one-man, one-vote, equal representation is a basic proposition of "republican" form of government.

When the State of Montana came into the Union 75 years ago, a great constitutional lawyer from the State of Montana, who was the first Governor of the State, pointed out that this malapportionment and misrepresentation in State senates and State legislatures was a violation of the proposition of a representative form of government, a violation that we have only recently had an opportunity to correct through recent decisions of the U.S. Supreme Court.

This is no recent proposal. This is no new idea. This is no upstart idea. We have tried for over a century to correct the situation.

Mr. PROXMIRE. Mr. President, I thank the distinguished Senator from Montana. The distinguished and able Senator from Montana is a former State supreme court justice. He was an eminent judge, a scholar of our Constitution, of constitutional law, and constitutional government.

He is absolutely correct when he points out that we can go through the Federalist Papers carefully, and every single reference to State representation affirms

the right of each individual American citizen to equal representation. But, as Madison has said over and over again, the Federal Constitution is a Federal Constitution—just that, not a National Government alone. It is a Federal Constitution. It recognizes the sovereignty, the dignity of each individual State. It does give them, in one branch, equal representation.

I continue to read:

The little-noticed section 2 of the 14th amendment expressed further the increasing demand for direct election and, indeed, the idea of equality of representation, in replacing those portions of section 2 of article I relating to the method of apportionment. The original provision, a minor part of the great compromise, had specified that representatives (and direct taxes) should be apportioned among the States "according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." The 14th amendment changed this to provide that apportionment shall be exclusively in accordance with population, "counting the whole number of persons in each State, excluding Indians not taxed."

The 15th amendment, in the same spirit, was enacted to insure that no restriction of voting rights could be based on grounds of race or color. The trend continued with the adoption in 1913 of the 17th amendment providing for the direct election of Senators and in 1920 with the enfranchisement of women by the 19th amendment. Recent expression of the same sentiment is found in the Civil Rights Acts of 1957, 1960, and 1964.

The fight that we are engaging in now, in an effort to protect the dignity of the Supreme Court in their decision in Reynolds against Sims is the same kind of historic fight for the preservation of individual suffrage and for the establishment of what I believe is perhaps one of the most important defects in our system at the present time—the right of every individual to have equal representation in the State government.

I continue to read:

Even without formal amendment to the Constitution, changes effected by Congress have also worked toward equality of representation. Before 1842 Congress had limited the exercise of its apportionment power under section 4 of article I to prescribing the number of Representatives to be allotted to each State. But in the apportionment act of 1842 Congress provided that Representatives under the current apportionment should "be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative."

With this history in mind it seems at best anachronistic to argue the ready transferability of the congressional scheme of representation into the State legislatures. The nonrepresentative character of the Senate did not reflect majority sentiment even when adopted, but was instead reluctantly accepted as the required price for establishing an acceptable, if not the best possible, government. The consistent course of events since that time has been toward enlarged reliance upon direct and full participation by all citizens. With this has come increased recognition of the appropriateness in a representative government such as the United States of representation generally in close relation to population. In this light, the nonrepresentative character of the U.S. Senate is seen to be an historical anomaly and not at all a model for State emulation.

FEDERAL ANALOGY AND MAJORITY RULE

Proponents of the Federal analogy claim as an advantage of two houses, one of which is less responsive to popular will, a healthy restraint upon excessive majoritarianism. This formulation of the argument leaves unstated two underlying premises, neither of which can withstand close analysis.

First, there is a suggestion that majority rule is not altogether desirable, or at least that minority groups are likely to be unreasonably disadvantaged if the majority has its way. But is this true? Minorities are accorded constitutional protection in bills of rights and elsewhere to assure adequate hearing for their views and to protect against oppression by the majority. Once minority rights have been assured in these important respects, no sound reason appears for denying the majority its will in ordinary legislation. Indeed, if the two houses of a legislature are chosen in ways that will insure representation of radically different interests, an opposite and perhaps greater danger is threatened, the legislative stalemate. Even in Congress this has sometimes occurred, but the risk there is minimized by the greater physical expanse and cultural diversity represented in Congress as compared with the more parochial interests within any single State. The interest groups that operate in the U.S. Senate and House of Representatives are so numerous and diverse that ordinarily there is little risk that the two Houses can be separately controlled by opposing interest groups. In short, there are few issues that would pit the area-based Senate against the population-based House.

In the States the problem is very different, as illustrated most dramatically in the urban-rural conflict that is the pattern today in nearly all the States that have departed significantly from the principle of equal population in one or both houses. Sufficient evidence of this legislative impasse on urban-rural issues is found in the repeated refusal of many State legislatures to follow their own constitutional mandate of periodic reapportionment.

Incidentally, one example of that was Oklahoma. Oklahoma was cited as an example of the most flagrant interference of the Federal Supreme Court with the rights of a State. But in the case of Oklahoma, the State legislature refused to follow the State's own constitution. They have failed to follow it ever since 1921.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. DOUGLAS. The same thing, of course, was true in the case of Tennessee and Alabama.

They did not reapportion between 1901 and the decisions of the Supreme Court, which came in 1962 and 1964—after 60 years of refusal by the legislature to reapportion according to their own constitution.

In my own State of Illinois, the constitution required reapportionment every decennial period until 1955. From 1901 until that day there was no reapportionment. During that time there had been a great movement of population toward the cities, which was disregarded. That has been true in State after State.

Mr. PROXMIRE. Yes, indeed. What I believe has been overlooked is the fact that in all these cases—the Alabama case, the Oklahoma case and others—Federal district courts—or the Supreme Court, if it was called upon to support, to intervene, or to reject the decision of a lower court—have acted after State legislatures have been given many years in which to comply, in most cases, with their own constitutions, and yet they have failed to do so.

Mr. DOUGLAS. Mr. President, will the Senator yield further?

Mr. PROXMIRE. I yield to the Senator from Illinois.

Mr. DOUGLAS. The State courts almost uniformly have held that while the legislatures were acting in disobedience of their own constitutions, there was nothing that the State courts could do about it.

Mr. PROXMIRE. The Senator is correct. In the Oklahoma case, the Supreme Court of the State of Oklahoma said there was nothing it could do. It was none of their business. It was up to the State legislatures.

What has happened in some countries has been that unless the people could get equality of representation, there would be an actual physical armed rebellion. We do not like to do it that way in this country. The only other recourse is to rely on having the right upheld in the courts.

Mr. DOUGLAS. In the Federal courts.

Mr. PROXMIRE. In the Federal courts, because, as the Senator from Illinois has pointed out, the State courts have often refused to act.

Mr. President, continuing to read—

It becomes almost axiomatic that the more severe the malapportionment the less is the opportunity for legislative correction. All too often the Federal system in State legislatures has worked not to protect the minorities but to frustrate all sense of legislative responsibility. When legislatures become incapable of any action on important matters and when they flout the constitutional imperative of periodic reapportionment, State government falls into disrepute. Only through reassertion of State legislative responsibility can the decline of respect for the State governmental process be reversed.

A second major postulate underlying the check-and-balance arguments advanced in support of the Federal analogy is the common belief that the organization of State governments is not essentially different from that of the National Government. The assumption could scarcely be more false. The short answer is that the United States, as the very name implies, is a union composed of the sovereign States, consenting to centralized responsibility as to certain enumerated powers but reserving to themselves the balance. The constituent States, on the other hand, have uniformly adopted a unitary structure of government in which no subordinate political subdivision retains any sovereignty but exercises only such functions as are conferred upon it for the convenience of, and at the pleasure of, the State government.

That is the distinction which I have drawn many, many times, but I think must be drawn over and over again. The States are not a federated system. They are not a Federal system. There is no sovereignty, no power, no individual recognition for any area below the State government as there is in the Federal Government. Therefore, there is no basis for saying that there should be some representation other than population representation in the States.

Continuing to read:

While Congress may not alter the territorial boundaries of the States or take from them the powers over local affairs reserved to them, it has always been clear that the relationship between a State and its political subdivisions is very different. "The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." *Hunter* v. *Pittsburgh,* 207 U.S. 161, 178 (1907). At least this freedom to rearrange political subdivisions is absolute so long as action by the States does not impinge on a specific prohibition such as that in the 15th amendment against depriving a citizen of his vote because of race. *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1961).

FEDERAL ANALOGY AND BICAMERAL LEGISLATURE

A final argument advanced by advocates of the Federal analogy is that there must be differentiation of representation between the two houses not only to serve the check-and-balance function already discussed but as well to justify the existence of a bicameral legislature. As with many plausible-sounding arguments, the difficulty is that the logic has been pressed beyond defensible limits. The proponents of this argument must necessarily defend completely different representation formulas in the two houses, that is, one house related to population and the other totally unrelated.

In fact, however, there are a number of less drastic ways in which the two houses may be made to represent quite different interests.

Mr. President, I was fortunate to have the opportunity to serve in the Wisconsin State Assembly 13 years ago. There is no question that the check-and-balance system works very well in Wisconsin. It works well although both houses are based on strict population apportionment. There was a difference between the length of the terms of members of the State senate—the upper house—and those of members of the State assembly—the lower house. There was a difference in the size of the constituency. At that time a State senator represented 120,000 people. A member of the assembly represented 30,000 or 40,000 people.

Obviously, the views of legislators tend to be different when the constituencies tend to be different or are different, so that it is frequently possible to have a working bicameral system. The proof is not in theory; the proof is in experience. Wisconsin has had that experience for 116 years. We have had both houses based squarely upon population in the bicameral system—the check-and-balance system—and it has worked very well.

Most important is the fact that under any system no member of one house has the same constituency as any member of the other house. When the lower house is several times larger than the upper, as is ordinarily the case, the members of the more numerous house typically represent persons whose interests are often closely identified with each other in terms of geography, economics, and ethnic grouping. Members of the less numerous house, on the other hand, represent larger, more diverse segments of the State, whose problems and interests may be quite different in total impact from those of the smaller group represented by their opposite numbers.

Moreover, terms can be, and usually are, different between the two houses, thus automatically injecting somewhat different political considerations.

Finally, there is no reason to believe that rational, that is, reasonable, variations may not continue, as always, to be based on historical, political, economic or other nonpopulation factors. As Solicitor General Cox stated before the Tennessee Bar Association in June 1962:

"[I]t would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political, and geographical subdivisions provided that the departure from equal representation in proportion to the population is not too extreme."

CONCLUSION

In matters of franchise at the national level the uniform trend since 1787 has been toward more extended exercise of the right to vote, both as to classes of electors and as to removal of restrictions upon the free exercise of the right. Only in the choice of State legislatures, largely through rejection of the principle of representation in proportion to population, has the ideal of equality of the right to vote been limited in significant ways. To the extent that the Federal analogy is allowed to survive as a justification for these practices, present imbalances in representation can be expected to worsen with the passage of time and the inevitable further concentration of population in urban areas. Not until the idea of representation with some reference to population becomes standard throughout State legislatures can there be confidence in their responsiveness to popular needs and demands.

How better to conclude than by invoking once more James Madison in the Federalist, No. 39: "It is essential to [a republic] that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it."

Before I conclude, I should like to quote briefly from comments on the alleged analogy between the representation of the States in the U.S. Senate and the representation of county areas in State legislatures, which were brought together by John E. Bebout, director of the Urban Studies Center of Rutgers University, which is the State University of New Jersey:

We know of no extensive general discussion of the historical and constitutional basis, or lack of basis, for the analogy sometimes drawn between the equal representation of the States in the U.S. Senate and the representation of areas, usually counties or towns, in the State legislatures. The supposed analogy is frequently cited in defense of particular arrangements as, for example, the equal representation of the counties in the New Jersey Senate.

This was an extensive study made by Rutgers University. To continue the quotation:

We have found no acceptance, however, of the validity of this analogy in standard works on government nor in objective studies of particular legislatures by recognized authorities. Even in New Jersey, which is one of only seven States that provide for equal representation of all counties regardless of size in one house (and has done so since adoption of its first constitution in 1776), the "Federal analogy," though used from time to time as a debating point, has never been given authoritative endorsement as possessing inherent or technical validity. For example, Chief Justice Joseph C. Hornblower, speaking in the New Jersey Constitutional Convention of 1844, observed:

"Each of the States is sovereign and might or might not assent to the Constitution and come into the federation. But our counties have not that privilege. Our State is but one territory, one people, one municipality. We are, in fact, only making a municipal law to govern the State. There is, therefore, no similarity between the Constitution of the Federal Union, of an empire, and that of a sovereign State." Proceedings of the New Jersey Constitutional Convention of 1844, page 58.

The following excerpts are typical of the treatment of this subject in the literature.

Walker, Harvey, "The Legislative Process," the Ronald Press Co., New York, 1948, page 172: "The representation of areas rather than, or even in addition to, population in a legislative body has small place in a democracy; actually, one cannot represent an area. He must represent the people who live in it. If they are fewer in number than those represented in the same body by another legislator, there is an undemocratic imbalance. The use of artificially created boundary lines on a map to determine representation is as outworn as feudalism. Except in a few States, there is an effort to secure equal representation of population in both houses of the legislature. So while bicameralism makes possible the representation of areas, it is not always used for that purpose. Counties are created by the legislature in most States and may be abolished or consolidated by the same authority. Reform in county government, including considerable reduction in the number of counties, particularly in the South and East, is long overdue. Such reform would do much to show the absurdity of 'area representation.'"

"Legislative Apportionment in Oklahoma," Bureau of Government Research, University of Oklahoma, May 1956, pages 3–4: "General misunderstanding concerning the legal position of the county constitutes the chief obstacle to a fair distribution of the membership of State legislative bodies. The county does not occupy the same constitutional position in the State that the State holds in the Union. Its boundaries may be altered under procedures prescribed by the State, and the form of government under which it operates is set up by, and may be altered by, the State legislature. Unlike the State, the county can lay no claim to inherent powers; it enjoys only those which are specifically delegated by the parent government.

"In territorial days, the Supreme Court declared that counties 'are but subdivisions of the territory created for governmental purposes' * * * and that they 'derive their authority to hold elections and elect officers from the legislature.' Immediately after statehood a series of contests occurred over the constitutional position of counties, in which the Supreme Court had no difficulty in reaching the conclusion that 'a county is one of the territorial divisions of the State created for public and political purposes connected with the administration of State government.'

"This view of the legal status of the county is uniformly held among the States, and has long been accepted by the courts of the United States. There is no constitutional basis for the notion that a county is a unit in which the right of representation is inherent."

Bosworth, Karl, "Law Making in State Governments," page 85 in "The Forty-eight States: Their Tasks as Policymakers and Administrators" (final edition, background papers), Eighth American Assembly, Graduate School of Business, Columbia University, 1955: "First, perhaps it needs to be said that there is no reason why, in a system that gives allegiance to democratic ideals, any members of either house should have significantly different numbers of constituents—total populations, citizens or voters. Many of the constitutions reflect other theories: that small town and country peo-

ple and perhaps middle-sized city people are more deserving of representation than others, or that counties or towns are, like the States in the Federal system, independent political entities to be represented regardless of their population. There is no basic right in the constitutional theory of any State for counties or towns to have separate representation. Unlike the National Government vis-a-vis the States of the Union, the States can abolish, change the boundaries of, or transform the governments of counties, towns and cities. The local governments' legal position is one of complete dependence upon the States. Any 'sovereignty' of counties or towns is based on entrenched political power, not on constitutional or democratic theory."

There are, of course, numerous statements on the undesirable effects of the failure of many State legislatures to be sufficiently representative of the people. See, for example, the findings of the participants in the Eighth American Assembly, supra, page 138, and the discussion of the State legislature at pages 38 to 40 of the "Report of the Commission on Intergovernmental Relations" (Kestnbaum Commission), Washington, D.C., 1955.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. DOUGLAS. I congratulate the Senator from Wisonsin for his thorough analysis of the difference between the circumstances under which the U.S. Senate was created and the circumstances attending representation of individuals in the various State legislatures. The Senator from Wisconsin has produced a wealth of testimony to prove his point, and should have settled the matter beyond any possibility of doubt.

I take it the Senator from Wisconsin is planning shortly to yield the floor under certain conditions. Pending that time, I should like to ask unanimous consent that at the conclusion of the morning hour tomorrow I be recognized to speak on the subject.

The PRESIDING OFFICER. Does the Senator mean at the conclusion of morning business?

Mr. DOUGLAS. That at the conclusion of the morning business tomorrow I be recognized to speak on this subject.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. PROXMIRE. Mr. President, one more observation before I conclude. The Senator from Wisconsin has unwillingly held the floor since last Wednesday. This is Tuesday. It has taken an entire week for me to make this speech. It was not an infinite speech. It took 6 or 7 hours at the most. It was impossible to complete my speech because those who favor the Dirksen amendment were not available to develop a quorum on Thursday, Friday, or Saturday. On yesterday, Monday, we were able to obtain a quorum after about an hour of waiting for it. I spoke and then yielded to the Senator from Oregon, at which time it was transparently obvious that we could not get a quorum, and the Senate adjourned.

I wish to make it clear that those of us who are supporting the Supreme Court in opposing the Dirksen amendment are desirous of having Senators who oppose our position come to state their case, to make a quorum, and t o provide the kind of attentive and intelligent audience which I know they are capable of making.

Mr. President, I yield the floor to the distinguished Senator from Maryland [Mr. BREWSTER] with the understanding that while he holds the floor there will be no motion made on the pending question of the Dirksen amendment.

The PRESIDING OFFICER. The proposal of the Senator from Wisconsin is not permissible under the rules of the Senate.

Mr. PROXMIRE. Mr. President, I renew my motion. Perhaps I phrased it improperly. I ask unanimous consent that I may yield to the distinguished Senator from Maryland [Mr. BREWSTER], with the understanding that I shall not lose my right to the floor, and that while the Senator from Maryland holds the floor a motion will not be made on the pending business.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. BREWSTER. Mr. President, I thank my distinguished colleague from Wisconsin. I congratulate him on his very wise and able presentation of this case and his defense of liberty and representative government.

Mr. President, like it or not, we are caught up in a debate which goes to the very core of the generally accepted philosophy of our representative Government. More than that, we are participants in a political power play which will profoundly affect the future of millions of Americans.

My position on this issue should have been made clear by my recent votes on cloture and the McCarthy-Javits "sense of Congress" resolution. Let me state here and now so that there can be no doubt whatsoever—I am completely and unalterably opposed to any attempt to nullify the Supreme Court's series of "one man, one vote" decisions.

The Senate has already rejected the proposition put forth by the House-enacted Tuck bill, by a substantial vote. Now a second attack is being mounted on the House side in the form of a constitutional amendment sponsored by Representative PATMAN, of Texas. I sincerely hope that Maryland's Representatives on both sides of the aisle will stand firm against it.

The matter before us now is more insidious than either the Tuck or Patman bills because it purports to be—and to some may appear to be—milder in its approach. I, for one, will not buy this. I believe that the Dirksen rider's real purpose is to buy time in order that the antireapportionment forces in both the House and the Senate may mount a determined campaign for the passage of a constitutional amendment which will permanently take away the Supreme Court's jurisdiction and therefore its power to protect our citizens' right to equal representation.

I concur with and subscribe to the thoughts of the distinguished senior Senator from New Mexico [Mr. ANDERSON] when he recently said:

We are now engaged in a debate which centers on the vital organs of our form of government, and reopens arguments raised and resolved by the men who shaped the Constitution of the United States. The outcome of this debate and the issue which prompted it could, over the years, have a deeper effect on more Americans than the civil rights bill we passed in June. The House of Representatives has passed a bill, the Tuck bill, which would bar the Supreme Court from acting in cases involving the reapportionment of State legislatures. This bill defies the basic principle established by the Founding Fathers that the Supreme Court should exercise the role of final arbiter in disputes of interpretation of our Constitution because it would destroy one of the foundation stones of our Republic.

The Tuck bill, in my opinion, should have been defeated. There were those, however, who believed that the extreme measure passed by the House would force this body to accept some sort of more modest counter to the Supreme Court's decisions on legislative apportionment in the States. This so-called more modest measure took the form of the Dirksen amendment. I am as strongly opposed to the Dirksen amendment—even though some would label it a modest proposal—as I am to the Tuck bill. No hearings were held on the Tuck bill in the House. We have not held hearings in the Senate on the Dirksen amendment, yet we are asked here to attach this disruptive amendment to the foreign aid bill.

If this amendment should become a part of the foreign aid bill and the foreign aid bill be sent to the President, I would rather see the President veto that vital legislation rather than let the Dirksen amendment become the law of the land. The amendment abrogates the principles for which the Founding Fathers labored long and diligently in the Philadelphia Convention of 1787. More than that, it would encourage Congress to foreclose Supreme Court actions in other areas which might be unpopular with an active and influential minority. Even when the Supreme Court in 1954 handed down its momentous decision that there should be desegregation in the public schools, I do not recall that any measure was introduced in Congress to deprive the Supreme Court of the right to rule in such cases. Could it be that this issue has generated so much opposition because reapportionment has such a profound effect on the political power structure?

I find it somewhat surprising that the distinguished Senator from Illinois, who was one of the architects of the civil rights bill, should be the principal architect of this proposal which is nothing else but a civil wrongs bill, because it would deny to many the right of equal representation and does violence to the 14th amendment which was one of the bases for the civil rights bill. There are those who say that the Dirksen amendment accepts the decisions of the Supreme Court that both houses of State legislatures must be apportioned on the basis of population, but merely delays implementation of the rulings. In truth the purpose of the Dirksen amendment is to buy time—time in which it is hoped a constitutional amendment can be adopted that will produce the same results, wholly or partially, as the Tuck bill if it were enacted. In reality, we would wind up in the same leaky boat, nullifying the action of the Supreme Court, but worse, foreclosing future decisions by the Supreme Court in this area of fundamental principle. The Dirksen amendment only delays the day of final judgment for the inequality and injustices which have been the lot of large numbers of Americans for so many decades. Malapportionment will still be with us. I am afraid that millions of our citizens will despair that nothing can be done to erase

this blot on our democracy. They will believe that Congress has left them hostage to the whims and will of legislatures which do not accurately respond to their needs.

I also applaud the proposition set forth by the senior Senator from New York [Mr. JAVITS] in urging support for his "sense of Congress" resolution when he said:

The question, then, is how Congress may constitutionally manifest its desire for time to avoid hasty solutions and perhaps to propose a constitutional amendment. I do not believe the Dirksen-Mansfield amendment can do so validly under the doctrine of the separation of powers of the coordinate branches of the Federal Government unless the Court construes it as a request, not an order. I have heretofore argued that in my judgment, the Supreme Court will strike down the Dirksen-Mansfield amendment unless it construes the words "unusual circumstances," as contained in the amendment, to allow it, for all practical purposes, to consider that amendment as a request, not an order. That is a dangerous piece of business. The Court may feel constrained, as a matter of morality in the construction of the law, to hold that this is an order to the Court, and to strike it down, and face the terrible confrontation between Congress and the Court, which I do not believe anyone who loves our country and its institutions should invite. If the amendment is mandatory, if it is a statute, then it could well be construed as an attempt by Congress to impose upon the Federal courts what is called, in words of art, "a rule of decision." This has been held invalid in cases involving constitutional rights already pending before the courts. I have argued on the floor of the Senate the famous McCardle case. There is a great likelihood, in view of the later Klein and Glidden cases, that the McCardle decision is unlikely to be the law of the land as construed by the Supreme Court at this time. It is for these reasons that I wish to avoid this confrontation.

Mr. President, I believe I am correct in stating that the majority of Senators, on both sides of the aisle, are attorneys and were qualified as such before they became Members of the Senate.

As lawyers as well as lawmakers, I fear that some of us have not paid sufficient attention to the development of the law in those cases dealing with reapportionment, or more precisely with malapportionment.

For this reason I thought it might be useful for some of us, at least, to trace the legal history of one of these cases. I know that Senators will understand why I have chosen the Maryland case as my illustration.

It happens that three of the prime movers in the reapportionment fight in Maryland are well known to me personally. The first, Royce Hanson, a vigorous young political science professor from Montgomery County, Md., organized the Maryland Committee for Fair Representation, which served as the principal vehicle of the proreapportionment forces in Maryland. The other two, Alfred L. Scanlan and Johnson Bowie, are longtime personal friends and prominent Maryland attorneys. It was they who, with their cocounsel, John B. Wright, successfully argued the committee's case before the Supreme Court.

Before going into the details of the Maryland case, I believe it would be helpful and interesting to review the strategy of the successful attorneys.

Mr. Scanlan published an interesting article on this aspect of the case in the June 1963 issue of the Notre Dame Lawyer, published by the Notre Dame Law School.

In the article, which is entitled "Problems of Pleadings, Proof, and Persuasion In a Reapportionment Case," Mr. Scanlan wrote:

EXPLANATORY COMMENT

In the year which has elapsed since the Supreme Court's monumental decision in Baker against Carr, a constitutional ferment of the greatest dimensions has ensued. As the victorious attorney of Baker against Carr perceptively observes, "By every yardstick of measurement, this historic landmark decision has had the greatest effect on State Governments of any event since our Federal Constitution was adopted."

By a recent count, cases challenging legislative apportionments had been filed in 36 States, and 25 decisions had been handed down. In 19 of these decisions, the existing apportionment of one or both bodies of the legislature have been found to be unconstitutional. New reapportionment measures have been passed in 15 States and are expected in the near future in 11 more. The Supreme Court recently noted jurisdiction in eight cases involving either reapportionment of State legislatures or congressional redistricting. In addition, the Court already has struck down, by a vote of 8 to 1, the invidious unit rule system observed for so long in primary elections in Georgia.

Parenthetically, the same system, until quite recently, was followed in my State of Maryland.

Many talented and dedicated people have played a part in this battle for constitutional reform, or, if you prefer, revolt. Political scientists and professors of government and public administration have furnished underlying theory and plentiful statistics. The League of Women Voters, the AFL–CIO, and local chambers of commerce have helped furnish funds. Politicians, at least those favorably disposed toward reasonable apportionment, have contributed their native gifts of leadership, direction and productive political compromise. The courts, of course, have provided indispensable stimuli toward necessary legislative action.

In so doing, the judiciary, at last, has given "meaning to the otherwise sterile insistence of Mr. Justice Frankfurter that relief from inequitable apportionment 'must come through an aroused popular conscience that sears the conscience of the people's representatives.'"

However, the lawyer has proved to be the infantryman of this war. The late Robert Jackson once remarked that America believes in "government by lawsuit." Sooner or later, practically all of the great public issues which confront the Nation find their way to the courts in one form or another. This has been especially true of the reapportionment controversy. The basic issue is whether representative government is to prevail in the legislative chambers of the States and in the House of Representatives of the United States. More precisely, the question presented is whether there is anything in the 14th amendment that guarantees that the fundamental principles of representative government and majority rule shall obtain in the country's legislative bodies. Thus are raised constitutional issues of the greatest magnitude, enormous impact, and far-reaching effect. Under the circumstances, it is not surprising that it has been the lawyer who has been called upon to furnish the technical advocacy so indispensable to the presentation and resolution of the grave and complex constitutional questions with which the country, the States, and now the courts are wrestling.

My purpose here is to describe the anatomy of a reapportionment case as seen through the eyes of a lawyer who is called upon to prepare, try, and argue it. From pleadings through proof, a number of problems, some unique, some familiar, are encountered by the attorney who handles a reapportionment or a redistricting case.

BRINGING THE ACTION

1. Where to sue

At the outset the reapportionment advocate must determine, if the choice is open, whether to bring suit in a Federal or a State court. If there is an express remedy provided by the State's constitution, or in its statutes, perhaps the better course is to institute the litigation in the State court. For example, in *Asbury Park Press, Inc.* v. *Woolley*, a case decided 2 years before *Baker* v. *Carr*, the New Jersey Supreme Court sustained a claim that the New Jersey Assembly was malapportioned. The court relied on express provisions of the New Jersey constitution, even though it also indicated, without deciding the point, that the malapportionment under attack violated the 14th amendment. Moreover, long before the Supreme Court's decision in *Baker* v. *Carr*, a number of State courts had held apportionment statutes to be in violation of State law. As the Supreme Court of Oklahoma observed in *Jones* v. *Freeman:*

"It might be well to point out that in 1938, the courts of 22 States had exercised the power, or had stated that they had the power, to review legislative reapportionment acts upon (State) constitutional grounds, and no court had denied that it possessed such power."

It is perfectly clear also that the 14th amendment issues can be raised and decided in a State court, whether or not the complaining petitioners also have valid State grounds on which to rest their reapportionment action. On the other hand, it may still be contended that a State court would not be obliged to decide the Federal equal protection or due process questions in a reapportionment case where, under State law, no remedy is available by which a decision in favor of the complaining party could be enforced.

On balance, the rapid and momentous events which have transpired since *Baker* v. *Carr* strongly suggest that a three-judge Federal court certainly is the forum where the most expeditious decision may be obtained. The decision of such a court is directly appealable to the U.S. Supreme Court. In addition, a Federal judge may enjoy a slightly more independent status than a State judge. To the extent that the practical compromises of politics may be significant factors to be taken into judicial account in the resolution of apportionment controversies, these would appear to be considerations less likely to move an appointed judge than an elected judge.

However, there is at least one caveat about bringing a reapportionment action in a Federal court. The Federal courts surely are not anxious to plunge into the reapportionment controversy, despite the decision of the Supreme Court in *Baker* v. *Carr*. Sound and deeply engrained instincts of judicial abstention have led some Federal courts to hold their hands until the highest court of a State was given an opportunity to pass upon an apportionment law, especially "where the State constitution was germane to the issue. In *Lein* v. *Sathre*, a three-judge Federal court in North Dakota stayed the proceedings before it in order to afford an opportunity for the Supreme Court of North Dakota to pass upon questions arising under the North Dakota reapportionment provisions found in the State constitution.

2. When to sue

Proper timing may be quite important. The apportionment advocate may have to look sharply to avoid the dilemma represented by prematurity on the one hand and mootness on the other. Elections for the State legislature occur at regular intervals, and lawsuits take time. To avoid the hazard that injunctive relief may be denied on the grounds that the action is too late and the requested judicial interference with the electoral processes too severe, the safest course is to institute the action as far in advance of the next State election as possible.

The universal rule is that a court will not pass upon a constitutional issue in an action prematurely brought. Nevertheless, the apportionment cases decided up to now indicate that the risk of prematurity is not a substantial one. More usual has been the experience of those plaintiffs who have been told by a court that they have a cause of action, but that relief will be withheld until the legislature has had another opportunity to reapportion.

Disappointment at this type of delayed ruling is eased, however, when the court, as it did in *Lisco* v. *McNichols,* makes it ominously clear that at least a prima facie case of invidious discrimination has been established. The strong implication that corrective court action may follow further legislative inaction has induced the Legislatures of Minnesota, New Jersey, Maryland, Florida, Tennessee, and Delaware, among others, to reapportion themselves at the next general or special session following the entry of the court's interlocutory dec ee retaining jurisdiction of the case.

Still, there is always the possibility that a reapportionment suit will be rendered moot as the result of new legislation amending the existing statutes or pertinent provisions of the State constitution. One cannot complain if the legislative action which follows eliminates the constitutional violations against voting rights against which the suit was brought. On the other hand, where the new legislation still falls short of the minimum requirements of the 14th amendment, the apportionment advocate may have a difficult decision to make. In the Georgia unit rule case, for example, the Legislature of Georgia amended the statutes attacked by the complaint, on the same day that the case was heard before the three-judge court. However, the plaintiff was allowed to amend his complaint so as to challenge the amended act which still fell far short of the one-man, one-vote principle ultimately upheld by the Supreme Court of the United States.

The Maryland experience was somewhat different. The day after the Chancellor had declared existing provisions of the Maryland constitution with respect to the representation provided in the house of delegates to be in violation of the 14th amendment, a special session of the Maryland General Assembly was convened. Five days later, the special session adjourned after having enacted stopgap apportionment legislation which increased the membership of the house of delegates from 123 to 142 and allotted the 19 new delegates to the suburban and urban areas. Since the trial court had withheld ruling on the issue of the apportionment of the State senate, the Maryland Legislature naturally did nothing about that. The petitioners, therefore, had to choose between starting over with a new complaint, or appealing on a basis which eliminated a claim that the house of delegates, as such, was unconstitutionally apportioned. The latter course was chosen.

The question of mootness appears to have arisen in the Michigan case now pending in the Supreme Court as *Beadle* v. *Scholle.* The question of the constitutionality of the representation provided in the Michigan Senate is the sole issue. On April 1, 1963, the people of Michigan in a statewide referendum, by a very narrow margin adopted a new State constitution which provides a different and slightly improved basis for representation in the State senate. A case of controversy ends if the statute or constitutional provision which is the basis for the action or the conduct complained of is repealed or modified.

3. Who should sue

The problem of who are proper plaintiffs in a reapportionment action is not significant. Indeed, the advocate's problem here seems primarily to discourage, as diplomatically as possible, some of the ambitious young office seekers who want to have their names emblazoned not only in the judicial reports but in the public press as trail blazers in the vindication of fundamental voting rights. The standing to sue possessed by a voter whose vote is diluted or discriminated against has long been established; it is settled now, so far as reapportionment actions are concerned, by *Baker* v. *Carr.*

Plaintiffs in reapportionment cases may be residents, taxpayers, or voters. The obvious course, then, is to secure plaintiffs who possess all of these characteristics. Moreover, since at least the due process argument against gross malapportionment finds a partial basis in a showing of discriminatory taxation against the taxpayers of the more populous and underrepresented areas, it is provident to see to it that the plaintiffs are taxpayers in good standing from those areas, in addition to their being qualified voters.

Moreover, if one of the plaintiffs happens to be an association, as was true in the Maryland suit, or a radio station, as was the case in New York, *WMCA, Inc.* v. *Simon,* individual plaintiffs should be joined since associations and radio stations obviously are not voters.

4. Whom to sue

Generally, the proper defendants in a reapportionment suit are the State officials who have the duty, either under the statutes or the State constitution to conduct the elections. It is axiomatic that an official who acts under the color of an unconstitutional provision of a State statue or constitution is acting ultra vires, and his actions may be enjoined. For example, in *Gray* v. *Sanders,* the Georgia unit rule case, the chairman and the secretary of the Georgia State Democratic Executive Committee properly were named as two of the defendants since, under the statute, they performed certain administrative functions in the conduct of the primary elections. Generally, a declaratory judgment that the election laws or the statutes providing representation in the legislature violate the 14th amendment should be sought in a reapportionment action, plus such injunctive relief as is necessary to insure that the election officials will not conduct the election on the basis of the illegal laws.

5. How long to wait for the legislature to do nothing

Despite the outpouring of litigation following the Supreme Court's decision in *Baker* v. *Carr,* it is apparent that the courts, State and Federal, remains disinclined to act in a reapportionment case if there is any reasonable possibility that the legislature will do something about the situation. Nevertheless, courts are not blind to the political facts of life; they will not ignore what "all others can see and understand." There comes a time, and the courts will recognize it, however reluctantly on the part of some, when it is manifest that "it would be idle and futile to * * * (seek relief from malapportionment through) the voluntary action of the body that made it."

Accordingly, the petition ought to contain allegations which demonstrate, or at least recite, any extended history of legislative inaction in the premises. In *Baker* v. *Carr,* this was achieved through an affidavit by the mayor of Nashville, Tenn., which contained the history of the failure of the Tennesee Legislature, from 1901 through 1960, to reapportion as required by the State constitution.

In *Maryland Committee for Fair Representation* v. *Tawes,* plaintiffs stated the history of continuing and increasing malapportionment in Maryland as part of the allegations of the bill of complaint. The legislative reference service of the Maryland General Assembly was most cooperative in supplying the dates, numbers, and the disposition of bills that had been introduced over the years in vain attempts to secure some reapportionment of the legislature. The Governor of Maryland also unknowingly cooperated by stating to the press (quite accurately) that any proposed reapportionment legislation whereby representation might be reasonably related to population would be 'in the realm of the impossible." In addition, some of the more plain-talking rural legislators supplied further evidence of determined legislative inaction for inclusion in the complaint, and later in the briefs, by their candid acknowledgments of their of their unyielding opposition to reasonable reapportionment, lest they thereby be denied the privilege of continuing minority rule in the Maryland General Assembly.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. BREWSTER. I yield.

Mr. DOUGLAS. Do I correctly understand that there are nine Eastern Shore counties in the State of Maryland?

Mr. BREWSTER. The Senator is entirely correct.

Mr. DOUGLAS. Do I further correctly understand that each of those counties has a senator?

Mr. BREWSTER. At the present time, the nine counties on the Eastern Shore of Maryland each have one senator in the Maryland State Senate. There are a total of 29 senators. There are 25 members of the Maryland House of Delegates.

Mr. DOUGLAS. Is it true that there is one county on the Eastern Shore of Maryland that has a population of 19,000?

Mr. BREWSTER. There are very small counties by population. Caroline County, 1 of the smaller counties, approximates 19,000 people.

Mr. DOUGLAS. Is it true that Baltimore County, as distinguished from the city of Baltimore, has a population of more than one-half million and also has one senator?

Mr. BREWSTER. I am happy that the Senator from Illinois has brought out that point, because Baltimore County is my home county. I represented Baltimore County in the Maryland Legislature for more than 8 years. We now have more than a half million people in Baltimore County, and we have one State senator. When I was in the General Assembly of Maryland there were six members of the house of delegates. Very recently, by reason of court decisions, we have had stopgap reapportionment in Maryland and the house of delegates membership from Baltimore County has been increased to 13. But Baltimore County, with over one-half million people, has 13 delegates and 1 senator, whereas the 9 counties across the great Chesapeake Bay have 9 sen-

ators and 25 members of the house of delegates.

Mr. DOUGLAS. Is it true that the population of those 9 counties is approximately 220,000?

Mr. BREWSTER. That is correct. The population of our great, wonderful Eastern Shore is less than half the population of that one major suburban and urban county.

Mr. DOUGLAS. Still they have nine times the representation of Baltimore County in the State senate.

Mr. BREWSTER. They have nine times the representation in the senate, and they used to have four times the representation in the house of delegates; now they have two and a half times the representation in the house of delegates.

Mr. DOUGLAS. Can the Senator from Maryland inform me as to the population of Montgomery County, which lies in the outskirts of Washington? Is that over one-half million?

Mr. BREWSTER. There are two other very large counties in Maryland. They are both in Washington suburbia. They are Montgomery County and Prince Georges County. I believe each of those counties has a population slightly in excess of 400,000 people.

Mr. DOUGLAS. So if we consider the population of the three counties—Baltimore County—not Baltimore city but Baltimore County—Montgomery County, and Prince Georges County—we would have a total population of 1,300,000 or more. Those counties have three senators, whereas the nine counties of the Eastern Shore, with a population of less than one-quarter of a million, have nine senators.

Mr. BREWSTER. That is entirely correct.

Mr. DOUGLAS. No wonder the Senator from Maryland is such an able and devoted sponsor of legislative reform and true reapportionment.

Mr. BREWSTER. I thank my distinguished colleague. I might further comment in respect to our Maryland situation that until a recent reform, as a result of court decisions, we had an even more unfair situation in our primaries in both parties. We had a convention system under which each county was allocated in the State convention the same number of votes that it had in the legislature, the house and the senate.

A few years ago Baltimore County would have a total of 7 votes in the nominating convention, representing one-half million people, whereas our counties on the Eastern Shore, with slightly over 200,000 people, had a total of 35 votes, or 5 times as many votes in the nominating convention, with one-half or one-third of the population.

Mr. DOUGLAS. That was the so-called county unit system.

Mr. BREWSTER. The so-called county unit system, which I am now very happy to report to the Senate is no longer the law of our State. It is still the actual statute law, but the statutes have been set aside by court decisions.

Mr. DOUGLAS. And it was substantially the county unit system that prevailed in Georgia.

Mr. BREWSTER. Our system, though it was not precisely the same as the Georgia system, was the same in principle. Only in recent years—since World War II—have we seen a candidate get the greatest number of popular votes and still fail to be nominated by his party because a minority candidate was put over by the convention system.

Mr. DOUGLAS. I thank the Senator.

Mr. BREWSTER. Continuing in this history of litigation, with particular reference to the Maryland situation:

> If possible, then, the allegations of the complaint or petiiton should spell out to the fullest extent the past history of legislative inactions. The reapportionment advocate should emphasize at the outset, and at all stages of his case, the demonstrable futility of seeking legislative relief prior to an authoritative and compelling ruling by a court of competent jurisdiction. Even the most timid of judges will acknowledge that the law does not require the performance of a futile gesture as a condition to resort to the courts.
>
> PROVING THE CASE
>
> *1. How extensive a hearing*
>
> Despite *Baker* v. *Carr*, it is still possible that the allegations of a reapportionment petition or complaint will be met by demurrer or a motion to dismiss. The grounds might be that the complaint on its face shows that a court of equity should abstain from granting relief in the circumstances disclosed. Justice Rutledge's concurring opinion in *Colegrove* v. *Green*, could prove to have more enduring vitality than the Frankfurter majority opinion, now superseded by *Baker* v. *Carr*. Want of equity jurisdiction, unlike lack of jurisdiction over the subject matter, does not go to the power of a court only to the question whether it should, not whether it can, afford injunctive relief.
>
> The lingering possibility of judicial abstention despite jurisdiction to act suggests the importance of filing a fairly detailed "Brandeistype" complaint. Nothing is lost by making the original bill a comprehensive document. If the case goes up to the highest court of the State, or to the Supreme Court of the United States, the record, in the main, is the one created through the draftsmanship of plaintiff's counsel. For example, the petition filed in the Maryland case, including eight exhibits attached thereto, occupied 43 of the 59-page printed record on which the case was reviewed by the Maryland Court of Appeals.
>
> A more critical question, although not entirely the decision of plaintiffs counsel to resolve, is whether or not, following the defendant's answer, plaintiffs should seek a full hearing or elect to proceed by summary judgment. His nonpaying clients are apt to urge a full hearing in order to secure the maximum advantages of publicity which they imagine will be gained thereby. If he follows his instinct for the least work the better, the advocate will choose summary judgment; moreover, summary judgment has real advantages. For instance, the three-judge Federal court before which a full hearing was held in *WMCA, Inc.* v. *Simon* was very sticky about admitting into evidence certain proof offered by the plaintiffs. Plaintiffs were not allowed to present evidence to prove that existing apportionment represented an intentional discrimination against the residents of New York City and the surrounding area, and that as a result the citizens of the urban areas were subjected to substantial discrimination with respect to the allocation of tax revenues and distribution of State aid as well as in other matters affecting the economic, social, and political welfare of the State.
>
> The New York petitioners also were unsuccessful in an effort to have the court admit into evidence a consensus of scholarly opinion in support of the view that the only legitimate basis of representation in a State legislature is population. These difficulties very likely could have been circumvented by use of the summary judgment procedure. One comprehensive affidavit, or several, with the pertinent appendixes attached, could have placed before the WMCA court the same evidence that it rejected when it was offered as proof.
>
> Actually, of the reapportionment cases decided to date, only Delaware, New York, Alabama, and possibly Oklahoma, have had what might be regarded as full-scale hearings on the merits. In Wisconsin, the court referred the issues to a special master, before whom extensive hearings were held, and both written and oral testimony was taken. An objective reading of the comprehensive report of the special master shows that the evidence on which his findings of fact and conclusions of law are based were all matters of which a court could take judicial notice, or, at a minimum, material that properly could have been brought to the attention of the court in a carefully prepared brief.
>
> Still, there may be some advantage in having a full hearing in an apportionment case. Justice Harlan, for instance, the solitary dissenter in the Georgia unit rule case, *Gray* v. *Sanders*, lamented the lack of a full hearing on the merits. Certainly, the Supreme Court should not be asked to pass upon momentous constitutional issues on the basis of a partial or incomplete record. On the other hand, malapportionment issues rarely involve complex issues of contested material facts. In the writer's opinion, the one apparent advantage of a full trial on the merits of a reapportionment case is the possibility that, as a consequence, a court might be more disposed to find that the defendant election officials had not adequately explained away the seemingly irrational and discriminatory pattern of representation attacked in the suit. Also, since the record in a full hearing might be somewhat more complete, or at least appear to be, both trial courts and appellate courts might be, as a result, less chary about splashing around in waters usually reserved for the legislatures.
>
> *2. Judicial notice: A convenient crutch*
>
> As the three-judge Federal court in the Alabama reapportionment case put it:
>
> "We have no disposition to discourage the introduction of evidence by any party, and in the ordinary case our opinion as to whether the plaintiffs will be entitled to appropriate relief should await the introduction of evidence. However, we take judicial notice of the same facts which are well known to the * * * Supreme Court of Alabama and to the people of this State."
>
> In the Georgia unit rule case, the trial court made liberal use of the doctrine of judicial notice in concluding that the Georgia unit rule was invidiously discriminatory. I would encourage the reapportionment advocate to make maximum use of the helpful doctrine of judicial notice, whether in submitting proof in document or affidavit form, or in arguing to the court in a trial memorandum or appeal brief. Truly, there is no persuasive reason why all the material facts in a reapportionment case cannot be put in the record through liberal but perfectly acceptable use of the doctrine of judicial notice. Courts traditionally have taken judicial notice of matters of common knowledge and experience.
>
> Population figures, a critical item of proof in a reapportionment case, are, beyond argument, statistics of which a court can take judicial notice. For example, judicial notice was taken of population statistics furnished by the U.S. Census Bureau in *Tampa Electric*

Co. v. *Nashville Coal Co.* In other cases, courts have taken notice, not only of population statistics, but even of the comparative population ratings among different areas, and the rapidity of the expansion in population of a particular area.

Important to a persuasive presentation of a reapportionment case may be establishing that the urban and suburban areas, because of rural domination of the legislature, are subjected to discrimination in respect to both taxes imposed and revenues received back from the State for distribution among the local political subdivisions. Statistics of this type, if properly presented, can be judicially noticed, although, as pointed out above, a three-judge Federal court in *WMCA* v. *Simon* rejected an offer of proof of alleged discriminatory treatment with respect to both taxation and revenue against the residents of the urban areas of New York State.

It also has long been settled that courts may take judicial notice of common matters of public history. Even the mechanics of State legislative procedure represent information or facts of which a court may properly take judicial notice.

The precedents are available, therefore, to sustain the advocate who invokes judicial notice in attempting to place before the court important items of evidence in a reapportionment case. Apart from the adverse rulings in the New York case, the writer has discovered no authority with which to argue against liberal use of the doctrine of judicial notice in a reapportionment case. The major areas of inquiry pertain to statistics, projections, and comparisons, both in respect to population and to area, of the political subdivisions of a State, tax and revenue figures, the legislative history of a State constitution or statute, and the public history of the action, or, more usually, the inaction of a State legislature in apportioning the representation provided in its chambers. These are all matters of which a court properly can take judicial notice. They should be given every opportunity to do so.

3. Paucity of State legislative history materials

In attempting to demonstrate a legislative purpose to discriminate against urban and suburban areas in the enactment of apportionment legislation, or in the refusal to change existing statutes so as to eliminate gross inequities in representation, there is a paucity of legislative history material available, and this may present some problems. Usually, there are no written committee reports, published hearings, or debates on State legislation. Such information as can be obtained from legislative journals, etc., may be useful for tracing the progress of particular bills. Generally, however, they are of no help in determining the legislative intent in their enactment or defeat.

Maryland is no exception to the general situation; the debates on the floor of the General Assembly, committee reports and hearings are not published. However, in *Maryland Committee for Fair Representation* v. *Tawes,* we were able to circumvent this handicap by research in the "morgue" or back files of Baltimore and Washington newspapers. More recent developments were kept track of by extensive and careful clipping of the daily newspaper reports of the doings of the legislature.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. BREWSTER. I yield to the Senator from Illinois.

Mr. DOUGLAS. Is it not true that one of the greatest newspapers in the land is the Baltimore Sun?

Mr. BREWSTER. I believe the Baltimore Sun is known and respected throughout the country as one of the finest and oldest newspapers in the land. The Baltimore Sun's editorial policy through the years has consistently been for fair representation both in the House of Representatives of the United States and in the General Assembly of Maryland in Annapolis.

Mr. DOUGLAS. The Baltimore Sun had for many years the services of the learned, vitriolic, beer-drinking H. L. Mencken, who was a great newspaperman. Is that correct?

Mr. BREWSTER. Mr. H. L. Mencken was one of the great writers, reporters, thinkers, and users of the English language, I believe of our time, or perhaps of all time. The Baltimore Sun, Baltimore City, and the State of Maryland are proud of the enviable reputation which he established through his writings.

Mr. DOUGLAS. Is it not true that for a time the people thought of Mr. Mencken as a "wisecracker," but that by his book "The American Language" he showed himself to be a great scholar, and that his work on the derivatives of American expressions is better than perhaps that of any lexicographer? The University of Chicago brought from England Sir William Craigie who brought the great Oxford Dictionary to completion. When he came over to this country he had a perhaps superior attitude toward American scholarship, but after he worked through Mencken's book on "The American Language" he said it was a most excellent piece of work, accurate and pungent, and that it rivaled Dr. Johnson's Dictionary.

Baltimore can be justly proud of H. L. Mencken, although in later years he somewhat deteriorated. Certainly the Baltimore Sun has been one of the great newspapers of the Nation.

Mr. BREWSTER. I thank the Senator for his comments. I also recommend to my colleagues two books which I greatly enjoyed. They were written by H. L. Mencken. One is "Heathen Days," and the other is "Newspaper Days." It is a great delight to read those books.

Mr. DOUGLAS. Also "Happy Days."

Mr. BREWSTER. The Senator is entirely correct. "Happy Days," "Heathen days," and "Newspaper Days."

I remember the first national convention that I attended, in Philadelphia, in 1948, when I had the pleasure of accompanying the Maryland delegation, and also accompanying Mr. H. L. Mencken, who was on one of his last assignments for the Baltimore Sun, when he reported the comings and goings of our delegation in Philadelphia. Not only was it amusing to read his comments, but he wrote an excellent report. He drew on his vast experience in politics and public life in reporting the happenings in Philadelphia.

Now continuing with the problems of a lawyer as he attempts to set aside malapportionment in a State legislature:

While the whole State may know that the legislature's motive in enacting apportionment legislation, or failing to amend existing statutes on the subject, was to effect a discrimination in representation, it may be difficult to interest a court with this popularly accepted fact. Courts generally will not inquire into motives which influence the legislature or its individual members in voting for or against the passage of a statute. On the other hand, the long continuing failure of a legislature to act has a significance which should not be ignored. Moreover, the Supreme Court has told us on more than one occasion that the 14th amendment bars "ingenuous as well as ingenious discriminations." Legislative motives in enacting or in refusing to revise reapportionment laws would not seem to be immune from judicial inquiry.

However, in New York, as previously noted, a three-judge Federal court was not interested in hearing evidence offered as to the discriminatory motive of the New York Legislature in enacting apportionment legislation for that State. On the other hand, in another recent case, involving the claim of congressional redistricting on the forbidden basis of race, another three-judge Federal court in the southern district of New York held that the plaintiffs had failed to offer any proof demonstrating a legislative motive to discriminate on racial grounds in drawing the lines of congressional districts in New York City.

Here also, the difficulty which seemingly confronts the apportionment advocate in presenting evidence of legislative motive is more imagined than real. If the source materials are available, such as current or past newspaper reports, magazine articles, official notes of a State constitutional convention, etc., little ingenuity or effort is required to bring the information to the attention of the court. If the doctrine of judicial notice is not flexible enough to permit it, the even more liberal standards of effective brief writing provide the means for demonstrating to a court the reasons for the failure of a State legislature to reapportion. Long years of inaction are not without compelling significance in furnishing clues to legislative intention. The courts will listen to the apportionment advocate who attempts to supply those clues, if indeed the court does not already know them.

4. The burden-of-proof problem

The burden of proof in a reapportionment case is on the plaintiff. He starts with the proposition that courts will "accept as established such reasons for the districting as are fairly conceivable or inferable in and from the results. However, "there are limits to the extent of which the presumption of constitutionality can be pressed." The recent reapportionment decisions indicate that once gross discrepancies of representation are established by appropriate population statistics, the burden shifts to the defendant election officials to present evidence to explain away the disproportions contained in the statutes. Accordingly, while numerical inequalities of voting strength does not necessarily prove a deprivation of voting rights guaranteed by the Constitution, it may establish a prima facie case for that proposition.

Under the circumstances, the apportionment advocate should play his statistics to the limit. In establishing the inequities of representation that exist, he should not only use present population figures but, to the extent possible, project them to demonstrate that existing gross inequities in representation will become even greater as the years pass and the suburban areas continue to expand. He should single out and emphasize compelling statistics illustrating some of the incredible inequalities in representation that may exist. A court which hears that the vote of a resident of one district counts 33 times that of a resident of another district must be moved. In the Georgia unit rule case the Supreme Court listened somewhat incredulously, if not aghast, as counsel for the appellees advised them in oral argument that 5.5 percent of the population controlled the Georgia Senate. Again, to argue, as petitioners did in the Maryland case, that the senator from one large county is elected by

more people than are required to elect a majority of the entire State senate, is to attract the judges' attention, if not their vote.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. BREWSTER. I yield.

Mr. DOUGLAS. In other words, Fulton County, which contains the city of Atlanta, had less representation than approximately 5 percent of the population of the State of Georgia in the senate. Is that correct?

Mr. BREWSTER. In Georgia, prior to the Court's decision, 5½ percent of the voters in Georgia controlled the Senate of Georgia.

Mr. DOUGLAS. Fulton County, which has in it the great city of Atlanta, had only one senator. Is that correct?

Mr. BREWSTER. The Senator is correct.

Continuing, and thanking the Senator from Illinois for his comments:

Remember also the clues which Justice Clark may have furnished in his concurring opinion in *Baker* v. *Carr*; i.e., "legislative inactivity," "absence of any other remedy," "crazy quilt" patterns of representation. With these in mind, bring to the Court's attention, either in proof or in argument: the discrepancies even within the same class; i.e., rural or urban; the extent and duration of legislative inaction; and the absence of the right of referendum or initiative, if these are not available under the State constitution. If the latter remedies are provided, develop the practical obstacles to effective resort to them as a means of eliminating or substantially mitigating malapportionment in legislative representation.

Despite the fact that the courts have not emphasized the point in the apportionment decisions thus far, the attorney who finds himself in a reapportionment case would do well to emphasize such discriminations with respect to State taxation and the return of State revenue to the local area as he can persuasively establish. For example, in the Maryland case, statistics furnished by official agencies of the State were employed to show that as the result of unfair statutory equalization formula enacted by the rurally dominated general assembly, the suburban counties were severely discriminated against in the amount of State revenue which was returned to the local political subdivisions. Since taxation without adequate representation may reach the point where due process is offended revenue and taxation evidence, although overshadowed by the more compelling statistics regarding gross discrimination in voting strength, should not be overlooked. Moreover, such adverse consequences tend to demonstrate that discriminations in voting strength and legislative representation present more than an abstract injustice.

Indeed, to the extent possible, the petitioners in a reapportionment case should attempt to prove and to argue that discrimination to which they are subjected in the exercise of voting strength has practical adverse consequences. The petition for certiorari filed by the appealing Michigan election officials in *Scholle* v. *Hare,* for example, makes a fairly compelling argument that the appellees had made no showing that the malapportioned legislature "had failed to adapt itself to modern urban problems." On the other hand, an amicus curiae brief filed by the American Civil Liberties Union in the earlier case of *Magraw* v. *Donovan,* through an appendix attached thereto, made a convincing showing of the practical consequences on city folk of rural domination of the legislature.

An effort also should be made to allay the fears expressed by Justice Harlan in his dissenting opinion in *Gray* v. *Sanders* that reasonable reapportionment necessarily means domination by the city vote. As the newer statistics demonstrate, the suburban areas are the victims of the grosser malapportionment. Moreover, while urban and suburban interests in mass transportation and education may coincide, as frequently as not the representatives from the cities may oppose suburban demands for greater powers of taxation, zoning authority, etc. Therefore, the advocate who has the time and the resources would be well advised to provide the Court with either statistics or arguments in order to reassure it that reapportionment will not necessarily mean the substitution of city rule for country rule.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. BREWSTER. I yield.

Mr. DOUGLAS. Do I correctly understand the situation in the Senator's own State of Maryland to be that the city of Baltimore, as distingushed from the county of Baltimore, has six members of the State senate?

Mr. BREWSTER. The city of Baltimore is divided into six districts. Each district, for the purposes of representation in the State legislature, coincides with a county. Each of the six districts previously had six members of the house of delegates and one State senator. Now, with our temporary reapportionment in the house of delegates alone, the bigger districts in Baltimore City have had their representation partially increased, but their representation in the Senate of Maryland remains at six.

Mr. DOUGLAS. At six. What was the population of the city of Baltimore in 1960?

Mr. BREWSTER. The population of Baltimore City is slightly under 1 million. With 6 members of the Senate of Maryland, out of a total of 29, it is not too much out of line with the population of 900,000, in a State whose population is slightly more than 3 million. Baltimore City does not suffer to the same extent from malapportionment as do our suburban counties.

Mr. DOUGLAS. But it is underrepresented in comparison with the Eastern Shore.

Mr. BREWSTER. That is entirely correct.

Mr. DOUGLAS. The Eastern Shore has 9 senators, with a population of 220,000; the city of Baltimore has 6 senators, with a population of approximately 900,000.

Mr. BREWSTER. That is correct.

Mr. DOUGLAS. Or 1 for every 150,000; whereas the Eastern Shore has 1 for approximately every 25,000. But in comparison with Baltimore County, Baltimore City does very well.

Mr. BREWSTER. Considering the city of Baltimore as a whole, it does very well; but it is interesting to note that the six districts of Baltimore City are in no way whatsoever equal in their population. It has some very large districts with hundreds of thousands of people, and some very small districts. So again there is malapportionment.

Mr. DOUGLAS. What the Senator is saying is that the worst cases of malapportionment are in Baltimore County, Montgomery County, and Prince Georges County, on the one hand, as compared with the overrepresentation of the nine Eastern Shore counties, on the other.

Mr. BREWSTER. The Senator from Illinois is absolutely correct.

Mr. DOUGLAS. And that, therefore, the suburbs of Baltimore suffer more than does Baltimore City.

Mr. BREWSTER. The rapidly expanding suburbs of the two great cities of Baltimore and Washington are the ones that really "get it in the neck."

Mr. DOUGLAS. That is what the Senator from Illinois attempted to demonstrate yesterday and today in citing the figures for Illinois. We have senatorial districts of 570,000, 505,000, and more than 400,000 in the suburbs of Chicago. Then there are districts elsewhere in the State having populations of 53,000, 57,000, 59,000, and 67,000, approximately.

Mr. BREWSTER. Maryland has comparable situations surrounding the Nation's Capital and the great city of Baltimore—and we hope to do something about it.

Concluding this aspect of this presentation:

CONCLUSION

The writer is reasonably certain that most of the suggestions or observations contained in this paper have occurred, or will occur, to those of his colleagues called upon to participate in a reapportionment suit. To the extent, however, that they may furnish some shortcuts in research, briefing or arguments, this paper will have been worth its effort.

All lawyers should take professional pride in the realization that the reapportionment battles in which they are engaged, or which they may be called upon to join, represent primarily contests of law and advocacy. The basic struggle is a constitutional debate in the grand tradition. To that encounter, above all, lawyers should come particularly well equipped by training and experience. Their services are indispensable, for it is their professional skills which, in substantial measure, will determine the outcome. I, for one, am not sure what the ultimate achievements of the reapportionment crusade may turn out to be. Unlike Professor Bickel, however, I refuse to believe that *Baker* v. *Carr* may be regarded merely as an exercise in jurisdiction and justicability, with no real impact on substantive constitutional law. Perhaps the Solicitor General of the United States was closer to the mark when he stated that he would not be surprised if the Supreme Court "were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political, and geographical subdivisions, provided that the departure from equal representation in proportion to the population is not too extreme." I would prefer, however, to hope that Anthony Lewis, of the New York Times, will prove to be the more accurate prophet. In commenting on the Georgia unit rule case and the "one-man, one-vote" principle on which that decision rested, Lewis said, and I agree: "Why should it be permissible to use the device of unequal legislative districts any more than the unit rule system, to give one man 10 times the vote of another?"

PROBLEMS OF PERSUASION

Whatever the final answer, one can be sure that any renaissance of the principle of majority rule in the legislative chambers of the States will be, to a considerable degree, the fruit of lawyers' dedication and advocates' skills. I am sure that the final triumph, whatever its dimensions, will be forged on a case-by-case basis, with the Su-

preme Court of the United States and the other Federal and State tribunals of the Nation striking down those schemes of representation which do not comply with the minimum requirements of equal protection and due process. In that type of extended and litigious campaign, lawyers are peculiarly well trained to participate and to persist.

I have been privileged to play some small part in the effort expended in the courts of Maryland, and am grateful for that opportunity. I hope that many of my brethren will have a similar chance. I shall be gratified if anything I have written here provides them with even slight assistance in carrying out such assignments as may come their way.

I commend my friend, Alfred Scanlan, on his very able dissertation on the "Problems of Pleadings, Proof, and Persuasion in a Reapportionment Case." I am happy to take note of the article in the Notre Dame Lawyer that the many predictions he makes, and the question that he advocates, have come to pass in more recent decisions of the Supreme Court.

Mr. DOUGLAS. Mr. President, will the Senator from Maryland yield?

The PRESIDING OFFICER (Mr. McGOVERN in the chair). Does the Senator from Maryland yield to the Senator from Illinois?

Mr. BREWSTER. I yield.

Mr. DOUGLAS. The Senator from Maryland has made a unique contribution to this debate. Most of the speeches, thus far, have dealt with the reasons contained in the decisions. They have not dealt with the processes of litigation. This is the first address I have heard which has really gotten inside the legal struggle. It has been a unique contribution as to the types of evidence, the difficulties of pleading, and the problems which lawyers seeking fair representation encounter.

I am sure that the comments of the Senator from Maryland will be carefully read, not only by the people of his State but also by lawyers and people all over the Nation.

I thank him for his contribution. I congratulate him upon the high, intellectual level of his performance.

Mr. BREWSTER. I am most grateful for the gracious remarks of the Senator from Illinois. I also commend him on his valiant participation in this fight for fair representation in our State legislatures and in the Halls of Congress.

CORRECTION OF THE RECORD

Mr. DOUGLAS. Mr. President, this morning I found——

The PRESIDING OFFICER. The Chair understands that the Senator from Wisconsin has the floor and has yielded to the Senator from Maryland.

Mr. DOUGLAS. Then the Senator from Wisconsin must return to the Chamber and get back the floor?

The PRESIDING OFFICER. That is correct.

Mr. BREWSTER. Mr. President, I ask unanimous consent that I may be permitted to yield the floor to the Senator from Illinois under the same conditions that the Senator from Wisconsin yielded the floor to me.

The PRESIDING OFFICER. The Senator from Maryland does not have the authority to yield, unless he asks for recognition in his own right.

Mr. DOUGLAS. Mr. President, I should like to ask for recognition in my own right.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. DOUGLAS. Mr. President, I ask unanimous consent that I may be recognized, first to correct an error in the CONGRESSIONAL RECORD.

On page 21692 of the CONGRESSIONAL RECORD for September 21, 1964, I am made to say:

> The average allotment of inhabitants per senator would therefore be approximately 17,000.

The text should be 173,000, as is evident from the fact that the population of the State is 10,100,000 and 58 senators.

I ask that this may be corrected in the permanent RECORD.

The PRESIDING OFFICER. The correction will be made.

ORDER OF BUSINESS

Mr. PROXMIRE. Mr. President, it is my understanding that in yielding to the Senator from Maryland I did so with the understanding that I would not lose my right to the floor.

The PRESIDING OFFICER. The Senator is correct.

Mr. PROXMIRE. Mr. President, before I move to adjourn, I should like to have the parliamentary situation understood, that the senior Senator from Illinois [Mr. DOUGLAS] has received unanimous consent to be recognized after morning business tomorrow.

The PRESIDING OFFICER. That is correct.

ADJOURNMENT

Mr. PROXMIRE. Mr. President, I move that the Senate stand in adjournment until 12 o'clock noon tomorrow.

The motion was agreed to; and (at 5 o'clock and 5 minutes p.m.) the Senate adjourned until tomorrow, Wednesday, September 23, 1964, at 12 o'clock meridian.

NOMINATION

Executive nomination received by the Senate, September 22, 1964:

COAST AND GEODETIC SURVEY

Subject to qualifications provided by law, the following for permanent appointment to the grade indicated in the Coast and Geodetic Survey:

To be lieutenant

James G. Grunwell.

CONFIRMATION

Executive nomination confirmed by the Senate, September 22, 1964:

OFFICE OF ECONOMIC OPPORTUNITY

Robert Sargent Shriver, Jr., of Illinois, to be Director of the Office of Economic Opportunity.