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PROBLEMS OF PLEADING, PROOF AND PERSUASION IN A REAPPORTIONMENT CASE

*Alfred L. Scanlan**

Explanatory Comment

In the year which has elapsed since the Supreme Court's monumental decision in *Baker v. Carr*,[1] a constitutional ferment of the greatest dimensions has ensued. As the victorious attorney of *Baker v. 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."[2]

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.[3] The Supreme Court recently noted jurisdiction in eight cases involving either reapportionment of state legislatures or congressional redistricting.[4] 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.[5]

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

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1 369 U.S. 186 (1961).

2 Rhyne, One Year's Record In Reapportionment Results, address delivered before the New Jersey Institute of Municipal Attorneys, Newark, N.J., March 16, 1963, p. 1.

3 Washington Evening Star, March 24, 1963, p. B-3; Washington Post & Times Herald, March 24, 1963, p. C-1. The National Municipal League compiles a monthly list of cases on reapportionment which, plus the League's several other publications on reapportionment, are useful in keeping track of recent developments.

4 WMCA, Inc. v. Simon, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 460) (N.Y.); Wesberry v. Vandiver, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 507) (Ga.); Reynolds v. Sims, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 508) (Ala.); Vann v. Frink, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 540) (Ala.); Maryland Committee for Fair Representation v. Tawes, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 554) (Md.); McConnell v. Frink, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 610) (Ala.); Davis v. Mann, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 797) (Va.); Wright v. Rockefeller, *prob. juris. noted,* 31 U.S.L. Week 3404 (U.S. June 10, 1963) (No. 950) (N.Y.). The three Alabama cases, Nos. 508, 540 and 610, have been consolidated for argument before the Court. 31 U.S.L. Week 3407 (U.S. June 10, 1963).

The Court also has before it a petition for certiorari in the Michigan reapportionment case, Beadle v. Scholle, *petition for cert. filed,* 31 U.S.L. Week 3147 (U.S. Oct. 15, 1962) (No. 517).

5 Gray v. Sanders, 372 U.S. 368 (1963), *affirming the result but not the decree,* Sanders v. Gray, 203 F. Supp. 158 (N.D. Ga. 1962). The equally archaic Maryland unit rule statute has been declared unconstitutional by an uncontested order of a three-judge court for the District of Maryland; the order also permanently enjoined the state election officials from certifying as successful nominees candidates for the office of Governor, U.S. Senator, and other state-wide offices, who do not receive a plurality of the votes cast in the primary election. Baltimore Morning Sun, May 11, 1963, p. 30.

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 stimulae 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.'"[6]

However, the lawyer has proved to be the infantryman of this war. The late Robert Jackson once remarked that America believes in "government by law suit." 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 fourteenth 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.[7] 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,*[8] a case decided two 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

6 Sindler, *Baker v. Carr: How to Sear the Conscience of Legislators,* 72 YALE L.J. 23, 38 (1962).

7 For a discussion of the constitutional issues involved, compare Professor Dixon's preference for the due process provision over the equal protection clause as the basis for arguing most effectively against unfair representation, with Professor Hanson's leanings toward equal protection as the standard to be applied. Dixon, *Apportionment Standards and Judicial Power, infra* at 367, and Dixon, *Legislative Apportionment and the Federal Constitution,* 27 LAW & CONTEMP. PROB. 329 (1962); Hanson, *Courts in the Thicket, The Problem of Judicial Standards in Apportionment Cases,* 12 AM. U. L. REV. 51, 79 (1963).

8 33 N.J. 1, 161 A.2d 705 (1960).

Constitution, even though it also indicated, without deciding the point, that the malapportionment under attack violated the fourteenth 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.[9] As the Supreme Court of Oklahoma observed in *Jones v. Freeman:*[10]

> It might be well to point out that in 1938, the courts of twenty-two 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 fourteenth 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.[11] 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.[12]

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.[13] The decision of such a court is directly appealable to the United States Supreme Court.[14] 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,*[15] 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

9 Some of the earlier cases are collected and referred to in Annot., 2 A.L.R. 1337 (1919).

10 193 Okla. 554, 146 P.2d 564, 570 (1943).

11 Md. Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962); Scholle v. Hare, 369 U.S. 429 (1962); Sweeney v. Notte, 183 A.2d 296 (R.I. 1962).

12 See Judge Henderson's dissenting opinion in Md. Comm. for Fair Representation v. Tawes, *supra* note 11, at 676; see also, Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (1956), *appeal dismissed,* 352 U.S. 920 (1956), where the state law of remedies was upheld by the Supreme Court's dismissal of the appeal.

13 See, *e.g.,* Sanders v. Gray, 203 F. Supp. 158 (N.D. Ga. 1962) (striking down the Georgia unit rule); Moss v. Burkhart, 207 F. Supp. 885 (W.D. Okla. 1962) (declaring the existing apportionment of the Oklahoma Senate and House to be in violation of the equal protection clause); and Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962) (declaring the existing apportionment laws in Georgia to be unconstitutional, but giving the Georgia legislature another opportunity to rectify the constitutional defects before entering a final order).

14 28 U.S.C. § 1253 (1958).

15 201 F. Supp. 535 (D. N.D. 1962).

to pass upon questions arising under the North Dakota reapportionment provisions found in the State Constitution.[16]

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.[17]

The universal rule is that a court will not pass upon a constitutional issue in an action prematurely brought.[18] 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.[19]

Disappointment at this type of delayed ruling is eased, however, when the court, as it did in *Lisco v. McNichols*,[20] 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 decree 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 fourteenth amendment, the apportionment advocate may have a difficult decision to make. In the Georgia unit rule case, for example, the legislature of Georgia amended

16 Contrast Lisco v. McNichols, 208 F. Supp. 471 (D. Colo. 1962), where a three-judge court rejected an argument for federal abstention since the Colorado Supreme Court had postponed further hearing on the reapportionment case pending in that tribunal, with Remmey v. Smith, 102 F. Supp. 708 (E.D. Pa. 1951), a pre-*Baker* case, where a federal court deferred to the possibility of an available state remedy. The federal abstention argument was specifically rejected in Mann v. Davis, 213 F. Supp. 577 (E.D. Va. 1962), and this is one of the questions presented in the current appeal to the Supreme Court, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 797). See Dixon, *Apportionment Standards and Judicial Power, infra* at 367, 372.

17 For example, the Maryland reapportionment action was instituted in the Circuit Court for Anne Arundel County on August 12, 1960, although the relief sought was directed at the elections to be held in the fall of 1962. Even at that, the Circuit Court of Appeals did not finally decide the question of representation in the State Senate until September 25, 1962. Md. Comm. for Fair Representation v. Tawes, 229 Md. 406, 184 A.2d 715 (1962).

18 Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

19 See Baker v. Carr, *on remand*, 206 F. Supp. 341 (M.D. Tenn. 1962); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962); Magraw v. Donovan, 177 F. Supp. 803 (D. Minn. 1958); *In re* Legislative Reapportionment, 374 P.2d 66 (Colo. 1962).

20 208 F. Supp. 471 (D. Colo. 1962).

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 fourteenth amendment, a special session of the Maryland General Assembly was convened.[21] 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.[22] 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.[23]

The question of mootness appears to have arisen in the Michigan case now pending in the Supreme Court as *Beadle v. Scholle*.[24] 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 state-wide 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.[25] A case or controversy ends if the statute or constitutional provision which is the basis for the action or the conduct complained of is repealed or modified.[26]

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 dis-

21 Washington Evening Star, May 25, 1962, p. A-1.
22 Baltimore Morning Sun, June 1, 1962, p. 1; MD. ANN. CODE art. 40, § 42(a) (Supp. 1962).
23 Md. Comm. for Fair Representation v. Tawes, 229 Md. 406, 184 A.2d 715 (1962). However, part of the disadvantage, we believe, was eliminated by attacking on appeal, not only the representation in the Maryland State Senate, but also the representation provided in the General Assembly *as a whole*.
24 *Petition for cert. filed,* 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517).
25 Washington Evening Star, April 2, 1963, p. A-1.
26 Natural Milk Producers Ass'n v. San Francisco, 317 U.S. 423 (1942); Berry v. Davis, 242 U.S. 468 (1917). Though not wishing to prejudice any pending cases, it is not unlikely that the result of the state referendum has rendered the Michigan case moot. United States v. Alaska S.S. Co., 253 U.S. 113 (1920).

criminated against has long been established;[27] it is settled now, so far as reapportionment actions are concerned, by *Baker v. Carr.*

Plaintiffs in reapportionment cases may be residents,[28] taxpayers,[29] or voters.[30] 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.[31]

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,*[32] individual plaintiffs should be joined since associations and radio stations obviously are not voters.[33]

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 statute or constitution is acting ultra vires, and his actions may be enjoined.[34] 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 fourteenth 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, remain disinclined to act in a reapportionment case if there is any reasonable possibility

27 Smith v. Allwright, 321 U.S. 649 (1944). Indeed, a voter's standing to sue was settled at common law over 260 years ago. Ashby v. White, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703).

28 Magraw v. Donovan, 159 F. Supp. 901 (D. Minn. 1958).

29 Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960).

30 Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii 1956).

31 Concerning questions of standing, see Dixon, *Apportionment Standards and Judicial Power, infra* at 367, 371.

32 208 F. Supp. 368 (S.D.N.Y. 1962).

33 For example, in Maryland it is established that a corporation or association does not have standing in its own name to complain of legislative action which affects the rights of its members. Md. Naturopathic Ass'n v. Klorman, 191 Md. 626, 62 A.2d 538 (1948). For this reason, The Maryland Committee for Fair Representation may be the first plaintiff named in the complaint, but certainly it was not the only one. Ten other individuals, all voters, taxpayers and residents of the underrepresented urban and suburban areas, were carefully selected as party plaintiffs.

34 Cooper v. Aaron, 358 U.S. 1, 16 (1958).

that the legislature will do something about the situation.[35] Nevertheless, courts are not blind to the political facts of life; they will not ignore what "all others can see and understand."[36] 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."[37]

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, Tennessee, which contained the history of the failure of the Tennessee legislature, from 1901 through 1960, to reapportion as required by the state constitution.[38]

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."[39] 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 unyielding opposition to reasonable reapportionment, lest they thereby be denied the privilege of continuing minority rule in the Maryland General Assembly.[40]

If possible, then, the allegations of the complaint or petition should spell out to the fullest extent the past history of legislative inaction. 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.

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35 See, *e.g.,* Sweeney v. Notte, 183 A.2d 296 (R.I. 1962), where the Supreme Court of Rhode Island, in declaring the Rhode Island House of Representatives to be constituted in a manner violating the fourteenth amendment, nevertheless denied final relief, observing that they were not persuaded that their obligation to resolve the justiciable issues in the case was:

> so broad as to require us to hold that the superior court would be warranted in supervising reapportionment to the house of representatives, in the unlikely event that the general assembly should fail to do so. Such a declaration would be in the nature of mandamus by duress. In the light of the exclusive prerogative of the general assembly to apportion the membership of the house, we will respect the co-ordinate relationship existing between us.

36 Child Labor Tax Case, 259 U.S. 20, 37 (1922).

37 State v. Cunningham, 81 Wis. 440, 483, 51 N.W. 724 (1892).

38 369 U.S. 186, 191 & n.10 (1961).

39 Washington Post & Times Herald, Oct. 5, 1960, p. B-2.

40 Washington Evening Star, March 3, 1960, p. B-1; Baltimore Morning Sun, Dec. 12, 1950, p. 6. See also Tabor, *The Gerrymandering of State and Federal Legislative Districts,* 16 MD. L. REV. 277, 283 & n.29 (1956).

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,*[41] 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 of whether it *should,* not whether it *can,* afford injunctive relief.[42]

The lingering possibility of judicial abstention despite jurisdiction to act, suggests the importance of filing a fairly detailed "Brandeis-type" 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 plaintiff's counsel to resolve, is whether or not, following the defendant's answer, the 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.[43] 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.[44] These difficulties very likely could have been circumvented by use of the summary judgment procedure. One comprehensive affidavit, or several, with the pertinent appendices attached, could have placed before the

41 328 U.S. 549, 564 (1946).
42 Matthews v. Rodgers, 284 U.S. 521, 524-25 (1932).
43 Record, pp. 364, 369, 544, 562, WMCA, Inc. v. Simon, 208 F. Supp. 368 (S.D.N.Y. 1962).
44 *Id.* at 340.

WMCA court the same evidence that it rejected when it was offered as proof.[45]

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.[46] 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.[47] 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. . . .[48]

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 dis-

45 A federal court, of course, will apply the requirements of Federal Rule of Civil Procedure 56, which prescribes the summary judgment procedure to be followed in federal courts. Rule 56(e) requires affidavits in support of summary judgment to "set forth such facts as would be admissible in evidence." However, most of the evidence that would be offered to establish the existence of malapportioned representation is the type of which courts traditionally have taken judicial notice. Accordingly, there seems little risk that an affidavit filed in an apportionment case would be stricken on the grounds that the information it offers a court is inadmissible evidence.

46 In Delaware, the trial took a week and consumed nearly 750 pages of transcript. Sincock v. Duffy, 215 F. Supp. 169 (D. Del. 1963). However, after reading the record, I am convinced that all the proof put in by the Delaware plaintiffs could have been put in evidence either by affidavit or liberal use of the doctrine of judicial notice.

47 Wisconsin v. Zimmerman, 209 F. Supp. 183 (W.D. Wis. 1962).

48 Sims v. Frink, 205 F. Supp. 245, 247 (M.D. Ala. 1962).

criminatory.[49] 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 United States Census Bureau in *Tampa Electric Co. v. Nashville Coal Co.*[50] In other cases, courts have taken notice, not only of population statistics, but even of the comparative population ratings among different areas,[51] and the rapidity of the expansion in population of a particular area.[52]

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,[53] 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.[54] Even the mechanics of state legislative procedure represent information or facts of which a court may properly take judicial notice.[55]

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

49 Sanders v. Gray, 203 F. Supp. 158, 160 n.1 (N.D. Ga. 1962).
50 365 U.S. 320, 332 (1961). See *In re* B. P. Lientz Mfg. Co., 32 F. Supp. 233 (W.D. Mo. 1940).
51 NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir.), *cert. denied,* 321 U.S. 795 (1944).
52 Rice & Co. v. United States, 100 F. Supp. 468 (W.D. Mo. 1951), *aff'd,* 342 U.S. 937 (1952).
53 *E.g.,* Hall v. St. Helena Parish School, 197 F. Supp. 649, 653 (E.D. La. 1961), *aff'd,* 368 U.S. 515 (1962), where the trial court took judicial notice that 97.1% of the operating revenues of one parish were received from the State of Louisiana.
54 Blake v. United States, 103 U.S. 227 (1880); Rank v. Krug, 90 F. Supp. 773, 781-83 (S.D. Cal. 1950).
55 Griffin v. Sheldon, 11 Alaska 607, 78 F. Supp. 466 (D. Alaska 1948).

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.[56] 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.[57]

Maryland is no exception to the general situation; the debates on the floor of the General Assembly, committee reports and hearings are not published.[58] 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.

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.[59] On the other hand, the long continuing failure of a legislature to act has a significance which should not be ignored.[60] Moreover, the Supreme Court has told us on more than one occasion that the fourteenth amendment bars "ingenuous as well as ingenious discriminations."[61] 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.[62]

Here also, the difficulty which seemingly confronts the apportionment ad-

56 See Finley, Book Review, 24 IND. L. J. 328 (1949).
57 See NEWMAN & SURREY, LEGISLATION 652 (1955).
58 Meyer, *Legislative History and Maryland Statutory Construction,* 6 MD. L. REV. 311 (1941).
59 See Helvering v. Griffiths, 318 U.S. 371 (1943).
60 T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959).
61 Cooper v. Aaron, 358 U.S. 1, 17 (1958); Smith v. Texas, 311 U.S. 128, 132 (1940).
62 Wright v. Rockefeller, 211 F. Supp. 460 (S.D.N.Y. 1962), *prob. juris. noted,* 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 950).

vocate 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.[63] 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, who 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."[64] However, "there are limits to the extent of which the presumption of constitutionality can be pressed."[65] 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.[66] Accordingly, while numerical inequality 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.[67] 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 in 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 per cent of the population controlled the Georgia Senate.[68] Again, to argue, as petitioners did in the Maryland case, that the senator from one large county is elected by more people

63 See United States v. Elgin, J. & E. R.R., 298 U.S. 492 (1936).
64 Mann v. Davis, 213 F. Supp. 577, 584 (E.D. Va. 1962).
65 Skinner v. Oklahoma, 316 U.S. 535, 544 (1942).
66 *E.g.*, Mann v. Davis, 213 F. Supp. 577 (E.D. Va. 1962); Moss v. Burkhart, 207 F. Supp. 885, 891 (W.D. Okla. 1962). See Dixon, *Apportionment Standards and Judicial Power, infra* at 367, 380.
67 See the amicus curiae brief submitted by Montgomery County, Maryland, in support of the appeal to the Supreme Court of the United States in Md. Comm. for Fair Representation v. Tawes, *appeal filed,* 31 U.S.L. WEEK 3173 (U.S. Oct. 24, 1962) (No. 554). There, population projections are utilized to show that one of the grossly underrepresented suburban counties was increasing in population *each year* by an amount larger than the existing population of seven of the grossly overrepresented areas.
68 Abram, *A New Civil Right,* 52 NAT. CIVIC REV. 186, 187 (1963).

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

Remember also the clues which Justice Clark may have furnished in his concurring opinion in *Baker v. Carr*,[69] *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 areas 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 formulae 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."[70] On the other hand, an amicus curiae brief filed by the American Civil Liberties Union in the earlier case of *Magraw v. Donovan,*[71] through an appendix attached thereto, made a convincing showing of the practical consequences on city folk of rural domination of the legislature.[72]

69 369 U.S. 186, 251 (1961).

70 *Petition for cert. filed sub nom.* Beadle v. Scholle, 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517).

71 177 F. Supp. 803 (D. Minn. 1958).

72 Now that we suburban Marylanders are more alert to the problem, we are compiling an interesting record of the stalemated government furnished by a General Assembly where the lower house thereof is somewhat related to population, but where the state senate is based solely on area (with one conspicuous exception). As a consequence, when Md. Comm. for Fair Representation v. Tawes is argued before the United States Supreme Court, we will have ready an illuminating appendix contrasting the action and inaction of a rurally dominated Senate (14% elect a majority) to that of the House of Delegates, where 76% of the population are at least given 55% of the representation.

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.[73] 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.

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 short cuts in research, briefing or argument, 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 justiciability, with no real impact on substantive constitutional law.[74] 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.*"[75] 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 ten times the vote of another?"[76]

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73 David & Eisenberg, State Legislative Redistricting 8 (1962).
74 Bickel, *Durability of Colegrove v. Green,* 72 Yale L.J. 39, 45 (1962).
75 Cox, Current Constitutional Issues, Address delivered before the Tennessee Bar Ass'n, Nashville, Tenn., June 8, 1962; reprinted, 48 A.B.A.J. 711 (1962).
76 N.Y. Times (Western Ed.), March 21, 1963, p. 6.

Whatever the final answer, one can be sure that any renascence 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 Supreme 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.