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THE RIGHT TO VOTE AND JUDICIAL ENFORCEMENT OF SECTION TWO OF THE FOURTEENTH AMENDMENT*

Arthur Earl Bonfield[†]

I. THE PROBLEM

One of the fundamental challenges of our day is the preservation of our civil and political liberties from the encroachments of private and public bodies. To this end we set up civil rights commissions, enact civil rights legislation, and otherwise attempt to enforce those rights politically as well as in the courts.

Arguably the most fundamental of all these rights we enjoy is the right to vote. The possession of this privilege has made us a fortunate people in that we live under a government responsible to, and chosen by, those whose society it orders. The protection of the franchise as it is conceived in our framework of government should therefore be of great concern to us all, causing us to resist with utmost vigor any diminution of this right beyond that constitutionally sanctioned. Through preservation of its integrity we insure responsible democratic government, which, allowing for imperfections, continues to represent the people.

Various provisions in our Constitution endeavor to regulate, guarantee and safeguard this valuable right. Most of them have been amply commented on and sufficiently litigated so that their utility, both in fact and theory, is reasonably clear. This paper will attempt to explore a hitherto uncharted area of franchise regulation, an area based on a guarantee by indirection.

The second section of the fourteenth amendment is one of the few provisions of the Constitution which no one has seriously attempted to enforce through judicial action.¹ It is potentially one of the most powerful sections of our fundamental law available to counter the wholesale disfranchisement of many classes of our population, and stands as a powerful inducement to the achievement of universal suffrage among our adult citizenry.

The ease with which states are able to deny the franchise to persons

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[†] See contributors' section, masthead p. 138, for biographical data.

¹ This statement is not completely accurate since one attempt to enforce § 2 was made in *Saunders v. Wilkins*, 152 F.2d 235 (1945), cert. denied, 328 U.S. 870 (1946), discussed at length, text accompanying note 124 infra.

on account of their race, and thus circumvent the fifteenth amendment, has been amply demonstrated. The poll tax, literacy test, and other similar qualifications imposed on the exercise of the franchise, seem under present case law to be invincible in their "non-discriminatory" format. The provision of the fourteenth amendment discussed here may provide a remedy for this situation. It is not directed solely at the Negro or the South, for a certain amount of disfranchisement occurs in almost all areas of the union. It is aimed at inducing the enfranchisement of all citizens over twenty-one, regardless of their race, literacy or economic status.

This article will attempt to demonstrate how that provision would operate to secure these objectives. After a full discussion of its history and objectives, an attempt will be made to formulate a workable plan whereby section 2 of the fourteenth amendment can be enforced and its potential realized. The problems engendered by any such proposal are, of course, numerous and complex. Each of them will, therefore, be as thoroughly explored as space permits, and a solution ventured.

II. THE BACKGROUND

Facing the 39th Congress when it convened in 1865 after the Civil War, was the urgent problem of insuring that the new representational power resulting from the thirteenth amendment's abolition of slavery² did not rebound to the old southern leadership. This, the leaders of the controlling Republican party felt, could be accomplished in either of two ways. They could either reduce southern representation in Congress to offset the projected increase from the effects of the thirteenth amendment,³ or enfranchise the Negro who was bound, they reasoned, to vote for his Republican saviors.⁴ While the precise motives of the individuals engaged in the drafting and adoption of section 2 of the fourteenth amendment are difficult to define, it is fair to say on the basis of the evidence that both these objectives were sought by the provision as finally ratified.

Early proposals basing representation in the House on legal voters⁵

² The thirteenth amendment by abolishing slavery removed the class of people "all other persons," thereby ending the 3/5 compromise of article I, section 3 (Elk v. Wilkins, 112 U.S. 94, at 101-02 (1884)), all former slaves thereafter to be counted as whole persons for purposes of apportionment.

³ Flack, *The Adoption of the 14th Amendment* 98 (1908), felt that this objective was foremost in the mind of Congress when it adopted § 2, the desire to insure the Negro's ballot being only a secondary objective at best.

⁴ James, *The Framing of the 14th Amendment* 33 (1950), feels that this objective was primary in the drafting of § 2, thus disagreeing with Flack, *supra* note 3.

⁵ Cong. Globe, 39th Cong., 1st Sess. 9-10 (1865) (proposals introduced by Representatives Schenck and Stevens).

were almost immediately discarded as being politically inexpedient.⁶ Other measures, basing representation on population reduced by disfranchised Negroes,⁷ were ultimately considered by the Joint Committee on Reconstruction,⁸ which held its first meeting on January 9, 1866.⁹ After successive amendments in committee, a final text was reported to the House on January 31.¹⁰ Though the resolution was adopted in the House by the required two-thirds vote necessary for a constitutional amendment,¹¹ it failed in the Senate.¹² The failure of this first attempt at a fourteenth amendment is attributable to certain deficiencies in the proposed solution to the voting-representation problem. First, in the minds of some, the proposed measure seemed to sanction the right of states to disfranchise because of race and only suffer the prescribed penalty. Second, "the radicals correctly reckoned that the dominant race by imposing educational and property qualifications for voting, (for which no penalty was imposed by the first measure), would disfranchise a sufficient number of the Negroes to retain control of the South."¹³ A third reason probably contributing to its failure was the extreme penalty of exclusion of all Negroes from the apportionment when the right to vote of just one was denied.

Particularly noteworthy of this first attempt at solving the representational problem posed by the newly emancipated Negro, was the provision for reduction of a state's representation solely when that state denied or abridged the right to vote for reasons of race. This was the origin of the substantial loophole in the law furnishing the second objection to the scheme as initially proposed,¹⁴ and greatly contributed to its ultimate defeat.¹⁵

The Joint Committee on Reconstruction in reconsidering a solution to the problem, at first adopted a measure substantially identical to the

⁶ Cong. Globe, 39th Cong., 1st Sess. 141, 357 (1866) (remarks of Representative Blaine; Representative Conkling).

⁷ Cong. Globe, 39th Cong., 1st Sess. 134-36 (1866) (Representatives Pike and Blaine).

⁸ *Id.* at 535 (report by Representative Stevens).

⁹ Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 37 (1914) [hereinafter cited as Kendrick, *Journal*].

¹⁰ Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed: Provided, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation.

Joint Resolution 51, 39th Cong., 1st Sess. (1866). Cong. Globe, 39th Cong., 1st Sess. 535 (1866).

¹¹ Cong. Globe, 39th Cong., 1st Sess. 538 (1866).

¹² Cong. Globe, 39th Cong., 1st Sess. 1289 (1866).

¹³ Kendrick, *Journal* 295 (1914).

¹⁴ Cong. Globe, 39th Cong., 1st Sess. 358, 376 (1866) (remarks of Representatives Rodgers & Conkling; Representative Jenckes).

¹⁵ See *supra* note 13.

one that failed,¹⁶ but soon displaced it in favor of a new measure¹⁷ which was the one ultimately reported to the House¹⁸ and, with some additions, adopted as section 2 of the fourteenth amendment. It read:

Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.¹⁹

Unfortunately, no report of the discussion accompanying the adoption of this form by the Committee is available. This is especially unfortunate in light of the dramatic changes and innovations embodied in this measure.

This was the first proposal acceptable to the Committee which did not contain the words race or color as a limitation on the types of discrimination for which the penalty could be invoked. It was also the first measure that did not exclude in counting for apportionment purposes all Negroes in a state, for the deprivation of the right of suffrage of just one on racial grounds. Two of the deficiencies of the earlier defeated proposal were thus cured. Interestingly, section 1 of that amendment, which has emerged as one of the most important provisions of our Constitution, was added at this time almost as an afterthought,²⁰ present section 2 being deemed the more important contribution by its framers.²¹

The report of the Committee²² indicates that the measure had a dual purpose. First, it was directed at preventing any political advantage from accruing to the old southern leadership by virtue of the emancipation of the slaves. Second, it was aimed at insuring that "the rights of these persons by whom the basis of representation had been increased should be recognized by the general government." The report continues, pointing out that the reason the reduction formula was utilized was that the states would not consent to surrender their power over the franchise. Hence, the choice of dealing with the problem by indirection.

¹⁶ Kendrick, *Journal* § 3, at 90-91.

¹⁷ *Id.* at 101-02.

¹⁸ *Cong. Globe*, 39th Cong., 1st Sess. 2286 (1866).

¹⁹ Kendrick, *Journal* 102; *Cong. Globe*, 39th Cong., 1st Sess. 2286 (1866).

²⁰ Note the complete absence of anything like section 1 in the first proposal reported to Congress, *supra* note 10.

²¹ *Cong. Globe*, 39th Cong., 1st Sess. 2459, 2510 (1866) (Representatives Stevens; Miller).

²² Report of the Joint Committee on Reconstruction, 2 Reports of Committees, 39th Cong., 1st Sess. XIII (1865-6).

A careful reading of the Committee's official explanation of its work indicates no particular intention to limit the imposition of the penalty solely to cases where the basis of discrimination is "on account of race or color." These quoted words were omitted from this new proposal sent to Congress apparently because of the objection previously discussed—that they would enable circumvention of the congressional purpose via imposition by the states of unpenalizable educational or property qualifications.²³ Though the plight of the Negro was the chief concern of the drafters of section 2, nothing in the words of the Committee report precludes the most natural interpretation of the amendment, one consonant with a literal reading of its terms. That interpretation is, that all citizens over twenty-one whose franchise is denied or abridged *for any reason whatsoever*, are to be protected by indirection. Conversely, the states are to be protected against each other's political power to the extent that that power is derived from such disfranchised persons. The debates in Congress over the adoption of the Committee's resolution clearly indicate that this was the intention of that body in approving section 2 of the fourteenth amendment. They make clear that any abridgment of the franchise of citizen-inhabitants over twenty-one, regardless of whether it is grounded on race, education, or property, is to be penalized.²⁴ The proposed amendment being adopted with slight modifications²⁵ by the required two-thirds vote of both Houses,²⁶ it was ratified by three-fourths of the states to become section 2 of the fourteenth amendment.²⁷

Pressure for the enforcement of section 2²⁸ led to the enactment in the second session of the 42d Congress (1871-2) of a general implementing statute.²⁹ It reads: ³⁰

²³ See *supra* note 13.

²⁴ In the House, Cong. Globe, 39th Cong., 1st Sess. 2459, 2510, 2511, 2539-40 (1866) (Representatives Stevens, Miller, Elliot & Farnsworth); in the Senate, *id.* at 3026, 3033, 2767 (Senators Cowan, Henderson, Clark & Howard); the defeat of Senator Doolittle's amendments at 2986 and 2991 demonstrate this by negative implication.

²⁵ Added were the words "when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive, and judicial officers of a State, or the members of the Legislature thereof." Cong. Globe, 39th Cong., 1st Sess. 3038, 3041 (1866). They were added so the penalty could not be invoked in lesser elections, *i.e.*, school-district or justice-of-the-peace elections. Cong. Globe, 39th Cong., 1st Sess. 3039 (1866) (Representative Howard). Note also the substitution of the word "inhabitants" for "citizens" in the phrase "denied to any of the male inhabitants of such state, . . ."

²⁶ Cong. Globe, 39th Cong., 1st Sess. 2545 (1866) (House); the House concurred in the Senate's amendment at 3148-49, the Senate at 3042.

²⁷ Certified as ratified on July 28, 1868, Constitution, Annotated 45 (Corwin ed. 1952).

²⁸ Cong. Globe, 41st Cong., 2d Sess. 523, 552 (1870) (Representatives Judd & Paine); Cong. Globe, 42d Cong., 2d Sess. 64-65 (1871) (Representative Willard).

²⁹ 17 Stat. 29 (1872), Rev. Stat. § 22 (1875), 2 U.S.C. § 6 (1958).

³⁰ As substituted into positive law by the Revised Statute of 1875, § 22, now found in 2 U.S.C. § 6 (1958).

Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, article 14, section 2, except for participation in the rebellion or other crime, the number of Representatives apportioned to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

Those supporting the measure clearly were convinced that it, as well as the second section of the fourteenth amendment, would and did apply to all abridgments and deprivations of the franchise, whether such restrictions arose by virtue of an educational or property qualification, or by reason of race.³¹ Indeed, the amendment was probably enforced on this basis in the apportionment of 1872,³² although no penalty was imposed on any state due to the insufficient numbers disfranchised (or inability to find accurate figures substantial enough to impose a penalty).³³

Section 2 has never been enforced since that time, though attempts by individual Congressmen to make the apportionment of representatives conform to its mandate have not been lacking.³⁴ The hot political nature of such proposals has doomed them to failure.

A few have disagreed with the idea that section 2 was intended to apply to cases where the disfranchisement or abridgment was due to educational or property qualifications as well as to race.³⁵ In maintain-

³¹ Cong. Globe, 42d Cong., 2d Sess. 64-65, 83, 81, 35, 610 (1871) (remarks of Representatives Willard, Shellabarger, Garfield & Trumbull). Note that Representatives Shellabarger and Garfield, and many others, were also in Congress when both the second section of the fourteenth amendment as well as the fifteenth amendment were enacted. Biographical Directory of American Congress (1958). Compare id. at 290-98 with 318-25 and 299-308.

³² Note the concurrence of the House to the Senate's amendment to the apportionment bill enforcing § 2, Cong. Globe, 42d Cong., 2d Sess. 713 (1872), after the Senate purported to apply § 2, finding, however, that on the basis of the figures it had, no penalty was warranted. Cong. Globe, 42d Cong., 2d Sess. 617, 670 (1872) (Senators Thurman & Morrill); but see id. at 82-83 (1871) (Representative Garfield—"we are bound to take this report into account," i.e., the number disfranchised).

³³ Cong. Globe, 42d Cong., 2d Sess. 670 (1872); also id. at 83 (1871).

³⁴ 11 Cong. Rec. 1184, 1189, 1192, 1273; 13 Cong. Rec. 1233 (1882) (Representative Prescott); H. Rep. No. 2130, 56th Cong., 2d Sess. 121-46 (1900) (Representative Crumpacker's dissent); 34 Cong. Rec. 556, 600-01 (1901) (Representative Shattuc); id. at 67-75 (Appendix), 517, 607-09, 652 (Representatives Crumpacker, Olmstead, Lacey); 40 Cong. Rec. 3885-94 (1906) (Representative Keifer). 60 Cong. Rec. 1682 (1921); 61 Cong. Rec. 6311-12 (1921); 69 Cong. Rec. 3727-32 (1928); 70 Cong. Rec. 1597 (1929); 71 Cong. Rec. 2271-3, 2348, 2364 (1929) (all remarks by Representative Tinkham). (See also Representative Tinkham's efforts on this matter in Hearings before the Committee on the Census and Apportionment, 63d Cong., 3d Sess. 97-115 (1920); id. at 28, 35, 68, for statements by others pro-enforcement.) 103 Cong. Rec. 13461-65 (1957) (Senator McNamara); 105 Cong. Rec. 2455-56 (1959) (Senator McNamara); 106 Cong. Rec. 5749 (daily ed. March 21, 1960) (statement by Representative Bentley who had a short study of § 2 entered in the Record.)

³⁵ Blaine, *Twenty Years of Congress* 418 (1884-86); 1 Sherman, *Recollections of Forty Years in the House, Senate and Cabinet* 450-51 (1895) (both authors in Congress when the fourteenth amendment was passed); Maurer, "Congressional and State Control of Elections Under the Constitution," 16 *Geo. L.J.* 314, 338 (1928); O'Neal, "Power of Congress to Reduce Representation in the House of Representatives and in the Electoral College," 181 *N. Am. Rev.* 530 (1905).

ing that the penalty provided was only to be invoked where the disfranchisement or abridgment was directly due to the race of the deprived party, they concluded that the fifteenth amendment repealed section 2. Their position does not withstand analysis.³⁶ In the first place, the legislative history clearly demonstrates that the consensus of those who enacted both section 2 and present section 6 of 2 U.S.C. (1958) was that they are not so limited.³⁷ It was clear to them that if the provision were to be drawn so narrowly, it could easily be circumvented.³⁸ This they sought to avoid. The language of section 2 supports a far broader construction than these dissenters contend for. Also clear is the fact that the members of Congress who passed the fifteenth amendment did not think, nor intend, that it should in any way effect section 2.³⁹ This, since a somewhat similar Congress,⁴⁰ a year *after* the proclamation of the fifteenth amendment⁴¹ enacted a statute implementing section 2.⁴² The language of the fifteenth amendment⁴³ in no way indicates or suggests any adverse effects by it on the fourteenth.

The Supreme Court has indicated in dictum that the right to vote intended to be protected by section 2 was the right of the franchise as established by the laws of the several states.⁴⁴ In this the Court would seem clearly in error, for the legislative history demonstrates that it was just that qualification of electors by state law that the provision was aimed at discouraging. To be noted in this connection is the defeat of a measure basing representation on electors qualified by state law proposed just prior to the adoption of section 2,⁴⁵ as well as the rejection of the first proposed amendment because of the ability of states to impose educational or property qualifications on the electorate without being penalized.⁴⁶ The absurdity of this position is illustrated by the fact that if adhered to, a state restricting suffrage to whites only, before the passage of the fifteenth amendment, would not have been acting

³⁶ 2 Willoughby, *Constitution* 626 (2d ed. 1929); Wise, *Citizenship* 232 (1906) (both support the broader, historically more accurate, construction contended for here).

³⁷ See notes 24 & 31 *supra*.

³⁸ See notes 13 & 14 *supra*.

³⁹ No mention of § 2 is made in the debates in Congress on the adoption of the fifteenth amendment. *Cong. Globe*, 40th Cong., 3d Sess. XVI (1869) (pages where debate on the amendment appear are listed under Senate Joint Resolution No. 8).

⁴⁰ *Biographical Directory of the American Congress* (1958). Compare 299-308 with 318-25. See also 290-98 for a comparison of those in Congress when § 2 was passed.

⁴¹ The fifteenth amendment was certified as ratified March 30, 1870. *Constitution*, Annotated 47 (1952).

⁴² 17 Stat. 29 (1872), 2 U.S.C. § 6 (1958).

⁴³ "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

⁴⁴ *McPherson v. Blacker*, 146 U.S. 1, 39 (1892).

⁴⁵ *Cong. Globe*, 3th Cong., 1st Sess. 2986, 2991 (1866) (Senator Doolittle's amendment).

⁴⁶ See notes 13 & 14 *supra*.

within the penalizable scope of the section, because, by this view, the penalty could only be invoked when the franchise as granted by state law was denied or abridged. Nothing could be more inconsistent with the intentions of the framers of section 2.

This provision of our Constitution, therefore, directs in mandatory language (unlike the permissive language of the last sections of the thirteenth, fourteenth and fifteenth amendments giving to Congress power to enforce them) that whenever the right to vote of any adult citizen-inhabitant is denied or abridged, for any reason whatsoever, excepting only participation in rebellion or other crime, that that state's representation shall be proportionately reduced. Congress has no discretion in the matter and no enforcing legislation seems necessary. The fifteenth amendment in prohibiting any state from denying the franchise on account of race merely added an additional penalty, that of unconstitutionality, to that already imposed by section 2. The two amendments and remedies provided therein are not inconsistent, the penalty of section 2 being necessary and valuable as an alternative remedy to disfranchisement by a state because of race. Even if this argument fails to convince, the most that can be said is that the fifteenth amendment repealed section 2 to the extent of withdrawing the penalty in a case where the deprivation is based solely on race. It remains the only remedy in cases where the disfranchisement is grounded on reasons other than race, in which area the fifteenth amendment cannot be deemed to have even an arguable application.

The nineteenth amendment would seem to have abrogated the word "male" in section 2. While the original intent underlying the adoption of section 2 was to permit the disfranchisement of females as such without penalty, the addition of the nineteenth amendment to the Constitution implicitly reversed that policy by declaring that the franchise could not be denied because of one's sex.

Practically all qualifications imposed on the exercise of the franchise constitute deprivations or abridgments within the contemplation of section 2. The most common are the poll tax and literacy test.⁴⁷ The language of the provision would prohibit such qualifications since it uses the words "abridge" (to diminish, lessen, curtail, reduce in compass or to deprive)⁴⁸ and "deny" (refuse to recognize or acknowledge as having a certain claim, refuse to grant).⁴⁹ The word abridge imports depri-

⁴⁷ 2 Willoughby, *Constitution of the U.S.* 626 (2d ed. 1929) (they are abridgments); Wise, *Citizenship* 232 (1906); 2 Watson, *The Constitution of the United States* 1652 (1910) (they might be abridgments).

⁴⁸ 1 *A New English Dictionary* 33 (1888).

⁴⁹ 3 *A New English Dictionary* 201 (1888).

vation or diminishment at a particular instant regardless of future changes in that condition. Clearly, also, any individual able to vote by meeting these qualifications, such as a poll tax or literacy test, has not suffered a denial or abridgment of his franchise.⁵⁰

Prerequisites to voting based on residence within a state for specified periods (but not within a political subdivision) might be excluded from the scope of section 2. They may be said to operate merely as objective determinations of whether an individual is an inhabitant of the state for purposes of that provision, the penalty for which, it will be remembered, may only be invoked where "inhabitants" of a state are disfranchised. This construction, however, presupposes that varying state definitions of resident ("inhabitant") are incorporated by reference in the federal constitutional provision. This is unsatisfactory since the word "inhabitant" would have 50 different meanings and be subject to state whim (*e.g.*, a state might establish a ten-year residence requirement). Further, it is unlikely that the framers of section 2 intended such a result, their purpose in inserting the word "inhabitant" being solely to insure that no state is penalized for deprivations or abridgments worked on anyone other than bona fide residents. The better view would construe "inhabitant" as a word of art with an independent federal meaning—a more than appropriate position for the interpretation of a constitutional provision. All specific state periods of residence are, as a result, denials or abridgments to the extent that they exceed federal requirements imposed by the word "inhabitant." Inhabitancy in a state under federal law has been determined in the context of the diversity of citizenship provision,⁵¹ which construction is persuasive here. Those cases have defined a citizen of a state (by virtue of section 1 of the fourteenth amendment, an American citizen residing in the state) as one who has removed himself to that state (regardless of how long he has been there) with intent to be a bona fide resident.⁵² For this reason, any specific period of residence imposed by a state as a prerequisite to the franchise is, except as a rebuttable evidential presumption, an abridgment of the franchise within the terms of section 2. However, the requirement that an elector must register to cast his ballot is not an abridgment but a technical regulation of elections, not unlike require-

⁵⁰ Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (remarks of Representatives Stewart & Howard).

⁵¹ 72 Stat. 415, 28 U.S.C. § 1332 (1958).

⁵² *Williamson v. Osenton*, 232 U.S. 619 (1914); *Morris v. Gilmer*, 129 U.S. 315 (1889); *Paudler v. Paudler*, 185 F.2d 901 (5th Cir. 1950), cert. denied, 341 U.S. 920 (1951); *Cooper v. Gilbraith*, 6 Fed. Cas. 472 (No. 3193) (C.C.D. Pa. 1819); *Ellis v. Southeast Constr. Co.*, 158 F. Supp. 798 (W.D. Ark.), reversed on other grounds, 260 F.2d 280 (8th Cir. 1958).

ments dictating the form of the ballot or the hours during which votes may be cast.⁵³

Because a requirement like the poll tax is not an abridgment under section 1 of the fourteenth amendment⁵⁴ (privileges and immunities), it does not follow that it fails to abridge the right to vote as protected by section 2.⁵⁵ Each state may impose prerequisites to the franchise⁵⁶ so long as they do not conflict with the fifteenth and nineteenth amendments. Yet these prerequisites still create denials or abridgments to the extent that they inhibit the right to vote of citizens-inhabitants over twenty-one, and are therefore within the penalizable scope of section 2. The rejection of an amendment proposed by Senator Doolittle which would have based the apportionment on male citizens qualified by state law reinforces this view.⁵⁷

Malapportionment intrastate should also be considered an abridgment of the franchise within the scope of this provision, since the ballot of those electors residing in grossly overpopulated districts is worth only a fraction of that of an elector residing in an underpopulated district.⁵⁸ Dilution of the ballot being the equivalent of its abridgment,⁵⁹ all adult citizen-inhabitants residing in grossly overpopulated districts should be considered in imposing the prescribed penalty. Section 2 was directed at achieving almost universal suffrage. Such a goal by its very nature contemplates substantial equality among the ballots of each elector, since in the absence of such equivalence the few will control the outcome of the election, thereby negating in fact the existence of such universal suffrage. This is a compelling reason to apply the provision to malapportionment intrastate. Such an application would advance the general purpose of the framers, though the legislative history indicates no intent to include this particular type of action within the term "abridge." This lack of specific intent should not disturb the conclusion urged here, for the legislature could not have been expected to foresee all the possible

⁵³ Representative Shellabarger, who was in Congress at the time of the passage of present § 2, during the debates on enforcement of that provision which led to the enactment of 17 Stat. 29 (1872), 2 U.S.C. § 6 (1958), made remarks to this effect as to both residence and registration requirements. Cong. Globe, 42d Cong., 2d Sess. 81 (1871).

⁵⁴ *Breedlove v. Suttles*, 302 U.S. 277 (1937).

⁵⁵ In so far as *Saunders v. Wilkins*, 152 F.2d 235, at 237 (1945), intimates otherwise, it would seem to be in error.

⁵⁶ U.S. Const. article I, § 2.

⁵⁷ Cong. Globe, 39th Cong., 1st Sess. 2986, 2991 (1866).

⁵⁸ This argument was rejected rather unconvincingly in *Daly v. County of Madison*, 378 Ill. 357, 365-66, 38 N.E.2d 160, 165 (1941). See note 61 for evidence of a court inclination to construe the provision in the way suggested in the text.

⁵⁹ Cases such as *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Mosley*, 238 U.S. 383 (1915); *Ex parte Siebold*, 100 U.S. 371 (1880), which consider dilution of the ballot, as granted by article 1, § 2, equivalent to its denial or abridgment—support this conclusion.

applications of its proposal. It is enough in considering any potential application that the general spirit and purpose of the measure is adhered to.⁶⁰ And clearly the penalization of a scheme such as intrastate malapportionment, which makes possible the virtual exclusion of whole classes of the population from an effective franchise, is within the spirit and purpose of the amendment no less than educational or property qualifications. It is no objection to this equation of dilution of the ballot resulting from such intrastate malapportionment with the abridgments contemplated by the drafters of section 2, to suggest that it would mean penalizing state A for abridgments perpetrated in state B, since the ballots of the electors in A would otherwise be diluted. This argument fails by its misapplication of the remedy which must be applied solely to the state where the initial disfranchisement occurred, thereby correcting the inequality.

Any attempt to limit the compass of the words denial or abridgment solely to instances where citizen-inhabitants over twenty-one have actually attempted to vote, and have been rejected, should be strenuously resisted. Such a construction would thwart the basic purpose of the provision which was to prevent disfranchisement in fact. An attempt to vote and subsequent rejection are merely evidence of an abridgment, though of the most conclusive sort to be sure. The person who would have been kept from the ballot box had he attempted to use it is no less deprived of the franchise than the person who subjects himself to an actual rejection.⁶¹

Though section 1 of the fourteenth amendment requires state action as a prerequisite to its application,⁶² section 2, as a reading will disclose, is seemingly unencumbered by that requirement. Though the Supreme Court has often made the general pronouncement that the fourteenth amendment requires state action and is not applicable to the actions of private persons, it has referred solely to section 1.⁶³

The legislative history may be construed as indicating the intention of the framers to limit the penalty to cases of state action.⁶⁴ On the

⁶⁰ The fourteenth amendment "is to be construed liberally, to carry out the purposes of its framers." *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880). And see *Sweezy v. New Hampshire*, 354 U.S. 234, 266 (1957); *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *Maxwell v. Dow*, 176 U.S. 581, 602 (1900).

⁶¹ See *Thornhill v. Alabama*, 310 U.S. 88 (1940), giving support to the point of view that legal relations can be altered in the abstract by the mere presence of a statute without any necessity of an actual application in the particular case.

⁶² *United States v. Williams*, 341 U.S. 70, 92 (1951) (Mr. Justice Douglas' dissent); *Shelly v. Kraemer*, 334 U.S. 1 (1948); *Civil Rights Cases*, 109 U.S. 3 (1883); *Ex parte Virginia*, 100 U.S. 339 (1880). Section 1 reads: "No State shall . . . nor shall any State . . ."

⁶³ A study of the cases in note 62, *supra*, partly demonstrates this.

⁶⁴ *Cong. Globe*, 39th Cong., 1st Sess. 2459, 2498, 2510, 2939 (1866) (remarks of Representatives Stevens, Broomall, Miller, Hendricks).

other hand, it can be argued that the frequent and specific references to the state as the abridgor were due solely to the fact that its actions were the primary, but not the only target of the legislature's efforts. This line of reasoning is supported by the language of the section itself, as well as the failure of an earlier proposal in committee which by its terms would have required state action for the invocation of its penalty.⁶⁵

In line with the provision's underlying purpose of inducing universal suffrage, it would be inconsistent to limit its application to state action since the ballot may be effectively denied by private action. Even if the drafters intended to restrict the operation of the section to state action, could not that specific intent be overlooked in an effort to enforce the overriding purpose of their work? This argument gains force from the fact that the language of the provisions does not compel the imposition of this requirement. Section 6 of 2 U.S.C. (1958) is inconsistent with section 2 in that its effect is limited solely to instances of state action, thus reflecting the feeling of Congress that such action was a prerequisite to penalization. The preferred view, however, would still be in accord with a literal reading of the provision which does not require state action.

Assuming state action is necessary to activate section 2, acts of the state, or its agents under color of law, would come within the compass of such a requirement,⁶⁶ whether effected by statute or unjust administration of the law. State action should also include wholesale coercion and intimidation by members of the community though acting in their private capacities,⁶⁷ despite the fact that the wrongful acts of individuals unsupported by state action are usually merely private wrongs.⁶⁸ This latter inclusion in "state action" can be grounded on the assumption that the state by failing to prevent such coercion and intimidation tacitly approves and lends its support to such action. This assumption would not be sound where coercion or intimidation is isolated and infrequent. In such cases the state cannot realistically be expected to do anything more than punish culprits after the fact. However, it easily could, and is properly under a duty to prevent such incidents when they occur frequently on a widespread systematic level.

The closest the Supreme Court ever cleaved to an equivalence of such private action with state action was in the case of *Terry v. Adams*,⁶⁹

⁶⁵ Kendrick, Journal § 3, at 91 (1914).

⁶⁶ Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), as well as numerous cases cited therein. More recently see *Williams v. United States*, 341 U.S. 97 (1951); *Screws v. United States* 325 U.S. 91 (1945).

⁶⁷ See this line of reasoning advanced by Representative Keifer in 40 Cong. Rec. 3889 (1906).

⁶⁸ Civil Rights Cases, 109 U.S. 3, 17 (1883), *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁶⁹ 345 U.S. 461 (1953), culminating a line of cases equating state action with that of

where it equated the actions of a private political group that controlled the outcome of the primary with state action, in so far as that organization refused to permit the participation of Negroes in the selection of their candidate. The equation was struck there due to the critical position of the "Jaybird Association" in the electoral process,⁷⁰ so critical that it could be said to have acted in a quasi-public capacity by effectively controlling the conduct and outcome of the election. State action is, therefore, the product of the activities of a private group in so far as that organization acts as a representative of the state by performing its functions.⁷¹ That coercion by a community which abridges and denies the vote is state action cannot be easily denied, since the difference between regulation of the electorate by rule of a private organization and regulation by wide-scale intimidation and coercion is negligible. In both instances private individuals are performing a state function on a substantial scale.

Terry v. Adams and its predecessors,⁷² apart from charging a state with responsibility for actions of groups permitted to perform its functions, also seem to impose a duty on each state to keep the electoral process free from illegal and unconstitutional discrimination on any level. To the extent private coercion and intimidation is able to regulate the composition of the electorate, the state has breached its duty and may be deemed to have participated in the conspiracy.⁷³

On the basis of either of these two interpretations of the *Terry v. Adams* line of cases, state action can be found in wholesale community coercion restricting the franchise. For this reason, whether state action is or is not a requisite to the imposition of the penalty provided by section 2 would not seem to be of crucial importance.

Two last preliminary points should be understood. First, a penalized state also suffers a reduction in its electoral votes. This follows from article II, section 2, granting each state "a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress." Second, the penalty imposed by section 2 and 2 U.S.C. section 6 (1958) is capable of imposition or amelioration at any time between, as well as during decennial apportionments. Further support for this can be gleaned from the language of the original

private groups regulating the electoral process: *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁷⁰ *Terry v. Adams*, 345 U.S. at 469 (1953).

⁷¹ See cases cited note 69 supra.

⁷² See note 69 supra.

⁷³ Cases like *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943); and *Lynch v. United States*, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951), where state action has been found in the refusal of police officials to protect persons against mob violence, appear to support this view.

statute of 1872 before its codification.⁷⁴ Its language even more clearly contemplated the possibility of a reduction, if warranted, between apportionments. In terms of the intention of the framers, this is the only possible construction available, since they could not reasonably have intended the section to be effective only every ten years, thereby enabling the states to circumvent its mandate between times.

Though the penalty can be increased or ameliorated between decennial apportionments, the judiciary is incapable of imposing any such change before the next election. This, since all present representatives are seated *de jure*, the House being the sole judge of its members by virtue of article I, section 5. Congress could, of course, impose the penalty to take effect at any time, even in the midst of a session. It might do this on its own initiative or under the compulsion of moral force furnished by a judicial decision, knowing full well that at the next biennial election the Court's mandate would take effect anyway. All this rests on the basic proposition inherent in section 2 that the penalty invoked only reduces the representation of the culprit state, no corresponding increase occurring in the apportionment of any other state. The lost seats are held in abeyance pending such time as they can properly be reinstated.

With this as background, an attempt will be made to formulate a scheme for the judicial enforcement of section 2.

III. THE PLAN

Assuming legislative enforcement of section 2 is politically impossible,⁷⁵ a plan invoking the aid of the judiciary to attain this end would seem to promise most success. The present apportionment statute is as follows:

(a) On the first day or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under

⁷⁴ 17 Stat. 29 (1872), as codified and amended, Rev. Stat. § 22 (1875), 2 U.S.C. § 6 (1958).

⁷⁵ See the frequent futile attempts to do so set out in note 34 *supra*. Note the availability of the filibuster in the Senate as well as the control of key committees in the House by Southern Representatives owing to their greater tenure.

this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. . . .⁷⁶

This statute is clearly unconstitutional as being in conflict with section 2 of the fourteenth amendment. It contemplates and perpetuates an apportionment based solely on population, no account being taken of those disfranchised in each state. This is indicated by the language of section (b) which maintains that each state *shall be entitled* to the number of representatives indicated by section (a) which bases the apportionment on population alone. True, a state "would be entitled" to the number of representatives due it on the basis of population alone, but it properly "shall be entitled" only to that number minus the penalty imposed by section 2. Therefore, a state *is* not always entitled to the apportionment to which it *would be* entitled. As a study of the legislative history of this statute will corroborate,⁷⁷ it was intended to ground the apportionment solely on population regardless of the extent to which citizen-inhabitants over twenty-one in each state were disfranchised. The duty imposed on the Clerk is purely ministerial, and therefore the statute cannot be construed, to avoid unconstitutionality,⁷⁸ as giving him the power to impose the penalty. The present apportionment statute, and any apportionment effected thereunder, in so far as it is not in conformity with the mandate of section 2 of the fourteenth amendment, is thus unconstitutional.

A suit attempting to enjoin the President from the performance of his duty is untenable,⁷⁹ though it is not as clear that such a suit would be unsuccessful if the chief executive were acting beyond his authority (*i.e.*, under an unconstitutional statute). Since no precedent exists for the successful prosecution of an action against the President, any such alternative will be ignored. The more feasible plan would be a suit, by specified plaintiffs, commenced in the Federal District Court for the District of Columbia⁸⁰ against the Clerk of the House of Representatives.⁸¹ Plaintiffs would request a declaratory judgment, pursuant to

⁷⁶ 55 Stat. 761-62 (1941), 2 U.S.C. § 2a (1958).

⁷⁷ 71 Cong. Rec. 2271-73, 2348, 2364 (1929) (debates on the adoption of the apportionment statute). Representatives Tinkham's efforts to amend the apportionment statute to conform with § 2 failed, as demonstrated by the statute finally adopted. 46 Stat. 26 (1931), 2 U.S.C. § 2a (1958).

⁷⁸ Statutes are to be construed to avoid constitutional objections. *United States v. CIO*, 335 U.S. 106, 120-21 (1948).

⁷⁹ *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867).

⁸⁰ The court would have jurisdiction under 11 D.C. Code Ann. § 306 (1951).

⁸¹ Some precedent exists for such a suit in *Kilbourn v. Thompson*, 103 U.S. 168 (1881),

28 U.S.C. section 2201 (1958), adjudging the act unconstitutional in so far as it fails to conform with the requirements of section 2, and an injunction enjoining the Clerk from the performance of his ministerial duty under that statute insofar as it requires him to certify to any state more representatives than it is properly entitled. A three-judge district court would be required,⁸² with direct appeal to the Supreme Court,⁸³ unless the statute is construed to be constitutional. In that case, only the action taken under it would be attacked, and such a three-man court would be unnecessary. The suit is clearly not barred by sovereign immunity.⁸⁴ The injunction or temporary restraining order must be timed to prevent the Clerk's certification of the improper figures to the several states. This should present no problem since the numbers to be tendered to Congress by the President are ordinarily available with indisputable accuracy substantially in advance of any such actual tender during the first week of Congress.⁸⁵

A procedure that could be utilized to test the constitutionality of the present apportionment, (as opposed to the next apportionment to be certified to the states as brought into issue by the suit against the Clerk), would be as follows. Suit could be instituted under 42 U.S.C. section 1983 (1958) in a Federal District Court in any state where a penalty under section 2 is warranted against the local board of elections.⁸⁶ The action would be grounded on the theory that that body, by enforcing state statutes restricting the elector to casting his ballot solely for the contested congressional seat for the district wherein he resides, was depriving him of one of the privileges and immunities secured to him by the Constitution. This, since the state was not entitled to all of its present representation, and having more electoral districts than Congressmen properly apportioned it, all its representatives must be elected at large.⁸⁷ The board of elections, in acting pursuant to state law and restricting plaintiff-electors to balloting solely for one Congressional seat, thereby deprives him of his rights under article I, section 2 and section 4 of the Constitution and 2 U.S.C. section 2A (1958), enacted pursuant

where the Sergeant At Arms of the House, acting in a purely ministerial capacity, as does the Clerk here, was said not to be shielded in an action against him for false imprisonment by an unconstitutional House order.

⁸² 62 Stat. 968 (1948), 28 U.S.C. § 2282 (1958).

⁸³ 62 Stat. 928 (1948), 28 U.S.C. § 1253 (1958).

⁸⁴ 3 Davis, Administrative Law § 27.03 (1958). See also *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

⁸⁵ Even if not so available they can be calculated with indisputable accuracy since the President's role in the calculation of the apportionment from the census figures is non-discretionary and therefore clearly predictable.

⁸⁶ Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958). This is the same approach taken in *Saunders v. Wilkins*, 152 F.2d 235 (4th Cir. 1945) (to be discussed *infra*, text accompanying note 124).

⁸⁷ 55 Stat. 762 (1941), 2 U.S.C. § 2a(c) (1958).

thereto.⁸⁸ The board may, as a result, be enjoined to insure its acting in conformity with the Constitution and laws of the United States. A three-judge district court is required⁸⁹ with direct appeal to the Supreme Court,⁹⁰ since the injunction will probably be directed at restraining the enforcement of a state statute as unconstitutional.

In assessing the comparative merits of the two plans here outlined, it readily becomes apparent that the first is preferable. The suit attempting to restrain the Clerk from certifying an improper apportionment to certain states could settle the propriety of the apportionment to each state of the Union at one and the same time. The second method here outlined would require a separate suit in each malapportioned state. That method is, of course, the only one available between apportionments since it, unlike the suit against the Clerk, tests the validity of the present apportionment. The preferable procedure would, therefore, seem to be an action directed at the Clerk to insure a proper initial apportionment, and suits under 42 U.S.C. section 1983 (1958), to be instituted during interim periods to effect new or further reductions of representation in each state when warranted. The solutions and rationalizations of the various problems to be discussed in this paper must, as a result, be deemed to apply to both procedures unless otherwise specified.

The two parties in the strongest positions to challenge the unconstitutionality of the new apportionment to be certified by the Clerk are probably, first, a citizen-voter of a state that would suffer no penalty by an enforcement of section 2, and, second, such a state itself.⁹¹ Though it might be desirable to have those disfranchised test the statute on the theory that they have a "right" not to be represented when they are deprived of the ballot, the law of standing would probably make their ability to do so more speculative than the first parties suggested. For this reason attention here will be directed to a citizen-voter of a non-penalizable state and to such a state itself as the potential litigants.

It is not difficult to demonstrate that both those parties are directly

⁸⁸ The right to vote for federal officers, though subject to certain restrictions imposed by the state, is derived from the Constitution, article I, §§ 2 and 4, as modified by federal statute (here 55 Stat. 762 (1941), 2 U.S.C. § 2a(c) (1958); and see *United States v. Saylor*, 322 U.S. 385 (1944); *Smith v. Allwright*, 321 U.S. 649, at 661-62 (1944); *United States v. Classic*, 313 U.S. 299, 314 (1941); *Ex parte Yarborough*, 110 U.S. 651, 663-64 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880)) and is, therefore, one of the privileges and immunities protected by § 1 of the fourteenth amendment against state interference.

⁸⁹ 62 Stat. 968 (1948), 28 U.S.C. § 2281 (1958).

⁹⁰ 62 Stat. 928 (1948), 28 U.S.C. § 1253 (1958).

⁹¹ Note that with a state as plaintiff, under 62 Stat. 927 (1948), 28 U.S.C. § 1251(b) (3) (1958), this suit may also be brought in the Supreme Court's original jurisdiction if the Clerk is a citizen of another state.

injured⁹² by disregard of the mandate imposed by section 2 and 2 U.S.C. section 6 (1958).⁹³ Because of the failure to impose the prescribed penalty, the ballot of a voter in a state where suffrage is relatively universal is of far less weight than that of an elector in an unpenalized, disfranchising state. In the "universal-suffrage state" (*i.e.*, a state where no penalty is warranted), 1,000,000 qualified voters may elect six representatives. In such a state almost all citizen-inhabitants over twenty-one are competent to cast a ballot. An abridging state is also entitled to six representatives on the basis of its population. If it abridges the franchise of such persons to the extent of 50 per cent, it thereby endows those who are qualified to vote in that state with a ballot twice as potent as that of the elector in our universal-suffrage state. Enforcement of section 2, by reducing the representation of this state by 3 would remedy this inequality. Disregard of that provision thereby works a direct injury to the integrity of the ballot of all voters in universal-suffrage states, depriving them in an unlawful manner of a fully effective ballot. The direct injury to the universal-suffrage state by the failure to conform the apportionment of other states to the requirements imposed by section 2 is also demonstrated by the previous illustration. Disregard of the constitutional mandate has disabled that state from exercising twice as many votes in the House as its unpenalized counterpart, which disability may be expressed by saying that it has suffered a relative loss in representation.

The legal rights⁹⁴ of the individual elector that are infringed by an unconstitutional apportionment are varied. First, there is a naked claim of injury to the right conferred by section 2 of the fourteenth amendment and by 2 U.S.C. section 6 (1958). The assertion of such a direct legal right flowing from these general provisions would seem no less

⁹² Voters have standing where, though a large group, they are a divisible class sufficiently affected by a direct and immediate injury which is not too speculative and remote, and where the action complained of injures their legal interests. *Wood v. Broom*, 287 U.S. 1 (1932); *Carroll v. Becker*, 285 U.S. 380 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932); *Hawke v. Smith*, 253 U.S. 221 (1920) (all alleged themselves electors and tax-payer citizens except *Koenig*—just citizen-voter—and *Wood*—voter and potential candidate). For a general rationale of standing in federal courts, see Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-58 (1951), and cases cited therein, as well as in *Hart & Wechsler, The Federal Courts and the Federal System* 156-92 (1953). The Supreme Court never really questioned the standing of the plaintiffs in *Colegrove v. Green*, 328 U.S. 549 (1946), where an unsuccessful attempt was made to have the Illinois apportionment statute declared unconstitutional. This is born out by an analysis of the cases cited after the questionable comment at 552 (*i.e.*, that injury was only to Illinois as a polity).

⁹³ 17 Stat. 29 (1872), as codified and amended, Rev. Stat. § 22 (1875), 2 U.S.C. § 6 (1958).

⁹⁴ There must be an injury to a legal right. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (concurring opinion by Frankfurter, J.). Standing may be based on a legal interest created by the Constitution or a statute. *Bell v. Hood*, 327 U.S. 678 (1946); *Coleman v. Miller*, 307 U.S. 433 (1939). See also note 92 supra.

tenable than the numerous successful attacks prosecuted by individual tax payers on statutes violating the general directive of article I, section 3, clause 3, commanding that direct taxes be apportioned among the several states.⁹⁵

Second, the individual has a claim of legal injury in that the apportionment, by allegedly failing to conform with the requirements of section 2, deprives him of the right of the franchise as contemplated by article I, section 2, of the Constitution. The right to vote for federal representatives is not only established by that provision but will be protected by the courts.⁹⁶ That right (subject, of course, to state qualifications) by implication and by its very essence contemplates substantial equality among electors.⁹⁷ Disregard of section 2 and the statute of 1872, as previously demonstrated, destroys this substantial equivalence. Plaintiffs are thereby being deprived of their right to vote as guaranteed by article I, section 2, and 2 U.S.C. section 6 (1958), by the present apportionment and the new apportionment to be certified by the Clerk.

Third, dilution of the ballot being substantially the equivalent of its deprivation, the action of the Clerk under the statute here complained of may be considered as a deprivation of liberty or property under the fifth amendment, since it is effected without due process.⁹⁸ It is a deprivation of property to the extent that the right of suffrage may be analogized to such,⁹⁹ and of liberty since that term certainly embraces political rights such as the franchise.¹⁰⁰ These, then, are the various legal rights impinged upon if the present or projected apportionment, or apportionment statute, is unconstitutional, thereby supplying the requisite legal injury necessary for standing in a case challenging their validity. The rights of the plaintiff state to challenge such action will,

⁹⁵ See *Bromley v. McCaughn*, 280 U.S. 124 (1929).

⁹⁶ *Smith v. Allwright*, 321 U.S. 649, 661-62 (1944); *United States v. Classic*, 313 U.S. 299, 314 (1941); *Ex parte Yarborough*, 110 U.S. 651, 663-64 (1884).

⁹⁷ *United States v. Classic*, 313 U.S. 299 (1941) (ballots must be honestly counted); *United States v. Saylor*, 322 U.S. 385 (1944); *Ex parte Siebold*, 100 U.S. 371 (1880) (article I, § 2, protects voter against the diluting effect of stuffed ballot boxes).

⁹⁸ Action under a void statute is, of course, not due process. *A. L. A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁹⁹ That it can be so analogized, see *Cooley*, *The General Principles of Constitutional Law* 263 (2d ed. 1891), and see words of Mr. Justice Holmes in *Nixon v. Herndon*, 273 U.S. 536, 540 (1927), to the effect that, objection to a suit on the basis that the right asserted by an individual is political as opposed to a property right "is little more than a play upon words." See also cases cited in 20 C.J. Elections § 13, n.35; 29 C.J.S. Elections § 2, n.11; and 20 C.J. Elections § 13, n.36; 29 C.J.S. Elections § 2 n.12 (right of suffrage is a vested or property right in the sense that once conferred it cannot be taken away except by due process).

¹⁰⁰ Note that the term liberty as found in the fifth amendment is not qualified by any words such as civil, political or personal. See definition of liberty as "a franchise or personal privilege, being some part of the sovereign power, vested in an individual either by grant or prescription." *Black, Law Dictionary* 1065 (4th ed. 1957). See as well *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

of course, rest directly on section 2 itself.¹⁰¹ Clearly the plaintiffs are in the class sought to be protected by section 2 from the tyranny of those in disfranchising states, since by implication the protection of voters in universal-suffrage states, as well as the states themselves as political entities, was a prime consideration of the drafters.¹⁰² There being no question that the impending action of the Clerk is final and the injury wrought by his action sufficiently direct, the standing of the parties would seem to be established.

A case or controversy would seem to exist in the proposed suit.¹⁰³ The litigants are adverse since plaintiff would be attempting to enjoin the Clerk or board of elections from the performance of their statutory duty. The court's decree will be final, *i.e.*, not subject to revision by the President or Congress.¹⁰⁴

One of the most formidable objections that can be raised to this suit is that it presents a non-justiciable controversy, *i.e.*, a political question, and is therefore beyond the pale of judicial cognizance. The logic of this argument, though appealing to some,¹⁰⁵ must be rejected. The present case does not fit into that class of cases deemed political because the decision involved is relegated by the Constitution to the legislative or executive branch of the government.¹⁰⁶ Under article I, section 1, the actual enactment or non-enactment of an apportionment statute rests exclusively with Congress, the propriety of such action therefore being a political question. After the passage of such a statute, however, an attack on its validity, or action taken under it, presents a justiciable controversy, for nowhere in the Constitution are apportionment statutes expressly or impliedly accorded any different treatment than other legislation. Such an enactment is, as a result, not removed from the scrutiny of the Courts, and to the extent it conflicts with the non-discretionary and absolute mandate imposed by section 2 it must fail. This case is distinguishable from one where the validity of a Senator's election and

¹⁰¹ *Arizona v. California*, 283 U.S. 423, at 462-63 (1931), is demonstrative of the proposition that a state may contest the validity of a federal act if a direct interest of a state is shown.

¹⁰² One of the requirements often enunciated as a requisite for standing. *Lee v. New Jersey*, 207 U.S. 67 (1907).

¹⁰³ *Muskrat v. United States*, 219 U.S. 346, 357-62 (1911).

¹⁰⁴ Though it can be argued that the House, as sole judge of its members under article I, § 5, could disregard any decision of the court and seat any number of Representatives it pleases, a certain amount of good faith must always be presumed or Congress in a variety of devious ways could almost always circumvent or nullify decisions of the court.

¹⁰⁵ *Saunders v. Wilkins*, 152 F.2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946), 32 Va. L. Rev. 647 (1946), discussed *infra*, text accompanying note 124.

¹⁰⁶ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); U.S. Const. § 1 of articles I, II, III (concept of separation of power); Post, *The Supreme Court and Political Questions* (1936); Field, "Doctrine of Political Question in the Federal Courts," 8 Minn. L. Rev. 485 (1924). See also *Coleman v. Miller*, 307 U.S. 433, 454-56 (1939).

the Senate's right to seat him is brought into question. Since article I, section 5, endows Congress, and Congress alone, with the power to judge its members, such a suit would be non-justiciable.¹⁰⁷ Congress, however, has no where been made the final judge of the validity of its own apportionment, which apportionment rests on an enactment of its own making.

The present case does not fit into that category of questions deemed non-justiciable due to a lack of standards without which a court is unable to act.¹⁰⁸ The clarity of the language of section 2 of the fourteenth amendment, and 2 U.S.C. section 6 (1958), especially when contrasted with judicially enforceable phrases like "due process" or "privileges and immunities" in the first section of the amendment, would seem to militate strongly in favor of their similar treatment. Certainly the words "any . . . denied . . . abridged . . ." are not so vague as to defy judicial action.

Nor can this case be deemed political because the question to be resolved is one that must be left to the electorate at the polls.¹⁰⁹ Such a decision would require rules for its making, and the very question here under consideration is what those rules are, *i.e.*, who should get how many representatives or votes. This argument also fails by analogy to the separation of powers rationale previously discussed. That is, the Constitution nowhere relegates the enforcement of this provision to the electorate rather than the judiciary. Furthermore, nothing in that instrument indicates that a majority at the polls should be able to effectively destroy a provision of the Constitution which required three-quarters of the states to bring it into being and would require a similar number to repeal.

Though the three explanations just alluded to have been most often cited as the reasons for finding a political question, other reasons, also inapplicable here, have been equally important. The possibility of drastic consequences resulting from the court's decision may induce it to rely on the smokescreen of "political question."¹¹⁰ Such could not reasonably be said to be the case here since the unconstitutionality of the present or future apportionment would only become effective at the next election subsequent to the court's decree. This, since all present members of Congress are seated *de jure*, that body being the sole judge

¹⁰⁷ *Barry v. United States*, 279 U.S. 597, 613 (1929).

¹⁰⁸ *Coleman v. Miller*, 307 U.S. 433, 454-56 (1939). See also *Saunders v. Wilkins*, *supra* note 105.

¹⁰⁹ See Mr. Justice Woodbury, dissenting in *Luther v. Borden*, 48 U.S. (7 How.) 1, 51 (1849).

¹¹⁰ *Id.* at 37-39. The possible consequences of holding unconstitutional the entire government of a state seemingly induced the court to denominate the issue nonjusticiable.

of its membership under article I, section 5. Congress' failure to correct the situation seems irrelevant, for such a failure would be indistinguishable from the possibility of its neglect to pass an apportionment statute after the prior one expired by its own terms. So also the court should not denominate the issue here presented as non-justiciable due to an inability to enforce its decree,¹¹¹ since it can enjoin the operation of the apportionment statute, or state election statute, until such time as a constitutional one is enacted. The same argument can be leveled at the objection that Congress could thwart the court's decree by failure to enact a new statute. The suits can be timed to avoid any possible objection on the basis of the proximity to elections of the relief if granted,¹¹² thus obviating the possible inability of the legislatures to act soon enough to avoid disruption of the forthcoming election. Indeed, this can only be the case in the suit against the Clerk, since the new apportionment is certified to the several states within one week and fifteen days of the start of every fifth session of Congress, such new apportionment to be effective two years later at the next session.¹¹³

All these points militate in favor of the assumption by the judiciary of the responsibility for the enforcement of section 2, when such a case is presented. Certainly the fact that the rights sought to be vindicated are political,¹¹⁴ or are embroiled in politics,¹¹⁵ will not deter the court, for such considerations are not to be confused with that which is denominated "political question." In this connection it should also be noted that since the passage of the perpetual and automatic reapportionment act,¹¹⁶ interstate apportionment has assumed a non-political character, having become merely an administrative task.

The only hope for plaintiffs in terms of the vindication of their rights lies with the judiciary, for the legislature has been deaf to their pleas and negligent in its duty for a hundred years. Though subject to criticism, the argument must be made that failure to check this legislative encroachment on our fundamental law will lead to greater ones, and thus leave unprotected an unchecked power in that body capable of destroying our form of government. Thus, as Judge Elliot in the case of

¹¹¹ *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1867) (inability to enjoin the President in the performance of his duty). See note 104 supra.

¹¹² This seems to have been in the mind of some of the Justices in *Colegrove v. Green*, 328 U.S. 549, 565 (1946) (concurring opinion by Rutledge, J.).

¹¹³ 55 Stat. 761 (1941), 2 U.S.C. § 2a (1958).

¹¹⁴ See *United States v. Classic*, 313 U.S. 299 (1941); *Lane v. Wilson*, 307 U.S. 268 (1939); and *Nixon v. Herndon*, 273 U.S. 536 (1927) (all cases upholding the right of Negroes to vote in federal elections).

¹¹⁵ The issue in *Brown v. Board of Education*, 347 U.S. 483 (1954), was certainly one embroiled in politics as were those involved in the cases in note 114 supra.

¹¹⁶ 55 Stat. 761 (1941), 2 U.S.C. § 2a (1958).

*Parker v. State*¹¹⁷ said in reference to apportionment questions brought before his court,

To me it seems that the duty is, if possible, higher and sterner in such cases than in any others, for if unconstitutional apportionment acts are conceded to be beyond the domain of the judiciary, then . . . a legislative body would be at full and unrestrained liberty to enact measures perpetuating its own existence and augmenting its own power. . . . An apportionment act which violates the provisions of the Constitution can no more become a law than can an unconstitutional act upon any other subject, nor has it any peculiar virtue or sanctity that lifts it above the power of the judiciary.¹¹⁸

This is especially so when the malapportionment is interstate as here, rather than intrastate, since such a malapportionment affects the very foundations and framework of the federal system. The very essence of the relationship between the several states, one to another, and between the several branches of the government, would be altered by the courts denomination of this issue as political.

Cases denominating *intrastate* malapportionment as a non-justiciable issue¹¹⁹ are inappropriate precedents to the present suit. First, the constitutional provision governing intrastate apportionment¹²⁰ may be interpreted as conferring on Congress exclusive authority to secure fair representation by the states in the popular House, leaving to it alone the determination whether the states have fulfilled their responsibility internally.¹²¹ Apportionment interstate is governed by entirely different provisions, section 2 of the fourteenth amendment, and article I, section 2. Unlike article I, section 4, governing the conduct of elections, hence intrastate apportionment, no one is named as a supervisory or enforcement agency. Therefore, there is no reason to conclude otherwise than that laws enacted pursuant to section 2 are subject to judicial supervision in the same manner as any other. This is a prime distinction

¹¹⁷ 133 Ind. 178, 32 N.E. 836 (1892).

¹¹⁸ *Id.* at 210-11, 32 N.E. at 846.

¹¹⁹ See *Colegrove v. Green*, 328 U.S. 549 (1946), where the issue as to justiciability was actually decided favorable 4-3. The issue's justiciability may also have been dictum even as to the decision of the majority opinion of three. *South v. Peters*, 339 U.S. 276 (1950), seems, however, to indicate possible acceptance of the political rationale. The *Colegrove* case is criticized, *Notes*, 35 Calif. L. Rev. 296 (1947); 41 Ill. L. Rev. 578 (1946); 45 Mich. L. Rev. 368 (1947); 25 Texas L. Rev. 419 (1947); 56 Yale L. J. 127 (1946). In general on this problem of apportionment intrastate, see Lewis, "Legislative Apportionment and the Federal Courts," 71 Harv. L. Rev. 1057 (1958).

¹²⁰ Article I, § 4:

The Times, Places and Manner of holding elections . . . Representatives shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such regulations.

Justice Frankfurter is of that view in *Colegrove* supra note 119, at 554.

¹²¹ Rather than concede this to be the case, the author would prefer to think that the *Colgrove* case did not irrevocably settle the question of the justiciability of the issue of intrastate apportionment presented there, or if it did, it will in the future be limited to its "precise facts."

to be observed between the hypothetical case under consideration dealing with interstate apportionment, and cases dealing with intrastate apportionment.

A further distinction between this case and *Colegrove v. Green*,¹²² the principal case denominating intrastate apportionment a political question, is the presence here of a statute, 2 U.S.C. section 6 (1958), which purports to implement section 2. Such an expression of congressional will was absent to the facts in *Colegrove*.¹²³ Therefore, either if the issue of interstate apportionment is erroneously deemed controlled by an unfavorable view of that case, or as a political question as an independent proposition, the enactment of the statute of 1872 should render it justiciable. Congress through the formulation and enactment of legislation has given notice of its "political" decision, and having made that requisite policy formulation on a matter beyond judicial competence, invites and authorizes the court's intervention in favor of its enforcement. A refusal by the court to enforce the congressional mandate would be, in effect, hindering the supposed constitutional principle that Congress shall be supreme in the matter of apportionment, since without the aid of the judiciary the congressional will would be thwarted. For this reason the denomination of the issue presented here as non-justiciable cannot reasonably be supported from any vantage point.

A further distinction should be noted where interstate apportionment questions are involved. The judicial failure to enforce proper interstate apportionment might completely alter the nature of the federal system and the balance between the states, while intrastate malapportionment is limited in scope to each particular state. Obviously, as regards the individual voter, the effectiveness of his ballot may be diminished by abuse in either situation. However, if we proceed on the perhaps outmoded notion that the protection of the rights of the sovereign states were, in the minds of the framers of the Constitution, the most important ones to be protected, it might be concluded that judicial abstention in this case is far more dangerous than in the *Colegrove*-type situation. For that reason the court might deem it more important to intercede here than it did in that case. Of course, this extreme view need only be presented if that decision is erroneously accepted as authoritative in this situation.

A more direct discussion of the justiciability of section 2 was furnished

¹²² See note 119 supra.

¹²³ Note the Court's citation, 328 U.S. at 551, of *Wood v. Broom*, 287 U.S. 1 (1932), which held that the statute requiring substantially equal election districts had lapsed, thus lending credence to the view that the Court might have entertained the case had the statute there involved still been in force.

by the case of *Saunders v. Wilkins*.¹²⁴ There an action was brought against the Secretary of State of Virginia to recover damages, under what is now 28 U.S.C. section 1983 (1958), for his failure to certify the plaintiff as a candidate for election as a Representative-at-large in the House. His contention was that through the poll tax imposed by Virginia, 60 per cent of her United States citizen-inhabitants over twenty-one were deprived of their franchise, for which reason, pursuant to section 2, the representation of Virginia should be reduced from nine to four, the remaining four to be elected at large.¹²⁵ The court of appeals, in upholding the district court, dismissed the suit, declaring the issue presented under section 2 non-justiciable. The Supreme Court refused to hear the case on certiorari, which refusal, of course, imports no expression of opinion on the merits.¹²⁶ This case would seem erroneously decided.

The circuit court insisted that a Nebraska case, *State v. Boyd*,¹²⁷ where the issue was the effective date of the federal apportionment act,¹²⁸ could not be distinguished in principle from *Saunders* since both dealt with the constitutionality of federal apportionment.¹²⁹ But the Constitution is silent as to the effective date of an apportionment act, Congress thereby being given discretion, while as to the issue presented in *Saunders* it is specific and mandatory. That case is, therefore, poor precedent. The two other cases cited by the circuit court in support of its conclusion also seems to be inappropriate precedents to establish the non-justiciability of the issue. *Luther v. Borden*¹³⁰ is readily distinguishable due to the staggering consequences inherent in holding an entire state's government a nullity¹³¹ for not being "Republican" under article IV, section 4, as well as the possible measure of congressional discretion granted in that situation by the indefiniteness of the standard. And *Coleman v. Miller*¹³² would similarly seem inapplicable owing to the wide discretion accorded Congress under article V with regard to the ratification of proposed constitutional amendments. Nowhere in article V is there any direction as to how long the states shall have to ratify, or whether a rejection of an amendment by a state makes it impossible for it to later reverse itself (the issues in *Coleman* deemed political). Thus, Congress may properly be deemed to have wide and

¹²⁴ See note 105 supra.

¹²⁵ In accordance with 55 Stat. 762 (1941), now 2 U.S.C. § 2a(c)(5) (1958).

¹²⁶ *House v. Mayo*, 324 U.S. 42, 48 (1945).

¹²⁷ 36 Neb. 181, 54 N.W. 252 (1893).

¹²⁸ *Id.* at 188-89, 54 N.W. at 254.

¹²⁹ *Saunders v. Wilkins*, 152 F.2d 235, 238 (4th Cir. 1945).

¹³⁰ 48 U.S. (7 How.) 1 (1849).

¹³¹ *Id.* at 37-39.

¹³² 307 U.S. 433 (1939).

exclusive discretion in this regard which should not be interfered with by the judiciary.¹³³

The *Saunders* case should, as a result, be regarded as erroneous in so far as its decision rested on the non-justiciability of the issue presented. Indeed the whole doctrine of "political question" would seem, for the reasons outlined, totally inappropriate to the present case. The courts should both as a matter of good social policy and in order to be consistent with their past history, function, and judicial theory, entertain such a suit as here contemplated on the merits. This seems especially so when it is realized that both the statute and the administrative action in issue here work an injury to the fundamental framework and basic operation of the democratic process itself.

Though perhaps once in doubt,¹³⁴ equity has jurisdiction to enjoin the Clerk of the House from certifying to any state an incorrect number of representatives, or indirectly to force the local board of elections to hold elections at large.¹³⁵ The injunctions sought in this case could be combined with, or based on, a suit for declaratory judgment declaring the questioned action void. The exercise of equity power would clearly be warranted by the inadequacy of pecuniary damages to remedy the wrong suffered, the inability of plaintiffs to obtain relief elsewhere (*i.e.*, from Congress), and the crucial importance of the preservation of the rights here asserted to the future of democratic government. This being so, there would seem no bar in the present case to the granting of the remedy sought.

Of course, if the extent of disfranchisement cannot be demonstrated to the satisfaction of the court, this whole scheme must fail, for such proof is crucial both on the issue of the presence of the requisite injury, and on the ability of the court to rationally insure its cure. In the first instance, all that need be proven is that as to each state, where the board of elections is sought to be enjoined, or as to whom the Clerk's certification is sought to be enjoined, it has or will have one more representative than it is entitled to. This quantum of proof is all that need be

¹³³ Note the recent practice of Congress in specifying time limits on the ratification of all recent amendments, U.S. Const. amends. XX-XXII.

¹³⁴ *Giles v. Harris*, 189 U.S. 475 (1903) (equity will not meddle with political rights). For a more recent state court pronouncement on this in relation to § 2, see *Daly v. County of Madison*, 378 Ill. 357, 364-65, 38 N.E.2d 160, 164-65 (1941).

¹³⁵ Equity will enforce political rights. *MacDougall v. Green*, 335 U.S. 281 (1948); *Wood v. Broom*, 287 U.S. 1 (1932); *Siniley v. Holm*, 285 U.S. 355 (1932); and especially *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd per curiam*, 336 U.S. 933 (1949). *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), which might be construed as indicating *contra* where a state is involved, should more properly be viewed as denying such relief to a state solely when a non-justiciable issue is involved. This position is reinforced by the Court's citation of the *Georgia* case in *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923), as a case involving a political question.

presented in each of the repeated and successive injunction actions necessary to insure the apportionment's conformity with section 2.

The most difficult problem in proving the extent of section 2 disfranchisement in any state is that of isolating the truly apathetic from the disfranchised. From the number of citizens over twenty-one in each state,¹³⁶ we can subtract the number actually casting a ballot,¹³⁷ thereby arriving at a figure roughly approximating the number of citizens failing to vote in that state. The reasons for their failure to vote are numerous, running the gamut from those penalizable by section 2, to illness, or sheer apathy, unaffected by community coercion. The problem is to separate out in some rational fashion those whose ballot is denied or abridged within the meaning of section 2 from those failing to exercise their franchise for other reasons. It should be noted in this connection that though various studies have been undertaken of voting behaviour, none of them distinguishes with any accuracy, on a state by state basis, between those disfranchised by poll taxes, literacy tests, community coercion, maladministration of the state's election laws, and those failing to vote for other reasons.¹³⁸

A tentative though perhaps not completely satisfactory solution to this problem may be suggested. A comparison between the percentage of citizens over twenty-one casting a ballot in each state, and the national percentage of such citizens voting, is very revealing.¹³⁹ We can rationally conclude that to the extent the percentage not voting in any state exceeds by more than a reasonable number of percentage points (say 10 per cent) the national average, the right to vote in that state is denied or abridged. Though this conclusion is obviously subject to a variety of objections, its logic is appealing when we remember that denials or abridgments contemplated by section 2 include community coercion as well as poll taxes, literacy tests, residence requirements, and maladministration of the law. It presumes a fairly constant per-

¹³⁶ These figures are available, see Appendix II.

¹³⁷ See Appendix II *infra*.

¹³⁸ American Heritage Foundation Report on the Presidential Election of 1956, as reported in the N.Y. Times, Nov. 28, 1956, § 1, p. 24, col. 1 (unable to calculate numbers disfranchised by poll tax and community coercion). As to the inconclusiveness of the estimates of the actual effect of the poll tax alone as a disfranchising device, see 1 Emerson & Haber, *Political and Civil Rights in the United States 169-70* (1958). See also *Comparison of Potential Voters and Actual Votes Cast by Counties in Each State 1948-50*, S. Doc. No. 150, 82d Cong., 2d Sess. (1952), comparing total population over 21 (not only citizens) with the vote cast in each county. On disfranchisement generally see Report of the U.S. Commission on Civil Rights 19-147 (1959).

¹³⁹ See Appendix II *infra*. Survey and census figures are generally admissible in evidence. Wigmore, *Evidence* 1671, 2578 (3d ed. 1940); Zeisel, "The Uniqueness of Survey Evidence," 45 *Cornell L.Q.* 324 (1960). The higher of primary or election statistics should of course be used. This might be significant in those states with a one-party system where the primary is more important than the election.

centage of adult citizens in each state who do not cast a ballot for reasons excepted from penalization by section 2 (*i.e.*, bad weather, illness, apathy, etc.). The possible defects in this presumption are sought to be cured by the introduction of a tolerance percentage of 10 per cent between the national average and the individual states.¹⁴⁰ This, then, is a possible, though perhaps inconclusive, solution to this most critical problem of proof. It is one that will require careful future consideration along with others as they reveal themselves.

Obviously on a minimal plane, actual rejections at the polls of the various states may be used as a measure of disfranchisement. Their great deficiency comes from the inability to obtain them,¹⁴¹ as well as their failure to reveal the bulk of the disfranchised who never attempt to vote due to a knowledge of the futility of such action in light of their qualifications, community coercion, or maladministration of the law. However, sufficient determination on the part of those disfranchised might lead to a drastic rise in these figures with the realization of the utility of their attempts.¹⁴²

If it is concluded, as it is here contended, that intrastate malapportionment constitutes an abridgment of the franchise within the scope of section 2, then proof will also be required on that issue. Such proof may be easily obtained by tabulating the number of citizen-inhabitants over twenty-one residing in every malapportioned congressional district,¹⁴³ in the state. Adjustments will, of course, be necessary to insure that no person is counted twice, once as an abridgee due to malapportionment intrastate, and once for disfranchisement grounded on literacy tests, poll taxes, community coercion, or the like.

The problem of proof should not pose an obstacle to the enforcement of section 2. This optimistic position seems warranted though the writer is aware of the numerous thorny problems inherent in a completely satisfactory solution. All factors considered, however, the solution to

¹⁴⁰ When one considers that the national average includes in its computation the low as well as the high, the low thereby initially pulling downward that figure, a 10% figure seems more than reasonable. Indeed, for this reason there may be justification in using the base figure without the 10% differential. A comparison of the modal group with each state may also be persuasive. Is it surprising that the utilization of any of these formulas reveals just those states as the worst culprits that one might have supposed on the basis of all the other evidence available? See Appendix II *infra*, and the Civil Rights Report, *supra* note 138.

¹⁴¹ Now more easily available under the new Civil Rights Law, 74 Stat. 88 (1960), which incidentally, as is obvious, in no way affects the relative efficacy or necessity of the scheme here outlined.

¹⁴² The use of expert witnesses as a method of proof is rejected as impracticable because of the ease with which either party can produce a bevy of witnesses to bolster their point of view.

¹⁴³ *I.e.*, a district whose population exceeds by more than a reasonable amount the population each should have on the basis of an equal distribution of elective offices.

the problem of proof ventured would seem acceptable. Certainly only a sound approximation, supported by the weight of probability, is all that should be required in order to invoke the aid of the judiciary, since plaintiffs must establish their case only by a preponderance of the evidence.¹⁴⁴

CONCLUSION

The foregoing exercise has been an attempt to formulate a workable plan to enforce section 2 of the fourteenth amendment by utilizing the courts. It may reasonably be concluded that the various legal doctrines involved, at least on a technical level, favor the success of such an endeavor. It is felt that the only substantial stumbling block in the path of any such action, that of proof, can be adequately resolved. Realistically, however, as opposed to the exposition of pure legal theory, such a plan would probably have little chance of success without a favorable climate of public opinion to support it. It may be posited that that climate has already been achieved, and that American public opinion as a whole would welcome any decision by the judiciary further vindicating the effectiveness of this, our most precious right, thereby securing, by indirection to be sure, almost universal suffrage. By so doing the courts would help to reinforce and preserve the democratic framework within which we live, insuring to ourselves and our posterity the continuing vitality of representative government as conceived in our Constitution.

APPENDIX I

SUGGESTED STATUTE IMPLEMENTING SECTION 2 OF THE FOURTEENTH AMENDMENT

The following italicized amendments are recommended to 55 Stat. 761 (1941), 2 U.S.C. § 2a (1958). "()" indicates proposed deletions:

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the (President) *Director of the Census* shall submit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, *as well as the number of inhabitants of each State, citizens of the United States and twenty-one years of age, whose right to vote has been denied or abridged for reason other than crime or rebellion as contemplated under section 2 of the fourteenth amendment,* as ascertained under the seventeenth and each subsequent decennial census of the population (and the number of). *The Clerk of the House of Representatives shall then calculate the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member. He will also calculate in accordance with the figures tendered to Congress by the Director of the Census the penalty, if any, to be imposed on each State, in accordance with the mandate of section 2 of the fourteenth amendment.*

(b) (. . .) It shall be the duty of the Clerk of the House of Representatives within fifteen calendar days after the receipt of (such) *the statement of the Director of the Census,* to send to the executive of each State a certificate of the number of Representatives to

¹⁴⁴ The census is, after all, only an approximation, though a good one, of the actual population of each state on which apportionment is based. In the last analysis, therefore, all that is needed is the quantum of proof requisite in any civil suit to convince the fact-finder, i.e., the preponderance of the evidence must support the proposition sought to be proven. McCormick, Evidence § 319 (1954).

which such State (is) *would be* entitled under (this section) *the first sentence of the second section of the fourteenth amendment, and the number to which it is entitled, due account being taken of the second sentence of the second section of the fourteenth amendment.*

The following additional amendments are recommended:

(1) If at any time after such certification by the Clerk of the House of Representatives, any State shall deny or abridge the right to vote of a sufficient number of citizens of the United States, twenty-one years of age and inhabitants of that State, the Clerk of the House shall, on receipt of proper evidence from any interested party, certify to the executive of that State a reduction of that State's representation in the House of Representatives, as prescribed by section 2 of the fourteenth amendment, to take effect no later than the next election.

(2) On a demonstration by any interested party to the Clerk of the House of Representatives, that the number whose franchise was denied or abridged has been reduced in any penalized State by a sufficient amount to warrant an increase in that State's representation, the Clerk shall certify to the executive of that penalized State the corresponding increase in representation to which it is due. Such increase shall take effect no later than the next election.

(3) Any person or State aggrieved due to the failure of any official under this act to properly perform his duty may institute suit for injunction, or any proper remedy, to redress his grievance, in the Federal District Court for the District of Columbia. An appeal in any such action may be taken directly to the Supreme Court of the United States whether or not in absence of this act such appeal would lie.

Be it enacted that the Director of the Census is directed to ascertain in the most accurate and reliable manner possible, in the next and all subsequent censuses, the number of legal inhabitants of each State, citizens of the United States and twenty-one years of age, whose franchise, for reasons other than participation in rebellion or conviction of crime, was denied or abridged, as contemplated under section 2 of the fourteenth amendment. Such figures shall be published together with the rest of the census results.

APPENDIX II

PENALIZATION UNDER THE PRESENT APPORTIONMENT IF SECTION 2 WERE ENFORCED

State U.S.A	1 Number of Representatives presently apportioned	2 ^a Number of citizens 21 and in the state 1950 census	3 ^b Number of votes cast in 1952	4 % of citizens 21 and not voting in 1952	5 Penalty with 10% leeway over national average of those not voting	6 ^c Penalty based on % the state exceeds the national average of those not voting
	435	94,800,000	61,552,000	35	—16	—26
Alabama	9	1,755,000	426,000	76	— 3	— 4
Arkansas	6	1,110,000	405,000	64	— 1	— 2
Georgia	10	2,040,000	656,000	68	— 2	— 3
Kentucky	8	1,738,000	993,000	43	0	— 1
Louisiana	8	1,577,000	652,000	59	— 1	— 2
Mississippi	6	1,205,000	286,000	76	— 2	— 2
North Carolina	12	2,305,000	1,211,000	47	0	— 1
South Carolina	6	1,148,000	341,000	70	— 2	— 2
Tennessee	9	1,973,000	893,000	55	— 1	— 2
Texas	22	4,587,000	2,076,000	55	— 2	— 4
Virginia	10	2,013,000	620,000	69	— 2	— 3

^aSource for 2, Statistical Abstract of the U.S. 33 (1959).

^bSource for 3, Statistical Abstract of the U.S. 347 (1959).

^cSee note 140 supra. All figures are to the nearest thousand, whole number or % (i.e., 5 or more—next whole number).