

1965

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Recommended Citation

Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected for Defense of the Voting Rights of Southern Negroes*, 16 W. Rsrv. L. Rev. 965 (1965)

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*The Apportionment Section of the Fourteenth
Amendment: A Neglected Weapon for Defense
of the Voting Rights of Southern Negroes*

FOR ALMOST A HUNDRED YEARS, the promise held out in the fourteenth and fifteenth amendments of equal protection of the laws for all Americans and the prohibition against depriving Negroes of their constitutional rights on account of race were honored in the breach. Today, the nation is in the throes of a crisis brought about because the Negro population has taken to the streets to demand that the promises of the Constitution be carried out. In answer to this demand, the President of the United States has delivered a message to Congress asking for immediate passage of remedial legislation which will guarantee all Americans the right to vote, regardless of race, creed, or color. The resulting legislation will undoubtedly be tested in the courts, and no matter how expeditiously the challenge is handled, months will pass before the validity of the act is determined. Yet, there already have been many statutes and constitutional provisions directed toward this problem, often to little avail. Hence, one may well question whether this newest legislation, even if it be held valid, will adequately solve the problems which arise from deep-rooted Southern customs and which, for the most part, have negated the right of the Negro to vote.

I. ORIGIN AND SCOPE OF THE PROBLEM

A. The Provisions of Section Two

In 1868, the fourteenth amendment became the law of the land. In addition to the injunction in section 1 of that amendment that no state shall deprive inhabitants of the state of any of the privileges or immunities of United States citizenship or the equal protection of its laws, section 2 of the amendment provides a method for its enforcement. In very exact terms, this section sets out an apportionment procedure by which those states that deny the right to vote to any of their male inhabitants will suffer a reduction of representation in Congress. Four years after the fourteenth amendment became law, Congress enacted legislation which restated the second section of the fourteenth amendment.¹ No further effort has been

1. 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 partici-

made by Congress to effectuate either this part of the amendment or to apply its provisions in the apportionment legislation which was based on that amendment.²

The failure of Congress to implement this statute simply followed the general moratorium on Negro rights which dates from the Compromise of 1876, the year when federal troops were withdrawn from the Southern states, marking the end of the Reconstruction period. But the national consensus which allowed the Civil War amendments to remain ineffective as to the voting rights of Negroes in Southern states has been replaced by a new national attitude, one which seeks to guarantee that the civil and political rights of Negroes in the Southern states will not be violated.³ The unprecedented majority accorded to President Johnson in the 1964 election and the failure of a "white backlash" to develop may be interpreted as substantial popular approval of a continuing social, judicial, and legislative recognition that Negroes in the United States are guaranteed full political equality by the Constitution. In response to this approval, the present administration has taken several steps toward a more effective implementation of government power to protect these rights. Most pertinent here is the pending legislation that will attempt to guarantee Negroes in the South the right to register and vote in spite of any failure of state officials to cooperate. However, one may still question whether this is not merely another addition to the existing body of statutes⁴

pation 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. 17 Stat. 29 (1892), as amended, 2 U.S.C. § 6 (1964).

2. The paucity of comment in the official U.S. Constitution, Annotated, 1938 edition is little more than the statement that Congress has never exercised the power conferred upon it by this section: "Congress has never exercised the power conferred upon it by this section of reducing the representation of a State in the House of Representatives, but there can be no question of its power or its right to do so. Of its duty to do so, it alone is the judge. The amendment places the responsibility of enforcing its provisions upon that body."

"The right to vote intended to be protected refers to the right to vote as established by the laws and Constitution of the State." U.S. CONST. ANNOT. 1008 (1938), citing *McPherson v. Blacker*, 146 U.S. 1 (1892).

3. "Among the more wholesome aspects of the balloting on Election Day was the failure of the effort to obtain Northern votes for the Goldwater-Miller ticket by pandering to anti-civil rights sentiment. . . . [M]ost Americans outside the deep South . . . wanted a President whose commitment to civil rights was moral as well as legal and who could be counted on to seek national unity in making real the principle of equality." N.Y. Times, Nov. 6, 1964, p. 36.

4. 28 U.S.C. § 1343 (1958); 16 Stat. 140 (1870), 42 U.S.C. § 1971 (1958), as amended, 78 Stat. 241, 42 U.S.C. §§ 1971 (1964).

and constitutional provisions⁵ which were also expected to achieve the same result — equal rights for Negroes. Indeed, if the frustration of Negro rights, which for a hundred years belied the promises of the thirteenth, fourteenth, and fifteenth amendments is only now on the threshold of termination, one might legitimately question whether achievement of the goals and provisions of this new legislation will not again be postponed.

Although the coming period in the development of this nation's forward march to the achievement of its democratic goals may well continue to involve the bayonets of the national guard and demonstrations of Negro citizens, this Note will focus on another factor often ignored in the Negro's struggle for equality — section 2 of the fourteenth amendment:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But 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, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁶

The authors of this provision envisaged that it would serve as a most important weapon in guaranteeing that the Negroes of this nation would have the same right to vote as the whites. Although it has rarely been invoked to accomplish this purpose, its potential and promise have in no way been diminished.⁷ It is a part of the Constitution and has been given force by an implementing statute enacted by Congress in 1872. Indeed, the legislative history and announced purpose of the amendment demonstrate that section 2

5. U.S. CONST. amends. XIII, XIV, XV, XXIV.

6. U.S. CONST. amend. XIV, § 2.

7. After *Baker v. Carr* was decided, one author said: "The Court's handling of the 'political question' issue thus has significant implications in other areas. . . . It may even open up such questions as federal court enforcement of section 2 of the fourteenth amendment, providing for reduction in the congressional representation of states which deny their citizens the right to vote." Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 67 (1962). See also COOLEY, *CONSTITUTIONAL LAW* 274 (2d ed. 1891) where, in discussing section 2, the author says: "Important questions, however, may still arise under it. The provision is general; it is not limited to freedmen, but it applies wherever the right to vote is denied to male citizens of the proper age, or is abridged for other cause than for participation in crime." *Id.* at 274. (Emphasis added.)

could have, at any time in the past ninety-six years, been enforced to protect the Southern Negro's right to vote.

B. *Legislative History of Section Two*

The keynote for any discussion of the fourteenth amendment is to be found in the words of two Republican leaders in the thirty-ninth Congress — Charles Sumner and Thaddeus Stevens. While historiography has often referred to these men as "arbitrary" or "vindictive"⁸ a re-evaluation of their position in light of present circumstances will allow a latter day reader to decide for himself whether their thoughts and attitudes were inimical to or the essence of American democracy.

In February of 1866, Charles Sumner spoke the following words:

I begin by expressing a heart-felt aspiration that the day may soon come, when the states lately in rebellion may be received again into the copartnership of political power and the full fellowship of the Union. But I see too well that it is vain to expect this day, which is so much longed for, until we have obtained that security for the future, which is found only in the Equal Rights of All, whether in the court-room or at the ballot-box. This is the Great Guarantee, without which all other guarantees will fail. This is the sole solution of our present troubles and anxieties. This is the only sufficient assurance of peace and reconciliation. . . .

At least the same necessity, which insisted first upon emancipation and then upon the arming of the slaves, insists with the same unanswerable force upon the admission of the freedmen to complete Equality before the law, so that there shall be no ban of color in court-room, or at the ballot-box, and government shall be fixed on its only rightful foundation — the consent of the governed.⁹

8. 4 HART, *AMERICAN HISTORY AS TOLD BY CONTEMPORARIES* 482 (1912), describing Thaddeus Stevens says: "He was intolerant of compromise . . . urgent for confiscation and defiant to 'rebels, traitors, and copperheads.' [H]is extreme views often had to be modified before they were acceptable to the majority." DUNNING, *RECONSTRUCTION POLITICAL AND ECONOMIC* 86 (1907), describes Stevens as "truculent, vindictive, and cynical . . ." Dunning describes Charles Sumner as "the perfect type of that narrow fanaticism which erudition and fanaticism combine to produce. . . ." *Id.* at 87. 6 RHODES, *HISTORY OF THE UNITED STATES* 14 (1906), comments on Stevens: "Vindictiveness seemed to animate his frame." WOODWARD, *A NEW AMERICAN HISTORY* 589 (1910) is equally critical: "The conquered provinces theory was essential to Stevens's scheme of vengeance." Charles Sumner, says Woodward, was "a man who possessed malice without talent." *Id.* at 799. *But see* STAMPP, *THE ERA OF RECONSTRUCTION* (1965) for the viewpoint of a more modern school of historians which may be called "Reconstruction's revisionists." One reviewer draws from Stamp's book the thought that the "'vindictiveness' does not seem borne out by a record which shows no mass arrests, trials or executions, but rather only a disfranchisement policy which lasted no more than ten years in all and was constantly whittled down in scope before its abandonment." Weisberger, *Book Review*, *Nation*, April 26, 1965, p. 450.

9. CONG. GLOBE, 39th Cong., 1st Sess. 674 (1865-1866) [hereinafter cited as CONG. GLOBE].

More concerned with the economic basis of the post-war South, Thaddeus Stevens would have confiscated the property of the previous slave owners "for these 70,000 persons were the arch-traitors and since they had caused an unjust war they should be made to suffer the consequences."¹⁰ The pleas of the Negro freedmen were also heard in the halls of Congress. Tennessee Negroes pleaded that "we cannot believe that the General Government will allow us to be left without such protection after knowing, as you do, what services we have rendered to the cause of the preservation of the Union and the maintenance of the laws."¹¹ In addition, Mississippi Negroes asked for the suffrage to "more effectually prove our fidelity to the United States; as we have fought in favor of liberty, justice, and humanity, we wish to vote in favor of it and give our influence to the permanent establishment of pure republican institutions in these United States; and also that we may be in a position in a legal and peaceable way to protect ourselves in the enjoyment of those sacred rights which were pledged to us by the emancipation proclamation."¹²

Amidst these demands for implementation of the freedom granted by the Emancipation Proclamation was the practical effect of the thirteenth amendment which was scheduled to go into effect on December 18, 1865. That amendment would alter the effect of the original article I, section 3 of the Constitution which provided that "representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons."¹³ The "three-fifths" compromise, after the emancipation, was no longer effective.

Representative Conkling of New York was among those who refused to accept the result which would give Southern states the population figures for congressional apportionment, which included Negroes, in face of any denial to the Negroes of full equality. He argued: "Shall this be? Shall four million beings count four million, in managing the affairs of the nation, who are pronounced by their fellow beings unfit to participate in administering government

10. DUBOIS, *BLACK RECONSTRUCTION* 198 (1935).

11. CONG. GLOBE 107.

12. *Id.* at 128.

13. U.S. CONST. art. I, § 2.

in the states where they live . . . who are pronounced unworthy of the least and most paltry part in the political affairs?"¹⁴

The earliest attempts of Congress to deal with the problem of Negro suffrage are found in proposals made by Representatives Schenck of Ohio,¹⁵ Stevens of Pennsylvania,¹⁶ and Broomall of Pennsylvania.¹⁷ These bills were directed toward efforts to base apportionment for members of the House on the number of legally authorized voters in the states. The proposals were referred to the fifteen member Joint Committee on Reconstruction where they encountered opposition from representatives of the New England states. The latter were opposed to such proposals due to the disproportionately high number of male voters in the Western states as compared with the New England states where a large part of the population was made up of non-voting women and children.¹⁸ Nevertheless, a "voter-based apportionment" proposal emerged vic-

14. CONG. GLOBE 35. See Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961).

In 1860, before passage of the thirteenth amendment, the three-fifths compromise led to the apportionment of eighteen seats to the Southern states. The abolition of slavery required that all the Negroes be counted for apportionment purposes, with a resultant increase of eleven additional representatives. Such a result was anathema to the Republican members of Congress. The 1952 edition of the U.S. CONST. ANNOT. says that "the effect of this section in relation to Negroes was indicated in *Elk v. Wilkins*. 'Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of . . . [Article I, § 2, cl. 3] of the . . . original Constitution as counted only three-fifth of such persons.'" U.S. CONST. ANNOT. 1171 (1952).

Senator Howard clearly expressed the refusal of the Republican Party to allow the end of the three-fifths compromise to result in added power to the Southern states in the absence of full democracy for the freedmen: "The three-fifths principle has ceased in the destruction of slavery and in the enfranchisement of the colored race. Under the present Constitution this change will increase the number of Representatives from the once slave-holding states by nine or ten. That is to say, if the present basis of representation, as established in the Constitution, shall remain operative for the future, making our calculations on upon the census of 1860, the enfranchisement of their slaves would increase the number of their Representatives in the other House nine or ten, I think at least ten; and under the next census it is easy to see that this number would be still increased; and the important question now is, shall this be permitted while the colored population are excluded from the privilege of voting? Shall the recently slaveholding States, while they exclude from the ballot the whole of their black population, be entitled to include the whole of that population in the basis of their representation, and thus to obtain an advantage which they did not possess before the rebellion and emancipation? In short, shall we permit it to take place that one of the results of the emancipation and of the war is to increase the Representatives of the late slaveholding States? I object to this." CONG. GLOBE 2767.

15. CONG. GLOBE 9-10.

16. *Ibid.*

17. *Ibid.*

18. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 41, 45 (1914).

torious constituting the first compromise adopted by the Committee. It read:

Representatives shall be apportioned among the several states which may be included within this Union according to their respective numbers, counting the 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.¹⁹

The House adopted the measure on January 31, 1866.²⁰ However, it was met by substantial opposition by Democrats in the Senate whose arguments were primarily based on the contention that the measure was an "attack on the South"; that the North was discriminating against the South in spite of the fact that it too was guilty of denial of suffrage to certain persons. At the other extreme, the Republican opposition to the proposal, led by Charles Sumner, saw the proposal as a grant of permission to Southern states to discriminate against the Negroes. Sumner described the proposal as a "delusion and a snare" and the means employed "unworthy of our country."²¹ In response to a second and similar version, his protest was indeed prophetic: "There are tricks and evasions possible, and the cunning slavemaster will drive his coach and six through your amendment stuffed with his representatives."²² The Senate vote on March 9, 1866 failed to obtain a 2/3 majority, and the measure was returned to the Joint Committee on Reconstruction of the House.²³

Later in the same year, another version was presented. As to section 2 of the proposed amendment, Stevens and the other Republicans who spoke for adoption considered it "the most important in the article."²⁴ In describing this section Stevens said: "It says, however, to the State of South Carolina and other slave states, true, we leave the right where it has been left for eighty years the right to fix the elective franchise, but you must not abuse it; if you do, the Congress will impose upon you a penalty, and will continue to inflict it until you shall have corrected your actions."²⁵

19. CONG. GLOBE 535.

20. *Id.* at 538.

21. *Id.* at 673.

22. *Id.* at 536.

23. *Id.* at 2459.

24. *Id.* at 539.

25. *Id.* at 1289.

But although he considered section 2 a compromise, Stevens called for support of the amendment in spite of its shortcomings: "I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this."²⁶ Representative Farnsworth of Illinois was more vehement as he spelled out the enforcement provision of the second section during the last days of the debate on May 10, 1866:

Now, this Amendment says to those States this: "If the freedmen are so degraded and ignorant as to be unworthy of enfranchisement; if they are not capable of governing themselves, but must be held in subjection to and governed by their late masters, then they are not fit to govern the country through the votes of others." They shall not by any such prestidigitation, be dead at the ballot-box, but alive here, dumb, without a voice for their own government, and with thirty-two voices on this floor, and thirty-two votes for President and Vice President. They shall not be used to swell their rebel masters into giants and dwarf the royal and patriotic men of the free states into Tom Thumbs!²⁷

This challenge to the Southern states that they would not be allowed to vote the thirty-two votes in Congress based on the Negro population so long as they denied the vote to the same Negroes has two important implications: (1) it was expected that section 2 would be enforced; and (2) the amendment was calculated to provide a stimulus to the returning Southern states to grant rights to the Negroes. Thus, the Thirty-Ninth Congress was face to face with a situation wherein the representation in the House of Representatives from the Southern states would be swelled as a result of the Negroes being counted as "free persons" in spite of the fact that they were denied the right to vote. The anticipated effect of the fourteenth amendment in stimulating the granting of the franchise to the Negroes was expressed by Congressman Nicholson of Delaware as follows:

It is presumed that the desire for as full a representation as can be obtained will compel the states having within their limits a large Negro population to confer upon them the elective franchise. This might ultimately be the result, though you are compensated in the event of their refusal by an increase of power.²⁸

26. *Id.* at 2767.

27. *Id.* at 435.

28. *Id.* at 2459.

The possibility continued to exist that the Southern states might refuse to recognize the "stimulus" and continue to deny Negroes the right to vote. This possibility, as is known, took place.

C. *The Effect of the Fifteenth Amendment*

Whether the passage of the fifteenth amendment created any additional voting rights for Negroes has been the subject of considerable comment. To the contemporaries of the period, there was no question that passage of another amendment was necessary to grant suffrage to Negroes. For example, in the *Slaughter House Cases*, the Court stated:

A few years' experience satisfied the thoughtful men who had been authors of the other two Thirteenth and Fourteenth amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all these States denied the right of suffrage. Hence the fifteenth amendment. . . . The Negro having, by the fourteenth amendment been declared to be a citizen of the United States, is thus made a voter in every State of the Union.²⁹

Representative Blaine also maintained that "the Fifteenth Amendment to the Constitution . . . would confirm the colored man's elective franchise and add the right of holding office."³⁰ To these two interpretations can be added President Grant's special message of March 30, 1870, in which he declared:

A measure which makes at once four millions of people voters, who were heretofore declared by the highest tribunal of the land not citizens of the United States, nor eligible to become so (with the assertion that, "at the time of the Declaration of Independence, the opinion was fixed and universal in the civilized portion of the white race, regarded as an axiom in morals as well as in politics, that black men had no rights which the white man was bound to respect"), is indeed a measure of grander importance than any other one act of the kind from the foundation of our free government to the present day.³¹

The southern Democrats, however, were never happy with the fourteenth amendment, and accordingly they advanced the theory that it had been repealed by the fifteenth amendment. An Alabama Democrat declared that Congress had passed the fifteenth amendment because it was "embittered by the failure of the south

29. 83 U.S. (16 Wall.) 36, 71 (1873).

30. CONG. GLOBE 448.

31. S. DOC. NO. 74, 41st Cong., 2d Sess. (1870).

to grant the negro the right to vote."³² In addition, he alleged that the fifteenth amendment repealed section 2 of the fourteenth. His reasoning was ingenious: "If a State passed a law which violated the provisions of the Fifteenth Amendment, such a law was unconstitutional and void If the law was void, it *could not* deny or abridge the right of the Negro to vote."³³ But this position fails to take into consideration the fact that section 2 of the fourteenth amendment is much broader than the fifteenth amendment in that *any* person's right to vote is protected by the provisions of the former. Senator Howard made this distinction clear during a Senate debate,³⁴ and other authorities have reached the same interpretation:

By some it has been argued that the Fifteenth Amendment is to be construed as repealing the clause of the Fourteenth Amendment relating to the reduction of the representation of the States, in that it renders constitutionally impossible the action which it was the object of that clause to deter the States from taking. This argument, though it has had the support of eminent authority, cannot be considered a sound one, for the clause of the Fourteenth Amendment provides for a reduction not simply in cases where adult male inhabitants, citizens of the United States, are denied the right to vote because of race, color or previous condition of servitude, but for *any cause whatever*, saving for participation in rebellion or other crime.³⁵

However, even the academic discussion of these issues dwindled as the moratorium on enforcement continued. Only in recent years has the federal government readdressed itself to this part of the Constitution which provides the method of enforcing the political and civil rights of individual citizens.

32. NORTH AMER. REV. 530, 536 (1905).

33. *Id.* at 539. Emmett O'Neal, a Democrat and former district attorney in Alabama, wrote the polemic to the plank in the Republican Party platform of 1904 which said: "We favor such Congressional action as shall determine whether, by special discrimination, the elective franchise in any State has been unconstitutionally limited, and if such be the case, we demand that representation in Congress and in the Electoral College shall be proportionately reduced as directed by the Constitution of the United States." *Ibid.* In rejoinder, O'Neal argued that Congress was being asked to usurp a judicial function and further, that the earlier *demand* for Negro suffrage in the fourteenth amendment had been replaced with a *command* in the fifteenth amendment. Any discriminatory law or practise would be void under the fifteenth amendment, and of no legal effect. Therefore, the second section of the fourteenth amendment was overruled. Suffice it to comment that sixty years later the allegedly void discriminatory practices were still in effect throughout the South.

34. CONG. GLOBE 2767.

35. 1 WILLOUGHRY, CONSTITUTION 534 (1910).

D. Equality of Population

The decision in *Wesberry v. Sanders*³⁶ was directed toward achieving equality of population in the state congressional districts, and it gave the Court an opportunity to reassert the intentions of the writers of the Constitution in regard to the nature of representation in the House of Representatives. First, the Court found that "the debates at the Convention make . . . abundantly clear: that . . . in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants."³⁷ To preserve this system the "Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people."³⁸ The Court went on to say in *Wesberry* that legislatures "may [not] draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."³⁹ The question may then be asked: if a state may not run its electoral affairs so as to defeat the principle of equal representation for equal numbers of people, can it nevertheless deny Negroes the right to vote and yet retain the right to representation based on their numbers? It has been noted previously that states cannot register voters through the use of invalid laws.⁴⁰ Therefore, how can it logically follow that although unconstitutional practices of abridgement and denial are struck down within the states, any resultant effect of such practices outside the state, such as determining the number of a state's delegation in the House of Representatives, is not subject to the same treatment?

Another supposed limitation on the scope of federal action in this area is that the right to vote is established by the laws of the

36. 376 U.S. 1 (1964). The significance of this case lies in the fact that it concerned *congressional* districts, whereas the previous apportionment cases dealt with state legislatures. Justice Black said for the Court that in "debasing the weight of appellants' votes the State has abridged the right to vote for members of Congress guaranteed them by the United States Constitution." *Id.* at 4. As to the source of the right to vote, Justice Black referred to the records of the Constitutional Convention and the words contained in article I, section 2 that Representatives shall be chosen "by the People of the several States." His conclusion was that "it is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted." *Id.* at 17. See also notes 77-95 *infra* and accompanying text.

37. *Id.* at 13.

38. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 14 (Farrand ed. 1911).

39. 376 U.S. 1, 14 (1964).

40. See *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965).

states. The case of *McPherson v. Blacker*⁴¹ was the earliest case to make this clear. It was later discussed in *Lassiter v. Northampton County Bd. of Elections*,⁴² where Justice Douglas declared that the right to vote mentioned in section 2 of the fourteenth amendment is of state origin. But the states do not have an *absolute* privilege in this respect. As was said in *United States v. Mississippi*,⁴³ the state is only allowed to regulate the right to vote by valid legislation. Legislation or conduct which falls short of the standards set forth in the fourteenth amendment is invalid. And from this it follows that if the invalidity constitutes an abridgement of the right to vote, the sanction provisions of section 2 should be enforced.

II. SECTION TWO AND THE CASE LAW

Ninety-nine years after the fourteenth amendment became law, Mr. Justice Harlan, dissenting in *Reynolds v. Sims*,⁴⁴ opposed application of the equal protection clause of the fourteenth amendment to a state apportionment act by pointing to section 2 of the same amendment. He said: "I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny 'or in any way' abridge the right of their inhabitants to vote for 'the members of the [State] Legislature,' and its express provisions of a remedy for such denial or abridgement."⁴⁵ Nevertheless, the Court has continued to disregard section 2, and indeed Congress has been equally as persistent in avoiding the section in each of the apportionments carried out since the passage of the amendment. Furthermore, it cannot be argued in light of the holdings in cases even before *Baker v. Carr*⁴⁶ and the dissent of Mr. Justice Harlan that the enforceability of section 2 could not have

41. 146 U.S. 1 (1892).

42. 360 U.S. 45 (1959). In *Lassiter*, the Court did not strike down a literacy test imposed by the laws of North Carolina because it was a device legitimately related to "the desire of North Carolina to raise the standards for people of all races who cast the ballot." *Id.* at 54.

43. 380 U.S. 128, 138 (1965). The tolerance which the Court showed in the *Lassiter* case toward a regulation of voter registration was not applied in the *Mississippi* case where the Court found that the state registration laws were intended to discourage or prevent Negro registration. Such a law was *invalid*, and the state has no right, under its authority to regulate voting, to pass invalid laws calculated to weaken the constitutional right to vote found in the fourteenth and fifteenth amendments.

44. 377 U.S. 533 (1964).

45. *Id.* at 594.

46. 369 U.S. 186 (1962).

breached the barriers of "nonjusticiability," "political question," "standing," or "want of equity."⁴⁷

A. Unsuccessful Attempts to Enforce Section Two

Until the recent case of *Lampkin v. Hodges*,⁴⁸ only three litigants had raised the question of enforcement of section 2 before the judiciary. All met with failure. In the first case, *Saunders v. Wilkins*,⁴⁹ the plaintiff, a citizen of Virginia, brought suit against the Secretary of the Commonwealth of Virginia for failure to certify his candidacy for the office of Representative from Virginia in the Congress. Alleging that by imposition of a poll-tax Virginia had denied sixty per cent of its population over twenty-one years of age and citizens of the United States the right to vote, the plaintiff argued that section two of the fourteenth amendment should be enforced and thereby the "basis of representation of the State should be reduced in the proportion which the number of such citizens bears to the whole number of citizens twenty-one years of age in the State."⁵⁰ The plaintiff further argued that failure to provide for reducing the representation from Virginia had rendered the federal apportionment act of 1941⁵¹ and the Virginia statute⁵²

47. See *Wood v. Broom*, 287 U.S. 1 (1932) wherein an attack on Mississippi's congressional districting was considered on the merits; *Smiley v. Holm*, 285 U.S. 355 (1932) wherein a review on the merits led to enjoining the holding of a congressional election pursuant to an improper state redistricting statute; *Koeing v. Flynn*, 285 U.S. 375 (1932) wherein the Court reviewed on the merits a suit brought by "citizens and voters" of New York for a writ of mandamus to order the state Secretary of State to follow a procedure outlined in a state statute.

It is now likely that with the aid which comes from the cases after *Baker v. Carr* and ending with the recent case of *Wesberry v. Sanders*, 376 U.S. 1 (1964), that such obstacles will be overcome. In the latter case, Justice Black cited *Baker v. Carr* as the root-source for the Court's policy in the apportionment-franchise area. The basic criteria outlined include: (1) federal courts have jurisdiction; (2) qualified voters have standing to sue; (3) such disputes involve a justiciable cause of action. These standards were applied first to intrastate apportionments, later applied *in toto* to the dispute in *Wesberry* which concerned state apportionment of congressional districts. See *Wesberry v. Sanders*, 376 U.S. 1, 5, 6 (1964). Note that the opinion cites section 2 of the fourteenth amendment and is applied so far as apportionment by population is concerned. Query: If the Court can use one phrase of section 2 to achieve representation based on population, cannot it be logically expected to use the entire section including the provisions for reduction of representation when denial or abridgement of the right to vote takes place in a state?

48. Originally filed as *Luther v. Hodges* [Secretary of Commerce], Civil Action No. 1355-63, the case was decided on March 29, 1965, *sub nom.* *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965), John T. Connor then being Secretary of Commerce.

49. 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

50. *Id.* at 236.

51. 55 Stat. 672 (1941), 2 U.S.C. § 6 (1958).

52. Va. Code of 1942, §§ 70-72.

which districted the state into nine congressional districts invalid. To support his candidacy for Representative-at-Large, Saunders sought to invoke the provisions of section 2(a)(c)(5) of the United States Code which states that "if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large."⁵³ He asked the court to order such a result by construing section 2 of the fourteenth amendment as requiring a reduction in the number of Representatives to which Virginia was entitled. But the court made short shrift of these arguments as well as of the contention that the Virginia poll-tax had denied citizens in that state the privileges and immunities protected by the fourteenth amendment. It stated that the "privilege of voting is not derived from the United States, but is conferred by the state"⁵⁴ In further support of this position, the court could still cite *Breedlove v. Suttles*,⁵⁵ which held that such taxes are valid exercises of state power. The court then went on to point out that section 2 of the fourteenth amendment is not offended by abridgment of the right to vote due to imposition of a poll-tax, because this argument presents a "question political in its nature which must be determined by the legislative branch of the government and is not justiciable."⁵⁶ Here the court relied on a long-standing definition of what was political and non-justiciable. Citing *Coleman v. Miller*,⁵⁷ it pointed to the requirement of attributing "finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination."⁵⁸

Since the court's opinion in *Saunders* was delivered in 1945, it is certainly possible to suggest that recent Supreme Court decisions would modify the rationale of the *Saunders* holdings as to the power of the judiciary to regulate electoral matters and the constitutional protection of the right to vote.⁵⁹ First, the twenty-fourth amendment

53. 46 Stat. 26 (1929), as amended, 54 Stat. 162 (1940), as amended, 55 Stat. 761 (1941), 2 U.S.C. § 2a(3)(5) (1958).

54. 152 F.2d 235, 237 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

55. 302 U.S. 277 (1937). The adoption of the twenty-fourth amendment, however, and *Harman v. Forssenius*, 380 U.S. 528 (1965), make this argument untenable.

56. 152 F.2d 235, 237 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

57. 307 U.S. 433 (1939). In *Baker v. Carr*, however, the political question doctrine was sharply limited. The Court said that the political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.

58. 152 F.2d 235, 238 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

59. See, e.g., *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962).

now prohibits the use of a poll tax in federal elections. The validity of the amendment was upheld in the recent case of *Harman v. Forssenius*,⁶⁰ where the Court held a Virginia poll tax unconstitutional. A further indication of the complete reversal in this area may be found in *Wilkins v. Davis*,⁶¹ where the court declared that Virginia's congressional districts must be reapportioned in conformity with *Baker v. Carr* and the apportionment decisions of June 15, 1964.⁶² The court also required that the new districts be "contiguous and compact," a quality which had been held to be unessential in prior cases.⁶³ Thus, one can only sympathize with plaintiff-Saunders in the *Saunders v. Wilkins* case as he reads that the Supreme Court of Appeals of Virginia now holds that *all* Representatives from Virginia must be elected at large until a proper apportionment is completed.

A further basis for dismissal in *Saunders v. Wilkins* arose when the court discussed its power to make adjustments in the apportionment of membership in the House of Representatives.

We have no means of knowing the effect upon the suffrage of the restrictions imposed by the statutes of other states in the form of poll taxes or other qualifications for voting.

We could not say, even if the question lay within our power, whether Virginia is entitled to nine out of the total number of four hundred and thirty-five Representatives provided by Congress without ascertaining the number to which other states are entitled when the provisions of the second section of the Fourteenth Amendment are taken into consideration.⁶⁴

The American Civil Liberties Union countered this argument as *amicus curiae* in the petition for writ of certiorari. It argued that petitioner had erred in demanding that the Apportionment Act of 1941 be declared unconstitutional because of failure to enforce section 2 of the fourteenth amendment. "It is axiomatic . . . that an act of Congress must be construed, if possible, so as to make it con-

60. 380 U.S. 528 (1965).

61. 205 Va. 803, 139 S.E.2d 849 (1965).

62. *Lucas v. Forty-fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964); *Roman v. Sincok*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

63. *E.g.*, *Wood v. Broom*, 287 U.S. 1 (1932) wherein the Court held that the requirements of contiguity and equality of population which had been part of the 1911 apportionment law had expired at the time these requirements were omitted from the 1929 apportionment law. In *Wesberry v. Sanders*, the holding based the requirement of equality of population on art. I, § 2 of the Constitution, rather than the apportionment law.

64. 152 F.2d 235, 238 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

stitutional.”⁶⁵ Congress, it said, “contemplated compliance with the mandate of the Fourteenth Amendment through the reduction provisions⁶⁶ . . . of the number of representatives otherwise apportioned to an offending state, in direct proportion to the unconstitutional disenfranchisement of the citizens of such state.”⁶⁷ The act “must be construed as apportioning to Virginia nine representatives *subject however, to reduction, ipso facto, in the proportion the number of male citizens twenty-one years of age in such State whose right to vote has been denied or abridged . . . shall have to the whole number of male citizens twenty-one years of age in such State.*”⁶⁸ In regard to the Court’s contention that it was without power to reallocate any seats which might be taken away from Virginia, it was argued that the number 435 was not to be considered a magic number. This was in fact illustrated when Alaska and Hawaii were admitted as states and the number was increased to 437. Furthermore, the Court would not have been required to reallocate to some other state the seats denied the State of Virginia. It merely could have reduced the entire number of 435 to the extent required under section 2 of the fourteenth amendment.

Another attack on the Apportionment Act of 1941 was posed by the defendant in *Dennis v. United States*.⁶⁹ There the issue was raised in defense of a prosecution for failure to respond to a subpoena issued by the House Committee on Un-American Activities. It was alleged that Congressman John E. Rankin of Mississippi, a member of the Committee, was not a validly elected member of Congress under the provisions of section 2 of the fourteenth amendment; that since in his election Negro citizens of Mississippi had been denied the right to vote, section 2 would necessarily reduce Mississippi’s congressional delegation from seven to four representatives. The court dismissed this defense as “sheer nonsense,” and announced that the validity of the apportionment act could not be attacked in a collateral proceeding.⁷⁰ It was also logical for the court to cite the case of *Saunders v. Wilkins*⁷¹ since that case was

65. Brief for the American Civil Liberties Union as Amicus Curiae, p. 3, *Saunders v. Wilkins*, 328 U.S. 870 (1946).

66. 55 Stat. 76, 2 U.S.C. § 2a(c) (5) (1958).

67. Brief for the American Civil Liberties Union as Amicus Curiae, p. 3, *Saunders v. Wilkins*, 328 U.S. 870 (1946).

68. *Id.* at 3. (Emphasis in original.)

69. 171 F.2d 986 (D.C. Cir. 1948), *cert. granted on other issues and aff’d*, 339 U.S. 162 (1950).

70. 171 F.2d 986, 993 (D.C. Cir. 1948).

71. 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

then valid precedent for characterizing state apportionment of congressional districts as political and non-justiciable. Admittedly, the *Dennis* case raised the section 2 issue collaterally, and it is for this reason that it cannot be considered precedent for rejecting a proper challenge to unconstitutional malapportionment. As the Court said in *Wesberry v. Sanders*, "the right to vote is too important in our free society to be stripped of judicial protection. . . ."⁷²

The difficulty faced by litigants in posing the issue of enforcement of section 2 of the fourteenth amendment is further exemplified by the case of *United States v. Sharrow*.⁷³ In that case, defendant was convicted for refusing to answer any of the questions posed to him by the census enumerator because the questions did not include matters necessary to the enforcement of section 2. The defendant asserted "that the census enumerators should have asked each citizen, or at least each male citizen twenty-one years of age, whether he was being denied his right to vote and that, this question not being asked, proper figures could not be obtained to apportion constitutionally the National House of Representatives; and hence the census-taking deprived him of his federally guaranteed civil right to equal protection of the law and to be governed by a constitutionally elected Congress."⁷⁴ However, the circuit court upheld the conviction, stating that "in the present state of the Law [the Congress] is not required to prescribe that census takers ascertain information relative to disfranchisement."⁷⁵ The court also added that reduction of a state's representation is a political question of the kind that has been considered unsuitable for judicial determination. But the court's decision was not without a note of sensitivity to the changing situation as to political questions, for Judge Waterman went on to state that "whether this classification is to survive the recent decision of the Supreme Court in *Baker v. Carr* . . . need not be determined by us in this case."⁷⁶

72. 376 U.S. 1, 63 (1964).

73. 309 F.2d 77 (2d Cir. 1962), *cert. denied*, 372 U.S. 949 (1963). Mr. Sharrow has dedicated his entire energy to writing and other efforts in regard to enforcing section 2. See, e.g., SHARROW, UNCONSTITUTIONAL CONGRESSIONAL GOVERNMENT (1960).

74. *Id.* at 79.

75. *Id.* at 79-80.

76. *Id.* at 80. The limited value of the *Sharrow* case as precedent is indicated in Chief Judge Lumbard's concurring opinion which states: "I agree with Judge Waterman that the statute under which Mr. Sharrow was convicted is constitutional. *This is the only question we are called upon to discuss.*" *Ibid.* (Emphasis added.)

B. Is the Right to Vote a Federal Right?

The recent decision in *Reynolds v. Sims*⁷⁷ makes it abundantly clear that "the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections."⁷⁸ Supported by a "consistent line of decisions" the Court found no problem in holding that "all qualified voters have a constitutionally protected right to vote."⁷⁹ Thus, since all qualified citizens have a right to vote, and a denial of this constitutionally protected right demands judicial protection,⁸⁰ it is only a short step forward to apply this same protection to a suitor who alleges that a congressional *enactment* or *executive* apportionment procedure which ignores the mandate of section 2 has resulted in a "debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."⁸¹ However, Mr. Justice Harlan maintains that these cases show "no violation of any constitutional right."⁸² This point of view can be traced to Mr. Bingham's recognition that "the exercise of the electoral franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States."⁸³ However, this approach fails to comprehend that even though the states have unquestionable authority to regulate matters pertaining to elections, such authority is subject to and regulated by federal standards imposed on the states by the fourteenth amendment.⁸⁴ In this respect, the states must:

77. 377 U.S. 533 (1964).

78. *Id.* at 554.

79. *Ibid.*

80. *Id.* at 566.

81. *Id.* at 555.

82. *Id.* at 592 (dissenting opinion).

83. CONG. GLOBE 2542.

84. The point was well illustrated in the case of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In that case, the Alabama legislature had redefined the boundaries of Tuskegee, Alabama, with the resultant effect of removing all but four or five Negroes from the city who thus lost their right to participate in municipal elections. Although the Court recognized "the breadth . . . of this aspect of the State's political power," and the state argued that it alone had the power to establish its own political subdivisions, the Court added that "to exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions. . . . *Id.* at 342. In striking down the "gerrymander," the Court stated: "When a State exercises power wholly within the domain of state interests, it is insulated from judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Id.* at 347. The Court therefore had no difficulty in judging the statute invalid: "It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens." *Id.* at 342.

(1) protect the right to have votes counted;⁸⁵ (2) prevent votes from being altered;⁸⁶ (3) prevent votes from being diluted by ballot-box stuffing;⁸⁷ (4) protect the right of qualified voters to vote;⁸⁸ (5) prevent gerrymandering based on race;⁸⁹ (6) protect the right to interracial primaries;⁹⁰ (7) protect the right of Negroes to vote;⁹¹ (8) preserve the right of women to vote;⁹² (9) protect the right of its citizens to vote in federal elections free from payment of a poll or other tax;⁹³ (10) preserve the right to a vote which is undiluted and undebased.⁹⁴ This is only a partial listing; nevertheless, it vividly demonstrates that voting and matters affecting voting are clearly within the realm of federal protection.⁹⁵

C. *Impact of Lampkin v. Connors*

In the recent case of *Lampkin v. Connor*,⁹⁶ twenty-five plaintiffs⁹⁷ alleged debasement or denial of their right to vote. Accordingly, they asked for a declaratory judgment ordering the Department of the Census to gather and report statistics relative to the number of voters denied the right to vote. The plaintiffs thereupon hoped to be able to prepare a case based upon the sanction provisions of section 2 of the fourteenth amendment for purposes of reapportioning the House of Representatives. The rationale of the plaintiffs' case was based on an effort to have the decennial appor-

85. *United States v. Mosley*, 238 U.S. 383 (1915).

86. *United States v. Classic*, 313 U.S. 299 (1941).

87. *Ex parte Siebold*, 100 U.S. 371 (1879).

88. *United States v. Classic*, 313 U.S. 299 (1941).

89. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

90. *Nixon v. Herndon*, 273 U.S. 536 (1927).

91. U.S. CONST. amend. XV.

92. U.S. CONST. amend. XIX.

93. U.S. CONST. amend. XXIV.

94. *Baker v. Carr*, 369 U.S. 186 (1962).

95. *Reynolds v. Sims*, 377 U.S. 533, 535 (1964).

96. 239 F. Supp. 757 (D.D.C. 1965).

97. Group I plaintiffs were fifteen voters from non-discriminating states (Pennsylvania, Massachusetts, Missouri, Illinois, Ohio, and California) who alleged that unless representation for discriminating states is reduced, "their votes will be debased and diluted to the extent that they will be of less value than the votes of the voters in the States which deny and abridge the right to vote." *Id.* at 759.

Group II plaintiffs were ten persons from the states of Virginia, Louisiana, and Mississippi. This group alleged that "voter qualification tests and conditions as applied to them by their respective States constitute a denial or abridgement of their right to vote." *Id.* at 758. By the date of decision in *Lampkin* (March 29, 1965), the Supreme Court had made the identical findings as to Louisiana and Mississippi. See *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965).

tionment act⁹⁸ construed in harmony with the apportionment law which explicitly repeats the sanction provisions of section 2 of the fourteenth amendment. The district court dismissed the complaint for lack of standing to sue. In so holding, however, the court completely ignored the mandates of several Supreme Court cases that specifically recognized standing whenever allegations were made relative to dilution or debasement of the right to vote.¹⁰⁰ For example, in *Gray v. Sanders*,¹⁰¹ the Court made it explicit that "appellee, like any person whose vote is impaired . . . has standing to sue."¹⁰²

In *Lampkin*, however, the court stated that both the amount of the impairment or dilution and the possibility of redress were remote and speculative.¹⁰³ The court found no difficulty in distinguishing *Wesberry v. Saunders* where the plaintiffs had properly alleged that their votes were debased or diluted in value. To meet the test of definiteness and proximity, the court pointed to the demand in *Wesberry* that the Georgia apportionment statute be declared invalid and that election officials be enjoined from conducting elections under it. The court also found the demand in *Gray v. Sanders* that a statute relating to the county unit system be declared invalid met the test of proximity and certainty and was thus distinguishable from the case before it. However, it is submitted that the district court was confused about the concepts of remoteness and speculation in this area. Consider for example, the statement of the Supreme Court in *Wesberry v. Sanders*: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."¹⁰⁴ In addition, there is the statement of Chief Justice Warren in

98. 2 U.S.C. § 2a (1958).

99. 17 Stat. 29 (1872), as amended, 2 U.S.C. § 6 (1964).

100. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that a claim that equal protection of the laws was denied when the right to vote was debased by state misapportionment was: (1) a justiciable controversy; and (2) could not be avoided by doctrines such as "standing," "political questions," or "want of equity." See also *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964); *Roman v. Sincok*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

101. 372 U.S. 368 (1963).

102. *Id.* at 375.

103. 239 F. Supp. 757, 761 (D.D.C. 1965).

104. 376 U.S. 1, 17 (1964).

Reynolds v. Sims.¹⁰⁵ "Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."¹⁰⁶ Likewise, Justice Brennan declared in *Baker v. Carr*¹⁰⁷ that "*Colegrove v. Green* squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue."¹⁰⁸ In specific answer to the problem of remoteness, Justice Brennan has found that "it would not be necessary to decide whether appellant's allegations of impairment of their votes by the 1901 apportionment will ultimately entitle them to relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it They are entitled to a hearing. . . ."¹⁰⁹

The dismissal in *Lampkin* is undoubtedly based on the philosophy of the late Justice Frankfurter, for the opinion is replete with quotations from his opinions in *Joint Anti-Fascist Refugee Comm. v. McGrath*.¹¹⁰ One example is his description of how "fastidious" courts must be as they invoke their power to review. There is also his equally well known sixty-three page dissent in *Baker v. Carr* which presents a powerful plea for the "Court's complete detachment, in fact and in appearance, from political entanglements and by absention from injecting itself into the clash of political forces in political settlements."¹¹¹ However, no matter how much support this approach might have had, it did not prevail in *Baker* and there is no question that it has little authority in the present judicial developments leading toward legal and social equality for all American citizens.

III. A CONCEIVABLE REMEDY

Any remedy for the wrongful abridgement of the right to vote must be based on proper proof that the necessary condition precedent exists — abridgement of the right to vote by state action. As Justice Brennan said in *Baker v. Carr*, courts have long been able to measure the impact and significance of state conduct in cases in-

105. 377 U.S. 533 (1964).

106. *Id.* at 566. This decision stands for the rule that both houses of a state's bicameral legislature must, by art. I, § 2, be apportioned to result in "one man, one vote."

107. 369 U.S. 186 (1962).

108. *Id.* at 206.

109. *Id.* at 208. (Emphasis added.)

110. 341 U.S. 123 (1951).

111. 369 U.S. 186, 267 (1962).

volving abridgement of the equal protection of the laws. In like manner, only abridgement by state action can have the impact of leading to congressional apportionment which would penalize states by reduction of their congressional delegation. However, one aspect of such a case is not difficult of proof, for the demands of Negro demonstrators have left little doubt that there is deprivation of the right to vote in Southern states. Indeed, the courts have taken judicial notice of this fact in states where policies in regard to voting or registration have been found to be in violation of the Constitution. For instance, the complaint in *Louisiana v. United States*¹¹² squarely charged that the right of Negroes to vote had been denied through the use of unconstitutional state laws, and that Louisiana would continue to "deny Negro citizens of Louisiana the right to vote. . . ."¹¹³ After tracing the historical record which disclosed successive attempts by Louisiana authorities to deprive Negroes of the right to vote, the Court concluded that the evidence proved "That thousands of Negroes, but virtually no whites, were purged from the rolls of voters."¹¹⁴ As a result, that state's registration procedure was struck down as unconstitutional. But the Court did not take the next step. If the registration law of the state is invalid, so ought the apportionment legislation of the Congress which allows representation in spite of abridgement be considered invalid.

A. *Application of the Section Two Penalty*

The abridgement of the right to vote was the basis for relief in the Louisiana case, but in *Reynolds v. Sims*,¹¹⁵ for example, the right of suffrage was protected against debasement or dilution due to malapportioned state districts which failed to take into consideration great population variances. Basic to the latter decision was the Court's finding that such malapportionment debased the right to vote of those who voted in the larger, more populous districts. In so finding, the Court stated the principle: "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."¹¹⁶

112. 380 U.S. 145 (1965).

113. *Id.* at 147.

114. *Id.* at 149.

115. 377 U.S. 533 (1964).

116. *Id.* at 555. Chief Justice Warren draws from Justice Douglas' dissent in *South v. Peters*, 339 U.S. 276 (1950) wherein the Court said: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a

Although the *Reynolds* case was concerned with state malapportionment, the judicial policy of protecting the right to vote against dilution is equally applicable on the federal level. Votes should be considered no less diluted when the debasement is between congressional districts in different states. Thus, the net effect of such abridgement is that a member of the House of Representatives can be elected to Congress from a district which is ostensibly composed of an equal number of persons; but yet such election would be based on a significantly smaller number of votes as compared with a Congressional election in another state which does not abridge the right to vote. Perhaps the following example will serve to clarify how this problem arises. Consider the situation in Louisiana where the total population is 3,257,022.¹¹⁷ Of this number, 1,818,114¹¹⁸ are over 21 years of age and are eligible to vote. The total Negro population in Louisiana is 1,039,027¹¹⁹ of which 508,282¹²⁰ are over the age of 21 and thus entitled to vote. According to the United States Commission on Civil Rights, only 32 per cent of the Negroes in Louisiana are registered to vote.¹²¹ This means that there are 344,639 Negroes over 21 years of age and otherwise eligible to vote that are not registered. The record is clear that this low number of registered Negro voters is primarily due to a policy in that state of refusal and resistance to register Negroes.¹²² To the extent that other factors, such as apathy, influence registration figures, the writer suggests that the burden of going forward with such proof should fall on the state accused of the abridgment. The situation is one which urgently calls for application and enforcement of section 2 of the fourteenth amendment.

The penalty provided in section 2 is determined by computing the proportional number of Negroes to the total eligible voters in the state. Hence, in the above example, the total number of unregistered Negro voters in Louisiana was determined to be 344,639, or 18.9 per cent of the number of eligible voters in that state.¹²³ If it could be proved that this figure represented the per-

state's geographical distribution of electoral strength among its political subdivisions." *Id.* at 277.

117. BUREAU OF THE CENSUS, 1 CHARACTERISTICS OF THE POPULATION, Pt. 20 Table 59 (1960).

118. *Ibid.*

119. *Id.* at Table 56.

120. *Id.* at Tables 59, 94.

121. UNITED STATES COMM'N ON CIVIL RIGHTS, VOTING IN MISSISSIPPI 11 (1965).

122. *Louisiana v. United States*, 380 U.S. 145, 151 (1965).

123. See note 122 *supra* and accompanying text.

centage of eligible voters in that state deprived of the right to vote,¹²⁴ the number of congressional representatives from that state should, under the provisions of section 2, be reduced accordingly. Thus, the delegation from Louisiana would be reduced by 18.9 per cent, thus bringing the weight of the votes in that state down to the weight carried by votes in states where discrimination in voting is not present.¹²⁵

In considering the possible effect of this application of section 2, at least two courts have stated that such enforcement would necessarily require a reallocation of the seats in Congress to other states.¹²⁶ However, it is submitted that there is no support for such a conclusion. First, as noted previously,¹²⁷ there is nothing sacred about the present number of seats in the House of Representatives. It has been increased by the addition of two new states to the union, and there is no reason why it could not likewise be reduced in accordance with the provisions of section 2. Second, even if a reallocation were necessary, it would not have to be accomplished by the courts as was the fear of the court in *Saunders v. Wilkins*.¹²⁸ Congress could, whenever desirable, reallocate the vacancies through enactment of an apportionment statute. Third, the trend since

124. Although the 32% figure does not represent the actual number of deprived Negro voters in Louisiana, it may nevertheless be presumed that in light of the known policy of that state to refuse Negro registration, it does constitute a close approximation thereof. Furthermore, the burden of proof that this maximum number of unregistered Negro voters is not the result of a policy of discrimination ought to be placed on the state.

125. The statistics for the State of Mississippi are even more startling.

Total Population	3,266,740
Number under age 21	994,927
Total entitled to vote	<u>1,183,214</u>
Negro population	915,743
Negroes under age 21	498,161
Total Negroes entitled to vote	<u>417,582</u>
Estimated Negro registrants	(6.7%) 27,639
Negroes presumed to have been denied right to vote	389,619
Percent of total eligible to vote represented by those denied the right	32.9%

Application of the section 2 penalty to Mississippi would result in that state's delegation being reduced from six to four; in the case of Louisiana from eight to six. Population figures are from BUREAU OF THE CENSUS, 1 CHARACTERISTICS OF THE POPULATION, Tables 56, 59 (1960). The estimated Negro registration is from A REPORT OF THE UNITED STATES COMM'N ON CIVIL RIGHTS 11 (1965).

126. E.g., *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965); *Saunders v. Wilkins*, 152 F.2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946).

127. See note 68 *supra* and accompanying text.

128. *Ibid.*

*Baker v. Carr*¹²⁹ shows that the Supreme Court considers it the duty of the judiciary to enter the "political thicket" in order to protect the rights of citizen to an equal vote.¹³⁰ Indeed, the Court has recognized that it has "not merely the power but the duty to . . . eliminate the discriminatory effects of the past as well as bar like discrimination in the future."¹³¹

B. *A Proper Case for Section Two*

After the dismissals in the cases which raised the issue of enforcement of section 2,¹³² the problem remains as to how to effectively pose an action so that the courts will give relief.¹³³ Up to this point, plaintiffs have been unable to so pose the relationship of discriminatory practices to the current congressional apportionment so as to lead the courts to enforcement of the provisions of section 2 where abridgement of the right to vote exists. Thus, it is suggested that a more direct approach might bring forth appropriate relief. In formulating such an approach, it would be necessary that the plaintiffs be able to claim dilution or debasement of their right to vote, in addition to outright abridgement. The defendant in such a case would be the Clerk of the House of Representatives upon whom the duty falls to "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section."¹³⁴ The demand would be for a declaratory judgment and injunctive relief involving the validity of the apportionment statute employed in the discriminating state. The essence of the plaintiffs' allegations would be that this apportionment statute is in violation of the Constitution because it fails to take into consideration the provisions of section 2.

Jurisdiction in such a case would be based on section 1343(3)

129. 369 U.S. 186 (1962).

130. Justice Frankfurter first warned the courts not to enter the "political thicket" of malapportionment in *Colegrove v. Green*, 328 U.S. 566 (1946). At that time, Justice Frankfurter spoke for the majority of the Court and denied judicial relief when a state failed to redistrict with resultant debasement of plaintiff's vote, saying that the task properly fell to Congress or the state.

131. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

132. *Sharrow v. United States*, 309 F.2d 77 (2d Cir. 1962), *cert. denied*, 372 U.S. 949 (1963); *Dennis v. United States*, 171 F.2d 986 (D.C. Cir. 1948), *cert. granted on other issues and aff'd*, 339 U.S. 162 (1950); *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965).

133. For a full discussion of this problem see Margolis, *Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 23 LAW IN TRANSITION 128 (1963).

134. 46 Stat. 26 (1929), as amended, 2 U.S.C. § 2a(b) (1964).

of the United States Code which provides that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ." ¹³⁵ The remedy would be by way of injunction, ¹³⁶ enjoining the Clerk of the House from submitting apportionment figures to Congress which do not reflect the constitutional requirements of section 2 pertaining to reduction of representation where abridgement of the right to vote has taken place. In other words, because no account is taken of the provisions of section 2 in determining "the number of Representatives to which each state would be entitled under an apportionment," ¹³⁷ any apportionment based on such figures would be unconstitutional. Furthermore, it would be argued that the provisions of section (b) of the apportionment statute, declaring that "each State shall be entitled" to the representatives based on the "whole number of persons in each State," completely ignores the express language of section 2 of the fourteenth amendment. Reference to the legislative history of section 2 strongly indicates that the writers of this section always contemplated a possibility of reduction to the extent and in the same proportion as the right to vote is abridged. ¹³⁸ Indeed, this was the contention of the plaintiff in *United States v. Sharrow*, ¹³⁹ where the court, instead of considering the apportionment act, limited its decision to the constitutionality of the Census Act, notwithstanding the fact that there is a direct connection between the results of the census and apportionment based thereon. It may be admitted that

135. 62 Stat. 932 (1948), as amended, 28 U.S.C. 1343 (3) (1958).

136. The following section of the code provides the basis for the equitable relief demanded: "(4) To recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights including the right to vote." 28 U.S.C. § 1343 (4) (1958). Injunctive relief has been sought against officers of the United States in *Bell v. Hood*, 327 U.S. 678 (1946) and *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912). The propriety of injunctive relief is discussed in *Baker* as follows: "An end of discrimination against the Negro was the compelling motive of the Civil War amendments . . . thus the Court, in cases involving discrimination against the Negro's right to vote, has recognized not only the action at law for damages, but, in appropriate circumstances, *the extraordinary remedy of declaratory or injunctive relief*." 369 U.S. 186, 285-86 (1962). (Emphasis added.)

137. U.S. CONST. amend. XIV, § 2.

138. See note 27 *supra* and accompanying text.

139. 309 F.2d 77 (2d Cir. 1962), *cert. denied*, 372 U.S. 949 (1963).

Congress *could* get whatever information it requires to implement section 2 from sources outside the census. This is borne out by reference to the activities of the United States Commission on Civil Rights and its authority under the Civil Rights Act of 1964¹⁴⁰ to gather information in regard to the right to vote. However, it seems difficult to avoid the clear connection made in the Constitution between the census and the decennial apportionment of the Congress.¹⁴¹

The new feature in the suggested action is its directness. Unlike the plea of the plaintiffs in *Lampkin* that the statute be so construed as to require enforcement of the section 2 sanction, the case under consideration here would directly attack the statute for its failure to apply section 2.

When the courts come to consider this direct challenge of the apportionment act, they will perforce apply article II of the Constitution as well as section 2 of the fourteenth amendment. The "political question" doctrine which might bar an action of mandamus against the Congress is moot since the act in its present form is self-executing. No mandamus being requested, the single issue will be the constitutionality of the statute. There has been no barrier to that process since the days of John Marshall.¹⁴²

It is of course possible that review of *Lampkin v. Connor*¹⁴³ will evoke such treatment by a higher court. The plaintiffs' request there of "a declaration of defendants' [Census] responsibility to comply with constitutional requirements when carrying out their functions with respect to apportionment. . . ."¹⁴⁴ would achieve the

140. Title I, 78 Stat. 241, 42 U.S.C.A. § 1971 (1964) prohibits denial of voting rights; Title VIII, 78 Stat. 266, 42 U.S.C.A. § 2000f (1964) directs the Secretary of Commerce to compile voting and registration statistics in areas recommended by the Commission on Civil Rights, created by the Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. § 1975; and The Civil Rights Act of 1964, Title V, 78 Stat. 249, 42 U.S.C.A. § 1975a (1964), extends the life of this Commission to 1968.

141. This was the basis for the suit in *Lampkin*, where the court was asked to imply a duty on the Census Bureau to gather all facts necessary to properly apportion according to section 2. Although the government argued and the holding of the court was to the effect that there was no statutory compulsion on the census to gather statistics pertinent to abridgement of the right to vote, it will remain to be seen, if the courts rule that the apportionment act is unconstitutional, what better device the Congress will utilize.

142. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 169-71 (1803).

143. 239 F. Supp. 757 (D.D.C. 1965). The National Association for the Advancement of Colored People legal defense and educational fund said in New York the day following the dismissal in *Lampkin*: "Our intention is to appeal immediately. Events in Selma underscore the gross injustice of permitting states to bar Negroes from the polls while counting them for purposes of inflating the size of their congressional delegation." *Cleveland Plain Dealer*, March 31, 1965, p. 7, col. 1.

144. *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965).

desired enforcement of section 2. On the other hand, a direct challenge to the act may be the only solution, *i.e.*, the act must be struck down because "to the extent it conflicts with the non-discretionary and absolute mandate imposed by section 2, it must fail."¹⁴⁵

C. *Possible Obstacles to the Action*

Among the problems which may be encountered in such a suit is the contention that the state and not the federal government has in fact been guilty of the discrimination. It is true that the abridgement which leads to reduction in representation is indeed that of the states. However, the only adequate remedy is against the Clerk of the House to prevent the improper exercise of his statutory duty. The United States Code sets forth the equitable basis for the relief demanded: "To recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights including the right to vote."¹⁴⁶ The court would then be directed to the specific act of Congress which protects the right to vote and is squarely based on section 2 of the fourteenth amendment:

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.¹⁴⁷

There is no restriction in this statute as to who may be a plaintiff. Any person can institute the action,¹⁴⁸ and there is equally no restriction as to who may be defendants. A properly framed petition seeking redress for the deprivation of the right to vote, if directed toward a public servant who denies that he is under a duty to apportion according to the Constitution because a statute otherwise defining his duties does not expressly tell him that this is his duty, contains the necessary adversity to constitute a controversy.¹⁴⁹ Furthermore, the

145. Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108 (1960).

146. See note 135 *supra*.

147. 17 Stat. 29 (1872), as amended, 2 U.S.C., § 6 (1964).

148. See note 135 *supra*.

149. 1 ANDERSON, DECLARATORY JUDGEMENTS § 179 (1951), wherein it is stated: "Where a state officer confronted with an uncertain meaning of a law requiring acts on his part or whether the law is valid, proposes to pursue a course of conduct injuriously affecting persons contending that he has no legal right thus to act, a 'controversy' arises under the declaratory judgment act justifying a declaration of the status of the law to

fact that the defendant is an employee of the United States does not bar the action as one against the government itself.¹⁵⁰ The diversity of citizenship and amount in controversy requirements are also no bar to the contemplated action. Recent cases have held that absence of either or both of these considerations will not bar the jurisdiction of a district court in actions based on the provisions of section 343, title 28 of the United States Code.¹⁵¹ Even if these conditions were a prerequisite to such a suit,¹⁵² it is likely that they could be met, for at least diversity of citizenship will exist.

IV. CONCLUSION

Current American political life includes a situation in which the majority of American states are wrestling with court decisions which, based on the rule in *Baker v. Carr*, have given plaintiff voters standing to sue to assert that their right to vote is impaired or diluted by malapportionment within the states. At the same time, however, the courts have denied redress for palpably unconstitutional apportionment of seats in the House of Representatives. The failure to take into account section 2 of the fourteenth amendment when apportioning the House of Representatives has been almost completely ignored by the Congress, the courts, and most scholars. The tragedy of this situation is that although most obstacles in the nature of standing to sue, justiciability, and the political question

settle a controversy between individuals, notwithstanding that some may be state officers." *Ibid.* "However, where there is a concrete contested issue presented and there is a definite assertion of legal rights on the one side and a positive denial on the other, there exists a justifiable controversy justifying maintenance of an action for declaratory judgment." 1 ANDERSON, *op. cit. supra* at § 177 (Supp. 1959).

150. 1 ANDERSON, *op. cit. supra* note 149, at § 180: "A suit against federal officers to determine the validity of legislation, as to the constitutionality of the renegotiation act, is not against the federal government and may be maintained.

151. *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir. 1957), *cert. denied*, 353 U.S. 959 (1956). In that case the court said: "A complaint which is so drawn as to seek recovery, under the Constitution or laws of the United States, of more than three thousand dollars establishes (with two possible exceptions noted in the margin) district court jurisdiction under 28 U.S.C.A. § 1331. A complaint which is so drawn to seek redress for any wrong specified in 28 U.S.C.A. § 1343 establishes, with possibly the same exceptions, district court jurisdiction under the latter statute, regardless of the amount in controversy. With respect to neither statute is it necessary to allege diversity of citizenship." *Id.* at 229. The exceptions referred to are set out in *Bell v. Hood*, 327 U.S. 678 (1945). "The previously carved out exceptions are that a suit may be sometimes dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial or frivolous. *Id.* at 682.

152. The right to vote was the basis of actions which were allowed to allege the jurisdictional amount as damages in *Swafford v. Templeton*, 185 U.S. 487 (1902) and *Wiley v. Sinkler*, 179 U.S. 58 (1900).

doctrine have been laid to rest by the Supreme Court, the courts have ignored the most explicit and detailed remedy for the dilution of democracy caused by racial discrimination in voting. The few cases in which the specific provisions of section 2 have been invoked by plaintiffs have failed to strike a responsive chord in the judges who have ruled against the constitutional argument. But it must be increasingly clear to any reader of Supreme Court decisions who is also a student of American social developments that the time is drawing near when, after almost a century of studied indifference, the courts are likely to accord to section 2 the efficacy which its drafters intended.

EUGENE SIDNEY BAYER

Appendix

DEVIATION FROM NATIONAL VOTING AVERAGE OF ELEVEN SOUTHERN STATES AND MAXIMUM POSSIBLE REDUCTION OF CONGRESSIONAL REPRESENTATION ACCORDING TO SECTION 2 OF THE FOURTEENTH AMENDMENT.

	<i>Population</i>	<i>1960 Vote*</i>	<i>% Voting</i>	<i>Present Apportionment</i>	<i>Maximum Reduction^a</i>
Nation -----	179,323,175	68,838,218	38	—	—
Alabama -----	3,266,740	570,225	17	8	4
Arkansas -----	1,786,272	428,509	23	4	2
Florida -----	4,951,560	1,544,176	31	12	2
Georgia -----	3,943,116	733,349	18	10	2
Louisiana -----	3,257,022	807,891	27	8	2
Mississippi -----	2,178,141	298,171	13	5	3
N. Carolina ----	4,556,155	1,368,556	30	11	2
S. Carolina ----	2,383,594	386,688	16	6	3
Texas -----	9,579,677	2,311,084	24	22	8
Virginia -----	2,853,214	771,449	27	10	3
Tennessee -----	3,567,089	1,051,792	29	9	2

*The figures as to population and voting in 1960 are taken from GOVERNMENTAL AFFAIRS INSTITUTE, *AMERICA VOTES 5* (1964). This work is edited by the former Director of the Census, Richard Scammon.

Admittedly, the above Appendix is merely reflective of the general problem of low voting figures in the Southern states, and plaintiffs, in order to invoke the section 2 sanction, may have to prove in each case the specific number of persons not voting because the state involved has abridged the right to vote. Courts will be interested in such questions as citizen-apathy, limited educational backgrounds, and other factors which may explain the disparity independent of abridgement. But it would be an extremely naive observer who could not recognize the correlation between the state policies in the states described in relation to Negro registration and voting and the low voting records indicated.