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George David Zuckerman

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## A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment

Cover Page Footnote

Member of the New York Bar.

# A CONSIDERATION OF THE HISTORY AND PRESENT STATUS OF SECTION 2 OF THE FOURTEENTH AMENDMENT

GEORGE DAVID ZUCKERMAN\*

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.<sup>1</sup>

SECTION 2 of the fourteenth amendment<sup>2</sup> has been much of an enigma in American constitutional history. Thaddeus Stevens, in reporting the fourteenth amendment to the House of Representatives, referred to the second section as "the most important in the article."<sup>3</sup> It was regarded by Representative George Miller of Pennsylvania as the "cornerstone of the stability of our government."<sup>4</sup> The apportionment problem that was resolved by section 2 was the first feature of the

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\* Member of the New York Bar.

1. U.S. Const. amend. XIV, § 2.

2. The Eighty-fifth Congress was successful in enacting the first major civil rights legislation in more than eight decades. Civil Rights Act of 1957, 71 Stat. 634, as amended, 5 U.S.C. § 295-1 (1958), 28 U.S.C. §§ 1343, 1361 (1958), 42 U.S.C. §§ 1971, 1975, 1975a-e, 1995 (1958) (Supp. II, 1959-1960). It was also responsible for encouraging greater scrutiny of constitutional provisions in a search for additional means of protecting the rights and privileges of American citizens. As a result of this search a bill was introduced by Senator McNamara of Michigan calling for the creation of a joint congressional committee to implement section 2 of the fourteenth amendment by providing for a reduction in congressional representation from states where the right to vote is denied or abridged. The bill was first introduced in the form of an amendment to H.R. 6127, 85th Cong., 1st Sess. (1957), which later became the Civil Rights Act of 1957. See 103 Cong. Rec. 12519 (1957). It was defeated, 103 Cong. Rec. 13460 (1957), but later introduced in the same session as a separate bill, S. 2709, 85th Cong., 1st Sess. (1957). See 103 Cong. Rec. 13703 (1957). Senator McNamara's bill was again introduced in the Eighty-sixth Congress, S. 1084, 86th Cong., 1st Sess. (1959), and notwithstanding that it was never enacted it has been of great value in calling attention to the language of the second section of the fourteenth amendment. Although the bill was not reintroduced in the Eighty-seventh Congress, Senator McNamara has indicated that he "may very well introduce it again as a bill or as an amendment at such time as it appears the Senate will be working on civil rights legislation." Letter From Senator McNamara to *Fordham Law Review*, Sept. 11, 1961.

3. Cong. Globe, 39th Cong., 1st Sess. 2459 (1865-1866).

4. *Id.* at 2510.

fourteenth amendment to be discussed by Congress and the debate on the problem extended over seven months. In the battle for ratification, the second section was hailed as the most important part of the fourteenth amendment by the *Washington Chronicle*, the leading Radical organ of the time.<sup>5</sup> However, despite these declarations concerning the significance of section 2, and the extensive debate preceding its adoption, the nine decades that have passed since its adoption have failed to produce a successful attempt to enforce its provisions.

It is the object of this article to attempt to shed additional light on section 2 by examining the conditions which led to its inclusion in the fourteenth amendment, the aspirations of its framers, the meanings that were attributed to its terms, and the manner in which it was expected to operate. The article will also consider the attempts of Congress to enforce section 2 and the reasons for the failures. Finally, inquiry will be made into the present status of section 2 and of possible means of its implementation.

#### I. THE ADOPTION OF SECTION 2 OF THE FOURTEENTH AMENDMENT

The Thirty-ninth Congress which assembled in December 1865 was well aware that a change in the method of apportioning representatives to Congress among the several states would be one of the major problems facing it. The thirteenth amendment, which was to become effective on December 18, 1865, would alter the apportionment provisions of article I, section 2, which had included only three-fifths of the slaves in determining the basis for representation. Now with the abolition of slavery, forty per cent of the colored population of the South would be added to that region's basis of representation. Under the "three-fifths provision," the fifteen slave states in 1860 had eighteen Representatives based upon their colored population. With Emancipation, the former slave states would gain an additional twelve Representatives. The vision of thirty Representatives from the South, based upon a Negro population which was totally denied the right to vote, did not rest well with the majority of members of the Thirty-ninth Congress. The Representatives of the former states of the Confederacy had not yet regained admission to Congress, but it was evident that the day of their readmission could not be indefinitely postponed. In the meantime, the large Republican majority in both houses of Congress presented the opportunity to curtail the political power of the South before its return to Congress by constitutional amendments designed to reduce Southern representation, and

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5. The importance of section 2 of the fourteenth amendment was stressed in every issue of the *Washington Chronicle* from Sept. 20 to Oct. 10, 1866. See Flack, *The Adoption of the Fourteenth Amendment* 143-44 (1908).

to encourage the enfranchisement of Negroes in the expectation that they would swell the ranks of the Republican Party.

Action to change the method of apportionment was not long awaited. On the second day of the session, bills were introduced by Representatives Robert C. Schenck<sup>6</sup> of Ohio, and by Thaddeus Stevens<sup>7</sup> and John M. Broomall<sup>8</sup> of Pennsylvania, each of which sought to apportion Representatives according to the number of legal voters in the several states. The Stevens bill included a provision calling for "a true census of the legal voters" to be taken concurrently with the regular census.<sup>9</sup>

However, the idea of basing representation upon the number of legal voters soon encountered strong opposition from New England's Representatives. New England, which restricted aliens from voting, imposed educational requirements in granting suffrage, and had a disproportionately large number of women (who were universally excluded from voting at the time) due to an extensive emigration of her males to the West, felt that it had much to lose from a voters' basis of representation. Representative James G. Blaine of Maine expressed his section's opposition to the propositions making suffrage instead of population the basis of representation.<sup>10</sup> He acknowledged that the goal of those bills was to deprive the rebellious states of a large representation in the House based on their colored population so long as that population was denied political rights by the legislatures of those states. But he said that basing representation on voters would have evil results in the loyal states where the ratio of voters to population varied from a minimum of nineteen per cent to a maximum of fifty-eight per cent. California, with a population of 358,110 in 1860, had 207,000 voters, while Vermont, with 314,369 people, had only 87,000 voters. Thus, Blaine argued that while California and Vermont each had three Representatives, if representation were based on voters, California would have eight Representatives to Vermont's three. Similarly, if Massachusetts were to keep its ten Representatives, on a voters' basis Indiana would be entitled to an increase in Representatives from eleven to fifteen. Blaine concluded that a voters' basis would cause conservative restrictions on voting, such as reading and writing, to be eliminated, invite foreigners to vote on mere preliminary declarations of intention, and tend to cheapen suffrage everywhere. He said that the "great end of depriving the South of the representation which is based on the colored population until that population is enfranchised,"<sup>11</sup>

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6. Cong. Globe, 39th Cong., 1st Sess. 9 (1865-1866).

7. *Id.* at 10.

8. *Ibid.*

9. *Ibid.*

10. *Id.* at 141.

11. *Ibid.*

could be accomplished without causing loyal states to suffer "offensive inequalities" by his bill, which read:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by . . . (*taking the whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color*).<sup>12</sup>

While the preliminary debates on apportionment were taking place on the floor of Congress, the Joint Committee of Fifteen on Reconstruction had begun its deliberations. This select committee of nine Representatives and six Senators (twelve of the fifteen members being Republicans) having the task of reporting legislation on reconstruction to Congress soon turned to the problem of apportionment. As was the case in the House, the first proposition on apportionment which the committee considered was a resolution by Thaddeus Stevens proposing a constitutional amendment basing representation on legal voters.<sup>13</sup> The resolution was defeated with eight members of the committee—including every member from New England—voting against it.<sup>14</sup> A subcommittee composed of Senators Fessenden and Howard, and Representatives Bingham, Conkling, and Stevens was then appointed to handle all propositions concerning representation, and submitted the following resolution:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective number, counting the whole number of citizens in the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation.<sup>15</sup>

A proposal by Representative Conkling of New York, to strike out the words "citizens of the United States in each State" and to insert instead "persons in each state, excluding Indians not taxed" was approved by the committee.<sup>16</sup> Conkling, in explaining why "persons" rather than "citizens" was used as a basis for representation, said persons had always constituted the basis in the Constitution, and that since "many of the large States now hold their representation in part by reason of their aliens. . . ," the amendment would have to be acceptable to the legisla-

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12. *Ibid.*

13. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 41 (1914). This work contains the original journal of the committee to which citations to committee proceedings will be made.

14. *Id.* at 45.

15. *Id.* at 50-51.

16. *Id.* at 51.

tures and people of those states to be ratified.<sup>17</sup> The latter seems to have been the real reason for the change. The exclusion of "Indians not taxed" from the basis of representation was defended by Stevens, who asserted it was favored by the committee because the Constitution (article I, section 2) so excluded them, and "because they are a tribal race, have their own separate governments, and, as a general rule, are not citizens."<sup>18</sup>

After the word "creed" was eliminated from the bill,<sup>19</sup> and the committee by a twelve to two vote removed the words "and direct taxes" from the measure in an effort to divorce the question of taxation from the apportionment controversy,<sup>20</sup> the amendment was approved by the Reconstruction Committee and forwarded to the House.

On the House floor, Frederick Pike, Republican from Maine, probably typified the majority sentiment when he declared that the object of the apportionment bill should be two-fold: "One is to lessen the political power of the South; the other is to protect the colored population of the country."<sup>21</sup> But even the members of the House who agreed with these objectives, differed as to how they could be accomplished.

Roscoe Conkling, of New York, spoke in favor of the amendment proposed by the Reconstruction Committee, declaring that it would leave control of the elective franchise in the states and permit qualifications of voters as to intelligence and property. Only if race or color were used as a qualification for voting would the states suffer a loss in representation. Conkling predicted the amendment would cause the free states to gain twelve Representatives and the former slave states to lose twelve.<sup>22</sup>

However, Republicans were heard in opposition to the measure. Samuel Shellabarger of Ohio felt the bill seemed to authorize states to disfranchise races if they so desired, which he maintained was contrary to the constitutional requirement guaranteeing states a republican form of government.<sup>23</sup> Thomas Jenckes of Rhode Island was perhaps on sounder ground when he objected that Southern States by property qualifications could easily get around the Reconstruction Committee's bill, though not depriving Negroes of the right to vote because of race or color. He asserted that if South Carolina adopted a requirement that voters own fifty acres of land, the Negroes would be just as easily disfranchised as by a law based on race or color.<sup>24</sup> The objection that property

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17. Cong. Globe, 39th Cong., 1st Sess. 359 (1865-1866).

18. *Id.* at 376.

19. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 52 (1914).

20. *Id.* at 58.

21. Cong. Globe, 39th Cong., 1st Sess. 407 (1865-1866).

22. *Id.* at 357-58.

23. *Id.* at 358.

24. *Id.* at 376.

qualifications were not covered by the bill was also raised by Thomas Eliot of Massachusetts,<sup>25</sup> and by Jehu Baker of Illinois, who declared that "no State should reserve in her basis of representation persons disfranchised and not represented, no matter on what ground she so excludes them."<sup>26</sup>

The desire to go beyond "race or color" in extending the grounds for exclusion from the basis of representation was strong among the Midwestern Representatives. William Lawrence of Ohio proposed an amendment basing representation on the number of adult male voters.<sup>27</sup> In his words:

If any class is unfit to be an element of political strength, it is unjust to clothe a favored class with political power on its behalf. . . . With what grace can we say to the South "You shall have no representation for freedmen not enfranchised," while we insist upon representation for aliens and women and children not enfranchised?<sup>28</sup>

Though no action was taken on the Lawrence proposal, a similar amendment introduced by Representative Schenck of Ohio was submitted to a vote. The Schenck amendment apportioned Representatives according to the number of adult male citizens in each state qualified to vote for the most numerous branch of the state legislature. Congress was to provide for an enumeration of such voters to be made separately at the time of the general census, taken every ten years.<sup>29</sup> On January 31, 1866, the Schenck bill came up for a vote in the House but was defeated 131 to 29.<sup>30</sup> New England, opposed to any bill which would exclude aliens and females from the basis of representation, voted solidly against the bill, and numerous other Representatives who had indicated sympathy with the Schenck proposal voted against it, probably out of the fear that it could never be ratified in the face of New England's opposition.

Stevens then submitted the Reconstruction Committee's amendment to a vote. After the committee's alterations the amendment read:

Representatives shall be apportioned among the several States which may be included within this Union according to their respective number, 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.

It is important to note that the effect of this amendment would be to

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25. *Id.* at 406.

26. *Id.* at 385.

27. *Id.* at 403.

28. *Id.* at 404, 405.

29. *Id.* at 407, 535.

30. *Id.* at 538.



exclude from a state's basis of representation *all* members of a class whenever *one* such member was disfranchised because of race or color. By a vote of 120 to 46 it was approved by the House and sent on to the Senate.<sup>31</sup>

On February 5, 1866, the Senate undertook discussion of the amendment. Senator Fessenden of Maine, the chairman of the Reconstruction Committee, declared that the amendment had the great excellence of accomplishing "indirectly what we may not have the power to accomplish directly. . . . If we cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions, the next question is, can we accomplish that work in any other way?"<sup>32</sup> The problem that Fessenden was referring to was that of the recent failures in Northern States to enact legislation directly guaranteeing Negro suffrage. Within the past decade, New York, Connecticut, Ohio, Minnesota, Wisconsin, and Kansas had voted against propositions granting suffrage to Negroes. Fessenden reasoned that since a direct attempt to regulate state suffrage might fail of ratification, the indirect manner of the Reconstruction Committee's measure which left the control of suffrage in the hands of the state, subject only to a possible loss of congressional representation of a class which the state felt was not fit to vote, would be the best solution.

The Democrats were vigorous in attacking the amendment as partial and sectional. Reverdy Johnson of Maryland said the amendment was designed to apply only in the Southern States with their large colored population, leaving the Northern States free to disfranchise Negroes without adverse results because of their small Negro population.<sup>33</sup> Senator Hendricks of Indiana declared that some fifteen to twenty Representatives in the North, who were based upon a population denied the right to vote for reasons other than race or color, wouldn't be affected by the Reconstruction Committee's amendment. He attacked the bill as a further attempt to make the manufacturing and commercial interests of New England dominant in Congress.<sup>34</sup>

In addition to the Democrats, opposition to the amendment came from quite a different corner—that of the more militant Republicans who felt the measure did not go far enough in preventing Negro disfranchisement. Charles Sumner called the amendment "a compromise of human rights." He appealed for universal suffrage "subject only to such regulations as the safety of society may require . . .," such as age,

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31. *Ibid.*

32. *Id.* at 705.

33. *Id.* at 766.

34. *Id.* at 877-78.

character, registration and residence.<sup>35</sup> Senator Yates of Illinois attacked the amendment as giving constitutional sanction to the "rebellious States to exclude from the right of voting and to disfranchise entirely the freedmen."<sup>36</sup>

Several Senators introduced substitute amendments of their own on the apportionment problem. James R. Doolittle, a Democrat from Wisconsin, proposed an amendment basing representation upon the number of voters in each state,<sup>37</sup> while Senator Henderson of Missouri introduced an amendment that "no state, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race."<sup>38</sup> Senator Wilson of Massachusetts said the results of Northern elections in the last six months indicated the Henderson proposal could not be passed by the states, and he attacked the Doolittle amendment basing representation upon voters as one that would cause the loyal states to lose fifteen representatives. Wilson stated that in 1860 there were 3,856,628 unnaturalized persons of foreign birth in loyal states, but only 233,651 in the rebel states. Since non-citizens were disfranchised, Wilson estimated that basing representation on legal votes would cause Massachusetts to lose one or perhaps two Representatives, Pennsylvania two, and New York as many as four.<sup>39</sup>

While debate was waged on the Henderson and Doolittle amendments, yet another proposal was made as Daniel Clark of New Hampshire offered an amendment basing representation upon the number of male citizens twenty-one and over qualified to vote for the most numerous branch of their state legislature.<sup>40</sup> This was similar to the Schenck proposal which had been defeated in the House.<sup>41</sup> It had the facility of basing representation upon the number of people who by section 2 of article I were qualified to be electors for the House of Representatives. Though the Clark bill won the support of Senator Trumbull of Illinois,<sup>42</sup> it failed to obtain sufficient support from other Senators and was withdrawn.

On March 9, 1866, after the debate on the question of apportionment had entered its fifth week in the Senate, the joint resolution of the Reconstruction Committee was voted upon. The amendment received twenty-five votes in its favor, but twenty-two senators voted against it

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35. *Id.* at 673.

36. *Id.* at 1256.

37. *Id.* at 1232.

38. *Id.* at 1283.

39. *Id.* at 1256.

40. *Id.* at 1284.

41. Note 30 *supra* and accompanying text.

42. Cong. Globe, 39th Cong., 1st Sess. 1284 (1865-1866).

and three were absent.<sup>43</sup> The measure thus failed to win the two-thirds approval required for constitutional amendments. Not only Democrats, but such Republicans as Sumner of Massachusetts, Cowan of Pennsylvania, Yates of Illinois, Pomeroy and Lane of Kansas, Brown of Missouri, and Stewart of Nevada, each of whom had supported more direct guarantees of Negro suffrage, voted against it. The problem of apportionment was thus returned to the Reconstruction Committee for future action.

In April, the Reconstruction Committee turned to the drafting of a new amendment concerning apportionment. But this time the committee had the lessons of three months of congressional debate to aid it. It still hoped to produce an amendment which would encourage the extension of suffrage to Negroes without directly regulating suffrage within the states. Penalizing states disfranchising Negroes through a reduction in congressional representation was still viewed as the most desirable method of achieving this result. But the debates in Congress had shown that qualifications based on race or color were not the only way Negroes could be disfranchised; property or educational qualifications might also operate to achieve the same result. Thus the committee searched for language extending beyond qualifications based on race or color in determining the basis of representation. The committee searched also for language which, in form at least, would be applicable to all states and avoid charges of sectionalism and which would be strong enough to satisfy the radicals who claimed that the previous amendment sanctioned disfranchisement based on race or color. But there were political pressures to consider. To be capable of passage, the amendment could not deprive the North of its representation based on aliens, nor could the New England States be made to suffer because of their greater proportion of female inhabitants. There was also a special problem in Missouri, where large numbers of the population had been disfranchised for participating in the rebellion. To placate Missouri, the disfranchised rebels must not cost that state a loss in congressional representation. The product of these considerations was the proposal adopted by the Reconstruction Committee on April 28<sup>44</sup> and presented to Congress as section 2 of the proposed fourteenth amendment:

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

43. *Id.* at 1289.

44. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 102 (1914).

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.<sup>45</sup>

Thaddeus Stevens began discussion of the proposed fourteenth amendment in the House on May 8. He regarded the second section as "the most important in the article." In his words: "The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government. . . ."<sup>46</sup> He said the rebel states would have but thirty-seven Representatives if they did not enfranchise the freedmen. "Southern pride would not long brook a hopeless minority. True it will take two, three, possibly five years before they conquer their prejudices sufficiently to allow their late slaves to become their equals at the polls."<sup>47</sup> But Stevens said that the delay would not be injurious because in the meantime the freedmen would become more enlightened and prepared for suffrage. The one feature he disliked about section 2 was that it allowed states to discriminate among the same class and yet receive proportionate credit in representation. He would have preferred that if one member of a race were excluded, the state should forfeit the right to have any of them represented, as had been provided in the earlier apportionment amendment that passed the House<sup>48</sup> but died in the Senate.<sup>49</sup> However, Stevens acknowledged that the present amendment was "a short step forward" in the right direction.<sup>50</sup>

Henry J. Raymond of New York supported section 2 as it now stood—based on proportionate representation—rather than on the exclusion of a whole class from the basis of representation because one member was denied the right to vote. The latter method, he thought, was so severe it would discourage any Southern State from gradually extending the suffrage.<sup>51</sup>

William Finck, a Democrat from Ohio, attacked the second section as a "mere scheme to deny representation to eleven States; to prevent indefinitely a complete restoration of the Union and to perpetuate the power of a sectional and dangerous party."<sup>52</sup>

Many of the speeches in favor of section 2 tended to confirm the Democrats' charge that the amendment was only intended to apply to the South. William D. Kelley of Pennsylvania asked: "Shall the par-

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45. Cong. Globe, 39th Cong., 1st Sess. 2286 (1865-1866).

46. *Id.* at 2459.

47. *Ibid.*

48. Notes 30 & 31 *supra* and accompanying text.

49. Note 43 *supra* and accompanying text.

50. Cong. Globe, 39th Cong., 1st Sess. 2460 (1865-1866).

51. *Id.* at 2502.

52. *Id.* at 2461.

doned rebels of the South include in the basis of representation four million people to whom they deny political rights, and to no one of whom is allowed a vote in the selection of a Representative?"<sup>53</sup> Ephraim Eckley of Ohio pointed out that unless the proposed amendment were adopted, two white rebels in South Carolina would have the political strength of five white loyalists in Ohio, Pennsylvania or New York.<sup>54</sup>

Stevens, in concluding debate on the amendment, conceded that section 2 would not be self-executing; that Congress must legislate for the purpose of ascertaining the basis of representation, but that "as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do."<sup>55</sup> On May 10, section 2, as part of the proposed fourteenth amendment, was approved by a 128 to 37 vote in the House.<sup>56</sup>

The Senate began its deliberations on the amendment on May 23. Due to the illness of Senator Fessenden, the chairman of the Reconstruction Committee, Jacob M. Howard of Michigan took the lead in pressing for its passage. In discussing section 2, Howard admitted that he would have preferred securing suffrage for the colored race, at least to some extent. But he said the real question was how to put through a measure that three-fourths of the states would accept.<sup>57</sup> Howard confessed that the Reconstruction Committee was of the opinion that three-quarters of the states could not be induced to vote to grant the right of suffrage in any degree or under any restriction to the colored race. Thus the second section left the right of regulating suffrage to the states. But "where a State excludes any part of its male citizens from the elective franchise, it shall lose Representatives in proportion to the number so excluded; and the clause applies not to color or race at all, but simply to the fact of the individual exclusion."<sup>58</sup> If the amendment passed, Howard claimed, the eleven seceded states, if they disfranchised Negroes would lose twenty-four members in the House according to the census of 1860. Though section 2 was drawn to make it to the political advantage of the former slave states to enfranchise their Negroes, he said it would apply equally to all the states of the Union.

Senator Clark of New Hampshire asked Howard whether a state such as Massachusetts would lose Representatives if it excluded a person from voting for want of intelligence. Howard replied that it certainly would

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53. *Id.* at 2468.

54. *Id.* at 2535.

55. *Id.* at 2544.

56. *Id.* at 2545.

57. *Id.* at 2766-67.

58. *Id.* at 2767.

"no matter what may be the occasion of the restriction."<sup>59</sup> As a member of the committee which drafted the amendment and a leading spokesman for its passage, Howard's answer is entitled to considerable weight in ascertaining the meaning of the amendment. In elaborating on this point, Howard declared:

No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion.<sup>60</sup>

As to the meaning of "abridged" as used in section 2, Howard gave the example of a state which allowed a person to vote for state officers but prohibited him from voting for members of Congress. That would be an abridgement and he would be included in the exclusion.<sup>61</sup> Howard emphasized that section 2 was to apply individually to each and every person who is denied or abridged the right to vote, and not to the class to which he might belong.

There were still members from both parties in the Senate who expressed dissatisfaction with the second section. William Stewart, a Republican from Nevada, asked, that if it was an outrage upon human rights to deny the ballot to blacks, then why license the South to commit such an outrage for the small compensation of reduced representation.<sup>62</sup>

Senator Hendricks, a Democrat from Indiana, opposed the partisan flavor of section 2, which he claimed was designed to strengthen the radical party by reducing Southern representation while allowing Northern States to base representation on aliens who were denied the right to vote. He asserted that section 2 was so involved and difficult that "one needs to be a mathematician to be sure that he comprehends the full force of the proposition."<sup>63</sup> As a substitute, Hendricks proposed an amendment which would base representation upon the whole number of persons in each state, but excluding two-fifths of such persons released from involuntary servitude.<sup>64</sup> This would, in essence, restore the former three-fifths compromise which Hendricks conceived to be the fair solution since it would avoid an increase of Representatives in the South caused by the emancipation of slaves. But the Hendricks proposal was rejected by the Senate.<sup>65</sup>

Senator Doolittle of Wisconsin moved to substitute for section 2 an

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59. *Ibid.*

60. *Ibid.*

61. *Ibid.*

62. *Id.* at 2800.

63. *Id.* at 2939.

64. *Id.* at 2940.

65. *Id.* at 2942

amendment that had been discussed earlier in the session, that of basing representation upon the adult male electors in each state qualified to vote for the most numerous branch of the state legislature.<sup>66</sup> A census was to ascertain the number of eligible voters. Doolittle predicted the measure would cost New England four Representatives, although the North-western States would gain twelve. Only seven Senators supported the measure,<sup>67</sup> and all but one of them were Democrats.

Undaunted, Doolittle then proposed to base representation upon the number of male citizens over twenty-one in each state qualified to vote.<sup>68</sup> Senator Sherman, a Republican of great standing from Ohio, announced he supported this proposition in principle, convinced that it embodied the true basis of representation and would equalize the political power of citizens in all states and destroy sectional animosity. He declared that there was no reason why New England with its preponderance of women, or New York with its many unnaturalized foreigners, should give their voters more political power than voters elsewhere. But Sherman announced that he would have to vote against the Doolittle amendment as he was "bound by the action of his political friends" to do so.<sup>69</sup>

This reference by Senator Sherman to the "action of his political friends" was an allusion to the results of a Republican caucus. In the face of extensive debate and numerous substitute proposals to the provisions of the fourteenth amendment, the Republican leadership had feared that the apportionment amendment might again be scuttled as it had been earlier in the session. Thus the Republicans who attended the caucus agreed to be bound by its decision. With one minor change the caucus approved the language of section 2 as it had been reported by the Reconstruction Committee. Sherman argued that "there must be at some point of every controversy of this kind some surrender of individual opinion."<sup>70</sup> The use of a party caucus to determine constitutional questions was bitterly assailed by the Democrats,<sup>71</sup> but it proved successful in uniting the Republicans. Not a single Republican Senator voted in favor of the second Doolittle amendment which again went down to defeat.<sup>72</sup>

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66. *Ibid.*

67. *Id.* at 2986. The seven Senators were: Doolittle of Wisconsin, Cowan of Pennsylvania, Hendricks of Indiana, Johnson of Maryland, Riddle of Delaware, and Davis and Guthrie of Kentucky.

68. *Cong. Globe*, 39th Cong., 1st Sess. 2986 (1865-1866).

69. *Ibid.*

70. *Ibid.*

71. Senator McDougall of California (Democrat) in denouncing the Republican caucus, declared "I must say it is the first time in the history of this Republic that legislative matters and great constitutional questions were settled in party caucus." *Cong. Globe*, 39th Cong., 1st Sess. 3041 (1865-1866).

72. *Id.* at 2991.

The Republican caucus had suggested one change in the wording of section 2, that of striking out the word "citizens" and inserting after "male" the words "inhabitants, being citizens of the United States." Senator Howard, in proposing this change in the Senate, asserted that its object was to "make section 2 conform to section 1; to make them harmonize."<sup>73</sup> Probably the real object of the insertion was the reason given by Senator Fessenden: "to prevent a State from saying that although a person is a citizen of the United States, he is not a citizen of the state."<sup>74</sup> This amendment was agreed to without a division.<sup>75</sup>

Before the proposed fourteenth amendment was submitted to a vote, a final alteration in the language of section 2 developed out of the Senate debate. Senator Henderson of Missouri referred to municipal elections in his state, such as those for school directors, in which only property holders were eligible to vote. Since the exclusion of non-property holders from local elections was not uncommon throughout the states, Henderson requested a change in the wording of section 2 to limit its effect to the election of the general officers of the state.<sup>76</sup> In response to a growing concern as to the effect of suffrage restrictions in municipal elections on the basis of congressional representation, Senator George Williams of Oregon moved to change the words "elective franchise" to read:

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 members of the Legislature thereof . . . [thus] specifying particularly the officers for which these people must be allowed to vote in order to be counted.<sup>77</sup>

Senator Howard strongly opposed the Williams amendment which he claimed would greatly increase the difficulty of ascertaining the basis of representation. The following picture which Howard drew, in describing what the result of the Williams amendment would be, is particularly significant in giving us an insight into the manner in which section 2 was expected to operate.

The census-taker will find it necessary, whenever he makes the count of the inhabitants of the particular State or district where he is acting, to ascertain, as precisely as he is able, and to note down in his tables the various persons within the State who are capacitated to vote for any one or all of these five classes of public officers. . . . No one class of the voters for these several classes of public officers is to be held as the standard and test for the number of persons in that State to be included in the count in the formation of the basis of representation. It appears to me that it introduces a rule which is so uncertain, so difficult of

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73. *Id.* at 2897.

74. *Ibid.*

75. *Ibid.*

76. *Id.* at 3010-11.

77. *Id.* at 3029.



practical application, as not only greatly to increase the expenses of ascertaining the basis of representation by Congress in procuring the necessary information, but in many cases the returns must be so inaccurate and unreliable as to be next to worthless.<sup>78</sup>

To avoid this difficulty, Howard proposed that the right to vote be tested only as to elections for the most numerous branch of the state legislature, and thus make the basis of representation conform to the number of people authorized by the Constitution to elect members of Congress. He suggested this would produce a workable and invariable rule, instead of the variable and shifting qualifications embraced in the Williams amendment. But minutes later, the Howard proposal was rejected, and the Williams amendment by a thirty-one to eleven vote was agreed to by the Senate and inserted into section 2.<sup>79</sup>

With section 2 in its final form, the fourteenth amendment was voted upon and approved by a thirty-three to eleven margin in the Senate.<sup>80</sup> The vote was taken on the fourteenth amendment as a whole, because a separate vote on each section was not permitted. Without any major discussion of the changes made in section 2, the House on June 13, 1866, approved the joint resolution calling for the submission of the fourteenth amendment to the states.<sup>81</sup>

## II. CONGRESSIONAL ATTEMPTS TO ENFORCE SECTION 2 OF THE FOURTEENTH AMENDMENT

With the ratification of the fourteenth amendment proclaimed on July 28, 1868,<sup>82</sup> the way was cleared for congressional implementation of its provisions. The apportionment provisions of section 2 of the amendment were obviously not self-executing. If they were to be enforced, it would require additional congressional action.

### *The Ninth Census and Section 6 of the Apportionment Act*

The first action taken to enforce section 2 came on December 19, 1868, when Senator James Harlan, a Republican from Iowa, offered a resolution directing the Senate Judiciary Committee to prepare a bill for the apportionment of Representatives in compliance with section 2 of the fourteenth amendment.<sup>83</sup> The resolution was agreed to by the Senate, but the short session of Congress terminated before further action on it occurred.

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78. *Id.* at 3033-39.

79. *Id.* at 3041.

80. *Id.* at 3042.

81. *Id.* at 3149.

82. 15 Stat. 709-11 (1868).

83. Cong. Globe, 40th Cong., 3rd Sess. 153 (1868-1869).

In the House of Representatives, a serious effort to apply section 2 developed in the proceedings of a select committee appointed to prepare for the taking of the Ninth Census. Under the chairmanship of James A. Garfield of Ohio, the committee undertook an investigation of the laws of each state which operated to exclude citizens from voting for the class of officers mentioned in section 2. The object of this census committee was first, to ascertain the laws which restricted suffrage, and then to provide the census takers with this information to assist them in determining the number of adult male citizens whose right to vote was denied or abridged.<sup>84</sup>

In describing the work of the committee to the House, Garfield provides us with a valuable report on how section 2 was intended to be implemented in this first significant effort to enforce its provisions.

The census is our only constitutional means of determining the political representative population. The Fourteenth Amendment has made that work a difficult one. At the time of its adoption it was generally understood that the exclusion applied only to colored people who should be denied the ballot by the laws of their State. But the language of the article excludes all who are denied the ballot in any and all grounds other than the two specified. This has made it necessary to ascertain what are in fact the grounds of such exclusion, and the Census Committee have compiled a record of the constitutions and laws of the several States from which exclusion from the privilege of voting (otherwise than on account of rebellion or other crime) may be stated in nine general classes as follows:

1. On account of race or color .....	16 states
2. On account of residence on lands ceded by the State to the United States .....	2 states
On account of residence less than required time in United States ....	2 states
On account of residence in State less than required time .....	36 states
On account of residence in county, city, town, etc. (18 different specifications) .....	37 states
3. Wanting property qualifications or non-payment of taxes .....	8 states
4. Wanting literary qualifications .....	2 states
5. On account of character or behavior .....	2 states
6. On account of service in army or navy .....	2 states
7. On account of pauperism, idiocy, or insanity .....	24 states
8. Requiring of certain oaths as prerequisites to voting .....	5 states
9. Other causes of exclusion .....	2 states <sup>85</sup>

After much reflection the committee could devise no better way than to add to the family schedule a column for recording those who are voters, and another with the heading copied substantially from the amendment, "citizens of the United States, being twenty-one years of age, whose right to vote is denied or abridged on other grounds than rebellion or crime."

It may be objected that this will allow the citizen to be a judge of the law as

84. H.R. Rep. No. 3, 41st Cong., 2d Sess. 52 (1869-1870).

85. *Id.* at 52-53. Extracts from the state constitutions and laws operating to disfranchise citizens can be found in the House Report. *Id.* at 71-93.

well as the fact, and that it will be difficult to get true and accurate answers. I can only say this is the best method that has been suggested.<sup>86</sup>

The machinery for enforcing section 2 of the fourteenth amendment was embodied in section 24 of the bill reported out of the Census Committee to provide for the execution of the Ninth Census.<sup>87</sup> This section provided that as soon as the next enumeration of the inhabitants of the several states was completed and returned to the office of the Department of the Interior, the Secretary of the Interior was to ascertain the aggregate representative population of the United States by counting the whole number of persons in each state, excluding Indians not taxed. However, when the right to vote in any election for the class of offices listed in section 2 was denied or abridged to any male inhabitant being twenty-one years of age and a citizen of the United States, except for participation in rebellion or other crime, the Secretary was to reduce the state's basis of representation in the proportion which the number of such male citizens bore to the whole number of male citizens twenty-one years of age in such state. The Census Committee further provided that in the census schedules, the family schedule was to contain two columns listing "male citizens of the United States twenty-one years of age, whose right to vote is denied or abridged on other grounds than rebellion or other crime," and "male citizens of the United States twenty-one years of age."<sup>88</sup>

Representative Hoar of Massachusetts objected to section 24, claiming that it gave the Secretary of the Interior absolute authority to determine the apportionment of Representatives and division of political power in the House without the right of appeal. Hoar proposed that the bill be amended to have the determination of apportionment subject to congressional approval.<sup>89</sup> But Garfield, the sponsor of the bill thought that it was not open to the objection raised, since the Secretary of the Interior was to have merely a ministerial duty to perform—the arithmetical task of ascertaining the ratio of apportionment from the two columns reported by the census-takers.<sup>90</sup>

As the House prepared to vote on section 24 of the Census bill, Garfield announced a change of view and recommended that the section be deleted. In support of this motion, he declared that it would be wiser to leave all questions of apportionment out of the present bill and let the problem be handled in a separate bill regulating the election of members of Congress. Garfield further pointed out that the fifteenth amendment,

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86. *Id.* at 52-53.

87. *Id.* at 62-63.

88. *Id.* at 66.

89. *Cong. Globe*, 41st Cong., 2d Sess. 40 (1869-1870).

90. *Ibid.*

which was then (December 1869) in the process of being ratified by the states, would prevent denials of suffrage based on race or color. The Census Committee had shown that one of the nine categories which restricted suffrage were laws based on race or color. Sixteen states had such laws. But if the fifteenth amendment became effective, all laws disfranchizing citizens on grounds of race or color would be invalid, and the states possessing such laws would be entitled to an increase in representation. However, if apportionment were adjusted before the fifteenth amendment prevailed, then all states entitled to an increase under the amendment would be deprived of such increase during the whole of the next ten years. Garfield thus appealed for the House to postpone the question of apportionment until the next session of Congress.<sup>91</sup> Despite the demand of John A. Bingham of Ohio that the mandate of section 2 be immediately carried out in the next census,<sup>92</sup> the motion of Garfield was accepted by the House.<sup>93</sup>

In the Senate, a bill was reported by the Committee on the Revision of Laws directing the Secretary of the Interior "to so change the schedules and blanks to be used in enumerating the inhabitants of the United States in 1870 as to make the same conform to the Constitution of the United States."<sup>94</sup> The object of the bill was to direct the Secretary of the Interior, in his supervision over the census, to abide by the express provisions of section 2 of the fourteenth amendment in determining the basis of apportionment. But the view of most Senators was that such a law was unnecessary; that even without new legislation, the Secretary of the Interior would be bound by the Constitution to consider the effect of the fourteenth amendment to guide him in his work. Apparently, the Secretary of the Interior accepted this view, for although the 1870 census was taken without any statutory changes pertaining to apportionment, the Secretary directed his assistant marshalls, who were to take the census, to list in separate tables the number of male citizens of the United States twenty-one years of age or more, and the number of "male citizens of the United States of twenty-one and upward whose right to vote is denied or abridged on other grounds than rebellion or other crime."<sup>95</sup>

As the second session of the Forty-second Congress assembled on December 4, 1871, the taking of the Ninth Census had been completed and Congress turned to the problem of apportioning the membership of

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91. *Id.* at 124.

92. *Ibid.*

93. *Id.* at 127.

94. *Id.* at 1078.

95. For a defense of the Secretary of the Interior's action taken in the absence of statutory authorization, see Garfield's address in *Cong. Globe*, 42d Cong., 2d Sess. 82-83 (1871-1872).

the House in accordance with the results of the census reports. On December 7, Representative Charles W. Willard of Vermont introduced a resolution directing the Secretary of the Interior to furnish the House with the census returns listing the number of inhabitants in each state, excluding Indians not taxed, the number of male inhabitants in each state twenty-one years of age or older and citizens of the United States, and the number of such citizens whose right to vote in any of the elections described in section 2 of the fourteenth amendment was denied or abridged except for participation in rebellion or other crime.<sup>96</sup> Since this was to be the first apportionment since the passage of the fourteenth amendment, Willard called for the strict enforcement of its provisions. He declared that the requirement of a poll tax or the exclusion from suffrage based on non-payment of taxes as existed in Georgia, Nevada, Massachusetts, Delaware, and Pennsylvania was an abridgment within the language of section 2. Willard particularly stressed the evils of property qualifications which he claimed would as effectively exclude Negroes from voting as exclusions based on race or color. Where the right to vote was restricted in any state for any cause, save participation in rebellion or other crime, Willard asked for a corresponding loss in that state's basis of representation.<sup>97</sup>

The Willard resolution was accepted by the House and was answered by the Secretary of the Interior four days later with the production of the returns (shown in the first three columns listed in Appendix) requested in the resolution.<sup>98</sup>

The trifling number of adult male citizens whose right to vote was reportedly denied or abridged, made the accuracy and reliability of the reports extremely doubtful. Indeed, Columbus Delano, the Secretary of the Interior, in submitting the reports requested by Congress, attached the following reservation:

[T]he Department is disposed to give but little credit to the returns made by assistant marshals in regard to the denial or abridgment of suffrage. The unfavorable judgment of the Department in respect to this single class of statistics is formed, first, from the application of certain statistical tests, and second, from a consideration of the agencies employed, which are not deemed adequate to the determination of the numerous questions of difficulty and nicety which are involved.<sup>99</sup>

The nature of "certain statistical tests" and agencies employed were not disclosed by the Secretary, but it did not require a great amount of research to realize that the returns were a far cry from the number of citizens who actually voted in the several states. The returns showed

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96. Cong. Globe, 42d Cong., 2d Sess. 42 (1871-1872).

97. *Id.* at 64-65.

98. *Id.* at 66.

99. *Ibid.*

that in all Southern States, except Texas, the number of adult male citizens who were disfranchised amounted to less than 0.5 per cent. The largest showing of disfranchisement was 6.4 per cent of the adult male citizens occurring in Rhode Island, which can probably be attributed to that state's requirement that electors possess at least 134 dollars worth of realty.<sup>100</sup>

Representative Ulysses Mercur of Pennsylvania, later the Chief Justice of his state, attacked the census report as "utterly inaccurate," unreliable, and as having been undertaken without any law, statute, or act of Congress to guide it. He felt that the fault lay with Congress which had not yet passed any law to enforce section 2 and to give practical effect to its terms. He condemned the fact that the assistant assessors who prepared the reports were judges both of law and of fact. Instead of the arbitrary manner in which the reports on disfranchisement had been assembled, Mercur offered the following suggestion:

To arrive at an intelligent result, a blank form ought to have been prepared, containing numerous subdivisions showing (if any man said he was disfranchised) the reason or ground upon which he said his disfranchisement was based. The facts should have been reported here, and then Congress would have determined whether those facts brought the individual within this clause.<sup>101</sup>

Representative Garfield defended the application of the census reports on the number of disfranchised citizens, asserting that the Secretary of the Interior was bound by the Constitution to adopt population schedules conforming to the language of section 2. Though admitting that the census figures were imperfect, Garfield declared that such figures formed the only basis of apportionment; that if Congress is to obey the fourteenth amendment, it must "take the results as they come and make them the basis of apportionment of representation."<sup>102</sup>

Although the number of disfranchised citizens was small, according to Garfield's calculations, it did threaten to cost both Rhode Island and Arkansas one representative if strictly enforced.<sup>103</sup> This was the result of the application of the "major fractions"<sup>104</sup> method of apportionment

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100. R.I. Const. art. II, § 11 (1843).

101. Cong. Globe, 42d Cong., 2d Sess. 79 (1871-1872).

102. *Id.* at 83.

103. *Ibid.* See Appendix, p. 136 *infra*.

104. Under this system, the number of Representatives apportioned to each state was determined by taking the total number of Representatives in Congress and dividing that number into the total representative population of all the states. The result produced a ratio of one Representative for each 135,458 persons in a state. To provide for a House with exactly 280 members, a moiety of approximately 78,000 was chosen, meaning that every state with a fraction above that number, after its representative population was divided by the ratio of 135,458 to one, was entitled to an additional Representative. (The moiety chosen under the "major fractions" method is not one-half of the ratio, but is

to the representative population of each state.<sup>105</sup> However, few congressmen are mathematicians and the list of disfranchised citizens, even to representatives like Samuel Shellabarger of Ohio who openly announced support for the principle embodied in section 2,<sup>106</sup> seemed too small and insignificant to apply in determining the apportionment of representatives. The result of the House debate was that the size of the House was set at 283 members, and the basis of representation was simply left at the number of inhabitants, excluding Indians not taxed, in each state.<sup>107</sup>

In the Senate, the House Apportionment bill was accepted both as to the number of Representatives and as to the method of apportioning them among the states.<sup>108</sup> The Senate too, felt that the census figures on disfranchisement of citizens were too insignificant to affect the representa-

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arbitrarily chosen as that fraction which will produce a House with the desired number of Representatives.) If the basis of representation was based merely on the number of persons in each state (excluding Indians not taxed), Arkansas with 434,471 persons would have three Representatives and a fraction of 78,097 entitling it to a fourth Representative, while Rhode Island with 217,353 inhabitants would have one Representative and a fraction of 81,895 entitling it to a second Representative. But after deducting from the basis of representation of each state a proportion equal to the number of disfranchised adult male citizens divided by the total number of adult male citizens in the state, Arkansas with a resulting loss of 938 in her representative population and Rhode Island with a loss of 14,009, each dropped below the required moiety and thus lost the additional Representative. These calculations show that even a small number of disfranchised citizens in a state might cost a state a Representative, as would have happened to Arkansas with only 193 disfranchised citizens, where the resulting loss in a state's representative population places it just below the established moiety or ratio of apportionment.

105. At the present time Congress uses the "equal proportions" method of apportioning Representatives. 55 Stat. 761 (1941), 2 U.S.C. § 2(b) (1953). This method is designed to produce the minimum relative difference per share in a Representative and in the average population per district. The operation of the method is described in Schmeckebier, *Congressional Apportionment* 21-32 (1941). Both the "major fractions" method (used by Congress until 1940) and the "equal proportions" method rely on priority lists in apportioning Representatives among the states. After assigning one Representative to each state, the priority list commences with the fifty-first member of the House which is assigned to the state possessing the highest priority number. The priority list numbers are obtained by multiplying the population of each state successively by the series of multipliers used in each method for determining the second member, the third member, and so on until the requisite size of the House is reached. But even with the use of a priority list, a small reduction in a state's representative population could cost it a Representative. For instance, in 1930, with the size of the House limited to 435 members, the 435th highest priority number, under the major fractions method, was possessed by Louisiana with 280,212 which enabled it to have an additional Representative. But had Louisiana's basis of representation been reduced by as little as 1%, Wisconsin, with the 436th priority number of 279,212 would have gained a representative instead of Louisiana.

106. Cong. Globe, 42d Cong., 2d Sess. 81 (1871-1872).

107. *Id.* at 142-43.

108. *Id.* at 679.

tion of any state. But there were Senators who expressed displeasure at seeing the number of disfranchised citizens ignored by Congress in determining the apportionment of the House. Justin S. Morrill of Vermont argued that it was important that section 2 of the fourteenth amendment must not become a "dead letter." Though Morrill thought the census figures were unreliable, he said Congress should not go beyond the census report even if the facts might warrant them in so doing.<sup>109</sup>

Morrill's appeal to the Senate to instill some life into section 2 was not entirely in vain. Although the Senate Judiciary Committee recommended that the Senate accept the House Apportionment bill, it did propose an amendment to give statutory authorization for the future enforcement of section 2 of the fourteenth amendment. The proposal of the Judiciary Committee was contained in the sixth section of the Apportionment Act,<sup>110</sup> in the following words:

That should any State, after the passage of this act, deny or abridge the right of any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, to vote at any election named in the Constitution, article fourteen, section one [*sic*], except for participation in the rebellion or other crime, the number of Representatives apportioned in this act 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.<sup>111</sup>

Apparently, this section was conceived of and drafted with great swiftness by the Judiciary Committee, for its shortcoming as a legislative implementation of the apportionment provisions of the fourteenth amendment are numerous and grave. The first obvious error in the proposal was its reference to the elections named in "article fourteen, section one," instead of to section 2. While this error could easily be corrected, it illustrates the careless manner in which the statute was prepared. The second, and far more serious shortcoming, was the absence in the statute of any machinery to enforce its provisions. How was the number of male citizens whose right to vote was denied or abridged to be determined? As an amendment to an apportionment statute, it is quite probable that the Senators conceived the determination of disfranchised citizens to be left to the census takers. But with the trivial census figures on disfranchised citizens, taken during the Ninth Census, quite fresh in the memory of these Senators, the least that could be hoped from the statute purporting to enforce section 2 would be a detailed plan of instructions to guide the census takers in their enumeration of disfranchised citizens. Instead, the language of the proposed bill merely states an objective—the reduction in a state's number of representatives propor-

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109. *Id.* at 670.

110. 17 Stat. 28 (1872).

111. *Id.* at 610.



tionate to its disfranchisement of adult male citizens, without expressing the manner of achieving that result. The bill, to be enforceable, would require further congressional legislation. The effect of the proposal was, therefore, to leave Congress in the same situation as it was in the absence of a statute.

A further criticism of the bill was in its divergence from the language of section 2. According to the mandate of the fourteenth amendment, once the number of disfranchised male citizens is found and divided into the total number of adult male citizens in the state, the resulting fraction is to be subtracted from the state's basis of representation which is set at the number of persons in the state, excluding Indians not taxed.<sup>112</sup> But the language of section 6 as proposed by the Senate Judiciary Committee applied the fraction of disfranchised citizens to the number of representatives apportioned to the state. Thus instead of using the fraction of disfranchised citizens in each state to establish the apportionment of Representatives among the states, the congressional bill would apply to a state's number of Representatives after an apportionment among the states was completed. The congressional bill would have the advantage of allowing Congress to act to reduce a state's allotment of Representatives in any session of Congress, not just after an enumeration by the census. But what would happen to the membership in the House if one state's allotment of Representatives was decreased? If the size of the House was to remain the same, then how was Congress to determine the manner in which the Representatives which one state lost were to be distributed to the other states? Since this question was never discussed in the congressional debate on the bill, it is quite possible that Congress was not aware of any divergence between the language of the bill and that of the fourteenth amendment.

Despite the criticisms mentioned, the proposed section was swept through Congress in whirlwind fashion with a minimum of debate. Senator Trumbull of Illinois, in introducing section 6, merely stated:

The object of that is to carry out the fourteenth amendment of the Constitution, and in case any of the States of the Union should, after the passage of this act, deny to any of their male citizens specified in the Constitution the right to vote otherwise than for the cause there assigned, the Congress will take occasion to reduce their representation in the manner provided for in the Constitution of the United States.<sup>113</sup>

When section 6 of the bill was read to the Senate on January 29, 1872, a vote was immediately requested. Senator Sherman asked that the second section of the fourteenth amendment be read to the Senate.<sup>114</sup> Ap-

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112. See Appendix, p. 136 *infra*.

113. Cong. Globe, 42d Cong., 2d Sess. 610 (1871-1872).

114. *Id.* at 678.

parently, Sherman sensed a discrepancy in the language of the bill. But the Senate had at that point passed the time deadline it had set for the vote on the Apportionment Act, and Senators cried out for a cessation of debate. Senator Sherman therefore withdrew his request for a reading of the amendment, and without any debate on the measure, the Senate by a twenty-eight to twenty-five vote accepted the section.<sup>115</sup>

On the following day, the House accepted section 6, as an amendment to the Apportionment Act, also without debate.<sup>116</sup> The only reference to the section was made by Representative Farnsworth of Illinois, who in describing its effect, significantly said it "can do no harm."<sup>117</sup> It was only after the bill had passed both houses of Congress that the mistake of citing section 1 of the fourteenth amendment, rather than section 2 in the bill, was discovered, and a separate bill had to be passed to rectify the error.<sup>118</sup> On February 2, 1872, the sixth section as part of the Act for the Apportionment of Representatives to Congress according to the Ninth Census was enrolled.<sup>119</sup>

The second session of the Forty-second Congress was thus responsible for producing a census report listing the number of disfranchised citizens among the states, and a statute authorizing the future enforcement of section 2 of the fourteenth amendment. But the census report had proven inaccurate and insignificant and Congress had chosen to ignore its results in providing for the basis of apportionment. The trivial nature of the returns probably produced its mark in history, as no Congress since that date has seen fit to request a similar census report on the number of disfranchised citizens among the states. As to section 6 of the statute passed by Congress to regulate apportionment, little can be said except that as an unenforceable measure it served only to remind the country that section 2 of the fourteenth amendment was not a "dead letter" and might be implemented if a future session of Congress was inclined to do so.

#### *The Apportionment Act of 1901 and Proposed Bills*

The next serious consideration in Congress of section 2 as a means of reducing the congressional representation of states whose citizens were disfranchised, came at the turn of the century. In the meantime, notable changes in the political complexion of the states had occurred. With the termination of Reconstruction and the withdrawal of federal troops,

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115. *Ibid.*

116. *Id.* at 713.

117. *Ibid.*

118. *Id.* at 703-04, 707, 777.

119. 17 Stat. 29 (1872). Section 6 of the act is now found in Rev. Stat. § 22 (1875), 2 U.S.C. § 6 (1958). It has never been enforced.

the Republicans had lost their foothold in the South. Federal protection of the right of Negroes to cast their ballot in Southern elections had disappeared and Negro voters became a rarity below the Mason-Dixon line. In addition to "grandfather laws," primary restrictions, literacy tests, and poll taxes, Negroes also faced individual violence and threats of violence to keep them away from the polls. The last quarter of the nineteenth century saw the Democratic Party firmly entrenched as the dominant party of the South. The memory of Reconstruction and the disfranchisement of Negro citizens in the South had destroyed the Republican Party's aspirations for success in that region. But the Republican hope of curtailing the political power of the South had not died.

On January 4, 1901, as Congress undertook to reapportion the House following the completion of the Twelfth Census, Representative William B. Shattuc, a Republican from Ohio, introduced the following resolution:

Resolved . . . That the Director of the Census is hereby directed to furnish this House, at the earliest possible moment, the following information:

First. The total number of male citizens of the United States over 21 years of age in each of the several States of the Union.

Second. The total number of male citizens of the United States over 21 years of age who, by reason of State constitutional limitations or State legislation, are denied the right of suffrage, whether such denial exists on account of illiteracy, on account of pauperism, on account of polygamy, or on account of property qualifications, or for any other reason.<sup>120</sup>

The Shattuc resolution further authorized the Speaker of the House of Representatives to appoint a select committee of five members from the Census Committee to investigate the question of the alleged abridgment of the elective franchise for any of the causes mentioned, in states where constitutional or legislative restrictions were claimed to exist. The select committee was to file a report declaring its findings to the Census Committee which was then directed to return a bill to the House of Representatives providing for the apportionment of Representatives based on the language of the fourteenth amendment.

Marlin E. Olmstead of Pennsylvania, a Republican, spoke in favor of the Shattuc resolution. Olmstead declared that

it is the plain intention of the Constitution that where there is a large wholesale restriction in the right of suffrage those people who are permitted to vote shall not have the force and influence of their votes augmented by permitting them to elect more members of Congress and more Presidential electors than the same number of people in any other State . . .<sup>121</sup>

He cited the case of Mississippi whose constitution excluded from suffrage those unable to read or interpret its constitution, part of which was

120. 34 Cong. Rec. 556 (1900-1901).

121. *Id.* at 557.

written in Latin. If Mississippi used its constitution to deny suffrage, then why, asked Olmstead, should not the mandate of section 2 of the fourteenth amendment be applied.<sup>122</sup>

The Shattuc resolution was referred to the Census Committee of the House, but the apportionment bill reported by that committee ignored the question of disfranchised citizens in determining the basis of representation. Representative Edgar Crumpacker of Indiana moved to recommit the apportionment bill back to the committee with instructions to ascertain whether any of the states had denied or abridged the right of adult male citizens to vote in any of the elections mentioned in section 2, and if so, to take such restrictions in account when determining the basis of apportionment.

In defense of his motion, Crumpacker gave his interpretation of section 2 and provided one of the few well considered statements on the meaning of its provisions. He emphasized that a denial of the right to vote must be distinguished from a limitation of its exercise in the interest of fair and orderly elections. Where a state imposed a property qualification on the right of its citizens to vote, or required a voter to be able to read Greek, that would obviously be a ground for the reduction of their basis of representation. But that was not to be confused with the use of the Australian system of voting, the official ballot, or registration laws designed to protect the purity of the ballot. In Crumpacker's words,

Restrictions upon the exercise of the elective franchise, reasonably necessary for the integrity of elections, are not denials or abridgments of the right itself within the meaning of the law. The people, in adopting the fourteenth amendment, intended it to have a practical operation, and it must be construed in conformity with the custom and necessity for holding elections under reasonable safeguard. . . .<sup>123</sup>

Crumpacker also believed that the exclusion from suffrage of idiots, the insane, and persons under guardianship were not denials of the right to vote within the language of section 2, as the act of voting involves the exercise of the will and that class of persons are presumed to have no will in the sense of the law. "They are disfranchised by their own want of power to perform the act of suffrage."<sup>124</sup>

There were 94 Representatives who supported Crumpacker's motion, but 136 voted against it, causing another effort at enforcing section 2 to culminate in defeat.<sup>125</sup>

However, the Republicans were not yet ready to write off section 2 as a possible political weapon in reducing Southern representation. At

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122. *Id.* at 748.

123. 34 Cong. Rec. app. 69 (1900-1901).

124. *Ibid.*

125. 34 Cong. Rec. 748 (1900-1901).

the national party convention in 1904, the Republicans included a plank in their national platform, declaring:

We favor such Congressional action as shall determine whether, by special discriminations 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.<sup>126</sup>

On December 7, 1904, Thomas C. Platt, Senator from New York and a member of the National Republican Committee, introduced a bill to amend the Apportionment Act of 1901.<sup>127</sup> The preamble of the bill declared that:

Whereas the Congress is satisfied that the right of male inhabitants of certain states being twenty-one years of age and citizens of the United States, to vote at some of said elections since the passage of the act hereby amended has in fact been denied or abridged for causes not permitted by the Constitution of the United States, and that the representation of the States hereinafter specified should be reduced pursuant to the Constitution. . . .<sup>128</sup>

The bill went on to provide that after March 3, 1907, and until otherwise enacted, the representation in the House of Representatives from Alabama would be reduced from nine to seven; in Arkansas from seven to six; in Florida from three to two; in Georgia from eleven to eight; in Louisiana from seven to five; in Mississippi from eight to six; in North Carolina from ten to eight; in South Carolina from seven to five; in Tennessee from ten to nine; in Texas from sixteen to fifteen; and in Virginia from ten to eight Representatives, causing the total representation in the House to be reduced from 386 to 367 members. Senator Platt did not describe the nature of the information that was utilized in determining the reduction in Representatives, except to say that the bill was prepared by the Committee on National Affairs<sup>129</sup> of the Republican Club of New York City. The bill was referred to the Committee on the Census where it died.

One further effort to apply the mandate of section 2 to the Apportionment Act of 1901 came in a bill introduced on February 26, 1906 by Representative Warren J. Keifer of Ohio.<sup>130</sup> The effect of the Keifer bill was to reduce the number of Southern Representatives by thirty-seven. This loss was equal to the number of Representatives based on the Negro population of the South whom Keifer claimed were totally dis-

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126. U.S. House of Representatives, *The Platform of the Two Great Political Parties 1865-1928*, 137 (1928).

127. 31 Stat. 733 (1901).

128. S. 5747, 58th Cong., 3d Sess. (1904-1905).

129. 39 Cong. Rec. 47 (1904-1905).

130. H.R. 15647, 59th Cong., 1st Sess. (1905-1906).

franchised by the use of fraudulent ballots, shotgun policies, dishonest registration policies, and intimidation at the polls.<sup>131</sup> The interesting point to note in Keifer's attack is his emphasis on the effects of *individual* acts of intimidation and fraudulent election practices.<sup>132</sup> Prior to this time, section 2 had been viewed in the light of the effect of *state* constitutional and legislative actions. Here in the wake of the post-Reconstruction era, we find an appeal to Congress to use section 2 to combat the disfranchisement of Negro voters whether the exclusion from suffrage be caused by state law or individual action. In the view of Keifer a denial or abridgment of the right to vote occurs within the meaning of section 2 whenever a citizen is disfranchised by the terms of a state's constitution or law, by the actions of election officials and other officers of the state who control the election machinery, and by individual acts of intimidation of would-be voters where such actions are met with popular acquiescence throughout the state. The number of Congressmen who supported this view is impossible to ascertain as the Keifer bill was referred to the Census Committee, the graveyard of measures attempting to enforce the provisions of section 2, and was never reported to the House.

#### *The McNamara Bill*

The most recent attempt in Congress to implement the second section of the fourteenth amendment occurred in the first session of the Eighty-fifth Congress. On July 24, 1957, during the debate on the bill,<sup>133</sup> which eventually was enacted as the Civil Rights Act of 1957,<sup>134</sup> Senator Pat McNamara, a liberal Democrat from Michigan, offered an amendment.<sup>135</sup> Believing that an implementation of section 2 of the fourteenth amendment should be an integral part of any bill designed to protect the right to vote, the McNamara amendment offered the following plan. A Joint Committee on Congressional Representation was to be established composed of nine members of the House of Representatives appointed by the Speaker, and nine Senators appointed by the President of the Senate. No more than five Senators or Representatives were to be members of the same political party.<sup>136</sup> By May 1 of the year following a biennial election for Representatives in Congress, the joint committee was to:

- (1) determine whether any State has, in violation of section 2 of the fourteenth

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131. 40 Cong. Rec. 3885-86 (1905-1906).

132. *Id.* at 3889-90.

133. H.R. 6127, 85th Cong., 1st Sess. (1957).

134. 71 Stat. 634, as amended, 5 U.S.C. § 295-1 (1958), 28 U.S.C. §§ 1343, 1861 (1958), 42 U.S.C. §§ 1971, 1975, 1975a-e, 1995 (1958) (Supp. II, 1959-1960).

135. See 103 Cong. Rec. 12519 (1957).

136. S. 2709, 85th Cong., 1st Sess. § 2 (1957).

amendment to the Constitution, denied or abridged the right of inhabitants of such State to vote in any election prescribed in such section since the preceding biennial election for Representatives in Congress; and

(2) calculate, in the manner prescribed in section 2 of the fourteenth amendment to the Constitution and in section 22 of the Revised Statutes, the number (if any) by which the Representatives in Congress of each state which the joint committee determines has so denied or abridged the right of its inhabitants to vote shall be reduced as the result of such denial or abridgement.<sup>137</sup>

The statement of the joint committee as to the number, if any, of Representatives to be reduced from each state for the Congress commencing after the date of such statement was to be reported to Congress by May 1 with a full and complete report of the facts upon which such statement is based.<sup>138</sup> The findings of the joint committee concerning the reduction of representation would go into effect thirty days after the submission to Congress of the statement, unless before that time Congress passed a concurrent resolution expressly disapproving the findings of the joint committee.<sup>139</sup>

The McNamara amendment to the Civil Rights Act enlisted support from both political parties. Senator Clark, a Democrat from Pennsylvania, hailed the measures as "an effort which has been delayed for perhaps some 90 years, and is certainly long overdue."<sup>140</sup> However, the amendment failed to win the approval of Senator Johnson of Texas, the majority leader, and while minority leader Knowland of California considered the bill to be worthy of consideration as a separate piece of legislation, he thought its status as an amendment to the Civil Rights Act was inadvisable.<sup>141</sup> By a voice vote, the McNamara amendment was rejected.<sup>142</sup> The provisions of the amendment were introduced by Senator McNamara as a separate legislative bill on August 6, 1957.<sup>143</sup> On February 17, 1959, Senator McNamara reintroduced his bill cited as the "Congressional Representation Act of 1959."<sup>144</sup> The bill was referred to the Committee on the Judiciary for future consideration and died there.

Senator McNamara deserves credit for his effort to revive congress-

137. S. 2709, 85th Cong., 1st Sess. § 3(a) (1957).

138. S. 2709, 85th Cong., 1st Sess. § 3(b) (1957).

139. S. 2709, 85th Cong., 1st Sess. § 4 (1957).

140. 103 Cong. Rec. 13464 (1957). Other Democratic Senators announcing their support for the amendment were Paul Douglas of Illinois, and Wayne Morse and Richard Neuberger of Oregon, while Republicans Clifford Case of New Jersey, Jacob Javits of New York, and Charles Potter of Michigan declared they would vote in favor of the measure. *Id.* at 13463-65.

141. *Id.* at 13465.

142. *Ibid.*

143. S. 2709, 85th Cong., 1st Sess. (1957); see 103 Cong. Rec. 13703 (1957).

144. S. 1084, 86th Cong., 1st Sess. (1959).

sional interest in the full provisions of section 2 of the fourteenth amendment. It is difficult to disagree with the Michigan Senator's statement that "we cannot be selective about enforcing our constitutional rights and duties. If we are to accept any of the constitutional provisions, we must accept all of them."<sup>145</sup> But in examining the McNamara bill as an attempt to implement section 2 it appeared to have several defects.

First, a discrepancy can be found between the wording in the bill and the language of the fourteenth amendment. The bill called on the joint committee to determine whether any state had denied or abridged the "*right of inhabitants of such state to vote in any election*" prescribed in section 2 and to reduce representation accordingly.<sup>146</sup> The fourteenth amendment limits the effect of disfranchisement to "the male inhabitants of such State, being twenty-one years of age, and citizens of the United States." If the McNamara bill had been enacted and was construed to include the effect of the disfranchisement of females and non-citizens in determining the basis of representation, would such a measure have been constitutional?

In considering the effect of the disfranchisement of female citizens, we must remember that at the time the fourteenth amendment was drafted (1866), no state permitted females to vote at general elections. Thus the limitation of the effect of disfranchisement upon representation to adult male citizens cannot be said to recognize a conscious choice on the part of Congress and the states to exclude the effect of female disfranchisement. If women could not vote in any of the states, it would have been foolish to ascertain how many of their number were disfranchised. But now by the language of the nineteenth amendment, ratified in 1920, "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 sex." There has been no judicial declaration concerning the effect of the nineteenth amendment on section 2 of the fourteenth amendment, but the Supreme Court of the United States did say, by way of dictum, in *Breedlove v. Suttles*,<sup>147</sup> that the nineteenth amendment "applies to men and women alike and by its own force supercedes inconsistent measures, whether Federal or state." To be consistent with the mandate of the nineteenth amendment, there is justice in the argument that in calculating the basis of representation, the disfranchisement of female as well as male citizens should be considered.

However, to reduce a state's representation by including non-citizens in the ranks of the disfranchised would offend the language of section 2.

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145. 103 Cong. Rec. 13463 (1957).

146. S. 2709, 85th Cong., 1st Sess. § 3(a) (1957).

147. 302 U.S. 277, 283 (1937).



The limitation of the effect of disfranchisement to citizens was not inserted in section 2 by accident. As we have seen, it was chosen at the insistence of New England States who demanded the right to disfranchise their alien population with impunity. The justification of ignoring the effect of the alien's exclusion from suffrage may be questioned, but it is a feature of the amendment that must be acknowledged.

A further criticism of the McNamara bill can be raised as to its method of determining whether a state has denied or abridged the right of inhabitants to vote. The bill assigned this task to a joint congressional committee which has four months to produce findings and a statement as to the possible reduction in the number of a state's Representatives to Congress. Senator McNamara construed the word "denial" in section 2 to mean "any effort [by a state] to deprive voters of their franchise."<sup>148</sup> Certainly such a view was justified in view of the legislative history of the amendment. But this means that a congressional committee entrusted with a duty affecting the composition of the national legislature would have had to consider voting restrictions in all the states, such as poll tax requirements in Mississippi,<sup>149</sup> a literacy requirement as in Massachusetts,<sup>150</sup> or an exclusion of paupers as in Maine.<sup>151</sup>

Section 7<sup>152</sup> of the McNamara bill authorized the committee to hold hearings and investigations with powers of subpoena over witnesses and documents, and section 10<sup>153</sup> provided for a staff of counsel and technicians. But even with such assistance, it is doubtful whether a committee could determine the number of disfranchised citizens in one state, let alone fifty states within four months. The use of census takers to enumerate disfranchised citizens was not provided for in the bill, and since the committee was directed to act every two years, the use of a decennial operation like the census would not have solved the problem.

In addition to the barriers imposed by time and space, if a congressional committee were responsible for ascertaining the number of disfranchised citizens, the political pressures operating on its members might seriously impair their effectiveness. The possibility of deals, and the "you stay out of my state and I'll stay out of yours" attitude cannot be discounted where congressional committees are concerned. Thus, while the ultimate decision of reducing congressional representation must be left to Congress, the wisdom of placing the initial task of ascertaining the existence and number of disfranchised citizens with a congressional committee is open to doubt.

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148. Letter From Senator McNamara to Author, March 2, 1959.

149. Miss. Const. art. XII, § 241.

150. Mass. Gen. Laws Ann. ch. 51, § 1 (Supp. 1960).

151. Maine Const. art. II, § 1.

152. S. 2709, 85th Cong., 1st Sess. § 7 (1957).

153. S. 2709, 85th Cong., 1st Sess. § 10 (1957).

Despite these difficulties, the McNamara bill may still be defended as an attempt to induce the states to enlarge the enfranchisement of their citizens. Although a congressional committee might be limited in its effectiveness to fully comply with the mandate of section 2, the very existence of such a committee would be a sword threatening to cut into the representation of states which continue to disfranchise their citizens. Apparently, this was the object of the bill, as Senator McNamara stated that "whether or not enough violations could ever be found to reduce a State's representation by even one, the existence of the joint committee and its responsibility to conduct a biennial investigation would have a tremendous impact on those states which deny citizens the right to vote."<sup>154</sup>

### III. THE PRESENT STATUS OF SECTION 2

There never has been a successful implementation of the full provisions of section 2 of the fourteenth amendment. No state has ever suffered a reduction in congressional representation through its disfranchisement of adult male citizens. Yet it is common knowledge that from the date of the ratification of the fourteenth amendment to the present day, there have been denials and abridgments of the right of citizens to vote, particularly in the case of the Negro population in the South.<sup>155</sup>

In thirteen counties in Mississippi of more than 50 per cent Negro population, only fourteen Negro votes were cast in the 1954 congressional elections, while in nine rural counties in Alabama with a large Negro population, not a single Negro was registered to vote in the same elec-

154. Letter From Senator McNamara to Author, March 2, 1959; see note 2 *supra*.

155. In a study showing the extent of disfranchisement, the Southern Regional Council, in 1957, offered the following statistics showing the number of Negroes of voting age and the number of Negroes eligible to vote under existing conditions in Southern States.

	<i>Negroes of Voting Age</i>	<i>Estimated Negro Voters</i>
Ala.	516,245	53,336
Ark.	232,191	67,851
Fla.	366,797	148,703
Ga.	633,690	163,380
La.	510,090	161,410
Miss.	497,350	18,000
N.C.	549,740	102,000
S.C.	309,000	98,890
Tenn.	371,480	148,592
Tex.	550,992	209,297
Va.	422,670	84,931

The statistics compiled by the Southern Regional Council were based on census reports and a study of eligible Negro voters under existing state registration laws and practices. *Newsweek*, July 15, 1957, pp. 24-25.

tions.<sup>156</sup> The examples need not be multiplied to prove that disfranchisement is still very much with us in this country.

Admitting that a problem of disfranchisement exists, it may still be asked whether enforcement of section 2 would be of aid in encouraging the extension of suffrage. Accordingly, we might first take note of an argument which has sometimes been advanced, that the reduction of representation provision of section 2 was nullified by the enactment of the fifteenth amendment. Such a proposition was advanced by Emmet O'Neal, a distinguished Southern lawyer and United States Attorney for the Northern District of Alabama, in his attack against the 1904 Republican platform which had advocated the enforcement of section 2.<sup>157</sup> O'Neal argued that section 2 did not vest in Congress the power to reduce the representation of a state which had regulated the suffrage in any manner it saw proper, provided the regulations were uniform and did not discriminate against individuals on account of race, color, or previous condition of servitude. Since the effect of the fifteenth amendment was to render any law so discriminating, inoperative and void, O'Neal concluded that Congress no longer had reason or authority to reduce a state's representation under section 2. Charles A. Gardiner, in a convocation address at New York University in 1903, went so far as to say that the penalizing clause of section 2 was abrogated when the fifteenth amendment was adopted and that any attempt by Congress to reduce representation under that clause would be unconstitutional and would promptly be set aside by the courts.<sup>158</sup>

However, the proposition that the penalizing clause of section 2 is limited to instances of disfranchisement based on race, color, or previous condition of servitude cannot be accepted in the light of events leading to the adoption of the fourteenth amendment. We have seen that an early proposal of the Reconstruction Committee reducing the representation of states which denied the elective franchise solely on grounds of race or color was rejected by Congress.<sup>159</sup> The argument then raised against limiting the grounds of exclusion to race or color was that states by high property qualifications could effectively disfranchise Negroes though not mentioning race or color in their laws.<sup>160</sup> Section 2 as finally drafted was intended to remedy that defect.<sup>161</sup>

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156. See *Southern Negroes and the Vote*, Time, July 29, 1957, p. 12.

157. See O'Neal, *The Power of Congress to Reduce Representation in the House of Representatives and in the Electoral College*, 181 No. Am. Rev. 530 (1905).

158. Gardiner, *Solution of the Negro Problem*, p. 210 (1903) (New York Univ. Convocation Address).

159. Cong. Globe, 39th Cong., 1st Sess. 1289 (1865-1866).

160. *Id.* at 376, 385.

161. See notes 59-61 *supra* and accompanying text.

Nor does the history after the passage of the fifteenth amendment support the view that the effect of that amendment was to abrogate the penalizing clause of section 2. In the Second Session of the Forty-first Congress, after the passage of the fifteenth amendment, the House Census Committee under James A. Garfield had compiled a list of state laws which operated to disfranchise citizens in preparation for guiding the census takers in the determination of the basis of representation under section 2.<sup>162</sup> That list included laws which in addition to race and color, denied the vote on account of residence, property tests, literacy qualifications, character tests, poverty, and insanity. Moreover, Section 6 of the Apportionment Act of 1872, saw Congress specifically authorize a reduction in the number of representatives where a state denied the right of citizens to vote except for participation in rebellion or other crime.<sup>163</sup> Thus we have a statutory enactment based on section 2 of the fourteenth amendment after the date of the ratification of the fifteenth amendment. The words of Representative Samuel Shellabarger of Ohio in describing section 2 at the session which enacted this statute are particularly worth noting:

The design of this constitutional amendment [article XIV, section 2] was that the poor man, the ignorant man, the colored man, should be secured, should be guaranteed [*sic*] his right to vote; that the States should not deprive him of his right of representation, except by taking the consequences of not having in this Hall representation for those of his class. That is to say, if a State decides that a man is not good enough to vote, the State shall thereby be regarded as saying that he is not good enough to be represented here.<sup>164</sup>

Though it was the hope of the framers of the fourteenth amendment that the threat of a loss in representation would primarily encourage the extension of suffrage to the Negroes, the legislative history of section 2 clearly proves that it was intended to operate whenever a state, in its control of the elective franchise, decided that certain of its citizens were unfit to vote.

A further question which may be raised as to the application of section 2 is whether states may suffer a loss in congressional representation when citizens are denied the right to vote through the actions of private individuals. In the Fifty-ninth Congress, Representative Keifer, in his effort to enforce section 2, argued that any device used to disfranchise citizens, whether by state law, electoral fraud, or by the intimidation of would-be voters by private parties within the state, should operate to reduce such state's congressional representation.<sup>165</sup> The Constitution,

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162. See notes 84, 85 *supra*.

163. Rev. Stat. § 22 (1875), 2 U.S.C. § 6 (1958).

164. Cong. Globe, 42d Cong., 2d Sess. 81 (1871-1872).

165. 40 Cong. Rec. 388-90 (1905-1906). See notes 130-32 and accompanying text.

as viewed by Keifer, was only interested in the fact of the denial of a citizen's right to vote, not in the manner in which such right was invaded.

The language of section 1 of the fourteenth amendment specifically declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." leaving no doubt that it is only state action which is condemned. However, the language of the penalizing clause of section 2 contained no express provision limiting its effect to state action. It merely states:

But when the right to vote at any election . . . 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. . . .

A literal reading might thus support the application of section 2 to individual as well as state action. However, the application of section 2 to individual action would be contrary to the meaning given to that section by the Congress that drafted the fourteenth amendment. We have seen that Congress clearly acknowledged the right of the states to control the elective franchise, subject to the principle embodied in section 2—that where a state determined that certain of its citizens were not qualified to vote, they should not have them included in determining the state's representation in the House of Representatives. Political representation in Congress was not to belong to those who had no political existence. The choice was left with the states: to disfranchise any of its citizens, or to enjoy full political strength in Congress. But this choice was necessarily to be reflected in the state's control of its electoral machinery. The Congressional Globe shows evidence that states would be penalized under section 2 when their use of tests based on race, color, property, and education disfranchised voters; but nowhere in the debates of the Congress which enacted the fourteenth amendment is there recognition that states would be penalized through the interference of voting rights by private individuals.

The activity of the Census Committee in 1870 in attempting to enforce section 2 is further evidence of its meaning. We have seen that this committee compiled a list of state laws and constitutional provisions which served to disfranchise citizens in preparation for the apportionment of Congress. The committee report made no mention of the effect of individual acts which deprive citizens of the right to vote,<sup>166</sup> although the activities of the Ku Klux Klan were well known to Congress by 1870.

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166. See notes 84 & 85 *supra*.

Finally, we have the evidence of the Congressional Apportionment Act of 1872, Section 6 of which states:

That should *any State*, after the passage of this act, deny or abridge the right of any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, to vote at any election named in . . . the Constitution, article fourteen, section two, except for participation in the rebellion or other crime, the number of Representatives apportioned in this act 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.<sup>167</sup>

Here, in the one congressional statute based on the second section of the fourteenth amendment, we find Congress specifically limiting the effect of the amendment to state action.

The conclusion dictated by the legislative history is that if a state is to lose congressional representation through the denial of a citizen's right to vote, the cause must be grounded on state action. Whether in the form of constitutional provisions, legislative statutes, or through the control of the electoral machinery, the state must be responsible if section 2 is to apply.

#### IV. THE APPLICATION AND ENFORCEMENT OF SECTION 2

With the scope and meaning of section 2 in mind, we might turn our attention to several areas where the enforcement of its provisions might prove of benefit in discouraging the denial of voting rights.

A prime target for the application of section 2 would be literacy tests, which in the South have been employed with great success in preventing Negroes from voting. As of 1956, there were nineteen states with some form of literacy requirement for voting.<sup>168</sup> Some tests merely call for the ability to read the Constitution and to write one's own name, as in California,<sup>169</sup> Delaware,<sup>170</sup> Maine,<sup>171</sup> and Massachusetts.<sup>172</sup> But Alabama requires an applicant to be able to read and write any article of the Constitution in English and to answer questions concerning his qualifications as an elector.<sup>173</sup> Georgia requires ability to read and write English plus a demonstration of an understanding of the duties and obligations of citizenship;<sup>174</sup> while Mississippi requires ability to read and write any section of the state constitution, plus the ability to give a reasonable in-

167. Rev. Stat. § 22 (1875), 2 U.S.C. § 6 (1958). (Emphasis added.)

168. Note, Use of Literacy Tests to Restrict the Right to Vote, 31 Notre Dame Law. 251, 255 (1956).

169. Cal. Const. art. II, § 1.

170. Del. Code Ann. tit. 15, § 1701 (1953).

171. Me. Rev. Stat. Ann. ch. 3, § 20 (1954).

172. Mass. Gen. Laws Ann. ch. 51, § 1 (Supp. 1960).

173. Ala. Code tit. 17, §§ 31-32 (1953) (Supp. 1959).

174. Ga. Const. art. II, §§ 2-704.

terpretation thereof to the registrar, as well as to demonstrate the duties and obligations of citizenship.<sup>175</sup> If states were threatened with a loss of political strength in Congress because of the effect of their literacy requirements for voters, the result might well be a reduction in such laws or perhaps a growing acknowledgment of the intelligence of the Negro population of the South.

Another form of voting restriction which would be vulnerable to attack by enforcement of section 2 is the poll tax requirement. In 1958, Alabama,<sup>176</sup> Arkansas,<sup>177</sup> Mississippi,<sup>178</sup> Texas,<sup>179</sup> and Virginia<sup>180</sup> imposed a poll tax as a prerequisite to the right to vote. Such a requirement has long operated to keep lower income groups away from the polls. The exclusion from suffrage of paupers, as in Maine<sup>181</sup> and New Hampshire,<sup>182</sup> would also be within the scope of section 2.

In applying section 2, the difference between laws designed to secure the orderly administration of elections and the purity of the ballot on the one hand, and laws and regulations calculated to repress suffrage on the other, must continually be kept in mind. It is only the latter regulation of the elective franchise—where the state has consciously decided through its laws or agents, that a group of citizens are unfit to exercise the right to vote—that the penalty of section 2 should be applied. If votes are impaired because of violation of registration laws and regulations imposed to secure honest and correct results, the force of section 2 should properly be withheld.

There is also merit in the argument that the exclusion from suffrage of idiots and the insane, who are presumed to have no will in the sense of the law, is not a disfranchisement within the meaning of section 2, for they are disfranchised by their own want of power to perform the act of suffrage.<sup>183</sup> But it would be advisable to require a judgment of incompetency from a court of record before ignoring the effect of the disfranchisement of such citizens.

The question of whether to exclude the effect of residence requirements for voting from the force of section 2 presents a more difficult problem. Every state has a requirement ranging from six months to two

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175. Miss. Const. art. XII, § 244.

176. Ala. Const. art. VIII, § 178.

177. Ark. Const. art. III, § 1, amend. 3.

178. Miss. Const. art. XII, § 241.

179. Tex. Const. art. VI, § 2.

180. Va. Const. art. II, § 21.

181. Me. Const. art. II, § 1.

182. N.H. Const. art. 28.

183. See 34 Cong. Rec. app. 67, 69 (1900-1901) (address of Rep. Edgar Crumpacker of Indiana).

years residence as a qualification for voting.<sup>184</sup> The use of residence requirements might be defended as a device for promoting honest elections by preventing the migration of would-be voters to areas where close electoral contests are expected, shortly before the holding of the election. However, a residency requirement for voting is also a decision on the part of a state that citizens who lack the prerequisite tenure of residence are unfit to vote. The Garfield Census Committee thus included residency laws as being within the language of section 2 operating to reduce a state's congressional representation.<sup>185</sup> To the extent that residence qualifications are common to all states, it might be said that their inclusion in section 2 would make little difference in the apportionment of Congress, as the loss in the basis of each state's representation would be roughly the same. But in any event, Congress in enforcing section 2 would not be prevented from enacting a statute declaring which state laws and actions would produce a reduction in a state's basis of representation. Literacy tests, poll tax requirements, and property qualifications would certainly be included within such list. Whether residency requirements would be considered a denial of the right to vote would be for Congress to decide. The production of such a statute clarifying and defining the terms of section 2 would not be an insurmountable task for Congress to perform. The far greater difficulty comes in selecting a method which will determine the number of citizens in each state who are denied the right to vote.

The problem of ascertaining the number of disfranchised citizens has beset Congress since the adoption of the fourteenth amendment, and has been a basic cause of the failure of Congress to enforce section 2. Obviously, the enumeration of disfranchised citizens cannot be left for the courts to decide. A judicial type hearing to determine the question of whether a single citizen was denied the right to vote would be costly and time-consuming. If the courts were to pass on all the claims of disfranchisement within a state, the task would necessarily be an impossible one for the courts to handle within the period between congressional elections.

However, even if the courts were equipped to handle the problems presented by section 2, judicial decisions have indicated that the courts would refrain from determining questions which relate to apportionment by considering such questions to be political in nature. In *Saunders v. Wilkins*,<sup>186</sup> it was held that questions relating to the apportionment of

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184. See, e.g., Cal. Const. art. II, § 1; Mass. Gen. Laws Ann. ch. 51, § 1 (Supp. 1960); N.Y. Election Law § 150.

185. See notes 84 & 85 supra.

186. 152 F.2d 235 (4th Cir.), cert. denied, 328 U.S. 870 (1945).



representatives among the several states are political by nature and reside exclusively within the determination of Congress. The court declared that though

it is well known that the elective franchise has been limited or denied to citizens in various States of the union in past years . . . it is noteworthy that there are no instances in which the courts have attempted to revise the apportionment of Representatives by Congress.<sup>187</sup>

Thus if section 2 of the fourteenth amendment is to be enforced, Congress must be counted on to perform this function.

### *A Suggestion For Implementing Section 2*

How, then, is Congress to implement the provisions of section 2? By now it must be clear that there is no easy answer to this problem. But the legislative history of the amendment does suggest one method for enforcing section 2—the employment of the United States Census Bureau for enumerating the number of disfranchised citizens in each state.

Though the Congress which drafted section 2 of the fourteenth amendment gave scant attention to the details of enforcing its provisions, we do find recognition in the addresses of Senators Wade of Ohio,<sup>188</sup> Doolittle of Wisconsin,<sup>189</sup> and Howard of Michigan,<sup>190</sup> that the task of determining the number of citizens in each state who were deprived of the right to vote would be entrusted to the census takers. We have also seen that in the first serious effort made by Congress to enforce section 2, the House Census Committee, in the Forty-first Congress, prepared a list of state laws which operated to disfranchise citizens, to be presented to the assistant marshals conducting the Ninth Census to guide them in enumerating the disfranchised of each state.<sup>191</sup> However, the plan of the

187. 152 F.2d at 237-38. For a truly imaginative attempt to utilize section 2 of the fourteenth amendment see *Dennis v. United States*, 171 F.2d 926 (D.C. Cir. 1948), *aff'd*, 339 U.S. 162 (1950). In appealing a conviction for willful default in failing to answer a subpoena of the House Un-American Activities Committee, Dennis contended that the committee which had issued the subpoena was not a validly constituted committee of Congress as it was not composed exclusively of members of Congress. He charged that Representative John E. Rankin of Mississippi, a member of the committee, was not a Congressman but an "interloper" because due to the election laws and practices of Mississippi, section 2 of the fourteenth amendment prevented Mississippi from having more than four of its allotted seven Representatives. Therefore, Dennis claimed, all Representatives from Mississippi were "interlopers" and all congressional committees on which they served were incapable of exercising congressional powers. After dismissing this contention as "sheer nonsense," Judge Clark went on to state that only Congress could enforce the provisions of section 2. 171 F.2d at 993.

188. Cong. Globe, 39th Cong., 1st Sess. 2768-69 (1865-1866).

189. *Id.* at 2942.

190. *Id.* at 3038-39.

191. H.R. Rep. No. 3, 41st Cong., 2d Sess. (1869-1870).

Census Committee was shelved by Congress, and the actual enumeration of disfranchised male citizens by the census takers in 1870 proceeded hastily, without congressional sanction or instructions. As a result, the rather trivial and probably unreliable figures that were obtained in the ensuing census report cannot be treated as an illustrative example of the type of report that the Census Bureau could produce today under modern means of investigation and with proper congressional instructions.

Even after the disappointing census report of 1870, subsequent attempts by Congressmen to implement the penalizing clause of section 2, as in legislative bills offered by Representatives John M. Bright of Tennessee,<sup>192</sup> and William Shattuc of Ohio,<sup>193</sup> have continued to recognize the need for utilizing the services of census takers in ascertaining the number of citizens excluded from the ballot in the several states. The reason for depending on census takers arises from the fact that the Census Bureau is the only national agency that is capable of undertaking a state-by-state investigation to determine our representative as well as aggregate population within the time remaining between the execution of the census and the holding of the next congressional election. Neither the courts, with their abstention from determining political questions, nor a congressional committee, with the barriers imposed by time and space, can handle the task of enumerating disfranchised citizens. If the function is to be delegated to an independent agency, the logical choice is the Census Bureau with its nationwide machinery for gathering information from the public.

The employment of the Census Bureau in the enforcement of section 2 could proceed along the following lines. First, a list would have to be compiled by the census takers showing the number of male citizens (or more likely, all citizens if the language of the nineteenth amendment is read into section 2 of the fourteenth amendment) twenty-one years of age or more, in each state. Actually, this presents no problem as such information is accumulated by the Census Bureau in the population schedules.<sup>194</sup>

In conforming to the mandate of section 2, the census taker, after discovering his subject is a United States citizen of twenty-one years of age or more, would be required to ask him whether he had attempted to vote in an election for the choice of Presidential electors, for Representatives to Congress, for executive and judicial officers of a state, or for members of the state legislature, and had been denied the right to cast his vote at any one or all of the above elections. Presumably, the elec-

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192. Cong. Globe, 42d Cong., 2d Sess. 140 (1871-1872).

193. 34 Cong. Rec. 556 (1900-1901). See notes 120-22 *supra* and accompanying text.

194. See, e.g., 1950 Census of Population, vol. 2 pt. I, app. 1-461 (1952-1953), for an illustrative example of the population schedule used by the Census Bureau.

tions mentioned would refer to the last one held for such offices prior to the date of the census. If the subject declared that his right to vote had been denied, at one of the named elections, he would then be asked to state, to the best of his knowledge, the reason or ground upon which the denial was based and the election in which it occurred. The statements would be recorded by the interviewing census official. With the completion of the census, all statements made by citizens claiming a denial of the right to vote at one of the prescribed elections would then be accumulated for each state.

If these statements were accorded finality, the method described might be subject to the criticism that the citizens would thus be made judges of the law as well as the facts upon which section 2 was to operate. This criticism might be overcome by providing for the submission of the statements of disfranchised citizens to the select committee appointed decennially by Congress to apportion Congress in the light of the census reports. This congressional committee on apportionment would be authorized to review the reasons upon which denials of the right to vote were based and to determine whether they came within the language of section 2. As stated earlier, a separate statute defining which state actions were denials or abridgments of the right to vote within the meaning of section 2 would serve as a guide to aid the committee. The committee might also find it advisable to request the appearance of electoral officials of the various states to explain their electoral practices.

After studying the claims of disfranchisement and determining which of the claims stated causes that were denials or abridgments of the right to vote, the congressional committee would be directed to reduce each state's basis of representation<sup>195</sup> (the total number of persons in the state) by the proportion which the number of such disfranchised citizens bore to the whole number of citizens in the state twenty-one years of age. The resulting sum would then constitute the political representation of each state and would be the figure relied upon in determining the apportionment of representatives.

The congressional committee would have the final word in deciding whether the facts, as stated by individual citizens, brought them within the category of disfranchised citizens as required by section 2. But, to make the plan work, the facts as reported to the census officials would have to be taken at face value. Otherwise, if each citizen would be re-

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195. The exclusion of "Indians not taxed" from the basis of representation is no longer a factor to be considered as all Indians are now subject to federal income tax laws. See *Superintendent v. Commissioner*, 295 U.S. 418 (1935). In 1940 the Director of the Census included all Indians in the tabulation of the total population of each state. The inclusion of Indians was accepted by Congress. See 87 Cong. Rec. 70 (1941).

quired to prove his allegation of disfranchisement, the amount of time and expense involved would make the enforcement of section 2 impossible.

However, the reliance on individual assertions of exclusion from suffrage in the statements made to census officials would not present a strong danger of falsity or inaccuracy in the reports. Individual assertions to census officials cannot be offered with impunity. Federal statutes provide for fines and imprisonment for anyone over eighteen years of age, who when requested by officers of the Census Bureau to answer any question to the best of his knowledge, refuses or wilfully neglects to answer,<sup>196</sup> or wilfully gives any answer that is false,<sup>197</sup> or directly or indirectly offers or renders any suggestion, advice, information or assistance of any kind, with the intent or purpose of causing an inaccurate report.<sup>198</sup> Secondly, it is unlikely that citizens would be inclined to give information that might reduce their state's political strength in Congress, unless the grievance of being deprived by the state of their right to vote left a strong impact on their minds. Indeed, if any danger exists, it is that the number of statements collected by census officials from disfranchised citizens will be smaller than the actual number deprived of the right to vote, as the Census Report of 1870 would indicate. But it must be remembered that the object of section 2 should not be to reduce the congressional representation of various states as an end in itself, but to encourage the extension of suffrage to all citizens. Regardless of the number of citizens who claim a deprivation of the right to vote, the very existence of a nationwide investigation as suggested here might prove of value in encouraging states to lower their restrictions on the right to vote.

It will be seen that the plan as outlined above, with its reliance on the services of census takers, contemplates an implementation of section 2 of the fourteenth amendment only once every ten years—at the taking of the national census. However, this is suggested by the language of section 2 which directs that the proportion of disfranchised adult male citizens in each state shall be subtracted from the state's basis of representation, which is determined only once every ten years. Furthermore, if any state is to lose Representatives as a result of the disfranchisement of its citizens, the problem of how to allot the number of Representatives removed from that state to the other states, would best be resolved at the time of the apportionment of the entire House of Representatives at the completion of each decennial census.

The plan that has been suggested to enforce section 2 is not presented

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196. 13 U.S.C. § 221 (a) (1958).

197. 13 U.S.C. § 221 (b) (1958).

198. 13 U.S.C. § 222 (1958).

as an infallible device. It is merely offered as an attempt to implement the complex mandate of the section in an orderly manner.

It should be noted that in his study of congressional apportionment, Lawrence Schmeckebier, after contemplating the difficulties involved in the enforcement of section 2 concluded that the section should be repealed and a more workable plan substituted for it. He recommended a constitutional amendment basing apportionment on the votes cast in each state at the presidential election preceding the apportionment of Congress every ten years.<sup>199</sup> This plan would prevent reliance on the truth of information given to census takers and would reduce a state's representation where a large proportion of its people were deprived of suffrage by individual threats and intimidation as well as by legal means. It would also directly encourage those entitled to vote to come to the polls to prevent a decrease in their state's representation. However, such a plan to become effective must not only meet congressional approval, but must be ratified by three-fourths of the states—a prospect which under present conditions is even more unlikely than the imminent enforcement of section 2. Indeed, if section 2 has any value today, it lies in the fact that its opportunity for enforcement rests with the will of a majority of Congressmen, rather than upon the consent of the states.

#### V. CONCLUSION

In looking to the future, one may hope that Congress will awaken to the need of giving life to the full provisions of section 2 as a means of encouraging the extension of suffrage to all citizens. But it must be conceded that the framers of the fourteenth amendment did not make the task of implementing the provisions of the section an easy one to perform. The arduous task of placing the long and difficult language of the section into a workable statutory plan has baffled congressional minds for nine decades. But perhaps the history of section 2 can be of value to future Congresses, if not as a guide to legislation, then at least as a lesson to be learned of the danger that is inherent in efforts to amend the Constitution when political expediency and compromise are allowed to take precedence over the need for careful draftsmanship and attention to the problems of future enforcement.

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199. Schmeckebier, *Congressional Apportionment* 96-97 (1941).

## APPENDIX

States	Aggregate Population	Male Citizens of the U.S. 21 years of age and upward	Male Citizens 21 years and upward whose right to vote is denied or abridged on grounds other than rebellion or other crime	Repre- senta- tive Popula- tion†
Ala.	996,992	202,182	690	993,589
Ark.	484,471	102,359	198	483,533
Cal.	560,247	145,802	243	559,313
Conn.	537,454	127,499	1,249	532,189
Del.	125,015	28,207	284	123,756
Fla.	187,748	38,871	41	187,549
Ga.	1,184,109	234,971	1,064	1,178,747
Ill.	2,539,891	542,833	609	2,537,041
Ind.	1,680,637	377,938	566	1,678,120
Iowa	1,191,792	255,471	283	1,190,471
Kan.	364,399	99,929	1,223	359,939
Ky.	1,321,011	284,096	873	1,316,951
La.	726,915	159,007	185	726,069
Me.	626,915	153,160	840	623,476
Md.	780,894	169,845	533	778,443
Mass.	1,457,351	312,770	3,719	1,440,022
Mich.	1,184,059	274,459	1,318	1,178,372
Minn.	439,706	75,274	117	439,022
Miss.	827,922	169,551	342	826,252
Mo.	1,721,295	381,129	9,265	1,679,451
Neb.	122,993	35,009	115	122,588
Nev.	42,491	18,652	16	42,454
N.H.	318,300	83,361	689	315,669
N.J.	906,096	194,109	535	903,598
N.Y.	4,382,759	984,255	469	4,380,670
N.C.	1,071,361	214,142	674	1,067,988
Ohio	2,665,260	593,950	2,551	2,653,812
Ore.	90,923	24,608	123	90,468
Pa.	3,521,791	776,627	2,345	3,511,157
R.I.	217,353	43,996	2,835	203,347
S.C.	705,606	146,979	516	703,128
Tenn.	1,258,520	258,093	733	1,254,945
Tex.	818,579	166,343	2,766	804,967
Vt.	330,551	74,867	107	330,078
Va.	1,225,163	266,437	981	1,220,652
W.Va	442,014	93,847	982	437,388
Wis.	1,054,670	204,177	301	1,053,115
Total U.S.	38,113,253	8,314,805	40,380	37,928,329

† The sums listed under "Representative Population" were presented by Representative Garfield, Chairman of the House Census Committee, who in relying on the figures presented by the Secretary of the Interior, subtracted from the figures listed in column (1), the figure derived by applying the sum shown in column (3) over the sum in column (2) to the figure in column (1) for each state. The figures are set out in Cong. Globe, 42d Cong., 2d Sess. 83 (1871-1872).