

PROPORTIONATE REPRESENTATION OF STATES IN THE HOUSE OF REPRESENTATIVES AND ASSOCIATED ISSUES — SOME RECENT DEVELOPMENTS IN AUSTRALIA AND THE UNITED STATES

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I. INTRODUCTION

In *Attorney-General (N.S.W.) (Ex rel. McKellar) v. The Commonwealth*¹ (hereinafter *McKellar's Case*) Gibbs J., as he was then, summarized the requirements governing the composition of the House Representatives created by the express provisions of section 24 of the Commonwealth Constitution as consisting of the following:

1. the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth;
2. the number of members shall be, as nearly as practicable, twice the number of senators;
3. the number of members chosen in the several States shall be in proportion to the respective numbers of their people, also that the number of members chosen in the several States shall (until Parliament otherwise provides) be determined, wherever necessary in the manner set out in the second paragraph of section 24;
4. five members at least shall be chosen in each Original State.

The third requirement mentioned by Gibbs J. may for convenience be referred to as the proportionate representation requirement.² As will be seen later, a similar requirement governs the composition of the House of Representatives in the United States. The High Court has in two important

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1 (1977) 139 CLR 527, 537.

2 A term used by Stephen J. in *McKellar's Case*, *id.*, 552.

cases dealt with various aspects of the Australian requirement and affirmed its justiciability.³ Notwithstanding the failure of Congress to give effect to the 1920 decennial census until nearly ten years later, American courts, by contrast, have not had occasion to deal with the corresponding requirement in that country apart from the inconclusive lower Federal Court challenges against the validity of the 1980 decennial census. On the other hand, the American Supreme Court has been far more preoccupied with the *implied* 'one person one vote' requirement — a principle which the High Court refused to *imply* from the similar language contained in section 24 of the Constitution. It is the purpose of this article to examine the different judicial experience in both countries and also to assess the possible relevance of some aspects of the American requirement for Australian purposes. In addition, a brief outline will be given of recent Australian developments on this and associated issues including the relevance of changes made to Australian federal election laws.

II. TIMING AND IMPLEMENTATION OF NEW DETERMINATIONS

The proportionate representation requirement has been described as 'curious' since it arises from the use of the States "even in the so called 'national' or popular lower chamber, as forms of electoral unit, a use which reflects the essentially Federal nature of the Constitution."⁴ This Federal requirement is contained as indicated above in section 24 of the Constitution which states:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii) The numbers of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

The current method for giving effect to the requirement is contained in the Commonwealth Electoral Act 1918 (Cth) (as amended), sections 46-50. It may be noted that the provisions of sections 46, 48(1) and 48(2) read as follows:

46. Where a House of Representatives has continued for a period of 11 months after the day of the first meeting of that House, the Electoral Commissioner shall, within one

3 *Attorney-General (Cth) (Ex rel. McKinlay) v. The Commonwealth* (1975) 135 CLR 1 (hereinafter *McKinlay's Case*) and *McKellar's Case*, note 1 *supra*.

4 *McKellar's Case*, note 1 *supra*, 552 *per* Stephen J.

month after the expiration of the period of 11 months, if that House is still continuing, ascertain the numbers of the people of the Commonwealth and of the several States in accordance with the latest statistics of the Commonwealth.

48.(1) The Electoral Commissioner shall, forthwith after he has ascertained, in accordance with section 46, the numbers of the people of the Commonwealth and of the several States, determine, in accordance with sub-section (2), the number of members of the House of Representatives to be chosen in the several States at a general election.

(2) The number of members of the House of Representatives to be chosen in the several States at a general election shall, subject to the Constitution, be determined by the Electoral Commissioner in the following manner:

(a) a quota shall be ascertained by dividing the number of people of the Commonwealth, as ascertained in accordance with section 46, by twice the number of the senators for the States;

(b) the number of members to be chosen in each State shall be determined by dividing the number of people of the State, as ascertained in accordance with section 46, by the quota and, if one such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.⁵

The provisions of sub-section 48(3) purport to make a decision by the Electoral Commissioner made pursuant to sub-section 48(1), final and conclusive, and also free from judicial review. However those provisions are expressed to be "subject to the Constitution".

In addition, the provisions of sub-section 9(2) of the Census and Statistics Act 1905 (Cth) (as amended) require the Australian Statistician to collect statistical information regarding the number of the people of each State as on the last day of March, June, September and December in each year. The provisions of section 8 of the same Act require a census to be held every five years (commencing from 1981) or at such other times as are prescribed by regulation.

The provisions of the Commonwealth Electoral Act referred to above and other provisions of the same Act have the effect of requiring that the number of members to be chosen from each State should be determined in time for each ordinary general election of the House of Representatives. The provisions in question give effect to the view taken by the majority of the members of the High Court in *McKinlay's Case* that this was required by the

⁵ As will be seen shortly, major amendments were made to the Commonwealth Electoral Act 1918 (Cth) as a result of the Commonwealth Electoral Legislation Amendment Act 1983 (Cth). The sections and parts of the principal Act were renumbered in the Commonwealth Electoral Legislation Amendment Act 1984 (Cth). The number of senators for the States was increased by 12 bringing the total to 72: see Representation Act 1983 (Cth) s. 3. The number of members chosen from the States in the House of Representatives was increased from 122 to 145. The fact that the latter increase did not exactly correspond to twice the number of new senators created was probably due to the proportionate representation requirement and the fact that the 'nexus' requirement is qualified by the words "as nearly as practicable": see Certificate of Electoral Commissioner dated 27 February 1984 published in Commonwealth of Australia Gazette, Special Issue No. s. 73 Monday 27 February 1984. At the time of writing, legislation had been introduced in the Senate which, if passed by the Parliament, would amend ss46(1) and 48(1)(b) by referring to the ascertainment of the number of people in the Australian Capital Territory and the Northern Territory and the determination of the number of members to represent those Territories: see Electoral and Referendum Amendment Bill 1988 (Cth) (introduced 29 April 1988).

provisions of section 24 of the Constitution.⁶ The need to make and implement fresh determinations in time for each ordinary general election is not thus the mere result of a statutory provision but is, instead, the consequence of a constitutional requirement which cannot be altered without amending the Constitution.⁷

In *McKinlay's Case* Gibbs J. said:

[t]he relevant words of s.24 of the Constitution require that the 'number of members chosen in the several States shall be' in the requisite proportion. These words naturally suggest that the proportion is to exist on each occasion when the members are chosen, ie. each time an election is held.⁸

The legislative provisions before the Court on that occasion were therefore deficient according to that view for two principal reasons. *First*, they only required the process of making fresh determinations to be undertaken with the use of population figures obtained on census day. Under the relevant legislation the census need not be held any more frequently than once every ten years. In other words a new determination was not required to be made in time for each ordinary general election for the House of Representatives. *Secondly*, the determinations were not required to take effect until and unless proposals for the redistribution of electoral divisions within the affected State were approved by both Houses of the Federal Parliament. There was no guarantee that this would take place in time before the holding of a general election, if at all, because the initiation of the redistribution process and the approval given to redistribution proposals rested in large measure in the *discretion* of the Governor-General in Council and the House of Parliament respectively.

After the challenges in the *McKinlay* and *McKellar* cases, the Commonwealth Parliament altered the relevant statutory provisions by enacting the Commonwealth Electoral Amendment Act 1977 (Cth), the Representation Amendment Act 1977 (Cth) and the Census and Statistics Amendment Act 1977 (Cth).⁹ The changes had the effect of ensuring that fresh determinations were required to be made regularly and implemented in accordance with the view accepted by the majority in *McKinlay's Case* with elections having to be

6 *Per* Barwick C.J., Gibbs, Stephen and Mason JJ. McTiernan and Jacobs JJ. did not agree with the view that a fresh determination had to be made in time for each ordinary general election for the House of Representatives - they would have regarded 5 years as being sufficient. The timing of ordinary general elections is governed by sections 32 and 28 of the Constitution. Section 32 requires writs for the general election of the members of the House of Representatives to be issued within ten days of the expiry of the House or its dissolution, while section 28 provides that the duration of the House is three years from its first sitting unless it is sooner dissolved by the Governor-General.

7 It is not without interest to note that if the referendum that was held to break the nexus in 1967 had been successful, this would have had the effect of leaving the frequency of the determinations in the discretion of the Parliament: see Constitution Alteration (Parliament) 1967 (Cth) s. 3. The proposed alteration failed however to obtain the necessary approval of electors.

8 *McKinlay's Case*, note 3 *supra*, 51.

9 The challenges in both cases and the effect of the legislation mentioned in the text were discussed in greater detail in M. Sexton, "The Role of Judicial Review in Federal Electoral Law" (1978) 52 *ALJ* 28.

held on a State-wide basis if redistribution proposals were not approved by the Houses of Parliament in time for the ordinary general elections of the House of Representatives. However, no machinery was provided for the holding of such elections, thus providing a powerful if somewhat unsatisfactory incentive to ensure that the necessary approval was given in time. At this stage, of course, proposals for the redistribution of electoral divisions in a State were still required to be approved by both Houses of the Parliament and hence the need to provide for the possibility that such approval was not obtained in time.

As a result of the most recent and wide-ranging changes made to the Commonwealth Electoral Act, the possibility of fresh determinations not taking effect through the failure of both Houses to approve redistribution proposals has now been removed. This is because the Houses of Parliament have been deprived of their role in such matters with the electoral redistribution procedure being placed in the hands of independent statutory bodies.¹⁰ This is an extremely significant departure from past practice and is based on the important philosophy that elected representatives have too much of a vested interest to make or be involved in the making of decisions of this kind. The change was made on the recommendation of the Joint Select Committee on Electoral Reform¹¹ along with a number of recommendations on other matters.

Special provision was also made for a redistribution of certain electoral divisions of a State to be carried out at short notice. This was to cover the possibility of elections being called at a time when the number of electoral divisions (House of Representatives) established for a State differs from the number of members to be chosen from that State according to the latest determination made pursuant to section 48(1) of the Commonwealth Electoral Act 1918 (Cth). These special provisions were presumably directed at the possibility of an early election being called, either for the House of Representatives alone or for both Houses simultaneously following a double dissolution of the Parliament:

- (a) *after* new determinations are made which alter the number of members to be chosen for a State, but
- (b) *before* the pre-existing electoral divisions can be redistributed in the normal way.

Under these provisions when a State is entitled to receive an *additional* member a specially constituted Redistribution Committee for that State is required to determine the two existing contiguous electoral divisions which

10 Commonwealth Electoral Act 1918 (Cth) (as amended) Part IV ss 55-78. The bodies are: the Electoral Commission, the Redistribution Committees and the augmented Electoral Commissions for each State and the Australian Capital Territory.

11 Joint Select Committee on Electoral Reform, *First Report* (September 1983) para 4.39 at 87-8 and para 29 at 206, and compare the dissenting report on this matter provided by Senator Sir J. Carrick, 227-8.

contain the *greatest* number of electors and then to redistribute those divisions by establishing three new divisions. In the reverse case of a State being deprived of a member a similarly constituted Redistribution Committee is required to determine the two existing contiguous electoral divisions which contain the smallest number of electors and then to redistribute those divisions by abolishing them and replacing them with one single electoral division. The electoral divisions so formed remain in effect for the purpose of holding the early election and until the redistribution of electoral divisions in a State can take place in the normal way.¹²

The special or mini-distribution provided for in this way would seem to further obviate the necessity for holding elections at large. They also appear to ensure that new determinations for fixing the number of members to be chosen from a State, once made, are given effect to in time for the holding of the next elections even if those elections are called suddenly and at short notice.

It is desirable at this point to turn to the American position. The corresponding requirement is to be found in Article 1 Section 2 Clause 3 as amended by Amendment 14 Section 2. Insofar as they are relevant, provisions of Article 1 Section 2 Clause 3 read as follows:

[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 adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Insofar as they are relevant, the provisions of Amendment 14 Section 2 read as follows:

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.

The provisions bracketed above were changed by the Fourteenth Amendment but the difference in the language used to express the proportionate representation requirement in both provisions has not been thought important.¹³ The remaining provisions of Amendment 14 Section 2 provide for the reduction of State representation when the right to vote is denied to male inhabitants of a State — a provision which followed in the wake of the American Civil War and was designed to deal with the disenfranchisement

12 Commonwealth Electoral Act 1918 (Cth) (as amended) s. 76. The provisions appear to be based on recommendations made by the Joint Select Committee on Electoral Reform, *First Report* (September 1983) paras 4.51-4.53 at 94-6 and para 30 at 206-7.

13 *The Constitution of the United States of America: Analysis and Interpretation* (1987 edition) 111; Chafee, "Congressional Reapportionment" (1929) 42 Harv L Rev 1015, 1015 n.1.

of negroes particularly in the light of the abolition of slavery effected by Amendment 13.¹⁴

It has been said that the power of Congress to apportion representatives should be implied even though that power is not expressly provided for in the provisions adverted to above.¹⁵ Under the current statutory provisions which govern the apportionment process, the Secretary of Commerce was required in 1980 and every ten years thereafter to take a decennial census of population as of the first day of April of such a year. The tabulation of the total population of each State as required for the apportionment of members of the House of Representatives among the States is required to be completed within nine months after the census date and then reported to the President.¹⁶ On the first day or within one week of the first regular session of the eighty-second Congress¹⁷ and of each fifth Congress thereafter (the life of a Congress being equated with the two year duration of each House of Representatives), the President was required to transmit to the Congress a statement showing the number of persons in each State as ascertained from the decennial census and the number of members of the House of Representatives to which each State would be entitled under the method of apportionment known as 'equal portions', with no State to receive less than

¹⁴ *The Constitution of the United States of America: Analysis and Interpretation* (1987 edition) 1810. Although the matter is not apparently free from doubt, the view seems to be taken that the provision in Amendment 14 Section 2 relating to "Indians not taxed" is obsolete in view of the fact that Indians are now subject to Federal Income tax laws: *ibid* and see also 1973 edition with 1978 Supplement, 1322-3. Section 127 of the Commonwealth Constitution formerly provided that aboriginal natives were not be counted in the number of the people of the Commonwealth or of a State but this section was removed as a result of the referendum held in 1967: see Constitution Alteration (Aboriginals) 1967 (Cth) s. 3. Section 25 still provides for the exclusion of persons of any race who are disqualified from voting at elections for the more numerous House of Parliament of the State in ascertaining the number of people of the State or of the Commonwealth for the purposes of the proportionate representation requirement. However it is unlikely to have any operation at the present time and is likely to be repealed at the first convenient opportunity. For a recent recommendation in favour of its repeal see Constitutional Commission, *First Report* (1988) Vol.1, 6, 197, 247-251.

¹⁵ *Prigg v. The Commonwealth of Pennsylvania*, 41 US 539, 619; 10 L Ed 1060, 1090 (1842). See also *Whelan v. Cuomo*, 415 F Supp 251, 256 (1976) where it was said that the historical record of the Constitutional Convention supported the conclusion that "[c]ongress was vested with authority to expand the number of members in the House and charged with the duty to apportion the membership among the several States."

¹⁶ 13 USC sub-s. 141(a) and (b).

¹⁷ The terms of the members of the House of Representatives for the 82nd Congress commenced at midday on 3 January 1951 and expired at midday on 3 January 1953: US Constitution Amendment 20 Section 1. Members of the House of Representatives are elected for a two-year period: US Constitution Art.1 S.2 Cl.1.

one member.¹⁸ Each State was entitled in the eighty-third Congress and in each Congress thereafter until the taking effect of a re-apportionment under the provisions now described to the number of members shown in the President's statement. The Clerk of the House of Representatives is obliged within a certain period to send to the executive of each State a certificate of the number of members to which each State is entitled.¹⁹

In the normal course of events, the holding of a decennial census would take place in April in the second year of the life of a House of Representatives with elections for the succeeding House of Representatives being held in November in the same year. The latter elections would relate to members whose terms would commence on 3 January in the following year. Those elections would also be held at least one month before the census figures are required to be reported to the President. This means that the new apportionment could not take effect until the holding of elections for the *second* succeeding House of Representatives after the holding of the census. For example in 1980 the census was held in April during the second year of the life of the ninety-sixth Congress. The new apportionment based on the new population figures revealed by the census could not take effect in time for the elections for the ninety-seventh Congress held in November of the same year but they could do so in time to take effect for the elections for the ninety-eighth Congress in November 1982.

It will be seen that some delay in implementing the new apportionment is inevitable if the procedure provided for in the current *statutory* provisions is to be followed. The writer is unaware, however, of any suggestion to the effect that those provisions are invalid on the ground that the Constitution requires:

- (a) a speedier procedure for making the fresh apportionment once the census is held; and that
- (b) such an apportionment must be implemented immediately and be given effect to in time for the first succeeding elections which take place after the holding of the census.²⁰

The current statutory provisions also purport to deal with States which fail to redistribute the electoral divisions to be represented by the members of the

18 2 USC s. 2a(a). The regular size of the House of Representatives is not specified in legislation currently in force. However the provisions in question require the statement of the President to indicate "the number of Representatives to which each State would be entitled under an apportionment of the *then existing number of Representatives*" [emphasis added]. The latter number was apparently last specified in the provisions of s. 1 of the Apportionment Act of 8 August 1911 (37 Stat.13) and this number appears to be treated as the current regular size of the House despite the assumption in *Simley v. Holm*, 285 US 355, 373; 76 L Ed 795, 804 (1932) that the provisions of s. 1 of the 1911 Act were superseded: House of Representatives Sub-Committee on Census and Statistics of the Committee on Post Office and Civil Service, *The Decennial Population Census and Congressional Apportionment* (20 July 1970). It seems there was a temporary increase in the size of the House to 437 when Alaska and Hawaii became States: *id.*, 5.

19 2 USC s. 2a(b). See also 2 USC s. 2a(c) and s. 2b.

20 In *Lowe's Case*, 1 Bartlett's Congressional Cases 418 (1862) it was held that an apportionment was not required to be made and implemented immediately upon the mere completion of the census process. The case was decided by a Congressional Committee appointed to decide contested election disputes.

House of Representatives who are to be chosen from those States, notwithstanding changes necessitated by the making of fresh determinations regarding the apportionment of such members *among* the State. These provisions were enacted in 1929 and provide for the holding of elections on a State-wide or at large basis:

- (1) if there is an *increase* in the number of members to be chosen from a State, as regards the election of the new or additional members;
- (2) if there is a *decrease* in the number of members to be chosen from a State but the number of electoral divisions established within the State is exceeded by the number of members to be chosen from the State, as regards the election of the excess members to be chosen from that State; and
- (3) if there is a *decrease* in the number of members to be chosen from a State but the number of electoral divisions exceeds the number of members to be chosen from that State, as regards *all* members.²¹

The above provisions need to be contrasted with those which were enacted subsequently in 1967²² which evidence a strong congressional policy in favour of ensuring that members of the House of Representatives should represent particular electoral divisions. Thus, it is provided that in the case of each State entitled in the ninety-first Congress or in any subsequent Congress thereafter to more than one member, there should be established by law a number of districts (referred to here as electoral divisions) equal to the number of members to which such State is entitled, with no district electing more than one member, that is, a single member district.²³

The two sets of provisions mentioned above could have been regarded as consistent with each other if the later provisions were not taken as having any operation where a State had failed to complete the process of electoral redistribution in time for the elections of the members of the House of Representatives. However, this view is less likely to be accepted today because of judicial authority which suggests that the provisions enacted in 1967 *impliedly repealed* the provisions enacted in 1929 which authorised the holding of State-wide elections for *all* members of the House of Representatives to be chosen from a State.²⁴ On the other hand, another lower Federal Court had taken the view that the subsequent provisions had

21 2 USC s. 2a(c). At large elections can also be held if there is no change in the number of members to be chosen from a State which provides for the holding of such elections: see s. 2a(c)(1) but see also the effect of USC s. 2c discussed below.

22 2 USC s. 2c.

23 *Ibid.* An exception was created in favour of a State which had in all previous elections elected its members at large, as regards elections for the 91st Congress.

24 *Shayer v. Kirkpatrick*, 541 F Supp 922 (1982); *affirmed* on appeal to the Supreme Court 72 L Ed 2d 841 (1982) but without opinion. The conclusion that USC s. 2c impliedly repealed s. 2a(c)(5) was based on at least two factors. Firstly, there was nothing in s. 2c to suggest any limitation on its applicability. Secondly, the Congressional debates indicated an intention to eliminate the possibility of at large elections including those in situations where the State legislature had failed to enact a redistribution plan. *Id.*, 926. See also *Legislature v. Reinecke*, 492 P 2d 385 (1972).

not impliedly repealed the provisions which authorized the holding of state-wide elections for additional or new members which were to be chosen from a State which had not made provision for their distribution within the State. The relevant provisions were interpreted as not precluding the use of State-wide elections in a "very limited circumstance", namely, where "no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan".²⁵

Even if the implied repeal view is accepted, however, it needs to be emphasized that it has not been suggested that the preclusion of State-wide elections will enable elections to take place otherwise than in accordance with any fresh determinations regarding the number of members who can be chosen from any one State. In other words, it has not been suggested that the failure of a State to redistribute will enable it to ignore the new determination.²⁶ Rather, the inability to hold State-wide elections simply removes one possible option for dealing with the failure of the State to redistribute its electoral divisions for the House of Representatives and may force either the legislature or a court to draw up a new distribution plan in time for the next congressional election. To the writer, at least, it appears doubtful whether this can be achieved in all cases where challenges are commenced in the courts on the eve of such elections.

It will be seen that the American constitutional and statutory provisions may have avoided in large measure the pitfalls disclosed by the successful challenge upheld in the *McKinlay Case* in at least two ways. *First*, it has not been suggested that the implementation of fresh determinations can be postponed until electoral divisions in an affected State are redistributed by the State legislature since the redistribution will either have to be made by a State legislature or, failing that and as a measure of last resort, by a court. In addition, there is the possibility, which was clearer during the period between 1929 and 1967, of having elections held on a state-wide basis. *Secondly*, fresh determinations are required to be made after the holding of a *decennial* census required to be held under Article 1 Section 2 Clause 3 of the Constitution, that is, within the time interval contemplated by those

25 *Carstens v. Lam*, 543 F Supp 68, 77-8 (1982). According to this view 2 USC s. 2a(c)(2) was not taken to have been impliedly repealed by s. 2c. In *Norton v. Campbell*, 359 F 2d 608 (1966) the view had been taken that neither the relevant constitutional provisions nor the statutory provisions in 2 USC s. 2a(c) prohibited the election of House of Representatives at large even though those provisions and some of the framers of the Constitution may have assumed or contemplated the election of members to represent particular districts.

26 In fact the contrary was assumed in a case involving the reapportionment of State and Congressional electoral districts for the State of New York. It was accepted that the failure of the State legislature to reapportion in the wake of the 1980 decennial census would have been constitutionally unacceptable: *Plateau v. Anderson*, 537 F Supp 257, 259 (1982); *appeal dismissed* 458 US 1123; 73 L Ed 2d 1394 (1982). The decrease in the State's total population, as revealed by the census figures (April 1980), resulted in a reduction of the number of Congressional representatives to be elected in that State, from 39 to 34. The Congressional elections in question were due to take place in November 1982.

provisions — a period which is considerably longer than that implied or inferred from the corresponding provisions of the Australian Constitution.

As regards the first of these points, it needs to be appreciated that the States are recognized as having a major responsibility to exercise in matters concerning the distribution of congressional districts (electoral divisions) within the States. This is because Article 1 Section 4 Clause 1 provides that:

The Time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators.

The primary responsibility for such matters in Australia has from an early time been exercised by the Commonwealth Parliament.²⁷ The need for the possibility of having State-wide elections may be seen perhaps to be greater in a system which lacks overall national control although it is interesting to note that such elections were contemplated under the relevant provisions of the Australian Constitution.²⁸ In any event, as seen above, the extent to which such elections can be used today in America is doubtful and the necessity for relying on their use in Australia pursuant to existing statutory provisions has been largely narrowed by the removal of the roles played by both Houses of Parliament in the approval of electoral redistribution proposals.

Of greater relevance to the position in Australia is the longer interval allowed under the American Constitution for the making of new determinations. It will be recalled that the obligation to apportion is tied to the "actual enumeration" of the persons to be counted which is required to be made "within every subsequent term of ten years, in such manner as they [the Congress] shall by law direct". In *Preisler v. Secretary State of Missouri*,²⁹ a District Court had occasion to remark that the decennial census was a constitutional tool which implicitly required that population changes which were inherent in the ten year period had to be tolerated for congressional apportionment purposes until the following decennial census in order to maintain a period of relative political stability contemplated by the Constitution. It is a matter for regret that the majority in the *McKinlay Case* did not support a longer period than that actually chosen, given the stability factor adverted to by the United States District Court. That factor needed to be given considerable weight although of course so did the proportionate

²⁷ See ss 29, 30 and 51(xxxvi). The State Acts contemplated by s. 29 "for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division" ceased to operate once Parliament passed the Commonwealth Electoral Act 1902 (Cth) in the exercise of its power to make other provision.

²⁸ See the concluding provisions of s. 29.

²⁹ 279 F Supp 952, 1003 (1967). The remark was made in the context of a comprehensive discussion of the constitutional significance of the decennial census requirement as it related to the use of other data for the purposes of apportionment *within* a State (as distinct from *among* the States) ie, for the distribution of Congressional districts according to the 'one person one vote' principle. For the subsequent history of the case see 394 US 526; 22 L Ed 2d 519; 395 US 917; 23 L Ed 2d 231.

representation requirement itself. As Gibbs J. himself recognized, the frequency of the determinations to be made and how the respective numbers of the people of the States were to be ascertained were two of a number of practical questions to which Parliament should direct its attention when it exercised the power to provide for the manner in which a determination of the number of members to be chosen in the several States is made under section 24. The questions are not easily answered by the actual text of section 24 so that a measure of implication is called for. It is true, as was seen by the same Justice, that it could not have been intended by the framers of the Constitution that it should be mandatory to use the census for this purpose, however reliable such statistics would be, because there is no constitutional requirement expressly included to hold a census thus making the position different in that respect to the position under the American Consitution.³⁰ However the provisions of section 24 paragraph 2 of the Constitution refer to the "latest statistics" of the Commonwealth and McTiernan and Jacobs JJ. recognized that it was for Parliament to determine how often the "latest statistics" to be used were compiled subject to the need to conform with the proportionate representation requirement. However they would have answered the question of timing by asserting that the same requirement needed to be given a practical operation. It appeared to them that a provision which allowed determinations to be made on the basis of a five-yearly census would be valid provided that the census continued to be taken at five-yearly intervals.³¹ Even on the view taken by Gibbs J., the obligation to make and implement fresh determinations in time for the general elections of the House of Representatives only operates in relation to the ordinary elections of the House of Representatives and not elections which are held "suddenly and with little warning". Thus, to that extent, Gibbs J. was prepared to have regard to practical reality since, as he pointed out, determinations under section 24 could not "be made and put into effect overnight."³²

A difficulty that arises with the view taken by McTiernan and Jacobs JJ. is that the making of fresh determinations is tied to the holding of a five-yearly census rather than the election cycles for the House of Representatives. This may in some cases result in two general elections being held otherwise than in accordance with the proportionate representation requirement. In order to understand how this result can come about it is necessary to have regard to a number of assumptions.

- (1) In the first place, it should be assumed that a general election for the House of Representatives takes place following the making and implementation of fresh determinations which comply with section 24.
- (2) Secondly, the determinations are based on population figures obtained at a census held approximately a year before the same elections are held.

30 *McKinlay's Case*, note 3 *supra*, 51.

31 *Id.*, 41. Provisions already existed which would have made it possible to have such a census under the Census and Statistics Act 1905-1973 (Cth) s. 8.

32 *McKinlay's Case*, note 3 *supra*, 52.

- (3) Thirdly, general elections are held on an average of every two or so years, as has been the trend in recent times.

It is possible to envisage that because of subsequent population changes the composition of the House may cease to comply with the proportionate representation requirement during the life of the House of Representatives elected after the making of the determinations referred to above and also during the second and third succeeding House of Representatives. This would continue until the problem was rectified upon the holding of the elections for the fourth succeeding House of Representatives. Although the next census would be taken during the life of the second House of Representatives this could occur towards the end of that period thus making it difficult to implement the necessary determinations in time for the holding of the elections for the third succeeding House of Representatives.

A reasonable compromise in the view of the writer, would be to ensure that fresh determinations are required to be made and implemented in time for each *alternate* ordinary general election of members of the House of Representatives. The preceding discussion is unlikely to cast essentially new light on the issues presented before the Court in *McKinlay's Case*. This and the fact that a number of important statutory changes have been made on the basis of the majority view in that case, makes it unlikely that the Court would be prepared to review the correctness of the majority view. Accordingly, it appears that the compromise solution advanced above will require an amendment to the Constitution if it is to be accepted. Whether it should be accepted largely depends on whether actual experience with the Court's present interpretation bears out the fears regarding instability. If those fears prove to be well founded and despite the well-known difficulties which attend any attempt to amend the Constitution, the writer believes that such an attempt should be made as a means of striking a balance between the proportionate representation requirement and the interests of political stability especially when regard is had to the longer period allowed under the United States Constitution.³³

It only remains to be mentioned, so far as the timing and frequency of new determinations are concerned, that the ten year period contemplated under the American Constitution may help to explain why the opportunity for challenge by reference to the proportionate representation requirement seems to be narrower in the United States than it is in Australia.

III. NEXUS AND TERRITORY REPRESENTATION

In the *McKellar Case*, the High Court had occasion to clarify the relationship between the Territories and the proportionate representation

³³ Any amendment along these lines would need to obtain the support of all major political parties if it is to have any chance of success at a referendum. Possibly it may need to be included as part of or incidental to other more far ranging amendments eg. if the opportunity was taken to deal with the equality of electoral divisions or the question of preventing abuse in relation to the representation of Territories in both Houses of the Parliament.

requirement and held that the expression "people of the Commonwealth" in the second paragraph of section 24 did not include the people of the Territories including those inland territories which originally formed part of New South Wales and South Australia. Accordingly, persons in the Territories are not counted for the purposes of giving effect to the proportionate representation of States requirement. The Court also had occasion to deal with the effect of according representation for the Territories in the two Houses of the Commonwealth Parliament on the nexus and proportionate representation requirements, both of which, as was indicated at the outset, are contained in section 24 of the Constitution.

The tendency of the High Court to date has been to treat section 122 as the source of power to provide for Territory representation without that power being qualified or governed in any way by the provisions of section 24.³⁴ The provisions of section 122 state that the Parliament "may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit". Largely as a result of the non-application of section 24 and, as indicated in a paper prepared for the Australian Constitutional Convention,³⁵ the Court decided in *McKellar's Case* that:

- (a) there is no constitutional nexus between the number of members of the House of Representatives and the number of senators that may be provided for to represent the people of the territories; and
- (b) the number of members a Territory has in the House of Representatives does not have to be in proportion to its population.

It is however open to the Parliament to incorporate any of those constitutional provisions in legislation that it enacts.³⁶ It has been thought to follow from the same case that Territory representatives need not be 'directly chosen by the people', thus allowing the Parliament to provide for their appointment or indirect election by, for example, an electoral college system. This provides a marked contrast with the position of members of the House of Representatives and senators who are chosen from or to represent the States.

34 The ability of the Parliament to provide for representatives of the Territories with full voting rights was upheld by the High Court in *Western Australia v. The Commonwealth* (1975) 134 CLR 201 *per* McTiernan, Mason, Jacobs and Murphy JJ.; Barwick C.J., Gibbs and Stephen JJ. dissenting (hereinafter the *First Territory Representation Case*) and *Queensland v. The Commonwealth* (1977) 139 CLR 585 *per* Gibbs, Stephen, Mason, Jacobs and Murphy JJ.; Barwick C.J. and Aickin J. dissenting (hereinafter the *Second Territory Representation Case*). The latter challenge was prompted by some remarks made by Barwick C.J. in *McKellar's Case*, note 1 *supra*, 532.

35 L. Zines, "Representation of Territories and New States in the Commonwealth Parliament" published as Appendix H in Volume 2 of the *Fourth Report of Standing Committee "D"* of the Australian Constitutional Convention dated 27 August 1982. The latter Report and Appendices are also published in *Proceedings of the Australian Constitutional Convention* (Adelaide 26-29 April 1983) Vol.2. See also Joint Select Committee on Electoral Reform, *Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament (Report No.1)* (Nov., 1985) paras 1.15-1.21 at 6-9 and paras 2.10-2.13 at 17-19.

36 Zines, *id.*, 5-6.

In view of the present position, it is perhaps not surprising that a Standing Committee of the Australian Constitutional Convention saw fit to recommend, amongst other things, that:

- (a) the Constitution be amended to require Territory Senators and members to be directly chosen by the people;³⁷ and
- (b) the Constitution be altered to ensure that the total number of senators for a Territory shall not at any time exceed that of an original State.³⁸

The same Committee referred to the full Convention for further consideration the following proposals:

(a) that the Constitution be amended to ensure that once Parliament has decided that the people of a Territory or a new State shall be represented in the House of Representatives by a number of members in excess of one, the number of members is in the same proportion to population as the number of members chosen by the people of the original States (other than a State for which the guaranteed minimum representation of five members is assured by s.24) provided that the representation of the Northern Territory and the Australian Capital Territory in the House of Representatives as provided for at (date) shall not be diminished;

(b) that the Constitution be amended to ensure that once Parliament has decided that the people of a Territory or a new State shall be represented in the Senate, the number of senators in excess of two shall be in the ratio of one additional senator to every two members in the House of Representatives from that Territory or State in excess of four provided that the number of senators for a Territory or a new State shall not at any time exceed the number of senators for an original State; and

(c) that the Constitution be amended to provide for the inclusion of Territory senators in the nexus calculation provided for in s.24 of the Constitution.³⁹

These proposals are largely based on proposals put forward by Ian Wilson MP, which were placed on the Agenda for the Perth Session of the Australian Constitutional Convention. The proposals in question and certain amendments have already been analyzed in the paper prepared for the Australian Constitutional Convention referred to above.⁴⁰ It is sufficient to mention here that the proposal in paragraph (a) constitutes an attempt to apply the proportionate representation requirement which at present applies to existing States to the representation of Territories (and new States) while the proposal in paragraph (b) is in effect a 'reverse' nexus and provides a means of limiting the extent to which the Parliament can create additional senators who will represent the Territories given the likely absence of any constitutional limit on the number of Territory senators that can be created at the moment.⁴¹

37 *Fourth Report of Standing Committee "D"*, note 35 *supra*, sub para 5.8(a) at 56. This proposal would need to be modified if it was sought to provide for the filling of casual vacancies in the Senate along the lines presently provided for in s. 44 of the Commonwealth Electoral Act 1918 (Cth) as amended. Those provisions adopt for the two mainland Territories represented in the Parliament a procedure similar to that adopted under s. 15 of the Constitution as regards the filling of casual vacancies by the *appointment* and not the *election* of the succeeding senator from the same political party as that of the vacating senator.

38 *Id.*, sub para 5.8(d) at 56.

39 *Id.*, para 5.9 at 57.

40 Referred to above in note 35 *supra*.

41 Zines, note 35 *supra*, 7-8.

The proposals were subsequently considered by the Structure of Government Sub-Committee of the Australian Constitutional Convention which reported on the breaking of the nexus requirement. In the course of recommending in favour of the breaking of the nexus between the sizes of both Houses of the Parliament the Sub-Committee considered that questions concerning the limits on the representation of Territories and new States in the Parliament should be dealt with simultaneously with the question of breaking the nexus. The Sub-Committee made the following recommendations in its report:

- (a) That if a Territory is to be represented in the Senate, the minimum number of Territory representatives in the Senate which the Parliament may decide to create and maintain should be two Senators elected at each House of Representatives election.
- (b) That the creation of Senate positions for Territories other than the Northern Territory and the A.C.T. should depend upon the population of such Territories exceeding 100,000.
- (c) That the representation of Territories and new States in the Senate should be an even number and should not exceed the number, being an even number which bears the same proportion to the minimum number of Senators to which the original States are entitled as the population of the Territories or new States bears to the average population of the original States.
- (d) The Parliament may provide for the representation of any Territory by one Member of the House of Representatives but any additional representation should only be allowed if the representation would be allowed to the Territory if it were a State.⁴²

As with the proposals already discussed these proposals seek to place *constitutional* limits on the representation which can be accorded to Territories and new States. The proposal in paragraph (b) seeks to create an additional minimum population requirement which would have to be satisfied before other Territories apart from the Australian Capital Territory and the Northern Territory could be granted full Senate representation, that is, senators with full voting rights.

The various proposals were debated at the Brisbane session of the Australian Constitutional Convention in 1985.⁴³ At these proceedings a resolution was moved, the effect of which would have been to recommend in favour of breaking the nexus and at the same time to support provisions for limiting the extent of Territory and new State parliamentary representation along the lines proposed by the Structure of Government Sub-Committee.⁴⁴ However, the motion was defeated and the Convention only resolved to note the report of that Sub-Committee.⁴⁵

Subsequently, and in the same year, a Commonwealth Parliamentary Committee, namely, the Joint Select Committee on Electoral Reform, was to

42 Australian Constitutional Convention Structure of Government Sub-Committee, *Breaking the Nexus Between the Sizes of the Houses of Parliament* (February 1985) 2-3. The report is also published in the *Proceedings of the Australian Constitutional Convention Brisbane 29 July - 1 August 1985 Vol.2: Standing Committee Reports*.

43 *Proceedings of the Australian Constitutional Convention Brisbane 29 July - 1 August Vol.1*, 264-285.

44 *Id.*, 267-8.

45 *Id.*, 285. For the views of Mr Wilson M.P., see 273-5.

conclude that the Constitution should be amended to place limitations on the power of the Parliament to provide for Territory and new State representation. For a variety of reasons, however, it thought that it would be premature to submit a proposal to the people at a referendum and, as will be seen shortly, it preferred to recommend a statutory solution to the problem as an interim step.⁴⁶

More recently, the Constitutional Commission recommended that the entitlement of Territories (and new States) to representation in the House of Representatives and the Senate should be prescribed in the Constitution. In particular the Commission recommended, *inter alia*:

- (a) A Territory should be entitled to its own representative in the House of Representatives when its population is in excess of 50,000.
- (b) The number of members of the House of Representatives chosen (in each new State) and in each Territory which is entitled to be represented should be in proportion to the population of the (new State) or Territory provided that at least two members of the House of Representatives should be chosen in the Australian Capital Territory and at least one member (in a new State) and in the Northern Territory.
- (c) Each (new State) and Territory should be entitled to representation in the Senate on the basis that it returns one senator for every two members whom it is entitled to return.

The last recommendation was subject to two provisos, namely that:

- (a) the Australian Capital Territory (and a new State) should each be entitled to representation in the Senate by at least two senators.
- (b) no Territory (or new State) should be entitled to be represented in the Senate by more than twelve senators — the number fixed for senators chosen in an Original State.

The effect produced by the formula recommended by the Commission is set out in the Commission's Final Report.⁴⁷

It needs to be borne in mind that the Commission also made quite far ranging recommendations regarding the alteration of constitutional provisions which govern the composition of the Commonwealth Parliament. These included:

- (a) the breaking of the nexus;
- (b) fixing the number of senators to represent each of the Original States; and
- (c) placing a limit on the power of the Commonwealth Parliament to increase the size of the House of Representatives.⁴⁸

⁴⁶ Joint Select Committee on Electoral Reform, note 35 *supra*, para 4.1 at 44 and paras 4.7-4.13 at 49-52.

⁴⁷ Constitutional Commission, *Final Report* (1988) Vol. 1, 5-6, (recommendations contained in paras (iv), (vi), (vii) and (ix)), paras 4.250-4.270 at 176-181, paras 4.277-4.279 at 183, paras 4.305-4.318 at 187-189.

⁴⁸ *Id.*, 5 (recommendations contained in paras (1)-(111), paras 4.250-4.276 at 176-182, paras 4.280-4.304 at 183-187.

In essence, the proposals for constitutional change presuppose a mistrust of the way in which Parliament may at some time in the future choose to exercise its largely untrammelled power to provide for the representation of the Territories. To some extent that mistrust can be rejected along the lines suggested by both Mason and Jacobs JJ. in the *First Territory Representation Case*. Mason J. referred to:

the grim spectre conjured up by the plaintiffs of a Parliament swamping the Senate with senators from the Territories, thereby reducing the representation of the States disproportionately to that of an ineffective minority in the chamber. This exercise in imagination assumes the willing participation of the senators representing the States in such an enterprise, notwithstanding that it would hasten their journey into political oblivion. It disregards the assumption which the framers of the Constitution made, and which we should now make, that Parliament will act responsibly in the exercise of its powers.⁴⁹

Jacobs J. said:

[t]he Parliament, it is said, might create fifty or a hundred senators for a Territory with multiple voting to boot and that could never have been intended. It is a preposterous suggestion in that it puts the cart before the horse. It is the Parliament which must make the law for representation of Territories and the framers of the Constitution trusted a system of parliamentary government in which they were mostly immersed. Those who were lawyers were mostly parliamentarians as well as if as lawyers they might scan a document for its hidden traps or loopholes, their sense as parliamentarians would tell them that the Parliament itself was the safeguard against the absurd possibility. We likewise should construe the words of the Constitution by its plain terms and not by some distorting possibility.⁵⁰

The remarks above were directed at the question of Senate representation but they are capable of equal application to the case of representation in the other House as well. Mason J., in particular, appears to have discounted the significance of the fact that the very measure challenged before the Court had not been passed by the Senate but was of course one of the enactments passed at the joint sittings of both Houses of Parliament in 1974. Even so, that procedure is by no means an easy or simple method of enacting legislation. In addition, the writer believes that insufficient weight is placed on the political accountability of the Parliament for its actions.

Although not persuasive to the writer, the competing view was espoused by the Joint Select Committee on Electoral Reform. In reaching that view the Committee had regard to the following factors.⁵¹

- (a) The “distorting possibility of section 122” could be used to upset the Party balance in the Senate by even “small manipulation(s) in favour of one or other of the Parties to ensure control of that Chamber”. That situation was said to be “exacerbated by the possibility of multiple voting and selection by means other than direct election by the people”.
- (b) The “control of either Chamber, in a tight numbers situation, could be affected by legislative change affecting the existing entitlement of the

⁴⁹ *First Territory Representation Case*, note 34 *supra*, 271.

⁵⁰ *Id.*, 275.

⁵¹ Joint Select Committee on Electoral Reform, note 35 *supra*, paras 4.10-4.11 at 50-51.

Territories", for example, removing the voting rights of Territory representatives.

- (c) Historical experience does not support the assumption that Parliament can always be relied on to act responsibly as is illustrated by what has happened where "a political party or leadership has suborned the democratic constitution of a nation", for example in Germany⁵² and South Africa.⁵³
- (d) "In a polity governed by the rule of law it is essential to ensure that the written Constitution cannot be legally exploited by the unscrupulous."

Although the Constitutional Commission favoured the view that the political process and the nature of 'our institutions' were sufficient in themselves to prevent the manipulations feared by the Joint Select Committee, the Commission nevertheless acknowledged that concern about possible abuse was widely held and would continue to exist so long as the terms and extent of the entitlement of Territories to representation was open ended. For that reason and for reasons of consistency, certainty and democratic principle the Commission recommended as indicated above that the entitlement of Territories to representation in the Senate and the House of Representatives should be prescribed in the Constitution. The reference to consistency may be taken as a reference to the Commission's proposals in relation to the breaking of the nexus and those concerning the size of both Houses of Parliament as regards members and senators chosen from the original States.⁵⁴

Had it not been for the additional amendments proposed by the Commission the writer would have thought that the nature of the institutions concerned and the political processes would have been sufficient in themselves to prevent manipulation of the system.

If the question of Territory representation is looked at separately and independently of any other proposal to alter the composition of the Parliament, the writer would concede that there may well be a good case for amending the Constitution in order to provide that:

- (a) Senators and Members representing the Territories be 'directly chosen by the people';
- (b) the entitlement of a Territory to representation in the Senate should not exceed the entitlement of the original States of the Federation; and
- (c) Territory representatives should not be entitled to more than one vote.⁵⁵

Beyond those matters, however, and notwithstanding the considerations advanced by the Joint Select Committee and the Constitutional Commission,

⁵² The destruction of the democratic constitution of the Weimar Republic by the Nazi Party.

⁵³ The success of the Nationalist Party in overriding the constitutionally entrenched rights of coloured voters as a prelude to the introduction of the apartheid system.

⁵⁴ Note 47 *supra*, 4.309 at 188.

⁵⁵ A position which was favoured by the Northern Territory Government in its submission to the Joint Select Committee on Electoral Reform, even though it was opposed to any other changes: note 35 *supra*, para 4.7 at 49.

the view taken by the writer is that any other potential abuse should be left to be resolved by the principles of political accountability. The kind of historical examples used to support the need for constitutional limitations tend to be situations where the political party or leadership which suborned the Constitution was unlikely to be deterred by such limitations if it was otherwise successful in its endeavours.

If the constitutional proposals are ultimately accepted, the point is made here that, for the sake of completeness, further attention should be paid to the duration of the terms of Territory representatives, particularly in the Senate. At the moment, a Territory senator holds his or her seat for the duration of the life of one House of Representatives, (that is, for a maximum of three years) while senators for States are of course elected for a fixed term of six years (barring a double dissolution). The failure to curb the discretion of the Parliament in determining the term of a Territory representative could, theoretically, allow the Parliament to lengthen unduly their present term and thereby destroy the integrity of one of the objectives referred to above, namely, that of ensuring the directly elective character of Territory membership in the Federal Parliament.

The proposal put forward by the Constitutional Commission in this regard is that the Constitution should be altered to provide that senators chosen in the Territories shall hold their places for one term of the House of Representatives.⁵⁶

The writer's view regarding the need for *constitutional* change in relation to Territory representation in the Commonwealth Parliament does not preclude the acceptance of *statutory* proposals for dealing with the same issue. Reference was made earlier to the proposals put forward by Mr Wilson.⁵⁷ He has always made clear his preference for the adoption of constitutional amendments to achieve the objectives which underlie his proposals. Nevertheless, during the course of the parliamentary debates on the Commonwealth Electoral Legislation Amendment Act 1983 (Cth), he did take the opportunity of proposing amendments to the legislation then under consideration which would have had the effect of giving proposals similar to those discussed above (ie. as to the proportionate representation requirement in the House of Representatives and the reverse nexus as regards the Senate) a *statutory* operation as regards the representation of the two mainland Territories. The Government refused to accept his amendments but agreed to have them referred to the Joint Select Committee on Electoral Reform. The adoption of statutory provisions of the kind proposed by Mr Wilson would not of course prevent a subsequent Parliament *repealing* these provisions, as would be the case with a constitutional amendment.⁵⁸

Subsequently, that Committee recommended the enactment of statutory

⁵⁶ Joint Select Committee on Electoral Reform, note 35 *supra*, 7 (recommendation contained in para (iv)), and paras 4.430-4.433 at 208-209.

⁵⁷ See above at p. 116.

⁵⁸ *Commonwealth Parliamentary Debates (House of Representatives)* 9 November 1983, 2575-2577.

provisions which were consistent but not identical with those proposed by Mr Wilson before the same Committee.⁵⁹

As the Joint Select Committee itself pointed out, statutory provisions of that kind could constitute a significant obstacle in the way of a government seeking to exploit the power of the Parliament to provide Territory representation as a means of obtaining electoral advantage. A government seeking to change the process would need the support of both Houses barring the availability of the joint sitting procedure for enacting legislation after a double dissolution.⁶⁰

Neither the question relating to the nexus nor that relating to Territory representation in the Commonwealth Parliament can arise under the American Constitution as it is presently worded. There is no provision in that Constitution for allowing the Territories of the United States to be represented in Congress by members with full voting rights.⁶¹ Nor is there any reference in the relevant constitutional and statutory provisions which deal with the proportionate representation of the States requirement to "the people of the United States". The persons to be counted are "the persons in each State".⁶² A further difference between the two constitutions is the absence of any nexus requirement — a requirement which is unique to Australia, at least in relation to other Federal constitutions.⁶³ One of the advantages stressed by the supporters of the nexus requirement during the debates which took place for the referendum to break the nexus in 1967 was that it acts as a break on the ability of the Parliament to increase the size of

59 Joint Select Committee on Electoral Reform, note 35 *supra*, para 4.6 at 46-48. It was thought that while Mr Wilson's proposals were satisfactory for achieving their proclaimed objectives, the amendments he proposed might require some redrafting and could not be adopted as they stood: para 2.18 at 21. Advice was obtained from the Federal Attorney-General's Department which supported the constitutional validity of legislation along the lines proposed by Mr Wilson: endnote 11 at 24. The full text of that advice may be found in *Official Hansard Report* (Tuesday 6 August 1985) 310-311. At the time of writing legislation had been introduced by the Commonwealth Government in the Senate (29 April 1988) for the purpose of giving effect to those recommendations and also to deal with other matters: see *Electoral and Referendum Amendment Bill 1988* (Cth).

60 Joint Select Committee on Electoral Reform, note 35 *supra*, para 4.13 at 51-52.

61 The position in the United States and the status of the so called 'delegates' to Congress who may speak but not vote was referred to in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 973 and in the *First Territory Representation Case*, note 34 *supra*, 230-231 *per* Barwick C.J. and 268 *per* Mason J. Although the power of Congress to legislate with respect to the Territories under Art.4 S.3 Cl.2 is recognised as being plenary there is no express power to make laws dealing with representation in Congress and the existing provisions with respect to the composition of both Houses are cast in terms of referring only to the States and not Territories.

62 See Am.14 S.2 and 2 USC s. 2a(a).

63 One country whose non-Federal constitution appears to embody a similar kind of requirement is that of Thailand. Under its constitution, the number of senators is not allowed to exceed three-quarters of the total number of members of the House of Representatives. The members of the latter chamber are elected by the people while the Senate is composed of members appointed by the king of that country: see ss 84 and 90 as published in A.P. Blaustein & G.H. Flanz, *Constitutions of the Countries of the World*. I am indebted to Ms L. Lenaz-Hoare, the Legal Research Officer appointed by the Secretariat of the Australian Constitutional Convention, for drawing this to my attention.

the House of Representatives.⁶⁴ Under the American Constitution, this function is supposed to be served by the different limitation contained in Article 1 Section 2 Clause 3 that "the Number of Representatives shall not exceed one for every thirty thousand". Lower Federal courts have taken the view that this limitation was not violated in spite of the claim that the then current ratio of one representative for every 467,000 contravened the spirit, if not the letter, of the provision in question. The provision was not taken as precluding the Congress from fixing the number of representatives at a figure less than the maximum of one for every 30,000 inhabitants.⁶⁵ It may be of interest to note that the proposed constitutional alteration to remove the nexus in 1967 would have replaced the nexus requirement with limitation of the kind just discussed.⁶⁶

IV. JUSTICIABILITY AND THE ATTACK ON THE 1980 UNITED STATES CENSUS

A. JUSTICIABILITY

The *McKinlay* and *McKellar* cases can be taken as confirming the justiciability of and the standing of the States to enforce the proportionate representation requirement created by section 24 of the Constitution. It may, however, be noted that those cases were not concerned with particular contraventions of that requirement but rather with the machinery legislation designed to give effect to that requirement. The High Court was able to avoid detailed discussion of what are, potentially at least, somewhat sensitive and embarrassing issues — the effect and the remedies available where the legislature deliberately fails to comply with the constitutional requirement in question. Gibbs J. as he was then, was content to observe:

Even if it were established that the numbers were not or are not in their correct proportion (and there is no evidence to that effect), that would not mean that elections conducted in the past have been invalidly conducted, or that an election conducted in future on the basis of the existing determinations as to the number of members to be chosen in the several States would be invalid. As I have already pointed out, there is an overriding constitutional duty to hold elections in certain circumstances. There is also a constitutional duty to ensure that each State is proportionately represented in the House of Representatives, but a failure to perform that duty does not invalidate an election held otherwise in compliance with the Constitution. Since, no doubt, the Parliament will act to give effect to the requirements of s.24 now that they have been

64 The nexus requirement in s. 24 para 1 of the Constitution qualifies the power of the Parliament to make laws for increasing the number of the members of the House of Representatives under s. 27 which is itself expressed to be "Subject to this Constitution".

65 *Whelan v. Cuomo*, 415 F Supp 251 (1976); *Wendelken v. Bureau of the Census*, 582 F Supp 342 (1983); *affirmed without opinion* 742 F 2d 1437 (1984).

66 Constitutional Alteration (Parliament) 1967 (Cth) s. 3. As indicated in note 7 *supra*, this proposal failed to gain the required approval of the electors. A similar limitation was recommended by the Constitutional Commission in its proposal for breaking the nexus: see Constitutional Commission, *Final Report* (1988) Vol. 1, 5 (recommendation contained in para (iii)) and paras 4.303-4.304 at 186-187.

pointed out, it is unnecessary to consider what remedies might be available if it did not.⁶⁷

Gibbs, Stephen and Mason JJ. and probably also Barwick C.J. can be taken as having decided that non-compliance will not invalidate an election or the consequent membership of the House of Representatives — a conclusion arrived at on pragmatic grounds somewhat similar to that reached in relation to the validity of a double dissolution under section 57 of the Australian Constitution, namely, the necessity to avoid constitutional uncertainty and confusion arising out of the non-existence of a legislative body.⁶⁸

The United States Supreme Court has yet to address these issues in relation to the corresponding requirement which exists under the American Constitution. As the writer has had occasion to mention elsewhere,⁶⁹ however, since 1962 when the Supreme Court decided the case of *Baker v. Carr*, the same Court has been prepared to intervene and allow federal courts to play a leading role in the enforcement of certain other requirements which govern the composition of the federal and State legislatures. The case referred to was a landmark in American constitutional law because it held that electoral redistribution disputes which involved the application of the principle of 'one person one vote' were not covered by the scope of the 'political questions doctrine' which precludes Federal courts from dealing with non-justiciable political issues. In the view of the Supreme Court, the electoral redistribution issues did not satisfy the criterion used to identify political non-justiciable questions:

[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving

67 *McKinlay's Case*, note 3 *supra*, 53. He had earlier in his judgment at 50 concluded that the provisions in the constitution dealing with the calling of elections would in the event of a conflict necessarily prevail over section 24: "[f]or example, an election could not be postponed, when otherwise necessary, simply because the number of members to be chosen in the several States had not been determined on the basis of the most recent reliable figures. The apparently absolute words of s. 24 may therefore need some qualification to enable them to work in harmony with the rest of the Constitution."

68 *Id.*, 34-35 *per* Barwick C.J. Stephen and Mason JJ. agreed with Gibbs J. on the issues involving the proportionate representation requirement: *Id.*, 60 *per* Stephen J., 63 *per* Mason J. In relation to s. 57 see *Victoria v. The Commonwealth* (1975) 134 CLR 81, 120 *per* Barwick C.J., 157 *per* Gibbs J., 178 *per* Stephen J., and 183 *per* Mason J. See also Zines, "The Double Dissolutions and Joint Sitting" in Evans (ed), *Labor and the Constitution 1972-1975* (1977) 218-233. For American State authorities which refuse to treat the failure of a State legislature to comply with constitutional requirements governing its composition as rendering the legislature non-existent see *Fergus v. Kinney*, 164 NE 665 (1928); *People v. Clardy*, 165 NE 638 (1929). Those cases were decided before the landmark case of *Baker v. Carr*, 369 US 186; 7 L Ed 2d 663 (1962) (hereinafter *Baker v. Carr*). Although courts have of course granted wide ranging relief in malapportionment cases decided subsequently, the writer is unaware of any case in which a court has attributed such a drastic consequence to a failure to comply with a constitutional requirement governing the composition of a legislature: see Lindell, "Judicial Review and the Composition of the House of Representatives" (1974) 6 *F L Rev* 84, 105, n.70.

69 Lindell, note 68 *supra*, 93-94.

it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁷⁰

More recently, the Supreme Court has had occasion to decide that the same criteria referred to above did not render political and non-justiciable a claim that the *political* gerrymandering of electoral districts violated the Constitution, even where the same districts may have been of equal size and there was no suggestion of *racial gerrymandering*.⁷¹

The decision in *Baker v. Carr* renders suspect earlier lower Federal court cases which assumed that questions involving the application of Amendment 14 Section 2 were political and non-justiciable under the political questions doctrine. The courts in those cases dealt with the reduction of a State's representation in Congress as a result of the disenfranchisement of certain of its citizens and not the proportionate representation requirement. In *Saunders v. Wilkins*,⁷² the Circuit Court of Appeals for the Fourth Circuit held that whether Amendment 14 Section 2 required Congress to reduce Virginia's representation in the House of Representatives because of a poll tax imposed by that State as a condition of the right to vote, presented a political and non-justiciable question. In reaching this conclusion, the Court emphasized the 'appropriateness' of "attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination".⁷³ These two factors were thought to be supported by:

- (a) the inability of the court to determine whether Virginia was entitled to retain its allotted 9 members without ascertaining the effect of Amendment 14 Section 2 on the entitlements of other States;
- (b) the absence of means of knowing the effect upon suffrage of the restrictions imposed by statutes of other States in the form of poll taxes or other qualifications for voting; and
- (c) the Court's lack of power to reduce the number of representatives fixed by an Act of Congress or to reallocate members which were to have been chosen to represent Virginia to other States in order to maintain the total number of members fixed by the Act of Congress.⁷⁴

70 369 US 186, 217; L Ed 2d 663, 686 (1962).

71 *Davis v. Bandemer*, 54 Law Week 4898 (1986) *per* White, Brennan, Marshall, Blackmun, Powell and Stevens JJ.; Burger C.J., Rehnquist and O'Connor JJ. dissenting.

72 152 F 2d 235 (1945); *cert. denied* 329 US 825; 91 L Ed 701 (1946). The case was followed in *Dennis v. United States*, 171 F 2d 986 (1948).

73 152 F 2d 235, 238 (1945).

74 At the time the total number of members of the House was fixed at 435 by 2 USC s. 2 37 Stat. 1728, as indicated in the report of the case at 236. One writer has questioned the necessity of a court having to undertake such a task: see Bayer, "The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes" (1965) *Western Reserve L Rev* 965, 980 and 988.

These considerations are not without considerable force and the two factors relied on by the Court are still relevant to the identification of non-justiciable questions under the political questions doctrine as explained in *Baker v. Carr*. What may, however, be more important today is the way these factors are *applied* in electoral matters as can be seen from the very outcome of the decision in *Baker v. Carr* and succeeding cases where the Supreme Court has had to deal with electoral reapportionment. What seems to be essentially involved in the difficulties stressed by the Circuit Court of Appeals is an inability to fashion appropriate judicial relief once it is found that a State's representation should be reduced by reference to Amendment 14 Section 2, especially where the total number of members of the House of Representatives is fixed by an Act of Congress. These kinds of difficulties appear to have been overcome in the modern cases which deal with electoral reapportionment despite the apparently formidable character of those difficulties. An action for a declaration regarding compliance with Amendment 14 Section 2 need not of itself require the Court to dictate or determine which way compliance with the relevant requirement should be secured leaving it to Congress to decide either to reduce the total membership of the House or to reallocate the number taken away from a State in favour of other States.⁷⁵

Although attempts to invoke the provisions of Amendment 14 Section 2 regarding the reduction of a State's representation as a result of the disenfranchisement of certain of its citizens have continued to prove unsuccessful in several lower Federal court cases, even after *Baker v. Carr*, the courts have been careful to avoid placing reliance on the political questions doctrine as a ground for refusing to intervene in those cases.⁷⁶ There was a recognition, in at least one case, that *Saunders v. Wilkins* may not have survived the subsequent decision of the Supreme Court in *Baker v. Carr*,⁷⁷ while in another, it was warned that the exercise of a discretion not to grant a declaratory action should not be misused to mask the improper dismissal of an action as a political question in the context of claims based on Amendment 14 Section 2.⁷⁸ The grounds for refusing to grant relief have included lack of standing⁷⁹ despite claims raised by voters that the retention

⁷⁵ Bayer, *Ibid*.

⁷⁶ *United States v. Sharrow*, 309 F 2d 77 (1962); *cert. denied* 372 US 949; 9 L Ed 2d 974 (1963); *reh. denied* 372 US 982; 10 L Ed 2d 147 (1963); *Lampkin v. Connor*, 239 F Supp 757 (1965) (District Court); 360 F 2d 505 (1966) (Circuit Court of Appeals); *Sharrow v. Brown*, 319 F Supp 1012 (1970) (District Court); 447 F 2d 94 (1971) (Circuit Court of Appeals); *cert. denied* 405 US 968; 31 L Ed 2d 243 (1973); *reh. denied* 405 US 1076; 31 L Ed 2d 812 (1972); *Sharrow v. Peyser*, 443 F Supp 321 (1977) (District Court); 582 F 2d 1271 (1978) (Circuit Court of Appeals); *Sharrow v. Fish*, 501 F Supp 202 (1980).

⁷⁷ *United States v. Sharrow*, *id.*, 80. Cf. the weak suggestion made by the District Court in *Sharrow v. Brown*, *ibid* that *Baker v. Carr* might perhaps be distinguished on the ground that the case dealt with State legislatures. However, the political questions doctrine has not prevented judicial intervention in cases dealing with Congressional reapportionment.

⁷⁸ The Circuit Court of Appeals in *Lampkin v. Connor*, note 76 *supra*, 509.

⁷⁹ *Lampkin v. Connor* (District Court), note 76 *supra* and affirmed on other grounds on appeal; *Sharrow v. Brown*, *Sharrow v. Peyser* and *Sharrow v. Fish*, note 76 *supra*.

by a State of its current level of representation in Congress when that level should be reduced because of Amendment 14 Section 2, as a result of the disenfranchisement of certain of its citizens, dilutes the weight or voting strength of votes cast by electors in other States. The view taken by the courts in such cases has been that voters in those other States were unable to establish that the application of the relevant provisions of Amendment 14 Section 2 to an offending State would necessarily result in the other States being entitled to increased representation since shifts in population might account for those States retaining their current level of representation as a result of the proportionate representation requirement.⁸⁰ Looked at in this way, the standing of the voters was thought to be too remote and speculative to sustain actions based on Amendment 14 Section 2, although in one case it was recognized that this view of the issue might have to be re-examined in the light of the more modern test of standing adopted by the Supreme Court in *Flast v. Cohen*.⁸¹ A further ground that was relied on was that Congress had already passed legislation in order to remove voting discriminations and that in exercising its discretion whether to grant declaratory relief a federal court should stay its hand until it could fairly be said that the discrimination persisted despite the new measures passed by Congress ie. the timing of the action was premature. At the same time, the observation was made that it was also "premature to conclude that Section 2 of the Fourteenth Amendment does not mean what it appears to say".⁸²

Apart from these grounds, there may be other difficulties in the way of seeking judicial relief to enforce the provisions of Amendment 14 Section 2 which deal with the reduction in a State's representation as a result of the disenfranchisement of certain of its citizens. For example, it is at least arguable that Amendment 14 Section 5 may support the view that Amendment 14 Section 2 does no more than empower Congress to pass legislation reducing the representation of a State, if it so desires. This possibility and other difficulties of interpretation were adverted to by the Court of Appeals for the Second Circuit in *Sharrow v. Brown*.⁸³ The same Court observed that practice would seem to indicate that the first sentence of Amendment 14 Section 2 (the proportionate representation requirement) has, on the other hand, been considered as *mandatory*. The other difficulties surrounding the judicial enforcement of the former provisions are not present

80 In *Lampkin v. Connor*, *ibid*, disenfranchised persons of a State sought to invoke the application of the relevant provisions of Amendment 14 Section 2 on the ground that the application of those provisions to that State would encourage it to remove the disenfranchisement in the future in order to avoid loss of representation in Congress. However, this too was thought to be too speculative and remote by the District Court. The Circuit Court of Appeals was careful not to base its decision on lack of standing since it preferred to leave this issue open for future decision.

81 392 US 83; 20 L Ed 2d 947 (1968). See *Sharrow v. Brown*, (District Court), note 76 *supra*, 1015, note 11.

82 *Lampkin v. Connor* (Circuit Court of Appeals), note 76 *supra*, 512.

83 Note 76 *supra*. See especially the questions left open at 98, note 9.

with the same enforcement of the provisions which impose the proportionate representation requirement.⁸⁴

The foregoing discussion should be sufficient to show that the cases dealing with the reduction of a State's representation in Congress as a result of the disenfranchisement of certain of its citizens under Amendment 14 Section 2, whether decided before or after *Baker v. Carr*, are unlikely to provide guidance on the justiciability of the American proportionate representation requirement except possibly as regards the question of the standing of voters to enforce the same requirement. This is not to deny, however, that *Saunders v. Wilkins* and the underlying assumption regarding the application of the political questions doctrine, may have helped to delay the availability of judicial review in relation to the proportionate representation requirement. Indeed the same doctrine may help to explain, at least in part, why no attempt was made to seek judicial relief when Congress failed to make new determinations after the taking of the decennial census in 1920 despite the widespread changes in population which were disclosed by that census. The position may well have been different if such a failure had occurred after *Baker v. Carr* was decided in 1962.⁸⁵

B. THE 1980 CENSUS

One issue which has arisen with respect to the proportionate representation requirement in the United States since 1962 and which has not been treated as a 'non-justiciable political' question concerns the constitutional and legal validity of the 1980 decennial census. The issue raises the question whether the federal courts have any role to play in the correction of inaccurate statistics collected in a constitutionally required census. As already indicated, the American Constitution requires an "actual enumeration" of "the whole number of persons in each State" every ten years and these figures are used for the purposes of determining how many members of the House of Representatives should be chosen in each State in accordance with the proportionate representation requirement.⁸⁶ It will be suggested later that a

86 *Meeks v. Avery*, 251 F Supp 245, 250 (1966); *Carey v. Klutznick*, 508 F Supp 404, 415 (1980). There is a question whether the same figures are constitutionally required to be used in the apportionment of members within a State, that is, in the apportionment or distribution of the electoral divisions represented by those members in a particular State. See also *Preisler v. Secretary of State of Missouri*, 279 F Supp 952, 998-1004 (1967); *affirmed* 394 US 526; 22 L Ed 2d 519 (1969); *reh. denied* 395 US 917; 23 L Ed 2d 231 (1969); *Dixon v. Hassler*, 412 F Supp 1036 (1976); *Travis v. King*, 552 F Supp 554, 570-571 (1982).

84 For an excellent analysis of the provisions in Amendment 14 Section 2 dealing with the reduction of a State's representation in Congress as a result of the disenfranchisement of certain of its citizens see Zuckerman, "A Consideration of the History and Present Status of Section Two of the Fourteenth Amendment" (1961) 30 *Fordham L. Rev* 93. See also Bayer, note 74 *supra*.

85 In the article written by Chafee, note 13 *supra* the proportionate, representation requirement was treated as a duty of 'imperfect obligation' and one 'without a sanction', 1017-8. It was thought that probably the Supreme Court would treat the issues as political and non-justiciable. As will be seen below in the text, lower federal courts have not been prepared to accept this view in the cases dealing with the attack on the 1980 decennial census.

similar question can be raised here even though the Australian Constitution does not require a census to be taken.

Apparently, the substantial undercounting of population in the taking of a census was reported to have taken place when the first United States census was taken in 1790 and although the mechanics of the counting process have been improved in each of the nineteen ensuing censuses, it has been said that there has never been a perfect count.⁸⁷ The 1980 decennial census brought to light serious problems that arose in the counting of the hispanic and negro persons and it was acknowledged by Census Bureau officials themselves that a sizeable or significant undercounting of these persons may have occurred, especially in the highly urbanized areas of the United States such as the cities of New York, Detroit and Philadelphia. It was recognized that it was difficult to conduct an accurate census in relation to underprivileged groups in society since the level of cooperation between government officials, on the one hand, and members of those groups on the other, tended to be lower than was the case with other groups in society.

According to testimony offered by one witness in one of the cases which ensued, the reasons for the undercounting were:

1. lower income leading to diverse and unique housing patterns and living arrangements which frequently involve the lawful or unlawful conversion of housing units to accommodate increased numbers of people;
2. greater antagonism or resistance to government;
3. relatively less education; and
4. increased numbers of individuals within the "harder to enumerate" categories, such as young males.⁸⁸

In the same case on appeal the Court of Appeals for the Sixth Circuit said:

[m]any factors account for the fact that some individuals are more difficult to count than others: attitudes toward government, visibility, and stability are personal characteristics which vary among regions and among different groups depending on age, sex, income, literacy, immigration status, employment, race and other cultural and religious traditions which mold living styles and environment. Non-personal factors such as climate, census procedures, house design and distance between homes also contribute.⁸⁹

The undercount had serious implications, not only for the application of the proportionate representation requirement and its effect on the extent of a State's representation in Congress, but also as regards the grant of federal financial assistance which was calculated by reference to population size and density. Although statisticians were aware of at least three methods to adjust the undercount,⁹⁰ none of these methods was free from difficulty and, in fact, although the Bureau of Census had itself used one of these methods in the past, by 1980 it had reached the conclusion that neither of the methods were sufficiently accurate to warrant their use. The feasibility of using any of the adjustment methods was strongly contested in the ensuing litigation.

87 *Carey v. Klutznick*, 653 F 2d 732, 735 (1981).

88 *Young v. Klutznick*, 497 F Supp 1318, 1327-8 (1980).

89 *Young v. Klutznick*, 652 F 2d 617, 619 n.4 (1981).

90 See the reference to the 'synthetic' method of adjustment *id.*, 622. A full discussion of the adjustment methods can be found in the note, "Demography and Distrust: Constitutional Issues of the Federal Census" (1981) 94 *Harv L Rev* 841, 851-853.

The situation was further complicated by an issue which could have involved the alleged overcounting of population, namely, the assertion that illegal aliens should not be counted in the population of each State which was used to determine the extent of each State's representation in Congress. According to that assertion, illegal aliens did not come within the meaning of "whole number of persons" for the purposes of the relevant constitutional provisions. Whereas undercounting would have had the effect of reducing the number of members to be chosen from a State, overcounting would of course have had the opposite effect.

With those considerations in mind and given the increased role of the courts in relation to the question of electoral malapportionment generally, it was perhaps not surprising that federal courts throughout the country were faced with a flood of legal challenges to the 1980 decennial census. Apparently, approximately fifty actions were brought by or on behalf of subordinate government bodies in each of which was made a claim of a substantial local or regional undercount.⁹¹ Although the challenges were in some cases to meet with initial success, to the point where census officials were ordered not to present population figures to the President until they were adjusted to remedy the undercount, those orders were stayed by the Supreme Court and subsequent appellate decisions handed down by the Federal Courts of Appeal had the effect of rendering the challenges inconclusive.⁹²

The difficulties brought to light by the 1980 census attracted the attention of Congress and its committees and extensive evidence was taken on the subject.⁹³ Proposed legislation was introduced without success which would have required the Bureau of Census to "adjust the population figures", by "employing the best available methodology to correct for undercounting for all purposes, including reapportionment". This was proposed on the theory "that imperfect adjustment (was) better than none at all".⁹⁴

The discussion below will focus on the following cases:

*Young v. Klutznick*⁹⁵ (the *Detroit Case*)

*City of Philadelphia v. Klutznick*⁹⁶ (the *Philadelphia Case*)

91 Note 87 *supra*. A full list of the lawsuits is provided at 735-6 note 10.

92 A full account of the background and analysis of these challenges is contained in "Demography and Distrust", note 90 *supra*, Jennis, "The Census Undercount: Issues of Adjustment" (1984) 18 *Columbia Journal of Law and Social Problems* 381, Tachau, "The Courts and the 1980 Census Challenges: Tailoring Rights to Fit Remedies" (1981) 15 *U Mich J L Ref* 153.

93 There are a wealth of Congressional and other official reports on the subject referred to in the articles mentioned in note 92.

94 Jennis, note 92 *supra*, 396. Legislation was ultimately enacted to deal with adjustment for the purposes of apportioning federal financial assistance.

95 497 F Supp 1318 (1980) (District Court); *revd* 652 F 2d 617 (1981) (Court of Appeal 6th Circuit); *cert. denied* 455 US 939; 71 L Ed 2d 650 (1982).

96 503 F Supp 663 (1980) (District Court).

*Carey v. Klutznick*⁹⁷ (the *New York Case*)

*Federation for American Immigration Reform v. Klutznick*⁹⁸ (the *FAIR Case*).

The first three cases are sufficiently similar to be dealt with together while the *FAIR Case* can be dealt with separately.

In the former group of cases, the plaintiffs sued in the various Federal District Courts and usually consisted of the Mayor of a city, suing individually and also in his official capacity and the City (the municipal government body). In some of the cases the plaintiffs included the Governor of the State in which the city concerned was situated and voters and taxpayers and, in at least one of the cases, even representatives of the relevant State in the United States House of Representatives and the State legislature. The defendants sued in these actions invariably included the Secretary of Commerce, the Director of the Bureau of the Census and other regional officials of the same Bureau. The plaintiffs usually claimed in effect that the census population figures collected for the cities concerned should be adjusted to correct the acknowledged undercount that had taken place in relation to persons of the hispanic and negro races since the relevant constitutional provisions contemplated the use of accurate statistics. Judicial relief was sought requiring the Bureau to adjust the census figures even if this prevented it from being able to present the figures to the President within the time fixed by Act of Congress, that is, that the time limit was directory only and not mandatory.

For their part, the defendants:

- (a) denied that the plaintiffs possessed the requisite standing, that the claims raised were 'ripe' for judicial determination and that the claims were justiciable since the defendants claimed that they raised political and non-justiciable issues;
- (b) argued that the 'actual enumeration' required by the relevant constitutional provisions precluded the use of adjusted figures and required instead the use of an 'untampered head count';
- (c) argued that even if the use of adjusted statistics was permitted, whether such statistics should be used fell within the discretion of Congress since the enumeration required to be taken under the Constitution was to be held "in such manner as they (the Congress) shall by law direct"; and the Congress had passed legislation which, properly construed, precluded the use of adjusted figures, that is, a *statutory* prohibition on their use;
- (d) argued that in any event there were no statistically defensible methods of correcting the undercount; and, finally,

97 508 F Supp 404 (1980) (District Court); *affirmed* 637 F 2d 834 (Court of Appeals 2nd Circuit); 508 F Supp 416 (1980) (District Court); 508 F Supp 420 (1980) (District Court); order of District Court stayed by Supreme Court pending appeal to Court of Appeal 2nd Circuit, 449 US 1068; 66 L Ed 2d 614 (1980); subsequently *revd* 653 F 2d 732 (1981) (Court of Appeals 2nd Circuit) *cert. denied sub nom. Carey v. Baldrige*, 455 US 999; 71 L Ed 2d 866 (1982).

98 486 F Supp 564 (1980) (District Court) appeal dismissed for want of prosecution, 65 L Ed 2d 1109 (1980).

(e) argued that the time limits imposed by Congress for reporting the census figures to the President were mandatory.

The above account states only the essential nature of the claims and arguments advanced by both sides.⁹⁹

A short account of the outcome of the claims in the three cases now follows. One of the main aims of the action in the *Detroit Case* seems to have been to obtain the correction of the undercount for purposes relating to the apportionment of members of the United States House of Representatives *within* the States rather than *among* the States, that is, for the redistribution of Congressional electoral divisions within a State, in this case, Michigan. Nevertheless, the case is still important because of assumptions made regarding the need to use accurate statistics for the purposes of the proportionate representation requirement. The District Court for the Eastern District of Michigan accepted the plaintiff's claims and made an order which had the effect of:

- (a) preventing the use and presentation to the President, of the population figures "based on the actual unadjusted headcount"; and
- (b) requiring the defendants to adjust "population figures for the 1980 census at the national, state, and sub-state level to reflect the undercount, and to adjust the differential undercount to prevent the known undercount of Blacks and Hispanics, as well as Whites".¹⁰⁰

Subsequently, however, the Supreme Court stayed the portion of the District Court's order which required the defendant to withhold certification of the unadjusted figures to the President. Furthermore, the Court of Appeals for the Sixth Circuit reversed the decision of the District Court on the ground that the plaintiffs in the case — a city and its Mayor — lacked standing to bring the action and also because the claims raised in the case were not 'ripe' for judicial determination at that time. Both points were essentially based on the fact that there was no assurance that the Michigan State legislature would actually use the unadjusted figures when it came to approving the redistribution of the Congressional electoral decisions in that State.

In the *Philadelphia Case*, the District Court for the Eastern Division of Pennsylvania refused a motion which sought to have the action attacking the 1980 census dismissed. The Court upheld the standing of certain of the plaintiffs — namely citizens who sued in their capacity as voters¹⁰¹ — and treated the claim as 'ripe' for determination as well as accepting that the

99 Jennis, note 92 *supra*, 385-6. For more detail the reader is referred to this and other articles referred to in note 92 *supra*. There was an additional statutory argument raised on behalf of the Bureau of the Census namely that the use of adjusted figures was committed by statute to the absolute discretion of the Bureau see "Demography and Distrust", note 90 *supra*, 857.

100 See the order issued by the Court: District Court, note 95 *supra*, 1338-9. Gilmore J. rejected the contention of the Bureau of the Census to the effect that it was not possible to use a 'statistically defensible' method of adjustment.

101 And the City of Philadelphia too as regards only its loss of revenue sharing but not the Mayor or the Congressional or State legislative representatives. In an earlier phase of the litigation in this case, the Court refused to issue a preliminary injunction requiring Census Bureau Officials to meet with the plaintiffs and review their data.

Bureau of the Census could lawfully adjust the population figures collected in the census. However, the Court made it clear that in order to succeed in their overall objective, the plaintiffs would have to show that the refusal of the Bureau to adjust those figures was arbitrary or capricious.¹⁰² While no appeal seems to have been taken against this decision, the writer is not aware of any report which indicates that the plaintiffs did in fact succeed in meeting the test laid down. What is known is that the Judicial Panel on Multidistrict Litigation subsequently did transfer the case, along with a number of other similar cases, to the District of Maryland. This was to facilitate access to relevant records and documents situated at the Bureau of the Census national records centre which was located in the same District.¹⁰³

The history and details of the *New York Case* are somewhat more complex. In the *first* phase of this litigation, the defendants unsuccessfully moved for the dismissal of the action with the District Court for the Southern Division of New York upholding the standing of the various plaintiffs, the justiciability of the suit and its 'ripeness' for determination at that stage. The Court took the view that neither the Constitution nor the Census Act precluded the use of statistical adjustment for the purposes of apportioning representatives among the States.¹⁰⁴ This decision was affirmed by the Court of Appeals for the Second Circuit.¹⁰⁵ In the *second* phase, the same District Court directed the defendants to adjust population figures for the State and City of New York. The view was taken that although there was nothing to suggest that the Census Bureau had abused its discretion or acted in an arbitrary or capricious manner, evidence before the Court had established an undercount of population for both the State and the city which was disproportionate to the national average. It was thought that mismanagement in implementing a plan for the decennial census contributed to the undercount and that there were statistical methods available which would produce a more accurate census.¹⁰⁶ Subsequently, however, the Supreme Court granted a stay, pending appeal to the Court of Appeals to that part of the District Court's order which precluded the Bureau of Census from certifying to the President population totals for New York and the State by State census tabulations on 31st December 1980, that is, by the time required by Statute.¹⁰⁷ A new panel for the Court of Appeals Second Circuit later reversed the District Court's decision and remanded the case back to the District Court, essentially because other affected States had not been given an opportunity to participate in the proceedings.¹⁰⁸

In the *FAIR Case* voters, legislative representatives and groups of persons concerned with problems posed by the entry of illegal aliens in the United

102 Note 96 *supra*.

103 *In Re 1980 Decennial Census Adjustment Litigation*, 506 F Supp 648 (1981).

104 508 F Supp 404 (1980).

105 637 F 2d 834 (1980).

106 508 F Supp 416 (1980).

107 449 US 1068; 66 L Ed 2d 614 (1980), Marshall J. dissenting.

108 653 F 2d 732 (1981); *cert. denied sub nom. Carey v. Baldrige*, 455 US 999; 71 L Ed 2d 866 (1982).

States challenged the constitutionality of the census on the ground that illegal aliens were not counted separately and excluded from the apportionment calculations. The action was dismissed by the District Court for the District of Columbia on the ground that the plaintiffs in the case lacked standing, with the court relying on some of the authorities which dealt with the reduction of a State's representation because of the disenfranchisement of certain of its citizens, under Amendment 14 Section 2. Beyond estimating that between one and sixteen congressional seats would be affected, the plaintiffs could do little more than speculate as to which States might gain and which might lose representation. Although it was generally acknowledged that individuals who claimed that their votes were diluted (because those representatives represented a greater number of constituents than did other representatives in the same assembly) had standing to challenge apportionment schemes, the speculative effect of what was the subject of their complaint was thought to be insufficient to support the standing of the plaintiffs in their case. There are passages in the Court's judgment which might suggest that the position may well have been different if the action had been commenced after the census returns were completed.¹⁰⁹ In addition, it was also thought that the claim put forward by the plaintiffs appeared to be very weak on the merits because of practical difficulties involved in separating and excluding illegal aliens and also because of problems of constitutional interpretation since the phrase "whole number of persons in each State" suggested the inclusion of illegal aliens rather than their exclusion.

An attempt can now be made to assess the points which seem to emerge from these cases. The first point is that the issue whether accurate and adjusted statistics should be used in carrying out the "actual enumeration" required by Article 1 Section 2 Clause 3 has been treated as justiciable and not political and non-justiciable under the 'political questions doctrine'. This has been the view of all the courts, including a Circuit Court of Appeals, which have had occasion to deal with the issue of justiciability.¹¹⁰ The courts in question rejected the contention that the relevant constitutional provisions operated as a 'textually demonstrable commitment' of the issue to Congress. Reference was made in one of the cases to the fact that a similar argument was advanced and rejected with respect to Article 1 Section 4 Clause 1 in *Wesberry v. Sanders*.¹¹¹ It was unsuccessfully argued in that case that those

¹⁰⁹ 486 F Supp 564, 574-5 (1980).

¹¹⁰ *Young v. Klutznick*, 497 F Supp 1318 (1980) (District Court for Eastern District of Michigan) — the *Detroit Case*; *City of Philadelphia v. Klutznick*, note 96 *supra*, (District Court for the Eastern District of Pennsylvania) — The *Philadelphia Case*; *Carey v. Klutznick*, 508 F Supp 404 (1980) (District Court of Southern District of New York) — the 1st phase of the *New York Case*; *Carey v. Klutznick*, 637 F 2d 834 (1980) Court of Appeals 2nd Circuit — 1st phase of the *New York Case*. In none of these cases did the reversal of the Court's decision affect the point involved.

¹¹¹ 376 US 1, 6-7; 11 L Ed 2d 481, 485-6 (1964). Article 1 Section 4 Clause 1 states: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators."

provisions had given Congress the exclusive authority to protect the rights of citizens to vote for congressmen. The further point was made that the Supreme Court had also decided that Article 1 Section 5 Clause 1, which provides that each House shall be the judge of the election returns and qualifications of its own members, did not constitute a textually demonstrable constitutional commitment to the Congress of the question of whether Congress could refuse to seat a member who possessed the qualifications of age, citizenship and residence set forth in the Constitution.¹¹² The District Court said:

[i]f Article 1, Paragraph 4, and Article 1, Paragraph 5 do not constitute textually demonstrable constitutional commitments of those questions to the Congress, then surely Article 1, Section 2, Clause 3 does not constitute a textually demonstrable constitutional commitment to the Congress of the question of whether the Constitution requires an adjustment be made in the official population count for the black and Hispanic undercount differential. That question is not for the Congress, but for the judiciary, whose constitutional function it has been ever since *Marbury v. Madison* to 'say what the law is'. This court has authority to decide the issue before the court.¹¹³

In affirming the justiciability of the claims based on the use of inaccurate statistics, the Circuit Court of Appeals for the Sixth Circuit in the *New York Case*¹¹⁴ expressly rejected the authority of *Saunders v. Wilkins*¹¹⁵ because that case was viewed as inconsistent with *Baker v. Carr*.¹¹⁶ It seems unlikely that courts will rely on the political questions doctrine as a ground for dismissing actions which challenge the validity of a census although, interestingly enough, two of the factors mentioned in *Baker v. Carr* seem to have received little attention so far in cases dealing with the attack on a census. Those factors were:

an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹¹⁷

In the view of the writer, however, the practical problems created by judicial review in this area are unlikely to be significantly greater than those already encountered with the electoral malapportionment cases.

A second point which seems to emerge from the cases under consideration is that there is now some judicial authority in favour of the view that the actual enumeration referred to in Article 1 Section 2 Clause 3 contemplates

112 This was decided in *Powell v. McCormack*, 395 US 486; 23 L Ed 2d 491 (1969). Insofar as it is relevant Article 1 Section 5 Clause 1 provides: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . ."

113 *Young v. Klutznick* (the Detroit case), 497 F Supp 1318, 1326. As was pointed out by one writer, the related but separate *statutory* argument that the Congress had committed the issue to the unfettered discretion of an administrative agency met with a cold reception in the courts: see "Demography and Distrust", note 90 *supra*, 857.

114 637 F 2d 834, 838 (1980). The non application of the political questions doctrine in claims attacking the validity of the census for other purposes was affirmed *City of Willacoochee v. Baldridge*, 556 F Supp 551 (1983).

115 152 F 2d 235 (1945).

116 369 US 186; 7 L Ed 2d 663 (1962). The case was seen as inconsistent despite the comments in *Sharrow v. Peyser*, 443 F Supp 321, 324 n.5. (1977).

117 369 US 186, 217; 7 L Ed 2d, 663, 686.

the use of statistics which most accurately reflect the population of each State.¹¹⁸ This view has been justified on essentially two grounds:

- (a) the contrary view would render ineffective the intention of the framers of the Constitution to provide for a periodic reapportionment based on the decennial census as a means of accurately reflecting shifts in population;
- (b) the dictionary definition of "actual enumeration".

Thus the District Court in the first phase of the litigation in the *New York Case* said of the terms "actual" and "enumeration",

[w]hen combined, these terms require a count of the population most reflective of the true facts or reality, and thereby supports the conclusion that apportionment is to be based on census tabulations that most accurately reflect the population of each state.¹¹⁹

Thirdly, there is now also judicial authority in favour of the view that neither the Constitution nor the statutory enactments of Congress preclude or prevent the use of statistical adjustments to improve the accuracy of census figures as a means of correcting an acknowledged undercount of population.¹²⁰ *Fourthly*, the view was taken in some of the cases that the statutory time limits for the presentation and report of census figures to the President was directory and not mandatory,¹²¹ although the correctness of this view may be open to greater doubt given the action taken by the Supreme Court in staying the orders issued by the lower federal courts.

The *fifth* point concerns the different views taken in relation to the applicable standard of judicial review once it is accepted that the accuracy of the census gives rise to a justiciable issue. For its part, the District Court in the *Philadelphia Case* took the view that in reviewing claims relating to an undercounting of a city's population in a census a narrow standard should be applied under which the methods used by the Census Bureau for conducting a census would be accorded a great deal of deference and could not be disturbed unless they were shown to be arbitrary, capricious or fraudulent. This standard was that used for attacking the legal validity of governmental and administrative decisions under the Administrative Procedure Act. A similar view may have been taken by the District Court in the *New York Case* during the second phase of that case as well although even in that case the District Court, it will be recalled, was prepared to prevent

118 *Young v. Klutznick*, 497 F Supp 1318 (1980) (District Court for Eastern District of Michigan) — the *Detroit Case*; *Carey v. Klutznick*, 508 F Supp 404 (1980) (District Court for Southern District of New York) — the 1st phase of the *New York Case*. The reversal of the decisions in both cases was not based on any disagreement with the point in the text.

119 *Carey v. Klutznick*, 508 F Supp 404, 414 (1980). It was pointed out that *Webster's Third New International Dictionary* (1971) defined "actual" as existing in fact or reality and "enumeration" as a "listing" or "counting".

120 See the cases cited in note 118 *supra* and also *City of Philadelphia v. Klutznick*, note 96 *supra*, (the District Court for the Eastern District of Pennsylvania) — The *Philadelphia Case*. The reversal of the decisions on appeal was not based on any disagreement with the point in the text.

121 *Young v. Klutznick*, 497 F Supp 1318 (1980) (District Court for Eastern District of Michigan) — the *Detroit Case*; *Carey v. Klutznick*, 508 F Supp 420 (1980) District Court for Southern District of New York — the *New York Case* 2nd phase.

the use of unadjusted figures because there was evidence to show that mismanagement of the Census Bureau in implementing its plan had contributed to the undercount. By contrast, the view taken by the District Court in the *Detroit Case* was that the Court should not be tied to a narrow type of review appropriate for decisions of an administrative agency even though the actions of the Secretary of Commerce and the Director of the Census Bureau were, it was conceded, entitled to great deference. It is not clear why constitutional challenges should be governed by standards of judicial review which are governed by considerations of *administrative law* although possibly this may have been due to the nature of the particular kind of jurisdiction invoked by the plaintiffs in these cases.

The cases in question also point to a number of procedural and practical obstacles which will have to be overcome in any future challenges if those challenges are to be successful. It will be recalled that the decisions of the trial courts have not been reversed or varied because of any disagreement with the justiciability or merits of these cases. Essentially, the reversals were based on narrower procedural grounds. The *first* of these obstacles was the question of standing and the related issue of 'ripeness' for judicial determination. These obstacles achieved prominence in the reversal of the District Court's decision in the *Detroit Case*. Care, however, must be exercised before emphasizing the importance of this obstacle, at least in relation to actions challenging the census for purposes concerned with the proportionate representation requirement. As was indicated above,¹²² the case may have been more concerned with a challenge to the census for purposes connected with the apportionment of Congressional districts within a State. The case for requiring the use of the census figures for apportionment of that kind is textually weaker than that for apportionment *among* the States, thus making it easier to see why there was no certainty, at least of a legal kind, that the census figures would either be used at all or without being adjusted later.¹²³ In addition, it may be that insufficient weight was placed on the standing accorded to voters to challenge governmental action which dilutes the voting strength in such cases as *Baker v. Carr*¹²⁴ and *Wesberry v. Sanders*.¹²⁵

Lack of standing was also a problem in the *FAIR Case* and that case did involve, in effect, the apportionment *among* the States requirement. However, as was pointed out before, there are passages in the Court's judgment which might suggest that the position could have been different if the action had been commenced after the census returns were completed. In addition, and

¹²² *Id.*, 132.

¹²³ The practical likelihood of the State of Michigan not using the figures was unlikely to be great given the absence of its own resources for carrying out a census of the State population. The reliance placed on standing and ripeness in these circumstances attracted justifiable criticism: see the dissenting judgment of Keith J. in *Young v. Klutznick* (the *Detroit Case*) on appeal, 652 F 2d 617, 629-635 and also Tachau, note 92 *supra*, 167-170.

¹²⁴ 369 US 186; 7 L Ed 2d 663 (1962).

¹²⁵ 376 US 1; 11 L Ed 2d 481 (1964).

here as well, it may also be that insufficient weight was placed on the standing accorded to voters to challenge governmental action which dilutes voting strength in such cases mentioned above as *Baker v. Carr* and *Wesberry v. Sanders*.

A further obstacle relates to the possible need to join or involve in some way other affected States in any litigation designed to correct an undercount for the purpose of enhancing or increasing the level of Congressional representation enjoyed by the State in which the undercounting occurred. Thus, in the second phase of the *New York Case* the Court of Appeals for the Second Circuit remanded the case to the District Court so that it could consider "pragmatic equitable alternatives" to the joining of all fifty states (since this was not feasible). The need to do so was necessitated by the following considerations:

[t]he House of Representatives has 435 members, and this number must be apportioned among the fifty States. If one State gains a member, another must lose one. Following the 1960 census, seven States each gained one seat, one State gained four, and one gained eight. As a result, twelve States each lost one seat, three States each lost two seats, and one State lost three seats. Following the 1970 census, three States each gained one seat, one gained three, and one gained five. Seven States each lost one seat, and two States each lost two seats. In effect, House membership is a fund in which fifty States have an interest. No State's share can be increased without adversely affecting at least one other State. The question presented by litigation such as the one now before us is whether one State can be granted such an increase without full consideration having been given to its effect on other States.

Persons 'who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience' are traditionally considered to be indispensable parties. Equity suggests that a person be brought into the litigation if the case cannot be decided on its merits without prejudicing his rights. This not only prevents possible injury to the absent person; it avoids multiplicity of suits and the danger of inconsistent decisions.¹²⁶

The Court also said:

[w]e think it clear beyond cavil that a statistically formulated increase in the population of only one State, such as New York will have an adverse effect on other States which are entitled to, but do not receive, the benefit of a similar adjustment.¹²⁷

The adoption of two of the pragmatic and equitable alternatives mentioned by the Court of Appeals for the Second Circuit may perhaps be sufficient to overcome the obstacle disclosed in this case. Under the second alternative mentioned by the Court, notice of suit could be given to all of the States with permission to intervene given to any State which felt that its interests were imperilled. This had not been done in the case. Under the third alternative, a special procedure could be invoked which was referred to as the seeking of "multi-district coordinated or consolidated pre-trial proceedings". This procedure would help to ensure the ultimate adoption of a "uniform nationwide method of making statistical adjustments". A further alternative

¹²⁶ *Carey v. Klutznick*, 653 F 2d 732, 736 (1980) — the *New York Case*, 2nd phase.

¹²⁷ *Id.*, 737. This observation may however have been directed to the effect on federal revenue sharing plans.

mentioned by the Court, on the other hand, casts doubt on whether the Census Bureau's conduct of the 1980 census could properly be challenged in fifty separate and unrelated actions — a matter which was sufficiently important to warrant the District Court staying its judgment pending a definite appellate ruling on the issue. The remaining alternative, which it was acknowledged had already been rejected by a different panel of the same Court, consisted of "substituting Bureau and congressional review for that of the court".¹²⁸

An equally significant, if not greater obstacle, concerned the adequacy of statistical adjustments which were available to correct any undercount. An acute difference of opinion existed between some of the courts and the Census Bureau on whether the existing methods were adequate enough to measure the undercount as can be seen from the judgment of Gilmore J. for the District Court in the *Detroit Case*. Werker J. also thought there were statistical methods available which would have produced a more accurate census when the second phase of the *New York Case* was decided by the District Court. On the other hand, the majority of the Court of Appeals in the *Detroit Case* hinted that the use of the method favoured by the District Court would, if anything, make worse the condition that was required to be corrected.¹²⁹ Even the dissenting member of the Court favoured the remand of the case to enable the District Court to consider new data on available methods to assess or measure the undercount.¹³⁰

It has been suggested that the doubt concerning the adequacy of existing adjustment methods, along with the inherent time delays that would result from their application, form the real and most convincing reasons for the ultimate refusal of the appellate courts to endorse the relief granted by the lower courts.¹³¹ The fact that the undercounting was known to have occurred did not of course mean that there were adequate solutions for its correction or that such solutions will be devised for the future. In addition, all courts have acknowledged that the procedures and methods adopted by the Census Bureau are entitled to deference given its expertise in the area.

Finally, brief mention should be made of practical obstacles disclosed by cases not discussed above. These concern the restrictions placed upon the discovery of Census Bureau documents given the statutory provisions which precluded disclosure of information gained in a census. In *Baldrige v. Shapiro*,¹³² the Supreme Court held that address lists compiled by the Bureau were not subject to disclosure under the Freedom of Information Act or the discovery provisions of the Federal Rules of Civil Procedure because of the statutory prohibitions on disclosure. The lists were sought to show that the

128 *Id.*, 737-8.

129 652 F 2d 617, 622 (1981) *per* Merritt and Martin JJ.

130 *Id.*, 629 *per* Keith J.

131 Tachau, note 92 *supra*, 183-5 as regards delays in the presentation of census figures. See also Jennis, note 92 *supra*, 414-6, 417 who also stressed the importance of the difficulty of devising a uniform nationwide standard of review given the affect of litigation on all the States.

132 455 US 345; 71 L Ed 2d 199 (1982).

Bureau had erroneously classified occupied dwellings as vacant. The Supreme Court thereby affirmed the decision of a lower court which had taken the same view notwithstanding the claim that a meaningful challenge to the Census Bureau's determination of a particular city's population could not be made without such information.¹³³ A similar view had been taken by the Court of Appeals for the Second Circuit in the second phase of the litigation in the *New York Case*.¹³⁴

Any final evaluation of the 1980 census cases needs to acknowledge the inconclusive nature and result of these cases. So far as their significance in the future is concerned, some academic writers appear to be sceptical of the ability of courts to fashion appropriate judicial relief primarily because of the problems concerning:

- (a) the adequacy of and time delays that would result in the use of statistical adjustment methods; and
- (b) the need to involve other affected States and to avoid a diversity of potentially conflicting court rules on the issue throughout the country.¹³⁵

These difficulties prompted one writer to express a preference for a congressional solution of the undercount problem given the ability of Congress to approach and develop a solution on a uniform and comprehensive basis.¹³⁶ By contrast another writer accepted the existence of a constitutional duty to use the most accurate possible population figures and seemed to assume also the appropriateness of a judicial enforcement of that duty.¹³⁷

In the view of the present writer, several conclusions can be advanced. In the first place, there is at least a distinct possibility of a court accepting a constitutional obligation to use the most accurate possible population figures. Secondly, the view that a congressional solution is to be preferred to a judicial solution is open to serious doubt. As Keith J. asserted in his dissenting opinion delivered in the *Detroit Case* in a slightly different context, it is probably too much to expect legislative representatives from areas which have benefited politically from differential undercounting to in effect vote themselves out of office and increase the representation of the citizens who reside in the undercounted areas. The vested interest of legislative representatives was in fact a major reason for the intervention of the Supreme Court in the field of electoral malapportionment.¹³⁸ Thirdly, there is at least

133 *McNichols v. Klutznick*, 644 F 2d 844 (1981) (Court of Appeals for 10th Circuit). The case was followed in *Seymour v. Barabba*, 559 F 2d 806, 807-8 (1977) (District Circuit Court).

134 653 F 2d 732, 738-740 (1981).

135 Jennis, note 92 *supra*, 416-7 and Tachau, note 92 *supra*, 177-187.

136 Jennis, *ibid cf.* Tachau *id.*, 187 who thought that the difficulties that surfaced in 1980 were likely to persist and demand more responsive court attention in the future.

137 "Demography and Distrust", note 90 *supra*, 863 at least as regards their use for the purposes of apportioning membership of the House of Representatives among the States.

138 *Young v. Klutznick*, 652 F 2d 617, 634 (1980). It is suggested that his remarks may be applied in the present context even though he was there concerned with the issue of 'ripeness' for judicial determination in regard to the use of unadjusted figures for Congressional apportionment within a State.

a possibility that proceedings to enforce compliance with the obligation will be actionable at the suit of voters in a State affected by any undercounting and that the claims raised by such voters will not be dismissed as political and non-justiciable. Fourthly, there is also the possibility that the problem of involving other affected States may perhaps be overcome by the use of some of the options which were mentioned by the Court of Appeals in the second phase of the *New York Case*.¹³⁹ Finally, it needs to be acknowledged, however, that the most difficult obstacle which will have to be overcome in order to ensure the success of any such proceedings concerns the adequacy of the available statistical methods for adjusting the population figures. It would seem to be dangerous for the courts to reject the judgment of the Census Bureau given the expertise enjoyed by that body in the conduct of a census. The present writer favours the application of a strengthened presumption of regularity in this area which would nevertheless leave open the possibility of a successful challenge if improved methods of statistical adjustment are devised in the future. Should such methods be devised it will then be necessary to test once again the correctness of an assertion put forward on behalf of the Bureau namely that the Constitution precludes any adjustment of population figures.

C. RELEVANCE TO AUSTRALIA

The issue concerning the use of inaccurate statistics could, it is suggested, arise in Australia with respect to the application of the proportionate representation requirement. This is so notwithstanding the absence of a constitutional requirement to hold a census. The doubtful constitutional validity of determinations based on the use of inaccurate statistics is, if anything, heightened rather than lessened when the proportionate representation requirement is expressed in *objective* terms without being tied to the ascertainment of population by the use of a census. The reference to the "respective number of their people" in relation to the States is not expressed in the opening part of paragraph 2 of section 24 of the Australian Constitution in such a way as to refer to the number of people in each State *as ascertained in a census* or to the *opinion* of some government or administrative agency regarding the number of people in each State.

Analogies drawn from the constitutional validity of *laws* whose validity is dependant upon the existence of fact may well suggest that judicial review should be generally available to determine the existence of that fact in order to ensure that constitutional limits are not transcended. Thus in *Hughes and Vale Pty Ltd v. New South Wales (No.2)*¹⁴⁰ Dixon C.J., McTiernan and Webb JJ. said:

under the rigid federal Constitution of the Commonwealth a provision is not valid if it would operate to withdraw from the courts of law, and so ultimately from this Court,

¹³⁹ See above at p. 138.

¹⁴⁰ (1955) 93 CLR 127, 165. See also Lane, "Facts in Constitutional Law" (1963) 37 ALJ 108, 108-9 and Lindell, "Duty To Exercise Judicial Review" in L. Zines (ed), *Commentaries on the Australian Constitution* (1977) 182-183.

the decision of any question as to the consistency of a statute or an executive act with the Constitution. So far as facts are concerned, the point is covered by the succinct statement of Williams J.: 'it is clear to my mind that it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation.': *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1, at p. 222. It is unnecessary to add that the correctness of the legal basis upon which the operation of the legislation depends likewise must be for the determination of the Court.

It has been pointed out that the duty of the Court to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation is a necessary corollary of the doctrine of judicial review under which the High Court is treated as the custodian of the Constitution. The same writer adverted to American authorities which suggest the acceptance of the same concept in that country.¹⁴¹

The duty discussed above does not preclude there being occasions when the facts necessary to give rise to a power to legislate will not involve facts of an objective character but, instead, only a reasonable apprehension of their existence. This was illustrated in *Richardson v. Forestry Commission*¹⁴² where it was held that it was open to the Federal Parliament to impose a regime of interim protection in respect of land which might subsequently be shown to qualify as land required to be protected under the Convention for the Protection of the World Cultural and Natural Heritage. The regime was only of an interim nature which only operated during or shortly after the completion of an inquiry held to determine whether the land qualified for protection under the same Convention. The legislation in question was seen as a valid exercise of the external affairs power under section 51(xxix) of the Constitution since it related to the implementation of an international obligation created by a convention to which Australia was a party.¹⁴³

The actual position under the Australian Constitution bears a closer similarity with the American position than might at first appear because of the way in which the proportionate representation requirement was to be applied with the use of the interim method provided for under the provisions of section 24 paragraph 2. It will be recalled¹⁴⁴ that the latter provisions refer to the number of people of the Commonwealth and the States "as shown by the *latest statistics of the Commonwealth*" [emphasis added]. The current *statutory* method for giving effect to the proportionate representation requirement also envisages the ascertainment of the numbers of the people of the Commonwealth and of the several States in accordance with the *latest*

141 Lane, *ibid.*

142 (1988) 62 ALJR 158, *per* Mason C.J., Wilson, Brennan, Dawson and Toohey JJ.; Deane and Gaudron JJ. dissenting. The minority justices did not disagree with the proposition stated in the text.

143 See especially Mason C.J. and Brennan J. who in their joint judgment emphasized that the power was only available where there was a reasonable basis to support a legislative judgment that the land in question might qualify for protection under the Convention. They also emphasized the ability of the Court to intervene if such a reasonable basis did not exist. *Id.*, 165.

144 Above at p. 103.

statistics of the Commonwealth.¹⁴⁵ It may be safe to assume that in most cases the use of a constitutional expression in a statutory enactment is intended to bear its constitutional meaning.¹⁴⁶

If the interim method of giving effect to the proportionate representation requirement allows the use of inaccurate population figures contrary to the kind of argument accepted by the lower federal courts in the United States Census cases, it would seem unlikely that the Constitution would be construed as prohibiting their use in any legislation enacted by the Parliament when it came to make other provision for the same matter as a means of giving effect to the proportionate representation requirement. On the other hand, if the interim method does not, properly construed, allow for the use of inaccurate population figures, it would seem somewhat difficult to establish that Parliament can allow for their use by making other provision to that effect since the same legislative power is taken as being necessarily qualified by the proportionate representation requirement, and, as already indicated that requirement is expressed in *objective* terms. In effect, then, the interpretation of the phrase "latest statistics of the Commonwealth" may well prove likely to be determinative of the basic issue raised here.

If this analysis is accepted, it will obviate the necessity to consider a further issue, namely, whether the power to make other provision can be exercised *retrospectively* so as to allow for the use of inaccurate statistics if it is found that such statistics cannot be used under the current statutory method for giving effect to the proportionate representation requirement. Normally it is accepted that the Parliament may enact legislation which has a retrospective operation.¹⁴⁷ However, recently the High Court refused to follow that view in a case where the retrospective operation of the law would have had *constitutional* consequences by attempting to make clear the Parliament's intention not to override the operation of an otherwise inconsistent State law for the purposes of section 109 of the Constitution.¹⁴⁸ The constitutional consequences involved here relate to the constitutional requirements governing the composition of the House of Representatives.

In what follows, it may be assumed that the High Court would have jurisdiction¹⁴⁹ to determine an action which was commenced to test and prevent the use of inaccurate statistics in relation to the proportionate representation requirement. It would have jurisdiction as to the subject matter

145 Commonwealth Electoral Act 1918 (Cth) (as amended) s. 46 quoted earlier above at p. 103.

146 For an interesting possible example to the contrary see the meaning ascribed to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" in the context of s. 5 of the Restrictive Trade Practices Act 1971 (Cth) by McTiernan J. in *R. v. Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

147 *R. v. Kidman* (1915) 20 CLR 425. The power in s. 51(xxvii) gives rise to special considerations: see Lane, *The Australian Federal System* (2nd ed. 1979) 230-1 and Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 128-9, 304-311.

148 *University of Wollongong v. Metwally* (1985) 158 CLR 447 per Gibbs C.J., Murphy, Brennan and Deanne JJ.; Mason, Wilson and Dawson JJ. dissenting.

149 The term is here used in the same sense as was intended in the article by the present writer note 68 *supra*, 95.

of the action having regard to the provisions of sections 75(v), 76(i) and 76(ii) of the Constitution and section 30(a) of the Judiciary Act 1903 (Cth) as amended. Section 47 of the Constitution has not been interpreted in such a way as to withdraw from the Court jurisdiction to determine questions concerning the constitutional requirements which govern the composition of the Houses of the Parliament.¹⁵⁰ As occurred in the *McKinlay* and *McKellar* cases, an aggrieved State or its Attorney-General could bring the action as plaintiffs while the defendants would include the Commonwealth of Australia, the Australian Statistician¹⁵¹ and also the Electoral Commissioner.¹⁵² It may also be assumed, following the pragmatic approach taken by the Court so far, that declaratory relief would be sufficient to ensure compliance with the constitutional position as declared by the Court without the Court having to consider the remedies available to enforce compliance where the Parliament deliberately fails to comply with the relevant constitutional requirements.

Attention can now be directed to the meaning of the term adverted to earlier, namely, "latest statistics of the Commonwealth". The relevant dictionary meaning of the word "statistics" in the Oxford English Dictionary¹⁵³ is as follows:

[i]n early use, that branch of political science dealing with the collection, classification and discussion of facts (especially of a numerical kind) bearing on the condition of a state or community. In recent use, the department of study that has for its object the collection and arrangement of numerical facts or data, whether relating to human affairs or to natural phenomena.

The dictionary meaning is therefore neutral as to whether the statistics need to be accurate or correct. It is certainly by no means obvious that such accuracy or correctness is required by the dictionary connotation of the term referred to above.

Moreover, it is not unknown for the law to recognise that incorrect determinations of facts should be accorded enduring legal recognition despite the subsequent development of newer, more accurate, methods of determining the same facts. This is indeed what may be said to have occurred in the famous boundary dispute case between South Australia and Victoria.¹⁵⁴ It was held in that case that the Letters Patent issued under the authority of an Imperial Act of Parliament fixed the boundary between the Colonies of New South Wales and South Australia as the 141st degree of east longitude and

150 The provisions of that section did not preclude the Court from determining the issues which arose in *McKinlay's case*, note 3 *supra* and *McKellar's case*, note 1 *supra* nor those which arose in the *Second Territory Representation Case*, note 34 *supra*, especially 596-597, 605-606 where a similar objection based on s. 49 was explicitly rejected as well.

151 That office is accorded statutory recognition by s. 5(2) of the Australian Bureau of Statistics Act 1975 (Cth) (as amended).

152 Established under s. 18 of the Commonwealth Electoral Act 1918 (Cth) (as amended).

153 Vol.10, 864.

154 *South Australia v. Victoria* (1911) 12 CLR 667 (High Court); (1914) 18 CLR 115 (Privy Council). See also *Hazlett v. Presnell* (1982) 149 CLR 107.

that the relevant instruments contemplated that the Executive Governments of both Colonies would have implied authority to determine the actual location of the boundary on the surface of the earth and to do everything necessary towards that end. The line actually marked out with agreement of both Governments¹⁵⁵ subsequently proved to be incorrect (being about two miles westward of the 141st meridian) but was nevertheless accepted as the permanent and statutory boundary between South Australia and Victoria.

It is easy to see why the incorrect line should be taken as the permanent boundary given the consequences regarding the exercise of governmental authority and jurisdiction in the boundary areas. The boundary could not be taken as being finally fixed but would be constantly liable to alteration in terms of its location as the means and instruments used to determine the location themselves changed. Undoubtedly, a similar view could be taken in regard to determinations governing the composition of the House of Representatives if the further view was accepted that non-compliance with section 24 of the Constitution results in the invalidation or non-existence of the House of Representatives. As already indicated, however, this further view has not, for good reason, been adopted by the High Court.¹⁵⁶

This leaves it open for a Court to take the view that, although the phrase "latest statistics of the Commonwealth" may not on its face require the use of the most accurate statistics, such a requirement should nevertheless be *implied* essentially for two related reasons:

- (a) the proportionate representation requirement which is given effect to by the use of the statistics in question is framed in *objective* terms; and
- (b) the use of inaccurate statistics will undermine the *effectiveness* of the proportionate representation requirement since it may allow actual departures from its operation.

Essentially, this argument is similar to the view which has been accepted by the lower federal courts in the United States 1980 census cases except that it lacks the additional linguistic support derived from the use of the word "actual" which appears in the reference to "actual enumeration" in Article 1 Section 2 Clause 3 of the United States Constitution. Nevertheless, the word "actual" may perhaps be taken as referring to the actual conduct of the process by which the necessary facts and data are collected rather than to the actuality or correctness of the facts and data being collected.

In essence, the issue that is raised by the argument is whether the courts are capable of passing judgment on the adequacy of statistical and counting measures — matters which would normally be regarded as falling within the expert field of knowledge possessed by the Census Bureau. However, the technical nature of factual determinations is not usually regarded as an insuperable bar to their determination by a court of law. Thus, in *Bank of*

155 The relevant adjacent area of the Colony of New South Wales later became part of Victoria.

156 See above at p. 124.

New South Wales v. The Commonwealth (The Bank Nationalisation Case)
Dixon J., as he then was, said:¹⁵⁷

[n]or do I think that it is correct to say that courts cannot inquire into such matters. There are few, if any, questions of fact that courts cannot undertake to inquire into. In fact it may be said that under the maxim *res iudicata pro veritate accipitur* courts have an advantage over other seekers after truth. For by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given. In the *Banco de Portugal v. Waterlow & Sons Ltd.* [1932] A.C. 452 an example is to be found of a judicial inquiry into the effect of an increased issue of notes.

The importance of a court undertaking such a task notwithstanding its technical complexity is underscored by the role it plays in protecting the operation of the Constitution. The acceptance of the argument being advanced need not, and indeed should not, be taken as resulting in the failure to accord due weight to the technical competence of statistical officials in matters of this kind. What it should do, however, is to ensure that the Court will be available as a measure of last resort in order to correct clear error on the part of technical experts where it can be shown that statistically defensible methods of adjustment are available to correct such error. The potential for judicial action should help to act as a powerful incentive in encouraging the census officials to strive to use the most modern and accurate counting methods.

Once it is accepted that the "latest statistics of the Commonwealth" should be construed as the need to use the statistics which most accurately reflect the population of each State, the factual correctness of population figures becomes, of course, susceptible to judicial review. The role which the Court will play in determining facts of that kind will bear some resemblance to its role in reviewing *legislation* whose validity depends upon the existence of a fact although in this instance the subject matter for review is not legislation but rather an *executive or administrative* determination made in purported compliance with section 24. Indeed, it was suggested by Barwick C.J. in *McKinlay's Case* that even if the Parliament had not made other valid provision for the purposes of the provisions of that section that it would have devolved "upon the Executive to apply the constitutional manner of determining the number of members to be chosen in each State . . .".¹⁵⁸ Perhaps a closer analogy is presented by the role of the courts in reviewing the exercise of specific executive powers which under the Constitution are only exercisable upon the existence or occurrence of certain facts as occurred with the cases dealing with the power of the Governor-General to dissolve both Houses of the Parliament at least where the validity of legislation enacted at a subsequent joint sitting of the Parliament is in issue. The existence of the conditions outlined in section 57 was treated as a matter to be determined by the Court.¹⁵⁹ An analogy which falls somewhere in between

¹⁵⁷ (1948) 76 CLR 1, 340.

¹⁵⁸ *McKinlay's Case*, note 1 *supra*, 29.

¹⁵⁹ *Cormack v. Cope* (1974) 131 CLR 432; *Victoria v. The Commonwealth (The Petroleum and Minerals Authority Case)* (1975) 134 CLR 81; *The First Territory Representation Case*, note 34 *supra*. See also Lindell, note 140 *supra*, 166-169.

the latter analogies would be presented by a legal challenge to the validity of a proposed law to alter the Constitution. If the ground of challenge related to the manner of its initiation because it was only passed by one House of the Parliament the position would be little different from that which arose in the cases dealing with the joint sitting of the Parliament held in 1974. What would be more in point here, however, would be the situation if the ground of challenge related to the alleged failure of the proposed law to obtain the necessary approval of the electors at a referendum — in other words, if the challenge was directed at the inaccuracy of the voting figures. It is suggested that such facts are *constitutional facts* which in the final resort are open to judicial review in order to determine the validity of a law which purports to amend the Constitution.

In that connection, it may be noted that the procedure for challenging the votes cast in a referendum as prescribed in the provisions of the Part VIII of the Referendum (Machinery Provisions) Act 1984 (Cth) appears to limit the parties who can challenge and the time within which a challenge can be made. The procedure appears to have been treated as the sole and exhaustive means by which challenges of this kind can be brought.¹⁶⁰ However, this view could raise the same kind of constitutional doubts which were adverted to in relation to similar provisions which deal with challenges to the election of members of the other House of Parliament. In *McKenzie v. The Commonwealth*, Gibbs C.J. said of those provisions:

I am by no means satisfied that s. 353(1) of the Act [Commonwealth Electoral Act 1918, as amended], which provides that the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise, would prevent this Court from interfering by injunction if a challenge were successfully made to the provisions of the Act on *constitutional* grounds. The case is distinguishable from *Berrill v. Hughes* . . . recently decided by Mason J., which turned on *statutory* and *not on constitutional considerations* [emphasis added].¹⁶¹

At the same time, it must be conceded that the interests of certainty may well demand some limitation in point of time for allowing challenges to be raised in relation to whether a constitutional amendment has carried.¹⁶²

Finally, it remains to deal with the weight that should attach to the judgment and views of the census officials as to the accuracy of statistics collected and used for the purpose of giving effect to the proportionate

160 See *Berrill v. Hughes* (1985) 59 ALJR 64. The provisions considered by the Court in that case were ss 27 and 28 of the Referendum (Constitution Alteration) 1906 (Cth). See now ss 100 and 101 of the Referendum (Machinery Provisions) 1984 (Cth).

161 (1985) 59 ALJR 190, 191. Unlike the provisions of s. 353(1) of the Commonwealth Electoral Act 1918 (Cth), the provisions of ss 100 and 101 of the Referendum (Machinery Provisions) 1984 (Cth) do not go so far as to *expressly* provide that the validity of any referendum or of any return can *only* be disputed by the prescribed petition procedure.

162 The cases dealing with the barring of remedies for unlawful governmental action taken pursuant to legislation found to be contrary to s. 92 as then interpreted, may provide a useful analogy: see *Antill Ranger & Co Pty Ltd v. Commissioner for Motor Transport* (1955) 93 CLR 83 (High Court); (1956) 94 CLR 177 (Privy Council); *Barton v. Commissioner for Motor Transport* (1957) 97 CLR 633.

representation requirement. As was foreshadowed earlier, the writer is of the view that there is much room here for the operation of a presumption of regularity — an evidentiary concept derived from acknowledged common law principles. It is of course true that the concept has, to the writer's knowledge, yet to be applied to the field of federal constitutional law and furthermore that, despite suggestions to the contrary, the presumption of validity probably does not have a recognized place in Australian constitutional theory, at least where the validity of laws is in question.¹⁶³ It may be argued here, however, that what is in issue is the existence of a fact and that common law principles of evidence should apply to govern the proof of that fact so long as there is no inconsistency with the Court's role as the guardian of the Constitution.

No doubt there may be found observations in the *Communist Party Case*¹⁶⁴ which may point toward or suggest the existence of such an inconsistency if the presumption of regularity were to be given the kind of operation canvassed above. For example, Fullagar J. refused to apply the normal rule under which recitals in a preamble to an Act of Parliament are accorded *prima facie* probating force as regards the recitals of fact upon which the power to make a law would depend.¹⁶⁵ It is suggested however that even if the *Communist Party Case* can be read as precluding reliance being placed on a presumption, the Court should be prepared to reconsider the principles of judicial review laid down in that case and modify their impact in a way that does not prevent the Court from performing its duty to review the validity of any governmental action in any case. It may be that the Court already recognises that the onus of disproving constitutional facts can be placed on those who seek to assert their non-existence in order to deny the valid application of federal legislation. This was certainly recognised before the *Communist Party Case* in the case of *Williamson v. Ah On*.¹⁶⁶ A similar kind of provision seems to have been upheld in a more recent case dealing with the drugs 'reasonably suspected' of being imported where the onus of disproving the fact of importation — a necessary link with the power to make laws with respect to overseas trade and commerce — was in effect successfully placed upon the shoulders of the defendant. The case *Milicevic v. Campbell*¹⁶⁷ which was, of course, decided after the *Communist Party Case*. A presumption of regularity would operate in much the same way providing of course that no attempt was made to make its operation *conclusive* in any

¹⁶³ As to which see generally H. Burmester, "The Presumption of Constitutionality" (1983) 13 *FL Rev* 277. The view that such a presumption does exist was asserted by Murphy J., for example in *The Commonwealth v. Tasmania* (1983) 158 CLR 1, 167-168 where he also asserted that there is, as a corollary, a presumption in favour of the existence of "all facts and circumstances" essential to support the validity of legislation.

¹⁶⁴ *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1.

¹⁶⁵ *Id.*, 263-264.

¹⁶⁶ (1926) 39 CLR 95. The constitutional fact in this case related to whether a person was an "immigrant" as to come within the valid operation of legislation based upon the immigration power in s. 51(xxvii) of the Constitution.

¹⁶⁷ (1975) 132 CLR 307.

way, that is, so as to prevent as a matter of law the adducing of evidence which did disprove the existence of the relevant constitutional fact, namely, the statistics used to give effect to section 24 of the Constitution.

The approach advocated above is consistent with, if not supported by, the case of *New South Wales v. The Commonwealth* [No.1] (*The Garnishee Case*) where the High Court by a majority upheld the validity of section 6 of the Financial Agreements Enforcement Act 1932 (Cth).¹⁶⁸ The provisions were upheld as an exercise of the power of the Parliament to make laws for the carrying out of the Financial Agreement under section 105A(3) of the Constitution.¹⁶⁹ Section 6 of the Act enabled the garnishee of State revenues to take effect even before a judgment of the Court was obtained to declare the existence of unpaid liability owed by a State to the Commonwealth under the Financial Agreement. The provisions of section 6 were designed to protect the interests of the Commonwealth in urgent cases until the question of liability could be determined in the High Court. They operated once:

- (a) the Auditor-General gave the Treasurer a certificate setting out money that was due and unpaid by the State to the Commonwealth; and
- (b) each House of Parliament resolved to approve the certificate and that by reason of urgency the garnishee provisions should apply immediately.

Rich and Dixon JJ. said:

[i]n other words, it [section 6] is brought into operation upon a reasonable or perhaps vehement presumption of default which may, nevertheless, conceivably be wrong.¹⁷⁰

They also concluded in the following terms:

[t]he question is whether a law for the immediate sequestration of the State's revenue upon a strong presumption of default, subject to the State's right to apply to the Court to displace the sequestration, can be considered as an exercise of the power as we have construed it. We have come to the conclusion that this question should be answered in the affirmative. Strong as the measure is, it may be fairly regarded in the conditions which at present prevail, and which we are entitled judicially to notice, as reasonably necessary to ensure payment of a liability if and when judicially established.¹⁷¹

The provisions of section 6 required the Commonwealth to apply to the Court within two months after the passage of the resolution for a declaration that the amount stated in the resolution was due and unpaid. The Attorney-General of the State could seek, at any time after the passage of the resolution, a declaration that no part of the same amount (or a smaller amount than that stated) was due and unpaid.¹⁷²

The key point to emphasise for present purposes is the acceptance of the

168 (1932) 46 CLR 155 *per* Rich, Starke, Dixon and McTiernan JJ.; Gavan Duffy C.J. and Evatt J. dissenting. The writer is indebted to Professor L. Zines for pointing out the possible relevance of this case to the problem under discussion.

169 The provisions of s. 105A(3) of the Constitution state: "The Parliament may make laws for the carrying out by the parties thereto of any such agreement." The majority rejected the view that section 105A(3) was confined to facilitating the *voluntary* carrying out of the Financial Agreement.

170 Note 168 *supra*, 181.

171 *Id.*, 181-182.

172 Sub-ss 6(3) and 6(4) of the Financial Agreements Enforcement Act 1932 (Cth).

power to enforce, admittedly for a limited period, the payment of an unsatisfied liability:

- (a) the existence of which was affirmed by a public official or body other than a court of law
- (b) even though such liability may on subsequent judicial examination be found to be non-existent.

This was so despite the fact that section 105A(3) of the Constitution only referred to laws for carrying out the Financial Agreement.¹⁷³ The provisions upheld contemplated the possibility of judicial review to correct any error. The same reasoning may be applied with respect to section 24 of the Constitution.

Whether different States (and other persons such as electors, if they are accorded standing) can be forced to use essentially the same evidence where more than one challenge has been commenced against determinations giving effect to the proportionate representation requirement is a matter which may be more doubtful. There is, however, some authority for this kind of restriction in the field of litigation involving section 92.¹⁷⁴ There is also something to be said for ensuring that the validity of a determination made under section 24 should rest on a basis of fact which is common to all potential parties.

In the final analysis, it is suggested then that the Court is in a position to, and indeed should, exercise its role as the guardian of the Constitution and ensure that judicial relief will be available to correct, where feasible, factual errors in the counting of the population of each State but at the same time it should not perform this role except in the very clearest of cases and where the suggested presumption of regularity has been displaced.

V. CONCLUSION

The conclusions advanced in this article can be summarised in the following way. *First*, the problem of ensuring that fresh determinations are *made and implemented* within the required time, in order to give effect to the proportionate representation of States requirement, has been dealt with in different ways in Australia and the United States. In Australia, the need to rely on State wide elections has been substantially lessened by reason of the automatic effect given to redistribution proposals drawn up by independent statutory bodies and also the use of a special mini-distribution procedure. In the United States, statutory provisions were enacted in 1967 which may have impliedly repealed provisions which made provision for State wide elections. It is likely that the redistribution of Congressional districts will either be

¹⁷³ *Richardson v. The Forestry Commission*, note 142 *supra* may also provide a useful analogy to the problem under discussion in the text.

¹⁷⁴ *Breen v. Sneddon* (1961) 106 CLR 406. See also Lane, note 140 *supra*, 112-113.

carried out by the legislature of the affected State or, failing that, and as a measure of last resort, by the federal courts themselves.

Secondly, on the question of *timing*, fresh determinations are required to be made and implemented in time for the second Congress which follows the holding of the decennial census. In Australia the position is that the determinations must be made and implemented in time for each ordinary general election of the House of Representatives but there is a case for *amending the Constitution* in such a way as to extend this period by requiring the determinations to be made and implemented in time for each alternate election of the same kind in the interests of political stability. The cogency of that case, however, largely depends on whether actual experience with the present position bears out the fears related to political instability.

Thirdly, problems concerning the *representation of the Territories* in the Federal Parliament and the effect of such representation in the proportionate representation and nexus requirements under the Australian Constitution have not arisen in the United States, presumably because the federal constitution of that country does not appear to make provision for such representation in Congress. Proposals have been advanced in Australia both of a statutory and constitutional nature in order to limit the discretion of the Parliament in regard to the provision of Territory representation in the Parliament but the writer's view is that the ordinary principles of political accountability should be sufficient to obviate the necessity for some of the *constitutional* amendments which have been suggested as a means of curbing any potential abuse in the future. At the same time reasons of consistency make it desirable to adopt the proposed constitutional amendments if the Constitution was also to be amended in order to break the nexus in such a way as to fix or limit the number of members and senators to be chosen to represent the original States. Independently of such amendments a good case exists for amending the Constitution to ensure that Territory representatives in Federal Parliament are not entitled to more than one vote and that such representatives are directly elected by the people. In addition the entitlement of a Territory to parliamentary representation should not exceed that of the original States of the Federation.

Fourthly, while the High Court seems to have affirmed the *justiciability* of the proportionate representation requirement, the United States Supreme Court has yet to deal with the issue. Notwithstanding earlier lower federal court authority to the contrary, which dealt with another aspect affecting the representation of States in Congress, it is unlikely that any claims to enforce by judicial means the operation of the same requirement in the United States will be dismissed as political and non-justiciable under the political questions doctrine.

Fifthly, the legal challenges to the 1980 Census raise at least the *possibility* that the United States proportionate representation requirement will be construed as requiring the use of the *most accurate statistics possible* and that this requirement will be capable of *judicial enforcement* notwithstanding the

inconclusive outcome of the same legal challenges and the procedural and practical obstacles which those challenges revealed.

Finally, it was suggested that a similar argument requiring the use of the most accurate statistics possible could be advanced and should be accepted in relation to the Australian proportionate representation requirement, even though there is no constitutional requirement to hold a census under the Constitution of that country. At the same time, strong support was expressed in favour of a strengthened application of a *presumption of regularity* in regard to the factual accuracy of any statistics used and collected by census officials.