THE LAW OF THE CENSUS: HOW TO COUNT, WHAT TO COUNT, WHOM TO COUNT, AND WHERE TO COUNT THEM

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ABSTRACT

The 2010 Census, like its predecessors, represented a momentous logistical and technological undertaking with far reaching consequences for political representation and allocation of public resources. It also promised to spawn a series of legal controversies over how to count people, what information the government should gather, which individuals truly "count" for purposes of the census, and where they should be counted. This Article explores these present and past controversies surrounding the census. The issues of "sampling" and "statistical adjustment" pervaded much of the legal commentary and caselaw concerning the census for the past twenty years. The undercount will continue to be a common theme, although given newfound ideological opposition to filling out the census form, it is unclear at this stage who is less likely to be counted. The 2010 Census raises new issues of relevance to redistricting claims under the Voting Rights Act, concerning the counting and distribution of data on both the noncitizen and prisoner population. At the same time, recent developments in voting rights law, which place a premium on the size of a minority community, have raised the legal stakes for this census. Despite the technical nature of many census-related controversies, one's position on how, what, whom, and where to count cannot be separated from the larger questions of how easy or difficult it should be for plaintiffs to bring and win civil rights claims, particularly with respect to the redistricting process.

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INTRODUCTION

The Framers of the American Constitution viewed the decennial census as providing a certain rhythm to American politics. Every ten years a state's tax burdens and representation in the House of Representatives would change to reflect its share of the national population as revealed in the "actual enumeration," the manner of which Congress "shall by law direct."[1] Much has changed since the first census, but the rhythm still remains. Perhaps unintended and unimagined by the Framers, however, is the rhythmic and ritualistic dance to the courtroom every ten years to argue over the census numbers themselves and the methods used to construct apportionment totals.

Just as its rhythm has remained true to the Framers' intent, so too the controversies surrounding the census have remained linked to the unique place of the census in the constitutional design. In the Constitution itself, the census is "about" representation, money, and race, so we should not be surprised to learn that courtroom controversies over the census have persisted with respect to these three themes. By tying both representation in the House and taxation to the census, the Constitution provided cross-incentives and an internal political check that might guard against manipulation of the census to overrepresent a state's population.[2] Today, dickering over the census numbers represents a critical stage in arguments states and localities make for more representation (concerning either apportionment among states of seats in the House of Representatives or within states with respect to redistricting) or for more money (given that funding for many federal and state programs is tied to the census). In addition, just as the first census necessarily had to categorize the population according to race in order to determine which people were "Indians not taxed" or "other persons" subject to the three-fifths rule,[3] so too today the racial categories of the census and the racial implications of census counts become fodder for litigation over representation and funding.

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[1] U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers.").

[2] *Id.* art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."); *see also* THE FEDERALIST NO. 54 (James Madison).

[3] 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*. U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

This Article examines the law of the census: specifically, how to count, what to count, whom to count, and where to count them. For the most part this Article draws on my experience and research concerning the use of census data in the redistricting process; however, many of the topics discussed apply to federal funding decisions as well. The Article begins by describing the most recent legal controversies involving census methods, particularly imputation and statistical adjustment. When one thinks of the "law of the census," these high-profile disputes probably come first to mind. In cases that have arrived at the Supreme Court at the beginning of each of the last three census cycles, undercounted cities and states have argued that census methods were deficient in that the procedures missed some people, double-counted others, or counted people that did not exist.

Second, this Article explores the legal implications of the decisions concerning what to include on the census form, paying particular attention to the topics of race and citizenship. For the second time, the 2010 Census allows respondents to check off more than one race, raising a host of interesting questions concerning the legal implications of alternative methods for categorizing the multiracial population. More significantly for the 2010 Census, the long form, which was previously asked of one sixth of the population, has been replaced by the yearly American Community Survey (ACS), distributed to 2.5% of households. The ACS is the only source for citizenship data from the census, raising questions about the reliability of citizenship estimates for purposes of Voting Rights Act (VRA) litigation.

Finally, this Article examines the related issues of who should be included in the census and where they should be counted. The section deals with special populations such as soldiers and other Americans living abroad, college students, the homeless, and prisoners. Prisoners, in particular, present an important case, as some have argued that the wholesale involuntary transfer of convicted criminals away from their communities toward more rural and often whiter areas has allowed for the padding of legislative districts in one part of a state at the expense of districts in other parts of a state. For the first time in 2011, the census will make data available in time for redistricting about the number of prisoners in each census block. Jurisdictions will now be able to subtract out prisoners from the census redistricting data file. Some states have even gone further and have reallocated prisoners to their pre-incarceration address for purposes of redistricting.

Although the principal purpose of this Article is to explain the law of the census, it makes two implicit arguments. First, decisions over these questions about the census ought to take into account the purposes of the census—that is, how census data will be used in reapportionment, redistricting, federal funding, and policy decisions. Second, and

somewhat in tension with the first point, it is very difficult to detach one's arguments as to how to conduct the census from other value-laden, normative arguments with respect to civil rights law and social policy. It should come as no surprise that those who make arguments, for example, about statistical adjustment, the racial categories on the census, or where to count prisoners view these decisions as affecting the achievement of some other, usually redistributive goal. Consequently, although the "language" of census policy disagreement is inevitably and inherently technocratic, the ultimate decisions on these questions reflect priorities concerning the desirability of those policies and programs that eventually use census data.

I. HOW TO COUNT

A. *"Sampling," Imputation, and the Undercount*

Census Bureau policies and procedures, like those of all arms of the federal government, are subject to scrutiny under multiple federal statutes and constitutional provisions. However, the principal legal terrain for the more high profile controversies has been bounded by the Census Act[4] and Article I, Section 2 of the Constitution, as amended by the Fourteenth Amendment.[5] Thus, the chief questions in recent years have revolved around whether certain procedures violate the Census Act, particularly its prohibition on sampling for purposes of apportionment, or Article I, Section 2, Clause 3 of the Constitution, which provides that apportionment shall be according to states' "respective numbers" as revealed in an "actual enumeration" that Congress "shall by Law direct."[6] In short, the Supreme Court has read the Census Act as prohibiting sampling or statistical adjustment for purposes of apportionment, but allowing it for non-apportionment purposes. And it has read the "actual enumeration" clause as permitting the use of another statistical method, imputation, for purposes of apportionment.

To understand the nature of these recent controversies and the implications of the Supreme Court's resolution of them, a few distinctions need to be made. The first, as noted above, is between the requirements of the relevant statute (the Census Act) and the requirements of the Constitution, particularly the Census Clause. Unlike the cumbersome process for amending the Constitution, a statute

4 13 U.S.C. § 141 (2006).
5 U.S. CONST. art. I, § 2.
6 *Id.* art. I, § 2, cl. 3.

and a court interpretation, of course, can be changed more easily by a subsequent Congress. Thus, to the extent that the Supreme Court has interpreted the Census Act as prohibiting sampling for some purposes or mandating it for others, a subsequent Congress could amend the Census Act so as to overturn the Court's interpretation of it. Second, a distinction needs to be made between reapportionment and other purposes of the census, including intrastate redistricting. The Actual Enumeration Clause only applies to the numbers used for reapportionment of the House of Representatives. No one suggests that the requirement of an actual enumeration somehow restricts the Census Bureau in its construction and distribution of non-apportionment data that states may use for the many other purposes of census-provided information. For the same reason that the Census Bureau's acquisition and distribution of data concerning the labor market, voter turnout, or housing values, for example, does not run afoul of the Census Clause, the Bureau can release statistically adjusted population data that can be used for redistricting or any other purpose. The Census Act, as we will see in a moment, is a bit more complicated, but insofar as it does restrict the Bureau's use of certain procedures, such as sampling, the Court has found that such restrictions apply only to creation of the apportionment totals. Third, a distinction needs to be made between "sampling" and other procedures: To the extent that the Census Act prohibits certain practices for constructing apportionment totals, the relevant question is whether such procedures can be characterized as "sampling" or as something else.

The Supreme Court has considered several cases dealing with census counting methods.[7] Its two most recent opportunities to weigh in came in *Department of Commerce v. U.S. House of Representatives*[8] and *Utah v. Evans*.[9] The narrowest reading of those cases suggests merely that the Census Act prohibits sampling for purposes of reapportionment (*Department of Commerce*) and that the actual enumeration clause permits imputation (*Evans*). However, the reasoning of the cases offers some insight as to the more general legal constraints on census methods.

In *Department of Commerce*, the Court interpreted the Census Act to bar sampling for apportionment purposes. The Court needed to reconcile two provisions of the statute. Section 141(a) of the Census Act states:

[7] *See* Wisconsin v. City of New York, 517 U.S. 1 (1996); Franklin v. Massachusetts, 505 U.S. 788 (1992); Dep't of Commerce v. Montana, 503 U.S. 442 (1992).

[8] 525 U.S. 316 (1999).

[9] 536 U.S. 452 (2002).

> The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, including the use of sampling procedures and special surveys.[10]

Section 195 of the Census Act states:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.[11]

The majority in *Department of Commerce* held that Congress, in enacting the amended section 195, sought to prohibit sampling in creating the state population numbers that it conveys to the President for use in reapportioning the House of Representatives.[12] The Court did not stop there, however. It also explained: "[Section 195] now *requires* the Secretary to use statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census."[13] Congress "changed a provision that permitted the use of sampling for purposes other than apportionment into one that required that sampling be used for such purposes if 'feasible.'"[14]

As it emerged from the Court, then, the Census Act forbids the use of sampling in construction of the apportionment totals, but may require it, *if the Secretary of Commerce deems it feasible*, for use in construction of the data used for redistricting and other purposes. After *Department of Commerce*, the Census Bureau planned to release two sets of 2000 Census data: the headcount and another set of statistically adjusted data produced, in part, through sampling. The unadjusted data were to be used for apportionment only, while the adjusted dataset was to be used for redistricting, and perhaps other purposes. However, a combination of a well-funded and remarkably successful census, plus a change to a presidential administration ideologically opposed to sampling, plus genuine and valid concerns about the accuracy of the adjusted data served to scuttle the plan to release adjusted data for redistricting. In fact, it took a court order to force the Bureau to release

10 13 U.S.C. § 141(a) (2006).
11 *Id.* § 195 (amending 13 U.S.C. § 195 (1976)).
12 525 U.S. at 338-42.
13 *Id.* at 339 (emphasis added).
14 *Id.* at 341.

the statistically adjusted data, and even then data users were given a disclaimer declaring the dataset inaccurate.[15]

From the saga of adjustment of the 2000 Census, which is only briefly covered here,[16] we learn that demonstrating that a method falls within the prohibition on "sampling" will kill its use in construction of the apportionment totals. The strategy, then, for those challenging census methods in the future is to characterize them as sampling. Moreover, for administrations that seek to avoid the prospect that sampling will be used for non-apportionment purposes, we should expect them to deem the use of sampling "infeasible," thus preventing the use of statistically adjusted data even for non-apportionment purposes.

Indeed, the plaintiffs in *Utah v. Evans* followed the former strategy in attempting to designate "hot-deck imputation"[17] a form of sampling

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[15] *See* Jennifer LaFleur, *Court-Ordered Release of Adjusted Census Data Spawns Debate over Accuracy of Original Count*, NEWS MEDIA & L., Winter 2003, at 27, *available at* http://www.rcfp.org/newsitems/index.php?i=6006.

[16] For a longer discussion, see generally PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS (2000); Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899 (2001).

[17] The Court's opinion in *Evans* described hot deck imputation in the following way:

> "Hot-deck imputation" refers to the way in which the Census Bureau, when conducting the year 2000 census, filled in certain gaps in its information and resolved certain conflicts in the data. The Bureau derives most census information through reference to what is, in effect, a nationwide list of addresses. It sends forms by mail to each of those addresses. If no one writes back or if the information supplied is confusing, contradictory, or incomplete, it follows up with several personal visits by Bureau employees (who may also obtain information on addresses not listed). Occasionally, despite the visits, the Bureau will find that it still lacks adequate information or that information provided by those in the field has somehow not been integrated into the master list. The Bureau may have conflicting indications, for example, about whether an address on the list (or a newly generated address) represents a housing unit, an office building, or a vacant lot; about whether a residential building is vacant or occupied; or about the number of persons an occupied unit contains. These conflicts and uncertainties may arise because no one wrote back, because agents in the field produced confused responses, or because those who processed the responses made mistakes. There may be too little time left for further personal visits. And the Bureau may then decide "imputation" represents the most practical way to resolve remaining informational uncertainties.
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> The Bureau refers to different kinds of "imputation" depending upon the nature of the missing or confusing information. Where, for example, the missing or confused information concerns the existence of a housing unit, the Bureau speaks of "status imputation." Where the missing or confused information concerns whether a unit is vacant or occupied, the Bureau speaks of "occupancy imputation." And where the missing or confused information concerns the number of people living in a unit, the Bureau refers to "household size imputation." In each case, however, the Bureau proceeds in a somewhat similar way: It imputes the relevant information by inferring that the address or unit about which it is uncertain has the same population characteristics as those of a "nearby sample or 'donor'" address or unit—e.g., its "geographically closest neighbor of the same type (i.e., apartment or single-family dwelling) that did not return a census questionnaire" by mail. Because the Bureau derives its information about the known address or unit from the current 2000 census

and therefore in violation of the Census Act. The five-member majority in *Evans* rejected that argument. Moreover, the Court, over the dissent of Justice Clarence Thomas joined by Justice Anthony Kennedy, did not find that imputation violated the constitutional requirement of an actual enumeration. Without going into too much detail of the statistical model involved in the imputation process, suffice it to say that the Court understood the imputation process as filling in missing data as opposed to using a sample to generate assumptions and corrections for a larger dataset. As Justice Stephen Breyer's majority opinion distinguished the two methods:

> [T]he two processes differ in several critical respects: (1) In respect to the *nature of the enterprise*, . . . sampling represents an overall approach to the counting problem that from the beginning relies on data that will be collected from only a part of the total population; (2) in respect to *methodology*, . . . sampling focuses on using statistically valid sample-selection techniques to determine what data to collect; and (3) in respect to *the immediate objective*, . . . sampling seeks immediately to extrapolate the sample's relevant population characteristics to the whole population.
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> By way of contrast, . . . imputation (1) does not represent an overall approach to the counting problem that will rely on data collected from only a subset of the total population, since it is a method of *processing* data (giving a value to missing data), not its collection; it (2) does not rely upon the same statistical methodology generally used for sample selection; and it (3) has as its immediate objective determining the characteristics of missing individual[s], not extrapolating characteristics from the sample to the entire . . . population.
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> . . . The nature of the Bureau's enterprise was not the extrapolation of the features of a large population from a small one, but the filling in of missing data as part of an effort to count individuals one by one. The Bureau's methodology was not that typically used by statisticians seeking to find a subset that will resemble a whole through the use of artificial, random selection processes; but that used to assure that an individual unit (not a "subset"), chosen nonrandomly, will resemble other individuals (not a "whole") selected by the fortuitous unavailability of data. And the Bureau's immediate objective was the filling in of missing data; not extrapolating the characteristics of the "donor" units to an entire population.

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rather than from prior censuses, it refers to its imputation as "hot-deck," rather than "cold-deck," imputation.

These three forms of imputation increased the final year 2000 count by about 1.2 million people, representing 0.4% of the total population.

Utah v. Evans, 536 U.S. 452, 457-58 (2002).

> These differences, whether of degree or of kind, are important enough to place imputation outside the scope of the statute's phrase "the statistical method known as 'sampling.'"[18]

Only Justice Sandra Day O'Connor was sympathetic to the contrary argument—that imputation constituted sampling. Hence, although the case did not settle the debate as to how to distinguish sampling from all other statistical methods, it raised the bar for plaintiffs who seek to pigeonhole a method as sampling when the Bureau describes the method as something else.[19]

The more substantial debate in the case, however, concerned whether the use of imputation violated the constitutional requirement of an "actual enumeration" for purposes of apportionment. (To reiterate, there is no constitutional restriction on the methods used to create the data used for redistricting or other non-apportionment purposes.) The Court (and Justice Thomas's dissent even more so) canvassed the historical literature and constitutional debates to discern what the phrase "actual enumeration" meant. For the majority, the imputation method, which used data from nearby respondents to create characteristics or even the existence of certain uncounted households, did not differ

> from other efforts used since 1800 to determine the number of missing persons. Census takers have long asked heads of households, "neighbors, landlords, postal workers, or other proxies" about the number of inhabitants in a particular place. Such reliance on hearsay need be no more accurate, is no less inferential, and rests upon no more of an individualized effort for its inferences than the Bureau's method of imputation.[20]

For Justice Thomas, the imputation process was by definition not an "actual enumeration," a phrase that, in contrast to "estimation," denotes "to reckon up singly; to count over distinctly" and the purpose of which was to prevent political manipulation of the census, not to achieve the most accurate count of the population.[21] Because it found imputation to fall well within the confines of an "actual enumeration," the *Evans* Court did not specify the outer limits of that phrase:

> [W]e need not decide here the precise methodological limits foreseen by the Census Clause. We need say only that in this instance, where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the

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18 *Id.* at 466-67 (emphasis added) (internal citations omitted).

19 *Id.* at 472 ("Although we do not rely on it here, under these circumstances we would grant legal deference to the Bureau's own legal conclusion [that imputation did not constitute sampling] were that deference to make the difference.").

20 *Id.* at 477 (internal citation omitted).

21 *Id.* at 492, 500 (Thomas, J., dissenting).

> population, and where consequently manipulation of the method is highly unlikely, those limits are not exceeded.[22]

In short, we need to wait for the litigation emerging from the current census, perhaps, for a definition of the outer bounds of the Census Clause.

From this description of the recent cases on census methods one might think the policy and legal debates were about abstract questions of constitutional meaning and technical accuracy. Once the veneer of legalese and technical language is stripped away, however, what remains are divergent interests and ideologies as to what priorities should guide the construction of the census. In particular, the debate over census methods, rightly or wrongly, has been recast as a partisan, racial, and regional battle.[23] Historically, the headcount has produced a differential undercount—that is, an undercount of racial minorities and other groups, such as renters and children. Advocates of "sampling," in particular, view statistical adjustment as a way of rectifying bias in the headcount. Opponents view such statistical methods as avenues of manipulation and as creating more inaccuracies in the census than they remedy.

With respect to reapportionment and redistricting, how one answers the question "how to count" is often highly correlated with one's answer to the question "who stands to benefit." The state of Utah was against the use of imputation, for example, only after it realized that redoing the census without imputation would allow it to have one more congressional seat. (Not a peep was heard while the Bureau was using imputation to construct the apportionment totals and the resulting winners and losers were unknown.) Similarly, large cities and states with large minority populations are often forceful advocates of statistical adjustment because they think their representation in either Congress or state legislatures will increase as a result or that a greater share of federal or state dollars will be directed their way.

When evaluating the impact of census methods on reapportionment and redistricting, it is important to keep in mind that census methods or even census numbers do not, by themselves, determine who wins and loses. With respect to reapportionment, the beneficiaries from sampling or imputation are usually not known before the census begins. Because of the complicated formula for apportionment, only a few states, maybe even only two, will gain or lose a congressional seat due to the *relative* gains or losses in population as revealed by a particular statistical method. It is quite natural for those cities and states with large minority populations, for example, to argue in favor of adjustment, but it is not so

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[22] *Id.* at 479 (majority opinion).

[23] *See generally* SKERRY, *supra* note 16; Nathaniel Persily, *The Right to be Counted*, 53 STAN. L. REV. 1077 (2001) (reviewing SKERRY, *supra* note 16).

clear whether, in the end, a sampling regime will actually benefit them. In order to know whether a certain method will benefit a particular state in the apportionment process, it is not enough to know that a large share of the state's population would otherwise be uncounted. One must also know whether that state's *relative* gain due to adjustment exceeds that of other states and whether the added population will put that state over the top in order to get an additional House seat.

With redistricting, other factors also play a dispositive role in determining winners and losers as a result of the employment of statistical methods. Whether a redistricting plan favors Democrats or Republicans has more to do with the partisan composition of districts than the actual or adjusted aggregate population that lives within them. The same is true for representation of racial minorities in a redistricting plan: The undercount of racial minorities is less influential on their representation than the precise racial breakdown and voting patterns within districts. Indeed, the differential undercount can be factored into decisions concerning how well districts will "perform" for a racial group in upcoming elections. Just as linedrawers might consider future population growth in their decisions as to where to draw lines and their assumptions as to how districts will perform, they can factor in assessments of the "true" size and composition of a prospective district's population regardless of what official census data might report.

B. *Effects of Counting Methods*

So when might the undercount matter? The answer may be "in court." There are certain legal claims that could be affected by the decision to use certain statistical methods. In particular, the decision to use adjusted data may bear on claims brought against redistricting plans under the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment.[24]

Without delving too deeply into the redistricting caselaw under the Voting Rights Act of 1965 (VRA), one lesson that can be easily expressed is that the size of a minority community constitutes a critical factor in the presentation of arguments concerning the legality of redistricting plans. Section 5 of the VRA prevents certain "covered" jurisdictions[25] from "retrogressing"—that is, from "diminish[ing] . . .

[24] For a more developed explanation of the foregoing, from which much of this is excerpted, see generally Persily, *supra* note 16.

[25] Section 5 of the Voting Rights Act was designed to cover only those jurisdictions that met specific criteria of discrimination and suspect voting practices; the decision of whether to change the coverage formula was debated before passage of the law's most recent version. *See* Nathaniel

the ability of [minorities] . . . to elect their preferred candidates of choice."[26] Section 2 of the VRA prevents dilution—that is, the use of redistricting to "crack" (disperse among many districts) or "pack" (overconcentrate into a few districts) a minority community so as to minimize its political power.[27] The parties in section 2 redistricting cases or the Department of Justice in evaluating retrogression under section 5 turn to census race data to evaluate whether a redistricting plan has had the alleged detrimental effect on racial minorities. Because minorities (racial, political, or otherwise) naturally "lose" in a majority rule system, not every racial group necessarily has a voting rights claim merely because it has been split up into districts where it cannot have the decisive voice in what candidate is elected. Minority communities must be "sufficiently large," such that redistricting, rather than low numbers, is to blame for their political powerlessness.[28]

For purposes of the VRA, courts and the DOJ have historically placed special importance in voting rights litigation on "majority-minority districts"—that is, districts in which the minority population exceeded 50% of the district's population. If a covered jurisdiction enacted a redistricting plan that reduced the number of such districts or reduced the minority percentages in those districts, the plan would ordinarily be seen as retrogressing and in violation of section 5.[29] Similarly, the Supreme Court has recently held that a minority community must be large enough to constitute a majority in a single-member district before its members can bring a claim of vote dilution under section 2.[30] Every minority community, regardless of its size, does not have a right to remain undivided in its own district. Redistricting, itself, is responsible for dilution of minority votes only when, under an alternative plan, the minority community would have a greater ability to elect its candidate of choice. After all, a tiny minority community cannot argue that a redistricting plan diluted its power if under an allegedly non-dilutive plan it would still be systematically outvoted by the white majority. Therefore, requiring a threshold showing that the minority community is large enough to constitute a

Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 178, 192-207 (2007).

[26] 42 U.S.C. § 1973c (2006); Beer v. United States, 425 U.S. 130, 133 (1976); Georgia v. United States, 411 U.S. 526, 531 (1973).

[27] 42 U.S.C. § 1973 (preventing redistricting plans in which racial minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

[28] Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

[29] The Supreme Court has not yet interpreted the retrogression standard under the newly reauthorized section 5. There is considerable debate as to whether the new section 5 places special emphasis on majority-minority districts. *See* Persily, *supra* note 25, at 237-40.

[30] Bartlett v. Strickland, 129 S. Ct. 1231 (2009).

majority in a single-member district provides a philosophically justifiable and administrable standard for identifying dilutive plans.[31]

The decision whether to employ statistical adjustment or other methods that could affect the size of minority communities as revealed in census numbers could affect the potential success of voting rights claims brought by members of those communities. In other words, if statistical adjustment to compensate for the differential racial undercount may allow a minority community to surmount the fifty percent threshold described above, then the failure to adjust the headcount may foreclose certain voting rights claims. Lest it need reemphasis, though, only a small number of legal claims might be affected by the choice of one dataset over another. In most cases where a viable Voting Rights Act claim can be demonstrated with adjusted data, the use of unadjusted data would probably reveal a voting rights violation as well. Moreover, other decisions, such as the racial and partisan composition of a district, could subsume adjustment in importance in voting rights litigation.

The 2010 Census, however, appeared to confront a potential undercount problem heretofore unforeseen. In the run up to Census Day 2010, it would have appeared that the main challenges for the Census Bureau would have revolved around the incredible dislocation and foreclosures caused by the recession, as well as unprecedented population shifts in the Gulf Coast area due to Hurricane Katrina.[32]

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[31] *Id.* at 1244-45 ("We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. . . . Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than [fifty] percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2. . . . Not an arbitrary invention, the majority-minority rule has its foundation in principles of democratic governance. The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has [fifty] percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." (internal citation omitted)). *But see id.* at 1260 (Breyer, J., dissenting) ("'Fifty percent is seen as a magic number by some because under conditions of complete racial polarization and equal rates of voting eligibility, registration, and turnout, the minority community will be able to elect its candidate of choice. *In practice, such extreme conditions are never present* . . . . [S]ome districts must be more than 50% minority, while others can be less than 50% minority, in order for the minority community to have an equal opportunity to elect its candidate of choice.'" (alterations in original) (quoting Brief for Nathaniel Persily et al. as Amici Curiae Supporting Neither Party at 5-6, *Bartlett*, 129 S. Ct. 1231 (No. 07-689), 2008 WL 2472394 at *5-6)).

[32] *See* Ed O'Keefe, *Gulf Coast Worried About 2010 Census: Concerns Focus on Residents Displaced by Two Hurricanes*, WASH. POST, Aug. 5, 2009, at A11; Campbell Robertson, *In New Orleans, Suspense Builds over Census Count*, N.Y. TIMES, Apr. 8, 2010, at A19; Gregory Korte, *Foreclosures an Added Challenge for Census*, THE COLUMBUS DISPATCH (Mar. 8, 2010, 3:45 AM), http://www.dispatch.com/live/content/local_news/stories/2010/03/08/foreclosures-an-added-challenge-for-census.html ("The 2010 Census presents an unprecedented challenge for

However, at its inception, the 2010 Census seemed to face a different kind of problem: ideological opposition to filling out the census form. Fearing government intrusion into personal privacy, a variety of conservative groups and commentators urged people not to fill out the census form. Fox News's Glenn Beck and Representative Michelle Bachmann both went to the airwaves to suggest not filling out the census form, for fear of what the government might do with the information.[33] Republican Representative Patrick McHenry from North Carolina blogged about his fears that "early census returns are showing that conservatives have been measurably less likely than liberals to return their census forms."[34]

Had these alleged trends continued for the remainder of the census mailback period, it could have affected apportionment of representatives for certain Republican leaning states. As the *Wall Street Journal* reported: "According to Census Bureau figures, some of the most conservative states have among the lowest response rates so far. About 48% of households in Texas and 53% in Alabama have mailed in their forms so far, for example, while the response rate in Massachusetts, a more-liberal state, is at about 57%."[35] And even within states, it could have affected redistricting if conservative white neighborhoods showed a lower rate of participation.[36]

It appears that no such general trend materialized, however.[37] As stakeholders pore over the census numbers, perhaps they will discover pockets of undercounted conservatives. It would be the height of irony if "sampling" reveals that such disparities could have been prevented by statistical adjustment.

A more likely and familiar problem is the predicted undercount of Latinos. As the fastest growing racial or ethnic group in the country, Latinos will undoubtedly increase in their share of the population

census takers: Counting people where they live even as the economy is uprooting them from their homes in record numbers.").

33 *See Beck Asks Bachmann "the Odds" the Gov't Will Fine Those Who Don't Complete Census, Says He's "Considered" Not Filling It Out*, MEDIAMATTERS FOR AM. (June 25, 2009, 6:56 PM), http://mediamatters.org/mmtv/200906250039.

34 Patrick McHenry, *Returning the Census Is Our Constitutional Duty*, REDSTATE (Apr. 1, 2010, 11:05 AM), http://www.redstate.com/rep_patrick_mchenry/2010/04/01/returning-the-census-is-our-constitutional-duty.

35 Naftali Bendavid, *Republicans Fear Undercounting in Census*, WALL ST. J., Apr. 5, 2010, at A4.

36 Richard S. Dunham & Meredith Simons, *Census Caught in Anger Toward Washington: Officials Worry Low Response Rate Is a Form of Protest*, HOUS. CHRON., Mar. 27, 2010, at A1, *available at* http://www.chron.com/disp/story.mpl/metropolitan/6932410.html ("In Texas, some of the counties with the lowest census return rates are among the state's most Republican.").

37 *See* Nate Silver, *No Evidence That Red States Are Lagging on Census*, FIVETHIRTYEIGHT (Mar. 31, 2010, 10:43 AM), http://www.fivethirtyeight.com/2010/03/no-evidence-that-red-states-are-lagging.html.

revealed by the 2010 Census.[38] Even those great gains might understate the size of that group, however, given both historic and new reasons for nonparticipation in the census.[39]

Adding to the more traditional reasons for a Latino undercount, such as language difficulties and fear of government, the 2010 Census had to grapple with the potential chilling effect of Arizona's new immigration-related law. In the middle of the census mailback and nonresponse follow-up period, Arizona passed its well-publicized law allowing police to stop and ask for identification from anyone suspected of being in the country illegally.[40] Census workers publicly worried about the possibility that doors would not be opened when they visited.[41] Given that the census counts people regardless of their citizenship status, an undercount of non-citizens (illegally here or otherwise), as well as those worried about being suspected of being non-citizens, will affect a state or community's population totals. Other states saw in the Arizona law the possibility that a marginal congressional seat might shift in their direction.[42]

The extent of the differential undercount due to any of these multiple foreseen and unforeseen phenomena remains to be determined. The fallout from Hurricane Katrina, social dislocation due to the economic downturn, ideological opposition to the census, and immigration-related fears of government will affect the census numbers to some extent. The real question is whether it will lead to differential effects such that certain groups, communities, or regions will thereby be underrepresented. Failures to count, if equally distributed throughout the population, have little political effect. If history is any guide, however, the undercount will fall harder on some communities than others.

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38 *See* Mark Hugo Lopez & Paul Taylor, *Latinos and the 2010 Census: The Foreign Born Are More Positive*, PEW HISPANIC CTR., i-iii (Apr. 1, 2010), http://pewhispanic.org/files/reports/121.pdf.

39 *Id.*

40 *See* Haya El Nasser, *Ariz. Law Adds a Census Hurdle: In Border State Where a Third of Residents Are Hispanic, Fear Percolates*, USA TODAY, May 25, 2010, at 3A, *available at* http://www.usatoday.com/news/nation/census/2010-05-24-census-workers-arizona_N.htm.

41 *See* Peter O'Dowd, *Arizona Immigration Law Concerns Census Workers*, MARKETPLACE (May 26, 2010), http://marketplace.publicradio.org/display/web/2010/05/26/arizona-immigration-law-concerns-census-workers.

42 Doug Grow, *Ripple Effects from Arizona Immigration Law Might Save Minnesota Congressional Seat in Redistricting*, MINNPOST.COM (July 13, 2010, 8:26 AM), http://www.minnpost.com/stories/2010/07/13/19628/ripple_effects_from_arizona_immigration_law_might_save_minnesota_congressional_seat_in_redistricting (celebrating the potential effect of the Arizona law because it might lead Minnesota to keep a congressional seat).

II. WHAT TO COUNT

The decision concerning what questions to place on the census form and what census data to make available can also affect the redistricting process and lawsuits under the Voting Rights Act. Questions about race and ethnicity constitute about half of the 2010 census form, which allowed respondents for the second time to check off more than one racial group. Despite admonitions from certain politicians, a question about citizenship does not appear on the decennial census form and is relegated to the yearly American Community Survey (ACS) received by only 2.5% of households. Although few claims may turn on the vicissitudes of census measurements of race and citizenship, courts considering VRA challengers in the coming decades will be called upon to resolve ambiguities in the census race and citizenship data.

A. *The Multiple Race Check-off Option*

The race question on the 2000 Census was the first to allow respondents to check off more than one race. In 1997, the Office of Management and Budget (OMB) issued "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," a directive that changed the way federal agencies, including the Census Bureau, would categorize people according to race.[43] By moving to a format that allowed respondents to check off any and all of the six principal racial groups on the census, the form effectively created 126 possible combinations of racial and ethnic categories.[44] Although many social scientists worried about the policy implications at the time the OMB and the Census Bureau made these decisions, the actual political and

[43] Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997), *available at* 1997 WL 670660 (explaining OMB's decision to move toward a different method for collecting data from multiracial individuals); *see also* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 00-02, GUIDANCE ON AGGREGATION AND ALLOCATION OF DATA ON RACE FOR USE IN CIVIL RIGHTS MONITORING AND ENFORCEMENT (2000) [hereinafter OMB BULL. NO. 00-02], *available at* http://www.whitehouse.gov/omb/bulletins/b00-02.html; Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978), *available at* http://www.whitehouse.gov/omb/fedreg/notice_15.html.

[44] Sixty-three combinations come from the following: 6 single-race categories, 15 combinations of 2 races, 20 combinations of 3 races, 15 combinations of 4 races, 6 combinations of 5 races, and 1 combination of all 6 races (6 + 15 + 20 + 15 + 6 + 1 = 63). If one multiplies the number of possible race categories by the dichotomous Latino origin category (i.e., a person either is or is not a Latino—only 2 options), then one arrives at 126 possible race and ethnicity combinations.

legal effects of this change have been minimal.[45] Even so, with each census, the share of the population identifying with more than one racial group will undoubtedly increase. At some point, the confusion caused by the data format, let alone the actual politics of multiracial identity, will present real political and legal challenges.

The first problem to recognize is a logistical one: How does one use the data with its 126 combinations in the process of redistricting? The short answer is that it is not easy unless one reaggregates the data into some more usable format. The OMB therefore promulgated a directive to do just that in the context of civil rights enforcement. The OMB issued Bulletin No. 00-02, which provides the following rules of aggregation:

> Federal agencies will use the following rules to allocate multiple race responses for use in civil rights monitoring and enforcement.
>
> - Responses in the five single race categories are not allocated.
> - Responses that combine one minority race and white are allocated to the minority race.
> - Responses that include two or more minority races are allocated as follows:
>   - If the enforcement action is in response to a complaint, allocate to the race that the complainant alleges the discrimination was based on.
>   - If the enforcement action requires assessing disparate impact or discriminatory patterns, analyze the patterns based on alternative allocations to each of the minority groups.[46]

The OMB approach maximizes the numbers for racial minority groups by recategorizing some multiracial respondents as some category other than white. Critics of the OMB guidelines have therefore described them as a modern version of the "One Drop Rule"—the Jim Crow-era law where one drop of black blood made someone black.[47] Defenders, however, would point out that the reaggregation rules merely create a presumption for purposes of civil rights enforcement. That presumption places the data in the light most favorable for the civil rights plaintiff (usually non-white). The reaggregation rules, while smacking of the same racial essentialism that often follows from any categorization scheme, simply try to provide

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[45] *See* Nathaniel Persily, *The Legal Implications of a Multiracial Census*, *in* THE NEW RACE QUESTION 161 (Joel Perlmann & Mary Waters eds., 2002).

[46] OMB BULL. NO. 00-02, *supra* note 43.

[47] *See* Joshua R. Goldstein & Ann J. Morning, *Back in the Box: The Dilemma of Using Multiple-Race Data for Single-Race Laws*, *in* THE NEW RACE QUESTION, *supra* note 45, at 119.

rules of thumb that prevent such plaintiffs from being disadvantaged by the new census format.

In the one opportunity where the Supreme Court confronted this conundrum it opted for an approach that counted anyone who checked the racial category that was relevant to the case before it. In *Georgia v. Ashcroft*, which involved potential retrogression of African American voting power, the Court maximized the potential count of African Americans by including in its count of Black Voting Age Population (BVAP) anyone who checked off black plus something else.[48] At the same time, the Court recognized that other approaches to counting multiracial individuals for whom white was not one of the races checked might be appropriate, "if the case involves a comparison of different minority groups. . . . Here, however, the case involves an examination of only one minority group's effective exercise of the electoral franchise. In such circumstances, we believe it is proper to look at all individuals who identify themselves as black."[49]

Of course, should courts or claimants come to reject the OMB guidelines, some rare claims of minority groups might be dismissed because the group would not seem large enough to get over the requisite numerosity threshold to present a section 2 VRA claim.[50] The voting rights issues surrounding the multiple race check-off are similar to those considered with respect to counting methods. Because some voting rights claims will turn on the size of the minority community as revealed in the census numbers, how one counts multiracial individuals may affect whether the minority community surmounts a threshold necessary to demonstrate a plausible voting rights claim. If the multiracial population is large enough, perhaps a voting rights plaintiff might need to include that population in its count of members of the minority community in order to prove that the community is sufficiently large to form a majority in a district. At the same time, adding a large multiracial population to the single race community only aids a section 2 plaintiff if the two groups are politically cohesive. Although maximizing the numbers of the minority community may be necessary to surmount section 2's numerosity threshold, doing so might come at some cost if it undercuts arguments about minority political cohesion.

Once again, the independent impact of this feature of census data should not be overstated. First, in its notices regarding the enforcement

48 *See generally* Georgia v. Ashcroft, 539 U.S. 461 (2003).

49 *Id.* at 473 n.1 (internal citations omitted).

50 *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). Courts have applied a three-part test derived from *Gingles* to determine whether a districting plan violates section 2 of the Voting Rights Act. First, the minority community making the claim must be large and compact enough to constitute a majority in a district. Second, the minority community must be politically cohesive. Finally, the majority must vote as a bloc so as to prevent the minority community from electing its preferred candidate. *See, e.g.*, Bartlett v. Strickland, 129 S. Ct. 1231 (2009).

of section 5, the Justice Department, while promising to use the OMB's aggregation rules to determine retrogression under section 5 of the VRA, has made clear that its determinations will involve a detailed and multifactor analysis, of which census race data are only a part.[51] As in the section 2 context, the Justice Department analyzes polarized voting patterns and other electoral data to evaluate changes in minority voting strength caused by new redistricting plans. Second, and most important, the multiracial population, while significant for the counting of certain groups, is too small to matter for most retrogression or dilution inquiries—almost all of which involve examinations of African American and Latino voting strength. African Americans display a low rate of multiracial identification,[52] and Latinos, counted through a separate "origin" question on the census, are unaffected by the multiracial format. If any group's voting rights under section 2 or section 5 will be affected in the short term by the format of the race question, it will most likely be American Indians in small covered jurisdictions (for example, a county districting scheme in South Dakota, Arizona, or Alaska)[53] and perhaps Asian Americans in New York City or California. Nevertheless, a remarkable confluence of political and geographic circumstances and a rejection of the OMB's aggregation rules would need to occur before the new racial data present real difficulties for voting rights litigation.

B. *Citizenship and the 2010 Census*

Consistent with the constitutional command to conduct an "actual Enumeration,"[54] "counting the whole number of *persons* in each State,"[55] the census counts citizens and noncitizens alike. As already discussed, the decennial census form does not even ask for the respondent's citizenship,[56] for fear that doing so would chill

51 Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.28 (2010) (listing supplemental contents of preclearance submissions).

52 In the 2000 Census, 36,419,434 people checked-off "black" on the census form. Of those, 34,658,190 checked-off black and nothing else. Depending on whether one counts the multiracial population, either 12.3% or 12.9% of the U.S. population is black. *See* U.S. CENSUS BUREAU, DP-1 PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, GEOGRAPHIC AREA: UNITED STATES, *available at* http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF1_U_DP1&ds_name=DEC_2000_SF1_U&geo_id=01000US.

53 *See generally* LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010) (discussing the history of American Indian challenges to voting equality, specifically under the VRA).

54 U.S. CONST. art. I, § 2, cl. 3.

55 *Id.* amend. XIV, § 2 (emphasis added).

56 *See Explore the Form*, U.S. CENSUS BUREAU, http://2010.census.gov/2010census/about/interactive-form.php (last visited Dec. 31, 2010).

participation by noncitizens and citizens alike.[57] Instead, such a question had historically been asked on the "long form" of the decennial census given to one sixth of U.S. households, and is now only asked of 2.5% of households in the yearly American Community Survey.[58]

This lack of national citizenship data on a par with census population data presents several quandaries for voting rights law. First, some argue that the philosophical foundations of the one-person, one-vote doctrine require that districts be drawn with equal numbers of citizens, not persons.[59] Second, despite the absence of a citizenship question on the census short form, several courts have required data concerning citizen voting age population as a critical component of proving a voting rights claim. This raises a third problem unique to the 2010 Census: Namely, will the estimates from averages of the American Community Survey (itself, truly a sample in the sense discussed earlier) satisfy courts looking to limit VRA claims to the citizen voting age population?

The one-person, one-vote rule seems a misnomer for the well-known requirement of equality for legislative districts. The inexactness of the phrase comes from the fact that no existing districting plan actually divides *voters* equally among districts. Instead, as a general rule, districts contain equal numbers of people, which includes noncitizens, children, prisoners, and other nonvoting populations. The Supreme Court established long ago in *Burns v. Richardson*[60] that a jurisdiction could satisfy one-person, one-vote by drawing districts according to a metric other than total population (in that case, equal numbers of registered voters). However, almost all jurisdictions use the P.L. 94-171 datafile to draw districts, and that dataset includes only aggregate population and voting age population, broken down by race

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57 *See* Haya El Nasser, *For 2010 Census, the Counting Gets Tougher: Security Issues, Hurricanes, Immigrants' Fears Complicate First Survey in Post-9/11 Era*, USA TODAY, Oct. 8, 2008, at 1A, *available at* http://www.usatoday.com/news/nation/census/2008-10-08-Census_N.htm.

58 *See* U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY SURVEY (2010), *available at* http://www.census.gov/acs/www/Downloads/questionnaires/2010/Quest10.pdf (ACS form, which includes the questions that are asked on the census); *Quick Facts About the Importance of Participating In the American Community Survey*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/Downloads/congress/CT_quick_facts.pdf (last visited Dec. 31, 2010) (noting that the ACS goes to 2.5% of households).

59 *See* Dennis L. Murphy, *The Exclusion of Illegal Immigrants from the Apportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969, 983-85 (1991); Charles Wood, *Losing Control of America's Future: The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 468-74 (1999); Stacy Robyn Harold, Note, *The Right to Representation and the Census: Is It Permissible for Congress to Exclude Illegal Immigrants from the Apportionment Base?*, 53 WAYNE L. REV. 921, 933 (2007). Most recently, Rep. Candice Miller proposed an amendment to exclude non-citizens from the census count. H.R.J. Res. 53, 109th Cong. (2005).

60 384 U.S. 73 (1966).

and ethnicity.[61] The circuit courts that have confronted the issue have been uniform in deferring to state decisions to use total population, instead of citizen population, as the basis for drawing districts.[62]

As we enter the 2011 districting cycle, one plaintiff is attempting to change all that. A lawsuit has been filed in the Northern District of Texas alleging that the radical disparity in the numbers of citizens between city council districts in Irving, Texas violates the one-person, one-vote rule.[63] The complaint in the case alleges that one of the districts, a Hispanic majority district drawn as a result of an earlier VRA section 2 case, has half the number of voting age citizens of other districts.[64] Quoting from *Reynolds v. Sims*, which decries "weighting the votes of *citizens* differently because of where they happen to reside"[65] and establishes that "the weight of a *citizen's* vote cannot be made to depend upon where he lives,"[66] the complaint seeks to force the redrawing of districts on the basis of equal numbers of citizens. If successful, such a rule threatens to destabilize districting plans in every area containing a large noncitizen population.

The lawsuit has little chance of success given the weight of the precedent, but it highlights a thorny related issue concerning the interaction between the data sources provided by the census and those assumed to exist as part of voting rights law. *Burns* has never been overturned and as such "the Equal Protection Clause does not *require* the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured."[67] Therefore, it would appear that the Constitution does not *prevent* jurisdictions from drawing districts on equal numbers of citizens, just as it could base districts on the subset of citizens who are registered voters.[68] However, subsequent to *Burns*, the Court has

61 *See* J. GERALD HEBERT ET AL., THE REALIST'S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS 14-15 (2d ed. 2010).

62 Chen v. City of Hous., 203 F.3d 502, 523 (5th Cir. 2000); Daly v. Hunt, 93 F.3d 1212, 1227-28 (4th Cir. 1996); Garza v. Cnty. of L.A., 918 F.2d 763, 774-75 (9th Cir. 1990). *But see* Chen v. City of Hous., 532 U.S. 1046, 1046 (2001) (Thomas, J., dissenting) ("[A]s long as we sustain the one-person, one-vote principle, we have an obligation to explain to states and localities what it actually means."); *Garza*, 918 F.2d at 782-84 (Kozinski, J., dissenting) (arguing that citizenship should be the basis for drawing districts).

63 Lepak v. City of Irving, No. 3-10-CV-277-P (N.D. Tex. Feb. 11, 2010).

64 *See* Complaint, *Lepak*, No. 3-10-CV-277-P, *available at* http://www.projecton fairrepresentation.org/wp-content/uploads/2006/11/Lepak-v-City-of-Irving-Complaint.pdf.

65 377 U.S. 533, 563 (1964) (emphasis added).

66 *Id.* at 567 (emphasis added).

67 Burns v. Richardson, 384 U.S. 73, 91 (1966) (emphasis added).

68 Whether the Voting Rights Act might prevent redistricting based on equal numbers of citizens remains a different and open question, however. Given the racially disparate impact such redistricting would have in some areas, one could easily make that argument. *See, e.g.*, Garza v. Cnty. of L.A., 918 F.2d 763, 775 (9th Cir. 1990) ("In this case, basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that

expressed that "[a]dopting any standard other than *population equality*, using the *best census data available* . . . would subtly erode the Constitution's ideal of equal representation."[69]

A constitutional rule requiring equal numbers of citizens would necessitate a different kind of census than the one currently conducted (or for that matter, the one the text of the Constitution requires). The decennial census and the redistricting dataset produced from it do not include citizenship numbers. The only source for such data is the American Community Survey, which is now given yearly to a very small subset (2.5%) of households[70] and, given its sample size, is not accurate in estimating citizenship totals at the census block level. Indeed, the census will not even release ACS citizenship estimates at the block level.[71] One-year estimates will be released only for units of population in excess of 65,000 people. Beginning in January 2011, three- and five-year averages will also be available at the census tract and block group level.[72] Unlike the redistricting data the census makes available, moreover, ACS estimates come with a margin of error, indicating, for example, that the number of Latino citizens in a given tract is somewhere between 900 and 1100 people. For purposes of one-person, one-vote or even one-citizen, one-vote, therefore, the only relevant citizenship data available from the census gives ballpark figures, at best, and misleading and confusing estimates at worst.

The errors inherent in such estimates are necessarily greater for the populations of interest for voting rights law. The ACS might provide more-or-less reliable estimates of the number of citizens at the county level. Linedrawers seeking to comply with the VRA are mostly interested, for example, in the share of citizens at the neighborhood level that is Latino and of voting age. In order to get an accurate picture of that subset of the citizen population, the ACS must have a sufficient number of Latino citizens of voting age in its yearly samples in the area of geography relevant for the given redistricting. Therefore, the error terms accompanying the estimates of the Latino citizen voting age population (CVAP) will definitely be larger than those of the CVAP totals for a given area of census geography.

district to their representative, and would similarly abridge the right of aliens and minors to petition that representative.").

69 Karcher v. Daggett, 462 U.S. 725, 731 (1983) (emphasis added).

70 *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: DESIGN AND METHODOLOGY 2-4 (2009) [hereinafter ACS METHODOLOGY], *available at* http://www.census.gov/acs/www/Downloads/survey_methodology/acs_design_methodology.pdf.

71 David R. Hanna, Senior Legislative Counsel, Tex. Legislative Council, Using Citizenship Data for Redistricting, PowerPoint Presentation Before the National Conference of State Legislatures Redistricting Task Force in Austin, Texas (Mar. 27, 2010), *available at* http://www.ncsl.org/documents/redistricting/HannaNCSLMar27final.pdf.

72 *See* ACS METHODOLOGY, *supra* note 70, at 2-4.

For some states, these problems are compounded by the fact that the ACS estimates will initially be given for 2000 Census, not 2010 Census, geography. Because the boundaries of census blocks, block groups, and tracts were changed for the 2010 Census, ACS estimates based on 2000 Census geography refer to different geographic units than the ones for which the 2011 redistricting data are released. Therefore, even if the ACS estimates themselves were accurate, they would not be usable for the 2011 redistricting. A statistical "bridge" will be necessary to convert data from old geographic units to new ones, which introduces a whole new set of errors on top of the existing margins of error in the survey estimates. Later in the redistricting cycle estimates will be given according to the new 2010 geography, but many states will already have drawn their lines by then.

This is not the only problem arising from the fact that the ACS, unlike the decennial census, is continually in the field with new estimates released every year.[73] Prior to this redistricting cycle, jurisdictions could rely on the fact that the citizenship estimates from the decennial census long form would generally settle the matter of citizenship totals for the following decade.[74] For this census and throughout the decade, the ACS will release one-year estimates, as well as three- and five-year averages. Each will indicate a different number of citizens, include a different statistical range for each level of geography, and be amenable to different arguments as to their relative validity. Although the five-year averages, for example, will be available at lower levels of geography, their estimates of current citizenship rates give past surveys the same weight as more recent ones. When estimating the citizen *voting age* population of an area, this use of outdated data poses new problems since some of the ACS respondents included in the released averages were below voting age five years ago, but will now be able to vote. With the yearly release of new ACS estimates and lagged averages, moreover, not only is there ambiguity as to which citizenship estimates to use at the beginning of the decade, but a new possibility arises of a community learning of its potential VRA claim later in the decade due to the release of new citizenship numbers.[75]

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[73] *See* C. Robert Heath, *Redistricting and the Census*, BICKERSTAFF HEATH DELGADO ACOSTA LLP, 12-13, http://www.bickerstaff.com/files/11_Bob__REDISTRICTING_AND_THE_CENSUS_sm.doc (last visited Dec. 31, 2010).

[74] Of course, the census updates population estimates throughout the decade, but none of those estimates has ever had the reliability and granularity of the datafiles associated with the decennial census.

[75] All of the errors just described do not include the more obvious problem that noncitizens, one can only assume, are less likely to respond to the ACS. Even if they do respond, one would be shocked if an accurate number of those in the country illegally, for example, would be eager to admit their lack of citizenship on an official government form.

This great variety of problems ought to seal the fate of any case that attempts to establish a constitutional rule based on equal numbers of citizens; however, the citizenship "issue" remains a live one for purposes of the Voting Rights Act. As discussed earlier, plaintiffs bringing a section 2 VRA claim in the redistricting context must demonstrate that their minority group could constitute a majority in an appropriately drawn single-member district.[76] The Supreme Court has not explicitly answered the question "majority of what": Specifically, do members of a minority group need to constitute a majority of the population, voting age population (VAP), or CVAP, in order to have a cognizable section 2 claim?[77]

The Court's most recent section 2 decisions point in different directions, while not resolving this fundamental problem. In *LULAC v. Perry*,[78] the Court paid special attention to CVAP estimates in a district to establish that the Latino vote had been diluted. The gerrymander of Texas's congressional districts violated section 2 because a district with a Latino CVAP majority was dismantled into one that only had a majority Latino total population. In *Bartlett v. Strickland*,[79] which established the fifty percent rule for section 2 claims, the Court sounded a different tune with respect to the citizenship issue. Although the lower court had assumed CVAP was the correct statistic to satisfy the numerosity requirement of *Gingles*,[80] the Court posed the question in the case as "whether the first *Gingles* requirement can be satisfied when the minority group makes up less than [fifty] percent of the voting-age population in the potential election district."[81] And in describing the rationale for its holding, the Court said:

> Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than [fifty] percent of the voting-age population in the relevant geographic area? That rule provides

[76] To be clear and accurate, *Bartlett* leaves open the possibility that racial minorities can join together to demonstrate a combined majority-minority district, in which no single minority group would comprise a majority in an appropriately drawn district.

[77] Other statistics are also a theoretical possibility: majority of eligible voters, registered voters, or actual voters. However, such data are usually not available by race.

[78] 548 U.S. 399, 429 (2006) ("Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates.").

[79] 129 S. Ct. 1231 (2009).

[80] Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); *see* Pender Cnty. v. Bartlett, 649 S.E.2d 364, 374 (N.C. 2007) (determining that a district's then-current configuration had not been mandated by section 2 because African-Americans did not "constitute a numerical majority of citizens of voting age"); *see also supra* note 50.

[81] *Bartlett*, 129 S. Ct. at 1240.

> straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2.[82]

At other times in the opinion, however, the Court makes mention of "voting population" and even total population.[83]

Several of the circuit courts that have confronted the issue squarely have ruled that CVAP is the appropriate statistic for evaluating a section 2 claim. Prior to *Bartlett*, several circuits had said so explicitly.[84] In the one Fifth Circuit case in the wake of *Bartlett*, the court said *Bartlett* did not disturb the CVAP rule, given the irrelevance of the issue there where African Americans were the group in question and the CVAP and VAP statistics did not differ substantially.[85] Therefore, voting rights plaintiffs should naturally expect a court to be skeptical of any claim brought by a minority group that cannot constitute a majority of citizens in a potential single-member district.

Voting rights law in some circuits, therefore, demands more information than the census can give. In the coming decade's VRA cases, courts will need to decide which ACS estimates (one-year, three-year, or five-year average) to rely on, how to deal with the margins of error and confidence intervals, and, perhaps, how to "bridge" from 2000 Census to 2010 Census geography. To some extent these problems at the front end of the redistricting process are not new.[86] Even though one sixth of the population was asked the citizenship question with the long form of the 2000 Census, citizenship estimates were not available in time for the 2001 redistricting. Like any estimates based on surveys, the earlier citizenship data garnered from the long form had an underlying margin of error. Courts simply abided by the legal or statistical fiction that the midpoints of such ranges were the appropriate

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[82] *Id.* at 1245.

[83] *Id.* ("The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has [fifty] percent or more of the *voting population* and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." (emphasis added)); *id.* at 1246 ("It remains the rule, however, that a party asserting § 2 liability must show by a preponderance of the evidence that the *minority population* in the potential election district is greater than [fifty] percent. No one contends that the African-American *voting-age population* in District 18 exceeds that threshold." (emphasis added)); *id.* at 1249 ("Only when a geographically compact group of *minority voters* could form a majority in a single-member district has the first *Gingles* requirement been met." (emphasis added)).

[84] *See generally* Barnett v. City of Chi., 141 F.3d 699 (7th Cir. 1998); Campos v. City of Hous., 113 F.3d 544 (5th Cir. 1997); Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997).

[85] *See generally* Reyes v. City of Farmers Branch, 586 F.3d 1019 (5th Cir. 2009).

[86] *See* Cathy McCully, Chief, Census Redistricting Data Office, U.S. Census Bureau, 2010 Census Redistricting Data: What Legislators/Congress and Other Stakeholders May Ask You, PowerPoint Presentation at the Annual Data User Conference at the Pennsylvania State Data Center, at slide 7 (Sept. 15, 2010), *available at* http://www.pasdcconference.org/LinkClick.aspx?fileticket=yIaJOB6KJjU%3D&tabid=759 (noting that the DOJ requested a "special tabulation [of CVAP by race and ethnicity] similar to the one done after the 2000 Census").

measure. Once the citizenship data were released, the estimates would then be used in litigation to challenge plans that failed to draw majority-minority CVAP districts when section 2 of the VRA required it. For the 2011 round of redistricting, however, controversy is built into the citizenship estimates themselves.

What is to be done? First, we should not make too much of a legal mountain out of this statistical molehill. Jurisdictions and courts will muddle through the redistricting process by making back-of-the-envelope calculations about the likely citizenship rates in their jurisdictions. Although citizenship data for lower levels of geography will be fraught with error, most county level estimates may give a good picture of the share of the noncitizen minority voting age population. Those drawing and challenging districting plans will need to make rough county-based calculations along the lines of saying: "A sixty percent Latino VAP district is roughly majority Latino CVAP for this particular area." Jurisdictions may therefore err on the safe side and choose to overconcentrate Latino districts in order to ensure that they have, in fact, created a majority-Latino CVAP district.

In light of the data problems the 2010 Census presents, courts should reconsider their decisions requiring citizen voting age population as the basis for a section 2 vote dilution claim. The notion that the minority group's ability to elect candidates of its choice depends on its share of the voting eligible electorate has intuitive appeal and is, of course, true. But courts have never required fine-grained estimates of the share of eligible voters in a given jurisdiction by fully accounting, for example, for the disenfranchised or incarcerated population. Indeed, precise numbers of eligible voters do not exist and even the best estimates are not available at the geographic units necessary for redistricting.[87]

One lesson to take away from *Bartlett v. Strickland*'s restriction of vote dilution claims to potential majority-minority districts is the Court's understandable preference for manageable rules in this context.[88] Requiring voting age population as the population basis for a section 2 claim avoids all the data problems inherent in employing ambiguous and contestable citizenship estimates. Moreover, doing so will not lead to a flood of new section 2 claims. When arguing for the creation of a district, plaintiffs still need to demonstrate that due to

[87] Michael McDonald has done his level best to estimate the eligible electorate at the state level. *See* Michael McDonald, *2010 General Election Turnout Rates*, U.S. ELECTIONS PROJECT, http://elections.gmu.edu/Turnout_2010G.html (last updated Dec. 13, 2010). No comparable dataset that attempts to exclude all ineligible voters exists for the low levels of geography necessary for redistricting.

[88] On the importance of manageable rules in section 2 litigation as a tool to avoid partisan bias in judging, see Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

racial bloc voting they are unable to elect their preferred candidates. In areas where the minority group has low citizenship levels, it is not bloc voting that is preventing them from electing their preferred candidates. If the low level of citizenship and voting eligibility among the minority community is the reason its preferred candidates cannot be elected, then that community will not have a viable vote dilution claim in any event. Just as the Court has attempted to bring clarity to voting rights law by limiting section 2 claims to majority-minority districts, it should clarify that voting age population, rather than citizen voting age population, is the appropriate metric by which to demonstrate the size of the minority community.

III. WHOM TO COUNT AND WHERE TO COUNT THEM

Every census cycle brings with it a new set of legal, political, and even philosophical controversies. This Part examines what promises to be *the* controversy of the 2010 Census: Whom should the census count and where should it count them? As discussed in Part I, the Constitution merely requires "counting the whole number of persons in each State." However, the census, for decades, has counted within a state's population some individuals, such as soldiers, who are elsewhere in the world, and some individuals who are not in their "usual residence" on Census Day. The choices as to which non-residents will be counted where have specific consequences for apportionment and redistricting.

The decision where to count respondents to the census follows the "usual residence" rule.[89] An individual's "usual residence" is the place where the person lives and sleeps most of the time.[90] Naturally, this rule does not mean an individual must count himself where he is located at the time he receives the census form or where he is standing on Census Day. People who are on vacation or in their non-primary residence on Census Day should place as their address the location of their more permanent home. For most Americans, the location of their usual residence does not present conceptual or political difficulty. For large classes of people—such as the overseas population, individuals without conventional housing, college students, and prisoners—the decisions concerning whether one should be counted in the census and, if so, where, have become hot political and legal issues.

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89 *See Residence Rule and Residence Situations for the 2010 Census*, U.S. CENSUS BUREAU, http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html (last visited Dec. 31, 2010) (describing the general residency rules applied in the 2010 Census).

90 *Id.*

A. *The Overseas Population*

For obvious reasons, a census of all Americans living abroad would be impossible.[91] The census has enough difficulty counting people living within the United States and its territories; tasking the Bureau with counting all Americans living everywhere from Antigua to Zimbabwe would magnify exponentially the logistical challenges of the census. However, the census has periodically included a subset of the overseas population. The 1830 and 1840 Censuses counted "crews of naval vessels at sea" but those sailors were not attributed to states for purposes of apportionment.[92] The 1900 Census was the first to include Americans abroad in the apportionment count; enumerators included in their counts federal employees living abroad and relied on family members in the United States to identify those individuals. Each census between 1910 and 1940 relied on family members to identify individuals "temporarily" living abroad. Instructions to enumerators dictated: "It does not matter how long the absence abroad is continued, provided the person intends to return to the United States."[93]

After a hiatus spanning the 1950 and 1960 Censuses, the 1970 Census included overseas Americans once again. Although the 1970 Census attempted to capture as many Americans abroad as possible, ultimately only Americans "affiliated with the Federal Government" were included for purposes of apportionment.[94] Even that practice was discontinued in 1980 because of concerns about accuracy of the government records used to construct the census of overseas federal employees. However, both the 1990 and 2000 Censuses used similar records to construct the census of overseas federal employees, who were then included in states' apportionment totals (although not assigned to census blocks for use in redistricting). And each of those censuses led to a lawsuit.

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[91] For an excellent summary of the legal and policy issues involved with the overseas population, see generally Thomas R. Lee & Lara J. Wolfson, *The Census and the Overseas Population*, 2 ELECTION L.J. 343 (2003).

[92] *Id.* at 344.

[93] *Id.* at 345.

[94] In *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3d Cir. 1971), the city of Philadelphia challenged the Bureau's failure to further subdivide overseas individuals within the state in the 1970 Census. The Third Circuit held "that the census is used to determine the total number of representatives to which a state's population entitles it, and neither the Constitution nor the Census Act demands the allocation of persons to any particular subdivision of a state." *Id.* at 581. Plaintiffs also challenged the Bureau's failure to additionally enumerate non-government employees living abroad. The court held that the Bureau's assertion that it could not accurately locate this portion of the population outside the United States was a sufficient justification for its failure to count them. *Id.* at 582.

The 1990 Census led to *Franklin v. Massachusetts*,[95] and the 2000 Census led to the first incarnation of *Utah v. Evans*.[96] Massachusetts in 1990 and Utah in 2000 were "next in line" for the last seat in the U.S. House of Representatives. In both cases, they alleged that the count of overseas federal employees violated the Census Clause of the Constitution. In *Franklin*, Massachusetts argued that the Census Clause as amended by the Fourteenth Amendment required that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons *in* each State. . . ."[97] Because overseas employees were not *in* their states, the argument went, they should not be included in their apportionment counts. The Court rejected that argument, holding that in allocating military overseas to their home state, "the Secretary of Commerce made a judgment, consonant with, though not dictated by, the text and history of the Constitution, that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress."[98] The Court explained that "[t]he first enumeration Act itself provided that 'every person occasionally absent at the time of the enumeration [shall be counted] as belonging to that place in which he usually resides in the United States.'"[99]

Through the use of administrative records, the census once again included some subset of the overseas population in 2000 as it did in 1990, and once again there were challenges. In the first incarnation of *Utah v. Evans*, Utah made two alternative arguments: First, that it was a violation of the Census Clause of the Constitution to include only federal employees abroad but not similarly situated Americans overseas, such as Latter-Day Saints (LDS) missionaries; or second, that including any Americans overseas violated the Census Clause.[100] The court rejected both arguments. Ordering the census to include LDS missionaries "would overwhelmingly favor Utah vis-à-vis all forty-nine other states," the court held. "Given that the goal of apportionment is 'to achieve a fair apportionment for the entire country,' commanding the enumeration of one group from one state obviously fails to further the constitutional goal of 'equal representation.'"[101] Then why not subtract overseas employees altogether from the apportionment count, as Utah pleaded? Like many courts in similar situations, the district court in *Evans* deferred to the Census Bureau and answered that the

95 505 U.S. 788 (1992).
96 143 F. Supp. 2d 1290 (D. Utah 2001).
97 U.S. CONST. amend. XIV, § 2.
98 *Franklin*, 505 U.S. at 806.
99 *Id.* at 804.
100 *Evans*, 143 F. Supp. 2d at 1295.
101 *Id.* at 1298 (quoting U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 464 (1992)).

decision to include only overseas federal employees in the apportionment count was "a rational exercise of the Secretary's discretion, delegated to the Census Bureau, to conduct its obligation to enumerate the population for apportionment purposes."[102]

Pursuant to congressional direction, the Census Bureau in 2004 convened the Overseas Enumeration Research and Planning Group (Planning Group) "to determine the feasibility, quality and cost of collecting data from U.S. citizens living overseas."[103] In 2004 the Census Bureau conducted a test focused on American citizens living in France, Kuwait, and Mexico. The questionnaire used was a unique form designed specifically for overseas enumeration that contained the "short form" questions asked within the United States as well as some additional questions needed for the purpose of this specific overseas enumeration. The General Accounting Office was quite critical of the of this 2004 test run,[104] and a broad count of the overseas population will not be included in the 2010 Census.[105]

As should be clear, the choice of which subset of the overseas population to include in the census could bias apportionment estimates in favor of one state and against others. Thomas Lee and Lara Wolfson argue quite persuasively that the decision to count only overseas federal employees biases the apportionment count in favor of certain states.[106] Depending on whether the overseas population is plugged into census blocks as well, the decisions concerning whether and to what extent the overseas population should be counted could also affect redistricting.

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102 *Id.* at 1301.

103 The 2004 Overseas Enumeration Test, 68 Fed. Reg. 19,495 (Apr. 21, 2003), *available at* 2003 WL 1903106.

104 U.S. GEN. ACCOUNTING OFFICE, GAO-04-470, 2010 CENSUS: OVERSEAS ENUMERATION TEST RAISES NEED FOR CLEAR POLICY DIRECTION (2004).

105 The 2010 Census provided the following directions for counting of the overseas population:

> 15. U.S. CITIZENS AND THEIR DEPENDENTS LIVING OUTSIDE THE U.S.
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> - U.S. citizens living outside the U.S. who are employed as civilians by the U.S. Government, including dependents living with them - Counted as part of the U.S. overseas population. They should not be included on any U.S. census questionnaire.
> - U.S. citizens living outside the U.S. who are not employed by the U.S. Government, including dependents living with them - Not counted in the census.
> - U.S. military personnel living on or off a military installation outside the U.S., including dependents living with them - Counted as part of the U.S. overseas population. They should not be included on any U.S. census questionnaire.
> - U.S. military personnel on U.S. military vessels with a homeport outside the U.S. - Counted as part of the U.S. overseas population. They should not be included on any U.S. census questionnaire.

U.S. CENSUS BUREAU, *supra* note 89.

106 *See generally* Lee & Wolfson, *supra* note 91.

It is difficult to know at the beginning of a census exactly which state stands to benefit in reapportionment from a decision to count the overseas population. States with large army bases, of course, argue in favor of counting soldiers abroad. States like Utah, with identifiable and discrete populations abroad who have heretofore remained uncounted, argue for an all or nothing approach to the overseas population. The difficulties in counting the overseas population cannot be stressed enough. The census misses millions of people who live inside the United States every year; assigning them the task of counting Americans in far flung corners of the globe would only magnify the difficulties we see in conducting the headcount. For reasons of politics but also from a genuine desire to find out which Americans live in which countries, however, this particular issue concerning "whom to count" will not be going away anytime soon.

B. *The Enumeration of College Students*

As a result of the rising number of students attending college and the failure of earlier censuses to count college student populations accurately, the 1950 Census was the first to count college students as residents of their college towns, as opposed to the previous policy of counting them in the residence of their parents.[107] Another reason for the change was to eliminate the inconsistency between the counting rules for college students and the "usual residence rule." Because college residences are the places where such students generally eat, sleep, and work, counting them there follows the same rules for counting the population in general.

The Court of Appeals for the Third Circuit upheld the application of the usual residence rule to college students in *Borough of Bethel Park v. Stans.*[108] The plaintiffs in that case argued that the Bureau should not automatically enumerate college students at their college town, but rather should consider whether each student has a particular attachment to the state of her parental home, and whether the student is registered to vote in the state of her parental home.[109] Giving great deference once again to the Census Bureau, the court rejected these arguments:

> Once a person has left his parental home to pursue a course of study at a college in another state which normally will last for a period of years, it is reasonable to conclude that his usual place of abode

[107] Borough of Bethel Park v. Stans, 449 F.2d 575, 579 (3d Cir. 1971); Edwin D. Goldfield & David M. Pemberton, *1950 Census*, *in* ENCYCLOPEDIA OF THE U.S. CENSUS 143 (Margo J. Anderson ed., 2000).

[108] 449 F.2d 575.

[109] *Id.* at 579.

> ceases to be that of his parents. Such students usually eat, sleep, and work in the state where their college is located.[110]

The application of the usual residence rule to college students does not spur much debate these days. However, counting students in college towns can often have a dramatic effect on the redistricting totals for certain areas of a state, and to a lesser degree the apportionment totals between states. The population of some college towns doubles in September when the students arrive. Especially when one considers redistricting for small area political bodies, such as county commissions or city councils, the decision to count students in the college towns can have a dramatic political effect. Moreover, the decision to apply the usual residence rule to college students serves as a template that governs how the census counts other populations, such as prisoners.

C. *Prisoners*

How and where the census counts prisoners is likely to be the subject of much debate surrounding the 2010 Census. The decision whether to count prisoners in prison as opposed to the state or census block of their pre-incarceration residence can have substantial regional effects, which sometimes correlate with the distribution of racial minority populations within a state.[111] Under the "usual residence" standard, prisoners generally eat, sleep and work in their place of confinement.[112] Therefore, *Stans* held that "[p]ersons confined to institutions where individuals usually stay for long periods of time, such as penitentiaries or correctional institutions, mental institutions, homes for the needy or aged, or hospitals for the chronically ill, are enumerated as residents of the state where they are confined."[113] The district court hearing the case of *District of Columbia v. United States Department of Commerce*[114] came to the same conclusion, finding that the application of the usual residence rule to prisoners was not arbitrary, capricious, or

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110 *Id.* at 580-81.

111 *See* Peter Wagner, *Outdated Methodology Impairs Census Bureau's Count of Black Population*, PRISONERS OF THE CENSUS (May 3, 2004), http://www.prisonersofthecensus.org/news/2004/05/03/blackpopulation (discussing abnormal African American population gains in many rural counties due to new prisons and arguing that "[t]he Census Bureau's method of counting the incarcerated disproportionately counts Blacks in the wrong place[; a]ssigning the incarcerated to the prison address is an outdated method of collecting data that reduces the value of Census information about the racial makeup of our communities"). *See generally* Peter Wagner, Aleks Kajstura, Elena Lavarreda, Christian de Ocejo & Sheila Vennell O'Rourke, *Fixing Prison-Based Gerrymandering After the 2010 Census: A 50 State Guide*, PRISONERS OF THE CENSUS (Mar. 2010), http://www.prisonersofthecensus.org/50states.

112 Dist. of Columbia v. U.S. Dep't of Commerce, 789 F. Supp. 1179, 1180 (D.D.C. 1992).

113 *Stans*, 449 F.2d at 582.

114 789 F. Supp. 1179.

unconstitutional. The plaintiffs there argued that prisoners at a Virginia prison funded by the District of Columbia should be counted as if they lived in the District of Columbia.[115]

The counting of prisoners in prison can create dramatic disparities between districts in their numbers of eligible voters. In some state legislative districts, for example, over ten percent of the population resides in prison.[116] The disparities can be even greater at the local level. In twenty-one counties in the country, over twenty percent of the population is in prison, leading to huge variations in eligible voter populations between districts.[117] The counting of prisoners in prison can also have a dramatic racially disparate impact. In several states, such as New York and Illinois, the prison population is heavily minority and from urban centers, while prisons are located in rural, largely white counties.[118] That pattern is hardly uniform, though, and states vary considerably as to the extent of demographic differences between communities that house prisons and those from which the prison population originates.

A notable recent study by Jason Kelly has argued that legislatures use prison populations in a systematic manner to effect the goals of gerrymandering.[119] Whichever party controls the redistricting process, it tends to use prisons strategically to enhance the party's representation. This process can "free up an equal number of citizens to be distributed among the neighboring marginal ones, thereby increasing that party's likelihood of picking up additional seats in the state legislature."[120] Although various factors can limit a legislature's power or will to gerrymander in this manner,[121] Kelly concludes that the practice often affects the partisan makeup of state legislative chambers.[122]

In order to allow states to address the concerns raised by the critics of its "normal residence rule" as applied to prison populations, the Census Bureau, for the first time, will make available to jurisdictions in time for the 2011 redistricting the number of prisoners in each census

115 *Id.* at 1185-86.

116 *See* WAGNER ET AL., *supra* note 111.

117 *See* Peter Wagner, *Twenty One Counties Have Twenty One Percent of Their Population in Prisons and Jails*, PRISONERS OF THE CENSUS (Apr. 19, 2004), http://www.prisonersofthecensus.org/news/2004/04/19/twenty-one.

118 *See A Dilution of Democracy: Prison-Based Gerrymandering*, DĒMOS, http://www.demos.org/pubs/prison_gerrymand_factsheet.pdf (last visited Dec. 13, 2010); Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, PRISON POL'Y INITIATIVE, http://www.prisonpolicy.org/importing/importing.html (last updated May 20, 2002).

119 Jason P. Kelly, The Strategic Use of Prisons in Partisan Gerrymandering (Nov. 30, 2010) (unpublished postdoctoral dissertation, Princeton University) (on file with *Cardozo Law Review*).

120 *Id.* at 3-4.

121 The existence of a nonpartisan commission, for example, or a requirement that the state's governor approve of the districting plan can affect the likelihood of prison-based gerrymandering. *Id.* at 7-10, 23-25.

122 *Id.* at 25.

block.[123] This will allow states, again for the first time, to subtract out prisoners from the published redistricting data set. Although they will not be able to use the census data to reallocate prisoners to their former residences, this change could still address most of the disparities caused by so-called "prison-based gerrymandering."[124] Three states have gone even further, though. Maryland,[125] Delaware,[126] and New York[127] have passed laws to reallocate prisoners to their pre-incarceration addresses for purposes of redistricting.

At this point in the census cycle, one can only guess as to the legal consequences of these policy changes. Presumably, under *Burns v. Richardson*, discussed above, the subtraction of prisoners does not pose any problems under one-person, one-vote. Just as a state can base its redistricting on equal numbers of registered voters, so too it can base it on equal counts of the non-incarcerated population. Indeed, many localities, sometimes pursuant to state law, have historically subtracted prisoners from their redistricting population data.[128]

What about the *failure* to subtract prisoners? Could that now constitute the basis for either a claim of malapportionment or, if there is a racially disparate impact, a violation of section 2 of the VRA? To be sure, if such ways of counting prisoners are illegal now, then they have always been. But jurisdictions formerly could have said that the census data simply did not enable subtracting out prisoners in time for redistricting. Now that the Bureau is making it easier for states to do so, on what basis could a state justify its decision to pad some districts to the detriment of others, if doing so has a racially disparate impact under section 2?

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123 *See* Peter Wagner, *Using the Census Bureau's Advanced Group Quarters Table*, PRISONERS OF THE CENSUS, http://www.prisonersofthecensus.org/technicalsolutions.html (last updated Dec. 9, 2010).

124 Editorial, *Prison-Based Gerrymandering*, N.Y. TIMES, May 20, 2006, at A12, *available at* http://www.nytimes.com/2006/05/20/opinion/20sat3.html.

125 No Representation Without Population Act, 2010 Md. Laws ch. 66 (codified in scattered sections of MD. CODE ANN.), *available at* http://mlis.state.md.us/2010rs/chapters_noln/Ch_66_sb0400T.pdf; Peter Wagner, *Maryland Enacts Law to Count Incarcerated People at Their Home Addresses*, PRISONERS OF THE CENSUS (Apr. 13, 2010), http://www.prisonersofthecensus.org/news/2010/04/13/maryland_law.

126 *See* Peter Wagner, *Delaware Passes Law to Count Incarcerated Persons at Their Home Addresses for Redistricting*, PRISONERS OF THE CENSUS (July 7, 2010), http://www.prisonersofthecensus.org/news/2010/07/07/delaware_law.

127 Act of Aug. 11, 2010, ch. 57, pt. XX, § 3, 2010 Sess. Law News of N.Y. 724, 815 (McKinney) (amending N.Y. MUN. HOME RULE LAW § 10 (McKinney 2010)) ("[N]o person shall be deemed . . . to have become a resident of a local government . . . by reason of being subject to the jurisdiction of the department of correctional services and present in a state correctional facility . . . ."); *id.* §1, 2010 Sess. Law News of N.Y 724, 814 (McKinney) (amending N.Y. CORRECT. § 71 (McKinney 2010)) (requiring the department of correctional services to provide the legislature with information on prisoners' former residences).

128 *See Local Governments That Exclude Prison Populations*, PRISONERS OF THE CENSUS, http://www.prisonersofthecensus.org/local (last updated Nov. 17, 2010).

Finally, how will courts adjudicate the reallocation of prisoners? Although this practice is not entirely new, it will be more widespread for the 2011 redistricting. Plaintiffs seeking to undermine a redistricting map may argue that such reallocations have the perverse effect of placing people into addresses where they have not lived for years and may never live again (if they are sentenced for life). For some prisoners previous addresses are unavailable, and for others, such as those in federal prison, they would need to be reallocated out of state. Reallocation also will lead to "strangers" "occupying" the same house for purposes of redistricting, but not for other purposes where census numbers may be employed. As argued above, courts have traditionally been deferential when it comes to census counting methods. Will they treat the counting and reallocation of prisoners with the same degree of deference under either one-person, one-vote or the Voting Rights Act?

CONCLUSION

The Framers of the Constitution knew that the census was a political hot potato. At the same time, they recognized that, by providing the foundation for representative government, the census would be essential to the workings of American democracy. Much has changed with respect to the census since the Constitution's drafting. No longer do we count African Americans as three-fifths of a person, nor do we tie taxation to a state's population total, nor can states allow their legislative districts to remain unchanged in the face of population shifts.

The process of taking the 2010 Census, like that for all its predecessors, exhibits both traditional and modern features. Change is a constant with the census: Every census has differed from its predecessor in some important respect. The greatest hope for reformers is that we learn from the mistakes of the past and try to attack the problems—how to count, what to count, whom to count and where to count them—with an appreciation of the demographic changes each census reveals.