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Census Politics Revisited: What to Do When the Government Can't Count?

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Census Politics Revisited: What to Do When the Government Can't Count?

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Census, United States House of Representatives v. United States Department of Commerce, Glavin v. Clinton

COMMENTS

CENSUS POLITICS REVISITED: WHAT TO DO WHEN THE GOVERNMENT CAN'T COUNT?

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INTRODUCTION

American censuses do a better job of counting whites than they do racial and ethnic minorities.¹ Because America is a democracy, where political clout inheres in numbers, this failure to count minorities adequately poses fundamental problems.² Indeed, census figures are used to determine the distribution of political power in the institutions that comprise the very heart of our democracy.³ First, the 435 seats in the House of Representatives are apportioned among the states on the basis of population information provided by the Census Bureau.⁴ Second, seats in Congress and state legislatures are distributed within the states based on the population of towns and counties as determined by the decennial census.⁵ Third, some \$200 billion in federal funds and untold billions in state funds are

1. The phenomenon of counting the white population more accurately than non-white populations is known as the "differential undercount." See NATIONAL RESEARCH COUNCIL, MODERNIZING THE U.S. CENSUS 32, 33 (Barry Edmonston & Charles Schultze eds., 1995) [hereinafter MODERNIZING THE U.S. CENSUS]. The most recent census failed to count 5.7% of blacks, while it missed only 1.3% of whites. See *id.* at 32 (charting the undercount problems).

2. Indeed, the strength and durability of our democracy is rooted in the belief that national decisions are made by elected officials acting as representatives for the people. See THE FEDERALIST NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961) ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States."). Thus, if seats in our legislature are distributed on the basis of population information that systematically undercounts certain minority groups, our system has broken down.

3. See *infra* notes 4-6 and accompanying text (describing the different uses to which census data is put).

4. See U.S. CONST. art. I, § 2, cl. 3 (stating that seats in the House are to be distributed among the states on the basis of population and that the population of each state is to be determined every 10 years); 13 U.S.C. § 14(b) (1994) (stating that the census of the population is required for the apportionment of seats in the House of Representatives).

5. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 244 (noting that the states began to use census data for federal and state redistricting in the 1960s). Unequal representation in the House was pervasive prior to the 1960s. See *id.* Indeed, after reapportionment and redistricting in 1960 the largest congressional district in the U.S. had over five times the population of the smallest district, and the 20 most populous districts had a combined population of 14 million compared with a combined population of 4.6 million for the 20 smallest districts. See *id.*

allocated to states and cities each year on the basis of population.⁶ Accordingly, congressional apportionment and redistricting, and the distribution of funds under many government programs will continue to be carried out in an unjust manner if the American census does not become more accurate.⁷

For the year 2000 census, the Clinton Administration (the "Administration") has proposed to ameliorate the problem of the minority undercount by supplementing census figures with figures determined by the use of statistical sampling.⁸ Under this proposal, statistical sampling would be used in the census to extrapolate information about the entire population from partial data.⁹ The Administration decided to use statistical sampling in the census after years of study by Census Bureau officials and at the behest of the National Academy of Sciences and other statistics experts.¹⁰ Because the census is of political as well as scientific concern, the Administration's plan has been the subject of two court challenges.¹¹

6. See David Seidman, Note, *Numbers That Count: The Law and Policy of Population Statistics Used in Formula Grant Allocation Programs*, 48 GEO. WASH. L. REV. 229, 229 (1980) (noting that more than one hundred federal programs use total population or some segment of the population as a factor in allocating federal funds). The following are two examples of the many federal programs that require population information and thus, mandate the Census Bureau to compile such information. First, the Elementary and Secondary Education Act requires data on the poverty status of school-age children by school district to allocate education funds to poorer districts. See 20 U.S.C. § 821 (1994). Second, the Department of Agriculture uses information regarding the income for tracts and rural counties to allocate grant funds. See 42 U.S.C. § 1786 (1994); see also MODERNIZING THE U.S. CENSUS, *supra* note 1, at 24.

7. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 35 ("There are several implications of the undercount for minority groups. In political representation and funding based on population, undercounted groups get less credit for their population than they are due.").

8. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, REPORT TO CONGRESS—THE PLAN FOR CENSUS 2000, at 23 [hereinafter REPORT TO CONGRESS] (defining "sampling" as using information on a portion of the population to infer information about the population as a whole). The Census Bureau claims that its plan will improve accuracy, save money, and "eliminate the traditional undercount of children, renters, and minorities." See *id.*

9. More specifically, the Census Bureau plans to use traditional methods to count 90% of the households in a census tract—a neighborhood of about 1,700 dwellings. See Steven A. Holmes, *Court Voids Plan to Use Sampling for 2000 Census*, N.Y. TIMES, Aug. 25, 1998, at A1. Data from the 90% of households would be used to determine the number and characteristics of the remaining 10%. See *id.*

10. The Administration's plan has been endorsed by panels at the National Academy of Sciences, American Statistical Association, the American Sociological Association, the General Accounting Office, and the Inspector General of the Department of Commerce. See REPORT TO CONGRESS, *supra* note 8, at 24.

11. See *United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp. 2d 76, 78 (D.D.C. 1998) (involving a suit by the Republican-controlled House), *dismissed by*, 119 S. Ct. 765 (1999); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 548-49 (E.D. Va. 1998) (involving a suit by individual citizens from counties in six states, including Representative Bob Barr (R-Ga.)), *aff'd sub nom.* *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765 (1999). The Census Act is not entirely clear on the legality of sampling. Indeed, § 141(a) and § 195 of the Census Act seem to contradict each other. Section 141(a) reads, in relevant part: "The Secretary shall take a decennial census of the population . . . in such form and content as he may determine, including the use of sampling

The politics of the census dispute are very simple.¹² Democrats seek to reform the census to count minority groups more accurately because these groups tend to vote Democratic,¹³ while Republicans oppose these reforms for exactly the same reason.¹⁴ Whatever the motivations fueling the census debate, much of the battle can be reduced to an issue of statutory construction: Does the Census Act prohibit the Census Bureau from using statistical sampling to supplement census figures compiled through traditional headcount methods?¹⁵

This Comment explores the legality of the Administration's plan for the 2000 census and assesses the effect of a consistently inaccurate census on the American body politic. Part I examines the undercount and the differential undercount problem and describes the Administration's proposed changes to the census. Part II discusses the two court challenges to the Administration's plan, explaining how two lower courts and the Supreme Court reached the conclusion that the use of statistical sampling for the purpose of apportioning the House violates the Census Act. Part III argues that the Supreme Court ruling represents only a limited setback for the Administration and sampling proponents. Significantly, the ruling makes the use of statistical sampling unlawful in connection with apportionment, but does not prohibit the use of sampling-adjusted

procedures and special surveys." 13 U.S.C. § 141(a) (1994). This language appears to authorize the use of statistical sampling. Section 195 of the Census Act, however, states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several states, the Secretary shall . . . authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." *Id.* § 195. This section appears to prohibit the use of statistical sampling in conducting the census because census information is used to apportion seats in the House under the Constitution. *See* U.S. CONST. art. 1, § 2, cl. 3.

12. *See* Holmes, *supra* note 9, at A1 (noting that the issue has achieved heightened importance because many believe that statistical sampling would count minority voters missed under recent censuses and that counting them would produce new congressional and state legislative districts likely to vote Democratic).

13. *See id.*

14. One editorial writer believes that:

The Republicans fear that a more precise count will turn up more immigrants, minorities, the poor and the young, who are likely to swell population in urban centers that lean toward the Democrats. But because an overt campaign against a fair count would be unseemly and politically risky, the Republicans have seized upon the abstract that sampling violates the constitutional requirement of 'actual enumeration.'

Editorial, *Impeding an Accurate Census*, N.Y. TIMES, Aug. 25, 1998, at A16.

15. Both the *Glavin* and the *House of Representatives* courts held that the Census Act was determinative in the fight over sampling. *See House of Representatives*, 11 F. Supp. 2d at 104 (holding that the use of statistical sampling to determine the population for the purpose of the apportionment of representatives in Congress among the states violates the Census Act); *Glavin*, 19 F. Supp. 2d at 552 (holding that "where section 195 is a specific statutory prohibition of sampling for apportionment of Congress, it prevails over the more general provisions of section 141's grant of authority to the Secretary").

census figures for other purposes. Finally, Part IV makes recommendations to the Administration, the states, and Congress regarding ways to remedy the differential undercount problem in the 2000 census without violating the Census Act.

I. RECENT HISTORY OF THE CENSUS

There has never been a completely accurate census of the American population.¹⁶ The fact that American censuses fail to count some people—that they “undercount” the population—has been known for over two centuries.¹⁷ More recently, we have learned that American censuses not only undercount the population generally, but they undercount racial minorities at higher rates than whites.¹⁸ The shortcomings of the census—and its successes as well—are the product of censuses that attempted to count directly every person in the country.¹⁹ In its plan for the 2000 census, the Administration proposes to supplement census figures from this direct contact method with figures derived from a series of surveys that involve the use of a counting technique known as “statistical sampling.”²⁰

A. *The Undercount Problem*

The undercount is neither a new nor a complex problem.²¹ An

16. “There have been twenty decennial censuses in the history of the United States. Although each was designed with the goal of accomplishing an ‘actual Enumeration’ of the population, no census is recognized as having been wholly successful in achieving that goal.” *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996).

17. Beginning with America’s first census in 1790, observers have been skeptical about census accuracy. *See* C. WRIGHT, HISTORY AND GROWTH OF THE UNITED STATES CENSUS 16-17 (1900) (explaining how Thomas Jefferson, then Secretary of State, was sure that many Americans were not counted by the 1790 census); *see also infra* note 21 and accompanying text (documenting America’s evolving views regarding census accuracy throughout our history).

18. The 1990 census missed 4.4% of African-Americans, 5.0% of Hispanics, and 12.2% of American Indians living on reservations, while it missed only 0.7% of non-Hispanic whites. *See* REPORT TO CONGRESS, *supra* note 8, at 4 (charting the estimated net undercount of the 1990 census).

19. The census of 1790 was conducted by United States marshals, who were directed “to visit every dwelling and count the individuals living there.” *See id.* at 1. By the end of the 19th century, professional census-takers replaced marshals, but the job of taking the census still involved enumerators visiting all households in the country. *See id.* (noting that professional enumerators were used because the population was growing faster than the number of U.S. marshals). For the portion of the census that involved counting the number of persons in the country, census-takers continued to visit each household physically until 1970, when the Census Bureau began using questionnaires in its “mail out/mail-back” procedure, followed by enumerators visiting nonresponding households. *See id.* This basic structure for census data collection did not change from 1970 through 1990. *See id.* at 2. Significantly, although there were innovations in the census over the years, census-takers always made an effort to contact directly—either by mail or in person—every household in the country. *See id.* at 1-2.

20. *See infra* Parts I.A, I.B (describing the factors that led the Administration to seek to reform the census).

21. After the controversial census of 1790—in which Washington was sure the numbers

“undercount” simply refers to the phenomenon where some percentage of the people in the country at the time of the census are not counted by the census. The United States first acknowledged the extent of the undercount after the 1940 census,²² when it was discovered that 5.4% of the population went uncounted.²³ In each of the four censuses that followed—the 1950, 1960, 1970, and 1980 censuses—the undercount rate decreased,²⁴ demonstrating that the ability of the Census Bureau to count the entire population improved over that period.²⁵ In 1990, however, the undercount rate grew for the first time since such records have been kept.²⁶

The fact that a very small percentage of Americans are not counted by the decennial census is neither surprising nor controversial.²⁷ With an ever-growing population—now estimated at close to 270 million—it is unrealistic to expect census takers to count 100% of the

were undercounted because some people had “religious scruples” against a census, others feared the imposition of a tax, and some of the officers responsible for the census had not done their jobs properly—debates over undercounting disappeared for more than a century. *See* HARVEY M. CHOLDIN, *LOOKING FOR THE LAST PERCENT: THE CONTROVERSY OVER CENSUS UNDERCOUNTS* 42 (1994) (noting that in the 19th century and early 20th century, census officials assumed that censuses counted all of the people). After the 1940 census, however, the Bureau admitted that there had been an undercount—marking the beginning of a period continuing to the present day in which the Census Bureau acknowledged that it cannot accurately count the entire U.S. population. *See id.* at 42-43.

22. An early study of the undercount was aided greatly by the fact that in 1940, in addition to the decennial census, there was also a compulsory registration of all males for the military draft. *See id.* at 43 (noting that a comparison of the census figures and the draft figures reveal that the draft had registered more men than the census had enumerated).

23. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 32 tbl. 2.1 (charting the undercount for every census from 1940-1990).

24. *See id.* (showing that the undercount rate steadily decreased from 5.4% in 1940, to 4.1% in 1950, 3.1% in 1960, 2.7% in 1970, and 1.2% in 1980).

25. The steady decrease in the undercount rate took place as census administrators were changing the process of census-taking in fundamental ways. *See* REPORT TO CONGRESS, *supra* note 8, at 1. The Census Bureau introduced two major innovations during this time. First, in 1940, the Bureau introduced its “short form” questionnaire, which posed several, very basic questions to a household, for the majority of the population, leaving the “long form,” with many more questions, for only a sample of the population. *See id.* Prior to 1940 all residents had been asked to complete the “long form” questionnaire. *See id.* A second major innovation came in 1970 when the Bureau introduced self-enumeration by mail. *See id.* Rather than send an enumerator (a Census Bureau employee) to every household, the Bureau first mailed questionnaires for households to fill out and mail back, and then sent enumerators only to non-responding households. *See id.* The basic structure for census data collection has not changed since this innovation in 1970. *See id.*

26. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 32 (showing that the 1990 census undercounted 4.7 million people, or 1.8% of the U.S. population, while the 1980 census only undercounted 2.8 million people, or 1.2% of the population).

27. One reason for the persistent undercount is that much of the population refuses to cooperate with census-takers. *See* REPORT TO CONGRESS, *supra* note 8, at 6 (noting that only 65% of households mailed back their census questionnaires in the 1990 census). This phenomenon should not be a surprise. Americans of the 1990s are busier, more mobile, more likely to speak a primary language other than English, and more suspicious of government than at most times in our history. *See id.* at 5.

people in the country.²⁸ Thus, although the undercount caused concern over the years for census officials, academics, and interested politicians, it was not a divisive problem.²⁹ The same studies that chart the persistent, relatively uncontroversial undercount problem reveal another problem with U.S. censuses, however, and this problem is both troubling and extremely controversial.³⁰ The undercount rate is not the same for all racial groups.³¹

28. The Census Bureau described how four basic characteristics of the American population in the 1990's hinder the work of census-takers. *See id.* First, the Census Bureau noted that in 1990 "[a]n increasing number of Americans were too busy to be counted. The number of people working more than one job had increased, along with the number of multiple-worker families, so people were home less often when enumerators visited." *Id.* Second, the large amount of junk mail that Americans received obscured important documents such as census forms. *See id.* Third, more Americans were living in housing that was remote or inaccessible—including gated communities with uncooperative security guards. *See id.* Finally, many Americans were "alienated from society in general and more distrustful of government in particular." *Id.* Although these new developments in American demographics have increased the difficulty of census-taking, it has long been known that an entirely accurate census is impossible to achieve. *See, e.g.,* *Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996) (recognizing that although each census is designed "with the goal of achieving an 'actual enumeration' of the population, no census is recognized as having been wholly successful in achieving that goal"); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (stating that "census data are inherently less than absolutely accurate").

29. *See* James Pack, *The Census Adjustment Cases: The Hunt for the Wily Trout*, 37 JURIMETRICS J. 35, 36 (1996) (noting that an undercount spread evenly throughout the population would be uncontroversial because it would have little impact on governmental use of the results). An example of the non-partisan character of the general undercount problem is that there were virtually no legal challenges to the manner in which the census was conducted until the 1970s. *See* Seidman, *supra* note 6, at 232. Indeed, there were no court challenges to Census Bureau procedures following the 1940, 1950, or 1960 censuses, even though after each of those three censuses the Bureau admitted a significant undercount. *See* REPORT TO CONGRESS, *supra* note 8, at 2. In addition to the uncontroversial nature of the general undercount, the lack of legal challenges may also stem from the widely held view that Census Bureau officials were perceived as dispassionate professionals and not partisan. *See* CHOLDIN, *supra* note 21, at 16, 18 (describing the Census Bureau as the "cornerstone" of the government's statistical "edifice," with a "highly educated, experienced, professional staff" that stands "apart from politics").

30. One way to observe the controversy that the differential undercount problem has brought to modern censuses is to review the amount of litigation surrounding the census. *See* Sheldon T. Bradshaw, *Death, Taxes, and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?*, 64 GEO. WASH. L. REV. 379, 380 (1996) (noting that 52 suits were filed against the Department of Commerce—the cabinet department within which the Census Bureau operates—in connection with the 1980 census). The two suits at issue in this Comment, of course, exemplify the politicization of the census. *United States House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d 76, 78 (D.D.C. 1998), is a suit brought by the Republican-controlled House of Representatives against the Administration, while *Glavin v. Clinton*, 19 F. Supp. 2d 543, 548-49 (E.D. Va. 1998), is a suit brought by residents of suburban congressional districts—among them Rep. Bob Barr (R-Ga.).

31. "Since at least 1940, the Census Bureau has thought that the undercount affects some racial and ethnic minority groups to a greater extent than it does whites." *Wisconsin*, 517 U.S. at 7; *see also* Linda Greenhouse, *High Court to Hear Case on Census Sampling*, N.Y. TIMES, Sept. 11, 1998, at A16 (noting that the political ramifications of the census debate stem from the fact that although census takers miss millions of people—some four million in 1990—city dwellers, poor people, and ethnic minorities in particular are missed out of proportion to their numbers).

B. The Differential Undercount

Although nearly all of America's white population is counted every ten years,³² our censuses consistently fail to count a significant percentage of the nation's minority population.³³ The minority groups that are most often uncouned by the census are those that live in America's inner cities.³⁴ The Census Bureau's counting problem is perhaps best understood as an inability to count America's urban population accurately,³⁵ and not as an inability to count racial minorities as such.³⁶ Still, the problem is demonstrated in racial terms because the survey methods used to determine the undercount focus more on race than on whether the survey participant lives in an urban, suburban, or rural community.³⁷ And undercount statistics by racial group—although maybe not as illustrative as statistics comparing urban and suburban areas—are nonetheless telling because racial minorities are more likely than whites to live in the nation's inner cities.³⁸

Each of the country's three largest minority groups is undercounted at a rate higher than whites.³⁹ This phenomenon is known as the "differential undercount."⁴⁰ The undercount of African-Americans has been documented for much longer than the undercount for other minority groups.⁴¹ The African-American undercount was first documented in 1940 and in each census since that time, African-Americans have been undercounted at significantly higher rates than whites.⁴² For example, the 1990 census failed to

32. A study by the National Academy of Sciences found that whites were undercounted at a rate of 5% in 1940, 3.8% in 1950, 2.7% in 1960, 2.2% in 1970, 0.8% in 1980, and 1.3% in 1990. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 32.

33. *See id.* at 33-35 (explaining that the census consistently undercounts African-Americans, Hispanics, and Asian-Americans).

34. *See id.* at 35 (explaining that "the people missed in the census are disproportionately concentrated in larger cities").

35. For example, states with large urban populations like California, New York, and Florida had among the highest rates of undercount in the country. *See id.* at 35-36 (documenting the level of undercount in every state in the country and characterizing the rate of undercount in those states as "very high").

36. *But see id.* at 35 (noting that "[s]tates with a population of the most undercounted groups," racial minorities, "tended to have higher net undercount rates").

37. *See id.* at 31 (noting that the survey technique used to determine the undercount in the 1990 census, a method called "demographic analysis," cannot provide estimates of the undercount rate at the state or other sub-national levels).

38. *See id.* (explaining that states with the highest populations of minority groups were the states with the highest rates of undercount).

39. *See id.* at 33-35 (noting that African-Americans, Hispanics, and Asian-Americans are consistently undercounted).

40. *See* Pack, *supra* note 29, at 36 (defining "differential undercount" as the high concentration of the undercount among racial and ethnic minorities).

41. *See* REPORT TO CONGRESS, *supra* note 8, at 4.

42. The census missed 8.4% of African-Americans in 1940, 7.5% in 1950, 6.6% in 1960,

count 5.7% of the African-American population, but missed only 0.7% of whites.⁴³ Asian-Americans and Hispanic-Americans also are undercounted at rates significantly higher than whites.⁴⁴ Unlike the general undercount rate, which basically has been in consistent decline since scientists began measuring it, the differential undercount was greater in the 1990 census than it was in the 1940 census.⁴⁵

The differential undercount is thought to be the result of several factors.⁴⁶ First, minorities in the nation's urban centers are believed to change residences more often than the rest of the population.⁴⁷ Second, undercounted groups are thought generally to be more suspicious of the government and therefore, less willing to respond to mailed census questionnaires and less vigilant about ensuring that they are counted by census takers knocking on doors.⁴⁸ In addition to these problems associated with counting urban populations, census experts attribute the undercount of Asian and Hispanic groups to the fact that some members of these groups do not speak English and therefore, are less likely to understand census questionnaires and procedures.⁴⁹

The differential undercount problem is more troubling than the undercount of the population as a whole because the consistent undercounting of minority groups threatens to make hollow the most basic promises of our democracy.⁵⁰ Unlike other nations whose

6.5% in 1970, 4.5% in 1980, and 5.7% in 1990. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 32.

43. See *id.* (noting that the 1990 census missed 5.7% of African-Americans, while it failed to count only 1.3% of "nonblacks"). The Census Bureau, meanwhile, states that the 1990 census missed 4.4% of African-Americans and 0.7% of non-Hispanic whites. See REPORT TO CONGRESS, *supra* note 8, at 4.

44. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 34 (explaining that the undercount of these groups "is likely to have been influenced by the relatively large numbers who are foreign born, people who may not have understood census questionnaires and procedures").

45. The differential undercount rate was 4.4% in 1990, while it was 3.4% in 1940. See *id.* at 32. Unfortunately, if the Census Bureau does not reform its enumerating procedures this trend is likely to continue in light of the rapid growth in the population of people more likely to be left uncouncted. See REPORT TO CONGRESS, *supra* note 8, at 5.

46. Some of the reasons that have been given for a greater undercount among minority populations are: "[P]overty, lack of education, language communication problems between respondents and enumerators, irregular living arrangements, and fear of revealing information about family that may jeopardize eligibility for government income programs." Abby L. Jennis, *The Census Undercount: Issues of Adjustment*, 18 COLUM. J.L. & SOC. PROBS. 381, 382 n.10 (1984).

47. See REPORT TO CONGRESS, *supra* note 8, at 5-6 (noting that the groups most likely to be left uncouncted by the census tend to be "highly mobile").

48. See *id.* at 6 (explaining that neighborhoods with high undercount rates tend to possess conditions "that lead to resistance to outsiders, concealment to protect resources, and disbelief of census confidentiality").

49. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 34.

50. The differential undercount results in a systematic deprivation of political power. "In political representation and funding based on population, undercounted groups get less credit

strength and vitality derive from the common heritage of their populations, America's strength is rooted in the people's shared faith in certain ideas. Among the most fundamental of these ideas is the idea that all persons are to be represented equally.⁵¹ It is impossible, however, for our elected leaders to represent all persons equally if we do not first accurately determine the racial and ethnic composition of the American population. Thus, America is not true to its commitment to political equality when racial minorities are consistently undercounted at rates disproportionate to whites.⁵²

In addition, the differential undercount causes inequities that are more tangible as well. These problems include the underrepresentation of minority communities in Congress and in state legislatures,⁵³ and the inequitable distribution of funds under government programs to minority communities.⁵⁴

A perfect example of the myriad inequities that the Administration is seeking to rectify through the use of sampling in the census can be seen in the city of Hartford, Connecticut.⁵⁵ As the city with the sixth highest rate of undercount in the 1990 census, Hartford's predominantly minority population was undercounted by about 6,500 persons.⁵⁶ The 6,500 person undercount has resulted in Hartford losing a seat in the state legislature and receiving

for their population than they are due." *Id.* at 35 (noting that minority areas have fewer elected representatives at the federal, state, and local level than their numbers demand). This state of affairs is antithetical to the idea of political equality upon which America is based. In what has been called the "seminal statement of the American Creed," JOSEPH J. ELLIS, *AMERICAN SPHINX, THE CHARACTER OF THOMAS JEFFERSON* 54 (1997), Thomas Jefferson wrote in the Declaration of Independence:

We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain [inherent and] inalienable Rights; that among these are life, liberty & the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

51. Justice Douglas summed up the principle of equal representation with his simple, yet extremely powerful "one person, one vote" formulation when he stated that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1962).

52. See *supra* note 50 and accompanying text (explaining how the differential undercount is incongruous with the fundamental American ideal of political equality).

53. See *infra* Part III.B (outlining the effect of the differential undercount on the political representation of undercounted groups).

54. See *infra* Part III.A (documenting the effect of the differential undercount on the distribution of funds under government programs).

55. See Barbara Vobejda, *In Hartford, Census Sampling Could Count for A Lot—In Added Aid*, WASH. POST, Feb. 12, 1999, at A6 (describing the effects of the undercount in the 1990 census on the city of Hartford and detailing the potential benefits to the city of a sampling-adjusted census).

56. See *id.* (explaining that Hartford's undercount in the 1990 census was determined by a survey conducted after the census).

approximately \$5 million less each year from the federal government than it would if the city's population was accurately counted by the census.⁵⁷ That \$5 million in federal aid would come in the form of homes for people with low incomes, child care centers, and more social service programs that bring food to the elderly and counsel victims of domestic violence.⁵⁸ Additionally, if Hartford's true population is counted by the 2000 census, state aid to the city will increase significantly.⁵⁹ The fact that federal and state assistance of this kind is needed in Hartford—America's eighth poorest city⁶⁰—is poignant and important. The central concern of this Comment, however, is that cities receive their appropriate share of funds under federal population-based programs and their deserved level of representation in Congress and state legislatures.⁶¹ The full extent of these problems, and the manner in which the Administration's plan to use statistical sampling in the census could potentially ameliorate them, will be explored in later sections of this Comment.⁶²

C. The Administration's Plan for the 2000 Census

In the upcoming 2000 census, the Administration plans to alter significantly traditional census-taking procedures in an attempt to produce a more accurate census, and in so doing remedy the differential undercount problem.⁶³ Previous censuses have determined the characteristics of the U.S. population solely on the basis of direct contact between census administrators and U.S. households.⁶⁴ This method of census data collection has two parts. The Census Bureau mails questionnaires to households for inhabitants to fill out and mail back and then sends enumerators only

57. *See id.*

58. *See id.*

59. The infusion of state funds would have almost as significant an impact as the federal funds. The 1990 census failed to count 2,228 Hartford children. *See id.* Had they been counted, Hartford would have four more schools and 155 new teachers under state population-based programs. *See id.*

60. *See id.*

61. *See infra* Parts III.A, III.B (documenting the vast sums of money at stake under federal and state population-based programs and the potential shift in political representation that could result from a sampling-adjusted census).

62. *See infra* Parts III, IV (describing the effect of the differential undercount on the allocation of funds under government programs and the drawing of congressional and state legislative districts, and the potential impact of a sampling-adjusted census on these problems).

63. *See* REPORT TO CONGRESS, *supra* note 8, at ix.

64. *See id.* at x (describing the manner of census-taking where specific individuals communicate with Census Bureau officials either through the mail or in person as "physical enumeration").

to households that fail to return questionnaires.⁶⁵ In each recent census, the Bureau has spent increasing amounts of money to heighten public awareness about the importance of being counted by the census, and to hire the number of enumerators necessary to collect information adequately from the ever-growing list of households that do not respond to the mailed questionnaires.⁶⁶ Despite the increased efforts of the Census Bureau, the undercount and differential undercount problems persist.⁶⁷ In the 1990 census—the most expensive census in history⁶⁸—the undercount rate grew for the first time since 1940 and the differential undercount was greater than it has ever been.⁶⁹

The Administration's plan for the 2000 census is based on the assumption that the traditional model of census-taking is fundamentally flawed.⁷⁰ The Census Bureau believes the direct contact method is both inherently incapable of accurately counting the entire population, and particularly ill-prepared to count the diverse and mobile American population of today.⁷¹ The Census Bureau and sampling proponents point to the 1990 census as support for their critique of the direct contact model.⁷² Despite the Census Bureau's unprecedented efforts to count everyone through the direct contact method, the 1990 census resulted in a greater rate of general undercount than the 1980 census,⁷³ and was less successful at counting minorities and other inner-city populations than previous

65. *See id.* at 1-2 (noting that this basic structure did not change from 1970, when the Census Bureau introduced self-enumeration by mail, through 1990).

66. For example, the 1990 census cost more money than any previous census, employing more than half a million people around the country to collect information from the approximately 36 million addresses that did not respond by mail. *See id.* at 4. Also, the Census Bureau spent approximately \$125 million on advertising campaigns directed at minority communities, those areas with the greatest risk of a large undercount. *See id.*

67. *See supra* Parts I.A, I.B (documenting the development of the undercount and the differential undercount problems).

68. The 1990 census cost \$25 per housing unit. *See* REPORT TO CONGRESS, *supra* note 8, at 5. On an inflation adjusted basis, the 1970 census had cost only \$11 per housing unit and the 1980 census \$20 per housing unit. *See id.*

69. The undercount rate grew to 1.8% in 1990 from 1.2% in 1980, while the differential undercount was 4.4% in 1990. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 32.

70. The Report to Congress claims that:

It is fruitless to continue trying to count every last person with traditional census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous Censuses, will not lead to improved coverage or data quality.

See REPORT TO CONGRESS, *supra* note 8, at 7 (citing MODERNIZING THE U.S. CENSUS, *supra* note 1).

71. *See id.*

72. *See id.* at 2 (stating that the results of the 1990 census demonstrate that new methods are needed).

73. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 32 (documenting the growth in the general undercount).

censuses.⁷⁴

The Administration's plan for the 2000 census assumes that the traditional direct contact method alone will not count these groups adequately.⁷⁵ The unique characteristics of today's urban population make direct contact census-taking less effective.⁷⁶ According to the Administration, the direct contact model is flawed because large numbers of minorities are either incapable of cooperating with census officials or are unwilling to do so.⁷⁷ This lack of cooperation exists because the nation's minority population is more likely to be mobile, speak a language other than English in the home, live in nontraditional housing arrangements, or live in neighborhoods where there is a resistance to outsiders, particularly government officials.⁷⁸ Thus, the Administration plans to supplement the results of the traditional headcount with statistical sampling.

The Administration plans to use a statistical sampling methodology in the 2000 census in three phases,⁷⁹ where information on a portion of the population will be used to infer information on the population as a whole.⁸⁰ First, the Census Bureau plans to use this methodology in the "Postal Vacancy Check" phase of the census.⁸¹ In this phase, census administrators seek to determine which of the households listed as vacant by the United States Postal Service ("USPS") are unoccupied.⁸² To correct anticipated errors in the USPS list, the Census Bureau will send interviewers to one out of every ten of the housing units that the USPS indicates as vacant.⁸³ The number of housing units found occupied and the number of people living there will be used to estimate the total population of homes initially

74. *See id.* (noting that the differential undercount in 1990 was 4.4%).

75. *See* REPORT TO CONGRESS, *supra* note 8, at 7 (calling it "fruitless" to try to count accurately the whole population through the traditional direct contact method).

76. The Census Bureau found that the population of people more likely to be left uncounted has grown more rapidly than the total population. *See id.* at 6. Communities with high undercount rates tend to have the following characteristics to a greater degree than the rest of the country: high level of mobility, language barriers, nontraditional housing arrangements, and neighborhood conditions that tend to lead to resistance to outsiders. *See id.* at 7.

77. *See id.*

78. *See id.* at 6 ("Because higher proportions of the nation's . . . minorities live in these situations, it should not be surprising that their undercount rates are higher.").

79. The three phases are the "Postal Vacancy Check," "Nonresponse Follow-Up," and "Integrated Coverage Measurement." *See id.* at 26, 29.

80. *See* Holmes, *supra* note 9, at A1 (stating that data from 90% of the homes in the country will be used to determine the number and characteristics of the remaining 10% of the population).

81. *See* REPORT TO CONGRESS, *supra* note 8, at 26.

82. The Census Bureau estimates that the Postal Service will identify about 5% of households as vacant in 2000. *See id.*

83. *See id.*

designated as vacant.⁸⁴ This method was used in the 1970 census and is less controversial than the other two planned uses of sampling.⁸⁵

The Administration also plans to use statistical sampling to determine the characteristics of the portion of the population that fails to return the mailed questionnaires.⁸⁶ In conducting the 2000 census, the Administration plans to rely mainly on mail returns of census questionnaires, as it has in every census since 1970.⁸⁷ Many households, however, do not return the mailed questionnaire: in 1970, when the mailed questionnaire was first utilized, the mail response rate was 78%, it declined to 65% in 1990, and is projected to remain the same in 2000.⁸⁸

The Bureau will attempt to contact the households that do not respond to the mailed questionnaire in the "Nonresponse Follow-Up" phase of the census.⁸⁹ The Bureau has divided the country into roughly 60,000 census tracts, which are neighborhoods with roughly 1,700 housing units and 4,000 people.⁹⁰ Census officials plan to contact 90% of households directly in each census tract.⁹¹ To obtain information from 90% of housing units in each census tract, those tracts with lower mail response rates will have a higher share of housing units visited by census officials in the follow-up stage.⁹² For example, for census tracts in which 80% of addresses return their forms by mail, the enumerators will be assigned randomly-selected addresses that represent half of the addresses that did not respond.⁹³ While, if only 70% of addresses return their forms, enumerators will be assigned to two out of every three addresses not responding.⁹⁴

84. *See id.*

85. The uncontroversial nature of sampling in the "Postal Vacancy Check" phase of the census is demonstrated by its absence from the legal challenge in either of the two lawsuits that are the subject of this Comment. *See United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp. 2d at 76, 80-81 (D.D.C. 1998) (noting that only sampling in the "Nonresponse Follow Up" and "Integrated Coverage Measurement" phases was being challenged); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 546 (E.D. Va. 1998) (same).

86. The Census Bureau calls this phase of the census "Nonresponse Follow-Up." *See* REPORT TO CONGRESS, *supra* note 8, at 26-27.

87. *See id.*

88. *See id.* (documenting the declining mail response rate).

89. The projected mail response rate in 2000 of approximately 65% will leave nearly 34 million occupied households that did not respond. *See id.* at 26.

90. *See id.* at 27.

91. The 90% figure is a combination of the percentage of homes that returned mailed questionnaires and those actually visited by enumerators in the follow-up stage. *See id.*

92. The group of houses that the enumerators visit is known as the "sample." *See id.*

93. The Census Bureau's goal for total direct contacts in each census tract is 90% of households. Thus, if 80% of households returned their questionnaires and half of the non-responding 20% of homes were visited in the follow-up stage, the 90% goal would be reached. *See id.* at 28.

94. The goal is 90% total direct contacts. *See id.*

After enumerators visit the sample housing units, the characteristics of those units will be used to estimate the characteristics of the housing units not in the "Nonresponse Follow-Up" sample.⁹⁵

In the third use of statistical sampling in the 2000 census, the "Integrated Coverage Measurement" phase ("ICM"), the Census Bureau plans to interview a random sample of 750,000 households to determine what proportion of the people living in the sample blocks were included and what proportion were excluded in the initial phases of the census.⁹⁶ The information from this sample will then be used to adjust the census figures for the population as a whole.⁹⁷

To select the sample 750,000 households, the Census Bureau plans to classify each of the country's seven million blocks into groups known as strata.⁹⁸ These strata will be based on the characteristics of each block in the 1990 census, such as the block's state, racial and ethnic composition, and proportion of homeowners to renters.⁹⁹ Enumerators will then conduct interviews at the 750,000 housing units in the sample blocks.¹⁰⁰ Housing units in which the census data compiled before the ICM interview is different from that received in the ICM interview will be assigned to a follow-up interview.¹⁰¹ Comparing the results of the ICM with the results of the initial phase will reveal whom, if anybody, was missed in the sample blocks.¹⁰² Finally, the relative accuracy of the ICM responses and the initial phases of the census in determining the true population of the sample households will be determined and then used to adjust the population for the country as a whole.¹⁰³

95. For example, in a census tract with 1,000 housing units and mail responses from 800 housing units, information on the remaining housing units would be based on a one in two sample of 100 housing units. *See id.*

96. This phase seeks to count persons missed in household units that did supply some information in the earlier phases of the census. *See id.* at 29.

97. The Census Bureau will use a statistical method known as Dual System Estimation to estimate the extent to which housing units and people were correctly included in the initial data collection phase, missed, or counted in error for each state. *See id.* at 31.

98. *See id.* at 30.

99. The Census Bureau will then select blocks at random for each stratum, for a total of 25,000 blocks. *See id.* With blocks having an average of 30 housing units, the ICM will obtain information from 750,000 housing units. *See id.*

100. These interviews will help establish an independent roster of Census Day residents in the sample blocks that will be compared with census information from the initial phases. *See id.*

101. The follow-up interviewer seeks to determine the "true" number of inhabitants at the address. *See id.*

102. Thus, the follow-up interview leads to a determination of whether the ICM response or the initial phase of the census is correct for a particular housing unit. *See id.* at 31.

103. This is done using Dual System Estimation. *See id.* at 32.

II. THE COURT CHALLENGES TO THE ADMINISTRATION'S PLAN TO USE STATISTICAL SAMPLING IN THE CENSUS

The Census Bureau's plan to employ statistical sampling methods in conducting the 2000 census was the subject of two court challenges.¹⁰⁴ In both cases, lower courts held that the Administration's planned use of statistical sampling violates the Census Act.¹⁰⁵ The Supreme Court upheld the lower court rulings on January 25, 1999, in *Department of Commerce v. United States House of Representatives*, by affirming one of the decisions and dismissing the other.¹⁰⁶

A. United States House of Representatives v. United States Department of Commerce

On August 24, 1998, a special three-judge panel of the United States District Court for the District of Columbia,¹⁰⁷ held that the Census Bureau's plan to use statistical sampling to supplement the 2000 census violates the Census Act.¹⁰⁸ In *United States House of Representatives v. United States Department of Commerce*, the House of Representatives sued the Commerce Department—which oversees the Census Bureau¹⁰⁹—seeking to enjoin the Census Bureau from using statistical sampling in the 2000 census.¹¹⁰ The House alleged that the use of statistical sampling to supplement the census violates both the Census Act,¹¹¹ and the provision of the Constitution that calls

104. See *United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp. 2d 76, 79 (D.D.C. 1998) (discussing a challenge by the House of Representatives) *dismissed by*, 119 S. Ct. 765 (1999); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 543 (E.D. Va. 1998) (discussing a challenge by individual citizens of six states), *aff'd sub nom.* *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765 (1999).

105. See *House of Representatives*, 11 F. Supp. 2d at 104 (holding that the use of statistical sampling to determine the population for purposes of the apportionment of representatives in Congress among the states violates the Census Act); *Glavin*, 19 F. Supp. 2d at 553 (same).

106. See *Department of Commerce*, 119 S. Ct. at 779 (affirming the lower court decision in *Glavin* and dismissing *House of Representatives* because the Supreme Court's decision resolves the substantive issues of both cases).

107. The law establishing a private right of action for persons aggrieved by the use of statistical sampling in conducting the census provides that such suits shall be heard by a district court of three judges. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 11 Stat. 2440, 2482 (1997) ("An action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code."); 28 U.S.C. § 2284 (1994) (stating that a three-judge district court panel shall be convened when required by an act of Congress). Appeals from the decisions of these three-judge courts are taken directly to the Supreme Court. See *id.* § 1253 (1994).

108. See *House of Representatives*, 11 F. Supp. 2d at 104.

109. See 13 U.S.C. § 2 (1994) (noting that the Census Bureau is an agency within and under the jurisdiction of the Commerce Department).

110. See *House of Representatives*, 11 F. Supp. 2d at 76.

111. See 13 U.S.C. §§ 5-6 (1994) (outlining, in very broad terms, the manner in which the

for an “actual enumeration”¹¹² of the population every ten years. Because the court was able to resolve the dispute on statutory grounds, it did not address the constitutional question.¹¹³

The Census Act both empowers the Census Bureau to conduct the decennial census and provides some guidelines for the manner in which the census is to be conducted.¹¹⁴ Accordingly, the court’s inquiry focused on the two provisions of the Census Act that address the use of statistical sampling.¹¹⁵ First, the court examined 13 U.S.C. § 195 which states “[e]xcept for the determination of population for purposes of apportionment” of the House of Representatives, the Secretary of Commerce “shall” order the use of statistical sampling if he considers it feasible.¹¹⁶ Second, the court addressed 13 U.S.C. § 141(a) of the Act,¹¹⁷ which authorizes the Secretary of Commerce to conduct the census every ten years “in such form and content as he may determine, including the use of sampling procedures and special surveys.”¹¹⁸ After examining the “plain meaning” and “legislative history”¹¹⁹ of the two provisions, the court held that § 195 amounted

census is to be conducted).

112. See U.S. CONST. art. I, § 2, cl. 3 (calling for an “actual enumeration” of the population every ten years for the purpose of apportioning both tax liability and seats in Congress).

113. See *House of Representatives*, 11 F. Supp. 2d at 104 (noting that federal courts are directed to avoid deciding matters on constitutional grounds when the matter can be resolved on other grounds).

114. See 13 U.S.C. § 4 (1994) (assigning responsibility for the census to the Secretary of Commerce).

115. See *id.* § 195 (mandating the use of statistical sampling in all areas deemed appropriate by the Secretary, “[e]xcept for the determination of population for purposes of apportionment”); *id.* § 141(a) (authorizing the Secretary to conduct the census in the manner he deems appropriate, including the use of sampling).

116. See *id.* § 195.

117. *Id.* § 141(a).

118. *Id.*

119. Prior to 1957, Congress’s grant of authority over the census to the Secretary of Commerce contained no specific mandates as to how the census was to be conducted. See *United States House of Representatives v. United States Dep’t of Commerce*, 11 F. Supp. 2d 76, 98 (D.D.C. 1998). In 1957, Congress enacted § 195 of the Census Act. See Pub. L. No. 85-207, 71 Stat. 481, 483-84 (1957). At the time of its enactment, § 195 provided that except for the determination of population for apportionment purposes, the Secretary of Commerce “may” use sampling where he deems it appropriate. See *id.* Congress made it clear at the time that although this provision sought to authorize the use of sampling in all areas of census taking, it did “not authorize the use of sampling procedures in connection with apportionment of Representatives.” See H.R. REP. NO. 85-1043, at 1, 10 (1957).

Section 195 was amended slightly in 1976, replacing the word “may,” with “shall.” See 13 U.S.C. § 195 (1994). The Administration argued that this change in the wording of § 195 eliminated the prohibition against the use of sampling procedures in connection with apportionment. See *House of Representatives*, 11 F. Supp. 2d at 101. In dealing with this argument, the court first noted that “dramatic departures from past practices should not be read into statutes without a definitive signal from Congress.” See *id.* at 100-01 (citing *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980)). Here, the court found no such definitive signal from Congress. See *id.* at 100. Accordingly, the court determined the meaning of § 195 from the face of the statute. See *id.*

to a prohibition on the use of sampling for the purpose of apportioning the House.¹²⁰ Further, the court held that the prohibition of § 195 trumped the apparent authorization of the use of sampling contained in § 141(a).¹²¹ Although both sections address the sampling issue, the court found that § 195 addressed the issue more directly and therefore, was the controlling provision.¹²² Hence, the court held that the use of statistical sampling for the purposes of apportioning the House of Representatives violate the Census Act.¹²³

The court's "plain meaning" analysis was two-pronged: it involved both a bewildering grammatical discussion¹²⁴ and a hornbook principle of statutory construction.¹²⁵ First, the court set out to determine whether the "except/shall" sentence structure of § 195 amounted to a prohibition in the area covered by the exception.¹²⁶ That is, does the statement, "[e]xcept for purposes of apportioning the House of Representatives, the Secretary shall order the use of sampling" prohibit the use of sampling for the purpose of apportioning the House or does the statement simply not address the legality of sampling in the apportionment context?¹²⁷ Bringing this grammatical conundrum to the attention of the court, the Administration argued that an exception from a mandate is not a prohibition in the area covered by the exception; instead, the area covered by the exception is discretionary.¹²⁸ After considerable

120. See *House of Representatives*, 11 F. Supp. 2d at 101.

121. "[W]hile section 141 permits sampling techniques and surveys in the conduct of the decennial census, that general grant is subject to the more specific 'Use of Sampling' directive in section 195, which . . . explicitly proscribes the use of sampling for apportioning representatives among the states." *Id.* at 103.

122. See *id.* (holding that § 195's prohibition on the use of sampling in determining the population for the purpose of apportioning seats in the House was more on point than § 141(a)'s general grant of authority to use sampling).

123. See *id.* at 104.

124. See *id.* at 99 (discussing the various ways in which "except/shall" sentence structures, like the one in § 195, may be read).

125. When construing a statute that has two seemingly conflicting provisions, the more specific provision controls the general. See *id.* at 103.

126. See *id.* at 98.

127. See *id.* at 99.

128. In support of this reading of the "except/shall" sentence structure, the Administration cited several examples from the United States Code in which an exception from a mandate that a federal officer "shall" do something does not constitute a prohibition in the area covered by the exception. See *id.*

One such example involves a statutory mandate to the Secretary of Interior: "[E]xcept in emergencies, any regulations of the Secretary promulgated under this section shall be put into effect only after consultation with the appropriate fish and game agency." See 16 U.S.C. § 230(d) (1994). The defendants note that this provision does not forbid the Secretary of the Interior from consulting with fish and game agencies in an emergency if he so chooses. See *House of Representatives*, 11 F. Supp. 2d at 99. Thus, they argue that the "except/shall" sentence structure in § 195 should not be read as a prohibition against sampling for apportioning representatives among the states. See *id.*

explanation, the court disagreed with the Administration's interpretation of § 195.¹²⁹ In so holding, the court reasoned that the parties' relation to the subject matter of the exception was crucial.¹³⁰ Here, the apportionment of seats in the House is of the utmost importance to the party making the statement—Congress.¹³¹ Therefore, the court refused to believe that Congress's intent in excepting the apportionment of the House from an authorization to use sampling was to leave that all-important matter to the discretion of the Secretary of Commerce.¹³² The importance of this interpretation of § 195 was cemented by the court's adherence to the canon of statutory construction that provides that when two provisions of a statute conflict with each other, the more specific of the two provisions is controlling.¹³³ Relying on the section headings of the two provisions, § 141 is entitled "Population and Census Information" and § 195 is entitled "Use of Sampling," the court concluded that § 195 more specifically addressed the sampling issue, and therefore, was controlling.¹³⁴

For the court, the statutory construction issue was relatively simple.¹³⁵ Although § 141(a) represents a congressional endorsement of the use of sampling methods in some aspects of the Census Bureau's work, § 195 specifically forbids the use of sampling for the purpose of apportioning seats in Congress.¹³⁶ Thus, the court granted

129. See *House of Representatives*, 11 F. Supp. 2d at 100 (explaining that although the Administration's reading of the "except/shall" sentence structure is proper in some instances, it is "strained" and "incorrect" when applied to § 195).

130. Refusing to adhere to any strict rule on the reading of "except/shall" sentences, the court instead relied on "common sense" and background knowledge concerning the subject matter of the exception. See *id.* To illustrate its point about background knowledge, the court considered the statement "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners." *Id.* The court then reasoned that the party issuing the directive to take the items to the cleaners would be very upset if she learned that the wedding dress had been taken to the cleaners. See *id.* The reason for this result is because of the court's background knowledge that "[wedding dresses] are extraordinarily fragile and of deep sentimental value to family members. We therefore would not expect that the decision to take the dress to the cleaners would be purely discretionary." *Id.*

131. See *id.* (noting that the apportionment function is the only constitutional purpose of the census).

132. See *id.* (reasoning that it is clear that the congressional apportionment function merits particularized treatment because each time Congress has authorized the use of sampling, it has excepted the apportionment function).

133. See *supra* note 125 and accompanying text. "A general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989).

134. See *House of Representatives*, 11 F. Supp. 2d at 103 (stating that of the two provisions, § 195 is "clearly the more specific, and therefore controlling" provision).

135. See *id.* (utilizing statutory construction to reach a resolution).

136. See *id.* (holding that § 141(a)'s general authorization to use statistical sampling is circumscribed by § 195's explicit proscription of the use of sampling for apportioning House seats among the states).

summary judgment in favor of the House and enjoined the Census Bureau from using statistical sampling for the purpose of apportioning seats in the House of Representatives.¹³⁷

B. Glavin v. Clinton

On September 24, 1998, in *Glavin v. Clinton*, a special three-judge panel of the United States District Court for the Eastern District of Virginia¹³⁸ resolved the statistical sampling issue in the same manner as the *United States House of Representatives v. United States Department of Commerce* court.¹³⁹ The *Glavin* court held that the use of statistical sampling for the purpose of apportioning seats in the House violates the Census Act.¹⁴⁰ *Glavin* was more than simply a reiteration of the *House of Representatives* holding, however.¹⁴¹ The precariousness of the House's standing to bring suit had the potential to make the *House of Representatives* holding little more than a temporary resolution to the census battle.¹⁴² Perhaps because of doubts as to whether the House

137. See *id.* at 79.

138. See *supra* note 107 and accompanying text (explaining why challenges to the Census Bureau's planned use of sampling are heard by three-judge district courts, with appeals taken directly to the Supreme Court).

139. See *Glavin v. Clinton*, 19 F. Supp. 2d 543, 552 (E.D. Va. 1998) (holding that the Census Act prohibits the use of statistical sampling for purposes of apportionment).

140. See *id.*

141. As the first of the two census cases, and the one that involved a head-to-head power struggle between the Republican-controlled House and the Administration, *United States House of Representatives v. United States Department of Commerce* was the more high-profile of the two census cases. See Holmes, *supra* note 9, at A1 (reporting the *House of Representatives* decision on the front page of *The New York Times*).

The *Glavin* holding, however, has proven to be the more significant of the two because of the precariousness of the House of Representatives' legal standing to bring suit. See Joan Biskupic, *High Court Arguments in Census Cases Leave Little to Count On*, WASH. POST, Dec. 1, 1998, at A2 (quoting Justice Scalia saying, "I don't see how you resolve these inter-branch disputes by dragging in a third branch"). To have standing to sue, a plaintiff must show, *inter alia*, that she has suffered an injury. As Justice Scalia observed, "[t]here is no case or controversy . . . when there are no adverse parties with personal interest in the matter." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 880, 881 (1983).

142. The House's claim to injury certainly was strained. The injury in *House of Representatives* consisted of the House of Representatives' inability to receive population information based on a headcount of the kind required by statute. See 11 F. Supp. 2d at 85. For the *House of Representatives* court, "informational injury" was sufficient. See *id.* Indeed, the *House of Representatives* court explained that "[t]he inability to receive information which a person is entitled to by law is sufficiently concrete and particular to satisfy constitutional standing requirements." *Id.* (citing *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777, 1784 (1998)).

The decision in *Federal Election Commission v. Akins*, is perhaps the Court's most liberal interpretation of the injury requirement. See 118 S. Ct. 1777 (1998). The Court held that a group of voters had suffered injury sufficient to confer standing where they were deprived of information regarding political contributions that was statutorily required to be publicly disclosed. See *id.* at 1784. A group of voters attempted to challenge a decision of the Federal Election Commission ("FEC") not to treat the American Israel Public Affairs Committee ("AIPAC") as a "political committee" under the Federal Election Campaign Act ("FECA"). See *id.* at 1781-82. The FEC's decision was significant because FECA imposes record-keeping and disclosure requirements upon groups that fall within the Act's definition of a "political

had standing to challenge the Census Bureau's plan, the Supreme Court ruled on the legality of the use of statistical sampling for the purpose of apportioning seats in the House on the facts of *Glavin* and decided to dismiss *House of Representatives*.¹⁴³ Thus, *Glavin* is an extremely important case because it guaranteed a Supreme Court ruling on the legality of the use of sampling in the 2000 census.¹⁴⁴

While the *Glavin* court reached the same holding on the statistical sampling issue as the *House of Representatives* court, it expressed even more certainty in doing so.¹⁴⁵ Indeed, the *Glavin* court resolved the sampling issue in little more than two pages.¹⁴⁶ The *Glavin* court relied solely on the text of the Census Act in reaching its holding that the Census Act prohibits the use of statistical sampling to determine the population for the purpose of apportioning seats in the House.¹⁴⁷ Unlike the *House of Representatives* court, and many observers of the battle over the census, the *Glavin* court did not view the Census Act as either ambiguous or vague on the issue of sampling.¹⁴⁸ With the aid

committee." See *id.* at 1781. As a result of the FEC's decision, AIPAC did not have to publicly disclose information, including information regarding the group's contributions to political candidates, that it would have been required to make public had the FEC designated it a "political committee." See *id.* at 1782-83.

Based on the assumption that the FEC's decision violated FECA, the Court found that the voters' inability to obtain information that AIPAC should have been required to make public under FECA was an injury sufficient to confer standing. See *id.* at 1784. The injury was "concrete" and "particular," the Court held, because the information that the voters had been deprived of would have helped them evaluate candidates for public office. See *id.* Thus, the concrete and particular "informational injury" in *Akins* had three elements: first, a statutory requirement that information be publicly disclosed; second, one's inability to obtain such information; and third, some need to obtain the information on the part of the party bringing suit. See *id.* at 1784-87.

In *House of Representatives*, two of the three elements arguably were not present. Although the House has a statutory right to receive population information, the House would not be deprived of that information, nor did the House demonstrate any need for the population information of the type required by the Census Act, as opposed to population information tabulated through the use of statistical sampling. See *House of Representatives*, 11 F. Supp. 2d at 85-87. In the census dispute, of course, the House did not allege that it was in danger of receiving no population information at all from the Census Bureau, but rather that sampling would cause the House to receive the "wrong" information because the census would be conducted unlawfully. See *id.* at 85-86.

143. See *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 779 (1999) (dismissing *United States House of Representatives v. United States Department of Commerce* case because the suit no longer presented a federal question after the Court's decision on the facts of *Glavin v. Clinton*).

144. See *High Court Widens Review of Census Sampling*, WASH. POST, Oct. 10, 1998, at A5 (noting that the Court would possibly not have been able to issue a ruling on the merits of the census dispute had it not decided to hear *Glavin* because the House's disputed standing "is a potential stumbling block to deciding the case on its merits").

145. See *Glavin*, 19 F. Supp. 2d at 553 (calling the statute "unambiguous," as well as "coherent and consistent").

146. See *id.* at 550-53.

147. See *id.* at 553 (stating that a conclusive reading of the statute's text on its face ends the court's task).

148. "In sum, the only plausible interpretation of the plain language and structure of the

of a few basic principles of statutory construction the *Glavin* court reconciled seemingly contradictory provisions within the Act.

Primarily, the court relied on the rule of statutory construction that implores courts to give effect, if possible, to every clause and word of a statute, "rather than to emasculate an entire section."¹⁴⁹ Applying this rule to the sampling issue, the court sought to interpret the Census Act in a way that gave meaning both to § 141(a) and § 195.¹⁵⁰ The *Glavin* court reasoned that if it were to accept the Administration's argument and hold that § 195 did not prohibit the use of statistical sampling in connection with apportioning seats in the House, the "[e]xcept for" clause of § 195 would be rendered meaningless.¹⁵¹ That is, under such a reading, the Administration's authority to use sampling would be "precisely the same with the 'except for' language as it would be if the statute did not contain that language."¹⁵² The *Glavin* court simply refused to believe that Congress would have included the "[e]xcept for" language if it did not intend to prohibit the use of sampling in determining the population for purposes of apportionment.¹⁵³

After rejecting the Administration's reading of the interplay of the two provisions, the *Glavin* court held that the provisions were not actually in conflict.¹⁵⁴ Indeed, the court found that the "only plausible interpretation" of the two sections is "that section 195 prohibits sampling for apportionment and section 141(a) allows it for all other purposes."¹⁵⁵ With this confident interpretation, the court ended its inquiry.¹⁵⁶

Act is that § 195 prohibits sampling for apportionment and § 141 allows it for all other purposes." *Id.*

149. *See id.* at 551 (stating that "the cardinal principle of statutory construction is to save and not to destroy" all provisions of the statute being interpreted) (citing *United States v. Menasche*, 348 U.S. 528, 538 (1955)).

150. Indeed, the court was able to ascribe a distinct meaning to each section. *See id.* at 550-51 (explaining that § 141(a) "generally authorizes the Secretary to use sampling in conducting various aspects of the census," while § 195 clearly prohibits the use of sampling for determining the apportionment of House seats).

151. The court reasoned further that were it to find that § 141(a)'s authorization to use sampling trumped the apparent prohibition contained in § 195, the entire latter provision would be useless. *See id.* at 552. Because § 141(a) already contains a general authorization to use sampling where appropriate, reading § 195 as another unconditional grant of authority would render § 195 superfluous. *See id.*

152. *See id.*

153. "As Congress prohibited sampling for purposes of apportionment, the Secretary has no authority to do anything but an actual headcount of the population for this purpose." *Id.* at 553.

154. *See id.* at 552.

155. *Id.*

156. *See id.* (stating that "[w]hen the words of a statute are unambiguous, the first canon of statutory construction is also the last: 'judicial inquiry is complete'" (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992))).

C. The Supreme Court's Decision in Department of Commerce v. United States House of Representatives

On January 25, 1999, the Supreme Court, in a 5-4 decision,¹⁵⁷ affirmed the lower court's decision in *Glavin*, and dismissed the suit brought by the House of Representatives.¹⁵⁸ The Court's decision in *Department of Commerce v. United States House of Representatives* was based on the plain text of the Census Act and a finding that the legislative history of the Census Act conclusively evinces a congressional intent to prohibit the use of statistical sampling for the purpose of apportioning House seats among the states.¹⁵⁹ Justice O'Connor's majority opinion gleaned Congress's intent to prohibit sampling in connection with apportionment from a brief review of the history of the census, and a more probing examination of the effect of amendments made to the Census Act in 1976.¹⁶⁰

1. The Court's review of the history of the census

In determining the legality of the Administration's plan to use statistical sampling in the 2000 census, the Supreme Court—like the two lower courts before it—was forced to reconcile two seemingly contradictory provisions in the Census Act.¹⁶¹ Before resolving the apparent contradiction between § 141(a) and § 195, the Court set out to put the Census Act in its proper historical context.¹⁶²

The Court began its brief study of the history of census law by noting that from America's first census in 1790 through the 1950 census—fifteen censuses in all—Congress prohibited the use of statistical sampling in calculating the population for purposes of apportionment.¹⁶³ The Court observed that Congress's directive to

157. Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas composed the majority, while Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer dissented. See *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 766 (1999).

158. See *id.* at 779 (affirming the judgment of the Eastern District of Virginia in *Clinton v. Glavin*, and dismissing the suit in *United States House of Representatives v. United States Department of Commerce* because the Court's decision resolved the federal question in *House of Representatives*).

159. See *id.* at 775 (agreeing with the district court below that the plain text and legislative history demonstrate that the use of statistical sampling for the purpose of congressional apportionment violates the Census Act).

160. Justice O'Connor noted that "[a]n understanding of the historical background of the decennial census and the Act that governs it is essential to a proper interpretation of the Act's present text." *Id.*

161. See *id.* at 776-79 (interpreting the meaning of the apparently contradictory provisions of § 141(a) and § 195 of the Census Act).

162. See *id.* at 775 (explaining that to properly interpret the present text of the Census Act, one must understand the history of the decennial census).

163. In a footnote, the Court listed eleven statutes that governed census taking throughout the first 150 years or so of American history. See *id.* at 775 n.5. An example of the prohibition on sampling techniques included in these laws is the Act of Mar. 23, 1830, § 1, 4 Stat. 384, which

census-takers changed relatively little throughout this period.¹⁶⁴ For example, the 1790 census legislation required census enumerators to swear under oath to make “a just and perfect enumeration” of every person within the division to which they were assigned.¹⁶⁵ More than a century and a half later, in 1960, the relevant law required enumerators to “visit personally each dwelling house in his subdivision” to obtain “every item of information” necessary to conduct the census.¹⁶⁶

For the Court, this consistent requirement that census figures be based on a direct headcount tells much about Congress’s intent in enacting § 141(a) and § 195 of the Census Act.¹⁶⁷ Significantly, in 1957, while the 1954 Census Act provision requiring a direct headcount was still on the books,¹⁶⁸ Congress enacted § 195.¹⁶⁹ That section provided that “[e]xcept for the determination of population for apportionment purposes, the Secretary may” authorize the use of statistical sampling in conducting the census.¹⁷⁰ Thus, Congress’s historical demand that the apportionment census be calculated on the basis of a direct headcount, combined with the language of § 195, made it clear to the Court that § 195 authorized the Secretary of Commerce to order sampling used in many areas of the census, “but it did not authorize the use of sampling procedures in connection with apportionment of Representatives.”¹⁷¹ After reaching this conclusion, the Court addressed the effect of the 1976 amendments to the Census Act.

2. *The Court’s interpretation of the 1976 Amendments to the Census Act*

In 1976, the provisions of the Census Act at issue in the dispute

provided, “the said enumeration shall be made by an actual inquiry by such marshals or assistants, at every dwelling-house, or by personal inquiry of the head of every family.”

164. Indeed, the requirement that census enumerators visit each home in person did not change at all until 1919 and even then the change was not great. *See* Act of Mar. 3, 1919, § 2, 40 Stat. 1296 (noting that enumerators would be permitted “to gather from neighbors information regarding households where no one is present”).

165. *See Department of Commerce*, 119 S. Ct. at 775 n.5 (quoting Act of Mar. 1, 1790, § 1, 1 Stat. 101).

166. *See id.* at 776 (quoting Act of Aug. 31, 1954, § 25(c), 68 Stat. 1012, 1015).

167. “[T]he Census Acts of 1810 through 1950 required census enumerators to visit each home in person. This demonstrates a longstanding tradition of Congress’s forbidding the use of estimation techniques in conducting the apportionment census.” *Id.* at 781 (Scalia, J., concurring).

168. *See* Act of Aug. 31, 1954, § 25(c), 68 Stat. 1012, 1015 (requiring enumerators to “visit personally each dwelling house in his subdivision” in order to obtain “every item of information and all particulars required for any census or survey” conducted in connection with the census).

169. *See* Act of Aug. 28, 1957, Pub. L. No. 85-207, § 14, 71 Stat. 481, 483-84.

170. *See id.*

171. *See Department of Commerce*, 119 S. Ct. at 776.

over the 2000 census took their present form.¹⁷² First, Congress amended § 141(a) to authorize the Secretary to take the census of the population every ten years “in such form and content as he may determine, including the use of sampling and special surveys.”¹⁷³ Second, Congress replaced the word “may” in § 195 with the word “shall.”¹⁷⁴ Accordingly, after the enactment of § 141(a) there are two possible readings of the Census Act that would permit the use of statistical sampling in connection with apportionment. A court could either hold that § 141(a)’s authorization to use sampling trumped the apparent restrictions on the use of sampling in § 195,¹⁷⁵ or a court could hold that § 195 mandated the use of sampling in all areas of census-taking except the apportionment census.¹⁷⁶

The Administration made both of these arguments and the Court rejected both of them.¹⁷⁷ The Court recognized the sweep of § 141(a) standing on its own, describing it as “a broad statement that in collecting a range of demographic information during the decennial census, the Bureau would be permitted to use sampling procedures and special surveys.”¹⁷⁸ The Court’s reading of § 141(a)’s scope narrowed considerably, however, when viewed in light of the rest of the Census Act and Congress’s historical reliance on direct headcount censuses.¹⁷⁹ While § 141(a) was a “broad grant of

172. There was one change in the Census Act between 1957 and 1976 that is relevant to the sampling dispute. In 1964, Congress repealed the provision requiring all census information to be collected from personal visits by enumerators to households, and in so doing permitted the Census Bureau to institute its “mailout-mailback” method of census data collection. *See* Act of Aug. 31, 1964, 78 Stat. 737; *Department of Commerce*, 119 S. Ct. at 776 (noting that census officials began conducting approximately 60% of the census through the “mailout-mailback” system after this change).

173. *See* 13 U.S.C. § 141(a) (1994).

174. Before the 1976 amendment, § 195 read: “Except for the determination of population for apportionment purposes, *the Secretary may*, where he deems it appropriate, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.” Act of Aug. 28, 1957, Pub. L. No. 85-207, § 14, 71 Stat. 481, 483-84. (emphasis added). After the amendment § 195 reads: “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.” 13 U.S.C. § 195 (1994) (emphasis added).

175. *See Department of Commerce*, 119 S. Ct. at 786 (Stevens, J., dissenting) (arguing that § 141(a) gives unqualified authority to the Secretary of Commerce to use sampling in the decennial census).

176. *See id.* at 777 (noting that one could reasonably read § 195 as “permissive” with regard to the use of sampling for apportionment purposes if looking to the text of the Census Act alone).

177. *See id.* (holding that § 195 governs the issue of the use of sampling in the apportionment context because it is more specific than § 141(a) and that § 195 prohibits the use of sampling in calculating the population for purposes of apportionment).

178. *Id.* at 776.

179. *See id.* at 777 (describing the effect of § 195 on the apparent broad authorization to use sampling in § 141(a)).

authority," § 195 was a specific, clear prohibition on the use of sampling in the apportionment context.¹⁸⁰ Thus, the Act does not mandate or prohibit the use of sampling for apportionment purposes.

The majority's last step toward concluding that the use of statistical sampling in connection with apportionment violated the Act was to reject the Administration's reading of the "except/shall" sentence structure of § 195.¹⁸¹ The Court noted that when divorced from historical context, "the language in the amended [section] 195 might reasonably be read as either permissive or prohibitive with regard to the use of sampling for apportionment purposes."¹⁸² The historical context, however, is central to understanding "except/shall" sentence structures.¹⁸³ And here, where "the context is provided by more than 200 years during which federal statutes have prohibited the use of statistical sampling where apportionment is concerned," the excepted portion of § 195 must be read as a prohibition.¹⁸⁴ Accordingly, the Court affirmed the decision of the Eastern District of Virginia in *Glavin* and upheld the injunction against the use of statistical sampling in connection with apportionment.¹⁸⁵

III. THE LIMITS OF THE SUPREME COURT'S *DEPARTMENT OF COMMERCE V. UNITED STATES HOUSE OF REPRESENTATIVES* DECISION

The Supreme Court's affirmation of the lower court's decision in *Glavin v. Clinton* was certainly a setback for the Administration and sampling proponents.¹⁸⁶ Because the decision only found sampling illegal in the apportionment context,¹⁸⁷ the setback is much more limited than it might first appear.¹⁸⁸ Population figures from the

180. *Id.* at 776.

181. *See id.* at 777 (noting that the Administration cited examples of statutes with the same "except/shall" sentence structure in arguing that "the exception cannot reasonably be construed as prohibiting the excepted activity").

182. *Id.*

183. *See id.* (explaining that the interpretation of the "except/shall" structure in § 195 depends on the broader historical context).

184. *Id.*

185. *See id.* at 779.

186. *See* Linda Greenhouse, *Jarring Democrats, Court Rules Census Must Be by Actual Count*, N.Y. TIMES, Jan. 26, 1999, at A1 (stating that because of the decision, Democrats took a "bitter blow"). The Administration believed that the use of statistical sampling was legal even in the apportionment context and had hoped for a Supreme Court ruling to that effect. *See* Joan Biskupic & Barbara Vobejda, *High Court Rejects Sampling in Census*, WASH. POST, Jan. 26, 1999, at A1 (noting that the Administration argued that statistical sampling could be used for apportionment).

187. *See* James Dao, *The Nation: Two (Many) Choices for 2000 Census*, N.Y. TIMES, Feb. 7, 1999, § 4 (Week in Review), at 4 (stressing that the Court did not prohibit all sampling and left open its use for other purposes).

188. *See* Steven A. Holmes, *White House Considers New Uses for Sampling*, N.Y. TIMES, Sept. 30,

decennial census are used for many purposes.¹⁸⁹ Most importantly, census data is used by federal and state governmental agencies to allocate funds under many programs, and by the states to draw federal and state legislative districts.¹⁹⁰ Nothing in the Supreme Court's ruling prohibits the Census Bureau from using sampling to supplement census data for these purposes.¹⁹¹

Before the Supreme Court decision, the seemingly important issue surrounding the Administration's plan for the 2000 census was the effect of a sampling-adjusted census on the apportionment of seats in the House. The focus now has shifted to funding and redistricting.¹⁹² The Court's decision notwithstanding, an Administration decision to use sampling in the census still has the potential to ameliorate greatly the ill effects of the differential undercount.¹⁹³ The use of sampling in the census could make the distribution of funds under government programs more equitable,¹⁹⁴ as well as measurably alter the partisan composition of congressional delegations and state legislatures across the country.¹⁹⁵ Accordingly, the funding and redistricting issues are at least as important as the apportionment of seats in the House.¹⁹⁶

1998, at A12 (stating that a Supreme Court decision invalidating the use of sampling for congressional apportionment would only add "a new wrinkle" to the census debate).

189. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 22-25 (explaining that census data is used for congressional apportionment, state redistricting, and the distribution of funds under federal and state population-based programs).

190. See *id.* at 23-25 (discussing how federal and state agencies use census data and detailing how census data is used for redistricting).

191. See *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 779 (1999) (holding that statistical sampling is prohibited only for apportionment purposes); see also Dao, *supra* note 187, § 4 (Week in Review), at 4 (stating that the Court left open the use of sampling for other purposes).

192. See Biskupic & Vobejda, *supra* note 186, at A1 (stating that despite the Court's decision, the Administration will continue with its sampling plan for use in allocating funds under federal government programs, as well as for use by the states in redistricting); see also David G. Savage & Nick Anderson, *Court Rejects Plan to Use Sampling for 2000 Census*, L.A. TIMES, Jan. 26, 1999, at A10 (noting that the White House still intends to use sampling for other purposes including distributing federal funds).

193. See Dao, *supra* note 187, § 4 (Week in Review), at 4 (maintaining that the proposed use of sampling data for redistricting could alleviate the undercount in large cities).

194. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 35 (explaining that the differential undercount results in certain groups "get[ting] less credit for their population than they are due in terms of money received under population-based programs").

195. See Dao, *supra* note 187, § 4 (Week in Review), at 4 (discussing how the use of sampling-adjusting census figures in redistricting likely will add Democratic seats in Congress and state legislatures).

196. Despite the controversy surrounding the use of sampling in connection with apportioning seats in the House, one study has shown, using 1990 as an example, that the affect of sampling on apportionment would not be great. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 40 (arguing that sampling in 1990 would not have made a significant difference because three states would have gained one seat, while three states would have lost one seat). Specifically, the winners would have been Georgia (a 12th seat), Montana (a 2nd seat), and California (a 53rd seat), while the losers with an adjusted census would have been Oklahoma,

A. The Use of Sampling-Adjusted Data for the Allocation of Funds Under Government Programs

The federal government disburses nearly \$200 billion each year to state and local governments using formulas involving census population data.¹⁹⁷ This money is distributed under 108 different federal programs, the largest of which are Medicaid, Highway Planning and Construction, Social Service Block Grants, and Community Development Block Grants.¹⁹⁸ Of these four programs, three are aimed at helping inner-city populations.¹⁹⁹ The differential undercount limits the effectiveness of population-based programs such as these because minorities, and the inner-city neighborhoods in which minorities often live, are denied the amount of government resources to which they are entitled.²⁰⁰ The states also use census data to distribute funds.²⁰¹ Although little data exists to document the exact dollar figures involved, it is believed that the census affects the distribution of funds in the states even more than at the federal level.²⁰²

The fact that the equitable distribution of vast sums of money under population-based programs is contingent on an accurate census would seem to provide enough of an incentive for the Administration to continue its efforts to use statistical sampling in the 2000 census.²⁰³ As the example of Hartford, Connecticut²⁰⁴ makes

Pennsylvania, and Wisconsin. *See id.*

197. *See* Vobejda, *supra* note 55, at A6 (noting that statistical sampling could still be used to distribute the over \$200 billion in federal funds).

198. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 40-42 (noting that in 1990 the federal government distributed \$34 billion in Medicaid funds, \$13.4 billion under the Highway Planning and Construction program, \$2.7 billion in Social Service Block Grants, and \$2.2 billion in Community Development Block Grants).

199. Medicaid is the federal health insurance program for indigent and disabled persons. *See* 42 U.S.C. § 1396u (1994). Social Service Block Grants provide funds to states and municipalities in need of publicly funded social services. *See id.* § 1397. Community Development Block Grants provide federal funds to poor, urban communities to stimulate construction. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 322-24 (explaining the purpose of community development block grants).

200. *See* MODERNIZING THE U.S. CENSUS, *supra* note 1, at 41-42 ("Because in the 1990 census blacks and other minority groups had a larger undercount than whites—as in prior censuses—minorities and the communities in which they live have been disadvantaged in federal and other programs in which population is an important factor for fund allocation.").

201. *See id.* at 43 (noting that much of the effect of the differential undercount and any attempt to remedy the undercount is felt at both the state and sub-state level).

202. The effect of the census is greater at the state level because there simply are more state programs than there are federal programs that use census figures to distribute funds. *See id.*

203. The Census Bureau initially decided to use sampling to supplement census figures because statistics experts agreed that sampling was the best way to remedy the problem of minorities being uncounted at higher rates than whites. *See supra* Part I.C (explaining the Administration's plan for the 2000 census and the Administration's reasons for departing from traditional census-taking methods).

Such a remedy would give these minority groups the representation in Congress and state

clear, even after the Supreme Court's ruling, much of what the Administration set out to accomplish through the use of sampling remains within its reach.²⁰⁵

B. The States' Use of Sampling-Adjusted Data for Redistricting

The Administration's use of statistical sampling takes on even greater importance when one considers the potential impact of the states' use of adjusted data for redrawing federal and state legislative districts.²⁰⁶ Although not constitutionally bound to do so,²⁰⁷ the states use census data to draw congressional and state legislative districts.²⁰⁸ If the Administration uses statistical sampling to adjust the census, each state will have a choice to make in deciding which data to use in redrawing their legislative districts: the census figures compiled for the purpose of apportioning seats in the House or the adjusted census data.²⁰⁹ Which of these options a given state will choose will

legislatures that their numbers justify and it would give cities and states money under federal and state population-based programs on the basis of their actual population. *See supra* Part I.C.

The Administration still can achieve these objectives despite the Supreme Court's ruling prohibiting sampling in the apportionment context. *See* Holmes, *supra* note 188, at A12 (reporting that the Administration is exploring ways to give Congress the unadjusted census data and use the adjusted data for other purposes such as allocating federal funds).

204. Rather than being unique, the case of Hartford is indicative of the situation in inner cities throughout the country. *See* David S. Broder, *The Census Fight*, WASH. POST, Jan. 31, 1999, at B7 (discussing a simulated census that used sampling conducted in Sacramento, California that added more than 6.3% to the city's population, which would "translate into millions of dollars of extra federal aid").

205. *See infra* Part IV (explaining the potential impact of the use of statistical sampling in the census despite the Supreme Court's ruling in *Department of Commerce v. United States House of Representatives*).

206. Although the House of Representatives determines the number of seats to which each state is entitled, the state government determines the way those seats are divided within a state. *See* Donald T. Deyo, *To Adjust or Not To Adjust: That Is the Legal and Political Question*, 13 CHICANO-LATINO L. REV. 114, 114-15 (1993) (noting that the political importance of whether to use sampling rests on its potential use by state legislatures when redrawing congressional districts, which must be done every 10 years to ensure that the districts have roughly equal populations). Without the use of sampling, the states—because they use information provided by the Census Bureau to redraw the districts—would have only the traditional headcount figures, which are known to undercount minorities at a greater rate than whites, in redrawing their districts. *See id.* at 117-19.

207. *See, e.g.*, *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (holding that although state legislatures must be apportioned on the basis of population, they need not use the federal census to do so); *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) (asserting that the Constitution does not compel the states or Congress to use only unadjusted census figures in redistricting).

208. *See* Holmes, *supra* note 188, at A12 (noting that states use population counts from the census to redistrict).

209. After the Supreme Court's decision in *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 779 (1999), the Census Bureau will not be able to conduct the census without making public the traditional headcount figures and giving those figures to the House for apportionment. Thus, if sampling is used to adjust the census there will be two sets of census data, each with a cadre of politicians and experts attesting to the accuracy of the data.

almost certainly depend upon the political affiliation of the state government.²¹⁰ States controlled by Democrats would most likely choose the adjusted data, whereas states controlled by Republicans would probably choose the census figures used to apportion the House.²¹¹

The impact of a sampling-adjusted census on redrawing congressional and state legislative districts would be the greatest in states with large urban populations.²¹² States like California, Texas, Illinois, New York, and Florida—the states that had the highest rates of undercount in the 1990 census—would see their urban populations significantly increase.²¹³ This increase in the population of America's cities would shift political power within these states to the urban areas.²¹⁴ Inner-city communities would receive more representatives in their state legislatures, as well as in Congress, if those states choose to use the sampling-adjusted census figures in conducting redistricting.²¹⁵ One estimate suggests that if statistical

See Herbert A. Sample, *Census Compromise May OK Two Sets of Data*, SACRAMENTO BEE, Sept. 20, 1998, at A12 (discussing the prospect of two sets of census figures: one set containing unadjusted figures for congressional apportionment and the second set comprised of adjusted figures to be used for the allocation of federal funds and state redistricting).

210. Gubernatorial and state legislative elections are always of heightened importance when the victor will preside over redistricting. See B. Drummond Ayres Jr., *Small Strides for Democrats Could Be Big After Census*, N.Y. TIMES, Nov. 5, 1998, at B11 (noting that the party that controls both chambers in a state legislature has an advantage in the redistricting process because districts can be drawn legally in many different ways).

211. See Dao, *supra* note 187, § 4 (Week in Review), at 4 (stating that Democrats are arguing for the use of sampling, while Republicans fight it); see also Ayres, *supra* note 210, at B11 (noting that after the midterm elections this fall, Democrats are in control of both legislative chambers in 21 states, while Republicans are in control of both chambers in 17 states).

The best example of what is at stake in redistricting following the 2000 census is in California. California recently elected its first Democratic governor in 16 years, Gray Davis, and he will be in office during redistricting. See Mark Z. Barabak, *Davis, Boxer Win; Prop. 5 OK'd*, L.A. TIMES, Nov. 4, 1998, at A1 (reporting Gray Davis' victory). California also has a Democratically-controlled legislature. See *id.* If the Administration uses sampling to adjust the census figures, California—with Democrats in control of the statehouse and the Governor's mansion—will use the adjusted data. See *id.* (explaining that "[Democrats] will enjoy an upper hand in state politics well into the early 21st century, thanks to unfettered control of the decennial reapportionment process"). This will greatly affect the partisan composition of California's 52-member House delegation. See Leslie Wayne, *Eye on 2000, National Parties Donate to State Races*, N.Y. TIMES, Nov. 3, 1998, at A24 (quoting Craig Engle, general counsel of the National Republican Senatorial Committee as stating that "[I]n California, there could be a difference of 10 House seats, depending upon how the map is drawn").

212. See James Dao, *Split Decision Sets Stage for State and Local Battles*, N.Y. TIMES, Jan. 26, 1999, at A20 (explaining that in states with large cities, a decision to use census data adjusted with statistical sampling would greatly affect the way legislative districts are drawn).

213. See Dao, *supra* note 187, § 4 (Week in Review), at 4 (noting that the population of large cities would increase because the undercount in the last census was highest in large cities).

214. See *id.* (explaining that the use of sampling-adjusted census figures for redistricting would result in urban areas receiving increased representation in both Congress and the state legislatures at the expense of suburban areas).

215. See Barbara Vobejda, *Ruling Tangles Scenarios for Census*, WASH. POST, Jan. 26, 1999, at A5 (explaining how sampling-adjusted numbers would add "tens of thousands of people" to

sampling were used to redraw congressional and state legislative districts, 24 seats in the House of Representatives, 113 seats in state senates, and 297 seats in state assemblies could switch from Republican to Democratic control.²¹⁶

The potential effect of the use of sampling-adjusted figures on the political representation of America's urban communities is difficult to overstate.²¹⁷ Experts claim that in New York City the use of sampling-adjusted census figures in redrawing legislative districts could lead to two new Democratic state Assembly seats and one Democratic state Senate seat.²¹⁸ In addition, it may shift two Republican state Senate seats to the Democrats and reduce the possibility of New York City losing a congressional seat to the suburbs.²¹⁹ In California, the use of sampling-adjusted figures for redistricting would likely result in the shift of one or more seats in the state legislature to Democratic-leaning Hispanic neighborhoods in Los Angeles and possibly San Diego,²²⁰ and may result in the shift of five to six House seats from Republicans to Democrats.²²¹ Additionally, in states where Republicans hold narrow majorities in state legislative bodies—for example, the Texas Senate and the Houses in the Pennsylvania and Illinois legislatures—the use of sampling-adjusted figures could help Democrats recapture majorities.²²²

The opposing sides in the census debate view this potential increase in the political power of America's inner-cities quite differently.²²³ For Democrats, the increase in political representation

urban areas); *see also* Dao, *supra* note 187, § 4 (Week in Review), at 4 (contending that sampling would shift seats to areas undercounted in 1990, such as Hispanic neighborhoods in Los Angeles).

216. *See* Steven A. Holmes, *The Path to the Next Census Has Been Far from Routine*, N.Y. TIMES, Feb. 1, 1999, at A18 (explaining the results of a study by Clark Bensen, demographer and former Republican National Committee staffer). These projections are based on the assumption that greater representation of urban areas in Congress and state legislatures would redound to the benefit of Democrats. *See id.*

217. In the words of Republican National Committee Chairman, Jim Nicholson, in a 1997 memo: "An adjusted census could provide Democrats the crucial edge needed to prevail in close contests to control several state legislative chambers." Dao, *supra* note 187, § 4 (Week in Review), at 4.

218. *See id.* (discussing the potential effect from using a sampling-adjusted census on the political representation of America's big cities).

219. *See id.* (noting that regardless of whether sampling is used in the census, New York state is expected to lose two seats in Congress in 2000).

220. *See id.* (assessing the effects of a sampling-adjusted census on redistricting in Los Angeles).

221. *See* Vobejda, *supra* note 215, at A5 (reporting a study by Clark Bensen, head of Polidata, a firm that conducts redistricting research).

222. *See* Dao, *supra* note 187, § 4 (Week in Review), at 4 (explaining how sampling may help Democrats regain control of state legislatures).

223. For example, Representative Carolyn B. Maloney (D-N.Y.), the ranking Democrat on

would represent an opportunity to win back the House and make other gains at the ballot box without broadening their political appeal.²²⁴ For Republicans, meanwhile, this shift would represent a politically-motivated gerrymandering of legislative districts throughout the nation.²²⁵ In reality, however, this shift would represent an overdue recognition of the true population of urban America.²²⁶

C. The Legality of Adjusting Census Data for Purposes Other Than Apportionment of the House

An examination of both the Census Act and the court decisions at issue in this Comment demonstrates that the use of statistical sampling to supplement census data for any purpose other than apportioning seats in the House is legal.²²⁷ In fact, Justice O'Connor's majority opinion in *Department of Commerce v. United States House of Representatives* notes that the Census Act requires the use of sampling in the census for purposes other than apportionment where it is feasible.²²⁸ Additionally, the only provisions of the Census Act that address the issue of sampling outside of the apportionment context authorize the use of sampling.²²⁹ Indeed, § 141(a) states that the Secretary of Commerce "shall" order the use of sampling procedures in all areas where it is feasible.²³⁰ Thus, the Administration is not barred legally from using statistical sampling to supplement census figures for purposes other than apportioning seats in the House.²³¹

the Census Subcommittee in the House, has described Democrats' role in the census debate this way: "We're not going to let the majority (in Congress) prevent those people from being counted." Vobejda, *supra* note 215, at A5. Republicans, meanwhile, refer to the Administration's census plans pejoratively as a "poll," rather than as an "actual count," and vow to fight against funding it. See James Dao, *Census Ruling Reignites a Partisan Battle*, N.Y. TIMES, Jan. 27, 1999, at A17 (quoting John Feehery, spokesman for House Speaker Dennis Hastert (R-Ill.)).

224. See Savage & Anderson, *supra* note 192, at A1 (explaining that Democrats believe that the use of statistical sampling in the census "will increase political power in predominantly Democratic areas").

225. Indeed, upon first mention of a plan to use sampling despite the Supreme Court's ruling in *Department of Commerce v. United States House of Representatives*, House Speaker Dennis Hastert (R-Ill.) said that the Administration "should abandon its illegal and risky polling scheme and start preparing for a true headcount." See *id.*

226. See *supra* Part I.B (explaining the differential undercount problem).

227. See *supra* Parts II.A-C (explaining the courts' holdings that the Census Act prohibits the use of sampling in connection with apportionment).

228. See *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 777 (1999) (stating that the 1976 amendments to the Census Act require the use of sampling for other purposes, such as assembling demographic data, where feasible, but noting the continued prohibition on use of sampling for apportionment purposes).

229. See 13 U.S.C. § 141(a), (d) (1994).

230. See *id.* § 141(a).

231. Although the use of sampling is not illegal for purposes other than apportionment, for

IV. RECOMMENDATIONS

The Supreme Court's ruling may not have resolved the battle over the 2000 census, but it has clarified several important issues in the census debate. First, the Court guaranteed that the Census Bureau will conduct a traditional headcount census with its ruling that such a count is required for apportionment purposes.²³² Second, and no less important, the Court held that the use of sampling is legal, and indeed may be required, in connection with census functions other than apportionment.²³³ Lastly, the Court has cleared the way for the political branches of government to resolve the many important issues that still remain regarding the 2000 census.²³⁴

A. *The Administration*

In light of the Supreme Court's ruling, the Administration must prepare to conduct a census that employs sampling in calculating the population for distributing funds under government programs, but not for apportioning seats in the House.²³⁵ The Administration's efforts to conduct a census using statistical sampling demonstrates that the Administration recognizes the seriousness of the differential undercount problem.²³⁶ The persistent differential undercount

the Census Bureau to use sampling in the 2000 census for any purpose Congress will need to appropriate the funds necessary to conduct a two-number census. The Republican-controlled House is, of course, averse to doing so. See Holmes, *supra* note 188, at A18 (noting Republicans' commitment to conduct a traditional census count). Likewise, any attempt by Congress to pass a law prohibiting sampling in any context would be vetoed by the President, and Republicans—with a five-seat majority in each chamber—lack the votes needed to override such a veto. See Holmes, *supra* note 216, at A18 (noting the President's expressed commitment to veto any census bill that forbids the use of sampling). Thus, the fate of sampling in the 2000 census will be decided in the give and take of budget negotiations over the next two years. See Steven A. Holmes, *White House Considers New Uses for Census Sampling*, N.Y. TIMES, Sept. 30, 1998, at A12 (noting that the legal battles will take a backseat to a political power struggle over the appropriation of funds for the census).

232. See *supra* Part II.C (explaining the Supreme Court's decision in *Department of Commerce v. United States House of Representatives*).

233. See *Department of Commerce*, 119 S. Ct. at 778 (noting that the 1976 amendments to § 195 of the Census Act 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).

234. See Editorial, *A Limited Census Ruling*, WASH. POST, Jan. 26, 1999, at A18 (describing the Supreme Court's decision as limited because the decision whether to use sampling in the census will be made by the President and the Congress).

235. See *supra* Part II.C (explaining that the Supreme Court's ruling prohibits sampling in connection with apportionment, but allows its use for other purposes).

236. Since the Court's ruling, the Administration has evinced renewed determination to use sampling in the census in every legal manner. See Barbara Vobejda, *Census Plans to Release Two Sets of Numbers; Full Count, "Sampling" Results Both Proposed*, WASH. POST, Jan. 27, 1999, at A2 (explaining that the Administration remains committed to using sampling in the census). Indeed, just hours after the ruling, the Census Bureau announced its plans to conduct a census with two sets of numbers, one set for apportionment and the other for the distribution of

systematically deprives racial and ethnic minorities of the political representation and government largesse that their numbers demand.²³⁷ The Administration must devote the political capital necessary to rectify this inequity.²³⁸

The Supreme Court's holding that statistical sampling is illegal in connection with apportionment certainly has hurt the cause of those who seek to bring an end to the differential undercount problem.²³⁹ The harshness of the ruling can be lessened to a great degree, however, by a determined effort on the part of the Administration to conduct a census that produces two population figures.²⁴⁰ The first number will be the total population in each state as tabulated by traditional headcount methods and will be furnished to the House of Representatives for the purpose of apportionment.²⁴¹ The second set of data will be compiled as prescribed in the Census Bureau plan for the 2000 census and will be used by executive branch agencies to distribute money under federal programs according to population.²⁴² States will then have the option to choose the sampling-adjusted data in drawing congressional and state legislative districts and thereby further ameliorate the negative effects of the differential undercount.²⁴³

federal funds and redistricting. *See id.*

237. *See supra* Parts III.A, III.B (explaining the effects of the differential undercount on the political representation and the distribution of federal funds to undercounted areas).

238. Thus far, the Administration has demonstrated a high level of commitment to remedying the negative effects of the differential undercount through the use of sampling in the census. For example, on October 15, 1998, President Clinton sent a letter to House Minority Leader, Richard A. Gephardt, stating "I am committed to vetoing any legislation from the 106th Congress that restricts the ability of the Census Bureau to conduct its plans using modern statistical methods." *See Holmes, supra* note 231, at A18.

239. The decision hurt the cause of sampling proponents in two ways. First, the differential undercount does affect congressional apportionment to some extent. A few states with large uncounted populations unjustly are denied a seat in the House of Representatives every time the House is apportioned on the basis of traditional headcount data. *See MODERNIZING THE U.S. CENSUS, supra* note 1, at 40 (noting that the use of sampling-adjusted census figures in the apportionment following the 1990 census would have affected three House seats). Second, and more importantly, the decision mandating a headcount census makes the Administration's efforts to use sampling much more expensive and therefore, much less politically popular. *See Barbara Vobejda, Hill Republicans Vow Fight on Dual Census, WASH. POST*, Feb. 25, 1999, at A2 (noting that the Census Bureau projects that a census with two sets of numbers will cost between \$6 billion and \$7 billion, while the initial Clinton plan was to cost approximately \$4 billion).

240. *See Vobejda, supra* note 236, at A2 (describing the Administration's plan to conduct a census with two sets of numbers in the wake of the Supreme Court decision prohibiting sampling in connection with apportionment).

241. *See id.* (stating that "the administration plans to produce one set of numbers for apportionment and another for redistricting and federal funding").

242. *See id.*

243. *See supra* notes 207-08 and accompanying text (explaining that states are not constitutionally required to use the Census Bureau's population data in redistricting, but traditionally have done so).

To conduct a census with two sets of data—one set for apportioning the House, one set for other purposes—the Administration will need to demonstrate a great commitment to ending the cycle of censuses that disproportionately fail to count racial and ethnic minorities.²⁴⁴ Funding for the 2000 census will be determined in the 2000 budget battle.²⁴⁵ The Administration will not receive funding for a census that uses statistical sampling for any purpose without making this issue a high priority in the budget battle.²⁴⁶ For the Administration to succeed in this battle with Congress, it must make the debate over the census a public one.²⁴⁷ If President Clinton personally takes the lead in the fight to end the cycle of censuses that disproportionately fail to count minorities, Congress will appropriate the funds necessary to conduct a census with two sets of data.

B. *The States*

If the Administration prevails in the battle over funding for the 2000 census, the next set of important decisions in the sampling dispute will be made in the statehouses and governor's mansions across the country.²⁴⁸ In the wake of a federal resolution of the census dispute, the states will have to make politically sensitive decisions of extreme importance.²⁴⁹ Each state will have to determine which of the two sets of census data to use in redrawing congressional and

244. Using sampling in the census will require a determined effort on the part of the Administration because Republicans in control of Congress are, at this point, strongly opposed to any census plan that involves the use of sampling. See Vobejda, *supra* note 239, at A2 (quoting Representative Dan Miller (R-Fla.), Chairman of the Census Subcommittee in the House, calling the Administration's plan to use statistical sampling an "irresponsible approach" hidden "under a thinly veiled shield of so-called accuracy").

245. See Steven A. Holmes, *Census Ruling is Said to Cost \$1.7 Billion*, N.Y. TIMES, June 2, 1999, at A20 (reporting that the Census Bureau requested an additional \$1.7 billion to conduct a two-number census).

246. As long as the census debate remains out of public view, Republican opponents of sampling have no incentive to compromise with the Administration. Republicans believe that sampling in the census will result in more Democratic seats in Congress and in state legislatures across the country. Because they are certain that voters are unaware of the census battle, there is no political incentive to make a deal. See Editorial, *First, Save the Census*, WASH. POST, Feb. 19, 1999, at A22 (noting that the census debate is too important to be resolved by the Census Bureau and congressional committees and imploring President Clinton and House Speaker Dennis Hastert to "step it up" and get involved in the dispute).

247. See *id.* (claiming that the census issue is "fundamentally political").

248. See *supra* Part III.B (explaining that the states are not bound constitutionally to use any population data in particular when drawing congressional and state legislative districts).

249. As one redistricting expert characterized the states' politically sensitive decisions: "Redistricting is already the purest of all political blood sports. The Court's ruling just provides another layer of uncertainty" See Dao, *supra* note 187, § 4 (Week in Review), at 4 (quoting Tim Storey, a redistricting expert at the National Conference of State Legislatures).

state legislative districts.²⁵⁰ A decision to use the data compiled for the purpose of apportioning seats in the House likely will result in little change in the manner in which districts are drawn.²⁵¹ Such a decision would give the negative effects of the differential undercount problem at least ten additional years of life.²⁵² But a decision to use the data compiled through the use of statistical sampling could eliminate much of the harm wrought by the differential undercount in a particular state.²⁵³ If enough states elect to use the adjusted data to redraw their congressional and state legislative districts, the negative effects of the differential undercount on the entire nation would be lessened significantly.²⁵⁴ Hence, decisions at the state level will go a long way in determining the impact of any use of statistical sampling in the census.

C. The Congress

Congressional importance in the census battle stems from its appropriations power—Congress’s constitutional prerogative to either appropriate or withhold funds for government programs.²⁵⁵ Significantly, the power to enact laws—the traditional mechanism by which Congress makes its will known—gives Congress little sway in this battle because the President has promised to veto any legislation banning the use of statistical sampling in the census.²⁵⁶ Thus, the fate of the Administration’s plan hinges on whether Congress will appropriate funds for the Census Bureau to conduct a census with two sets of population data.

With the focus of census observers on the impending battle over funding, there are two ways that the Administration could prevail in

250. See *id.* (explaining the political considerations that will play a role in these decisions).

251. But see *supra* Part I.C (explaining how the direct contact method of census-taking has resulted in a disproportionate undercount of minorities in every census since 1940).

252. Significantly, the Census Bureau does not believe that it can improve accuracy through traditional methods of physical enumeration. See REPORT TO CONGRESS, *supra* note 8, at 7 (calling it “fruitless” to attempt to remedy the differential undercount with the direct contact method of census-taking). Thus, a decision by a state to use the data compiled for apportionment will be a decision to use data that misstates the population of racial minorities, and the problems with regard to political representation that result from the differential undercount will persist. See MODERNIZING THE U.S. CENSUS, *supra* note 1, at 35.

253. See *supra* Part III.C (describing the potential shift in political representation from suburban neighborhoods to urban neighborhoods, where the undercount traditionally has been highest).

254. See Dao, *supra* note 187, § 4 (Week in Review), at 4 (stating that “California sampling could add one more congressional seat to Democratic-leaning Hispanic neighborhoods”).

255. See U.S. CONST. art. I, § 9, cl. 7 (stating that “[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by law”).

256. See Holmes, *supra* note 231, at A18 (quoting President Clinton’s letter to Rep. Gephardt (D-Mo.) in which he promised to veto any law prohibiting the use of sampling).

its effort to remedy the differential undercount problems through the use of sampling. First, a politically weak Republican majority in Congress could cave in to the politically popular President in a showdown over the best way to conduct the census.²⁵⁷ Second, Republican opponents of sampling in Congress could come to view the differential undercount problem as a serious problem and join the Administration in its efforts.²⁵⁸ For Republicans to make this determination they would have to believe that the use of sampling in the census will not be a boon to Democrats.²⁵⁹ Such a determination is not necessarily unfounded.²⁶⁰ Indeed, many political observers believe that African-Americans and other minorities are becoming more receptive to the message of the Republican Party.²⁶¹ With this view in mind, Republicans in Congress should support the Administration's plan to count racial minorities in the 2000 census accurately, and should implore its congressional candidates to fight hard for the votes of minority communities in coming elections.

CONCLUSION

The fact that every American census of the last sixty years has undercounted racial minorities at a rate disproportionate to whites has significant implications for our democracy.²⁶² This systematic

257. Compare Editorial, *First, Save the Census*, *supra* note 246, at A22 (calling the battle over appropriations for the census "a game of chicken," in which the first party to "flinch at the approach of a possible government shutdown" will lose), with Editorial, *Taking the Census Two Ways*, N.Y. TIMES, Jan. 27, 1999, at A26 (claiming that "Republicans will balk at the two-track proposal, but accuracy, fairness and the Census Act demand it").

258. The editorial pages of *The Washington Post* and *The New York Times* have directed Congress to realize the gravity of the differential undercount problem and to endorse the use of sampling. See Editorial, *First, Save the Census*, *supra* note 246, at A22 ("The opponents [of sampling] who fear manipulation are engaging in a form of manipulation of their own if they compel the undercount that they know will otherwise occur. To leave the vulnerable in society undercounted, underrepresented and without the funds to which they are entitled is especially unfair."); Editorial, *Taking the Census Two Ways*, *supra* note 257, at A26 (stating that "accuracy, fairness, and the Census Act" demand the use of sampling).

259. See Dao, *supra* note 187, § 4 (Week in Review), at 4 (noting that many political scientists and demographers discount the predictions that Democrats will gain greatly if sampling is used in the census because these experts believe that elections turn more on voter turnout than redistricting).

260. See *id.* (explaining that "creative Republican line drawing" in the states could also prevent the creation of many new majority Democratic congressional and state legislative districts).

261. The popularity of Texas Governor George W. Bush demonstrates that Republicans can win the votes of minority groups. See Dan Balz, *Bush Taking First Step Toward Run for President*, WASH. POST, Mar. 3, 1999, at A1 (noting that Governor Bush received almost 50% of the Hispanic vote and 25% of the African-American vote while winning re-election in November of 1998).

262. See *supra* Part I.B (describing the differential undercount problem and its effects on the distribution of funds under government programs and the political representation of

undercount results in an unjust deprivation of political power.²⁶³ The Administration recognized this problem and sought to produce a more accurate census through the use of a statistical method known as sampling.²⁶⁴ The Administration's plan has the support of the scientific community and it is widely believed that it will produce a more accurate census than the traditional headcount method.²⁶⁵ Nonetheless, the Census Act prohibits the use of statistical sampling in tabulating population information for the purpose of apportioning seats in the House of Representatives. Thus, the Supreme Court affirmed a district court decision to enjoin the Administration from using sampling for the purpose of apportionment.²⁶⁶ The Court's ruling notwithstanding, the Administration still can significantly lessen the ill effects of the differential undercount by using sampling for other purposes.²⁶⁷ In the end, then, the viability of a census plan that involves the use of sampling will be determined in the give-and-take of budget negotiations and the individual decisions of fifty state governments across the country.

undercounted communities).

263. See *supra* Part III.B (explaining the effect of the undercount on the representation of undercounted communities in Congress and state legislatures).

264. See *supra* Part I.C (describing the ways in which the Administration plans to use sampling in the 2000 census to remedy the differential undercount problem).

265. Indeed, the National Academy of Sciences, Panel on Methods concluded that the "[d]ifferential undercount cannot be reduced to acceptable levels without the use of integrated coverage measurement and the statistical methods associated with it." REPORT TO CONGRESS, *supra* note 8, at 8.

266. See *supra* Parts II.A-C (explaining those decisions).

267. See *supra* Part III (explaining that the Court's decision does not prohibit the use of sampling-adjusted census figures for distributing funds under population-based government programs or for redistricting by the states).