



Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes

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Summary

In the 2010 decennial census, the Census Bureau will attempt to count the total population of the United States. This includes, as in previous censuses, all U.S. citizens, lawfully present aliens, and unauthorized aliens. Some have suggested excluding aliens, particularly those who are in the country unlawfully, from the census count, in part so that they would not be included in the data used to apportion House seats among the states and determine voting districts within them.

One question raised by this idea is whether the exclusion of aliens could be done by amending the federal census statutes, or whether such action would require an amendment to the Constitution. The Constitution requires a decennial census to determine the “actual enumeration” of the “whole number of persons” in the United States. The data must be used to apportion the House seats among the states, although there is no constitutional requirement it be used to determine intrastate districts. It appears the term “whole number of persons” is broad enough to include all individuals, regardless of citizenship status, and thus would appear to require the entire population be included in the apportionment calculation. As such, it appears a constitutional amendment would be necessary to exclude any individuals from the census count for the purpose of apportioning House seats.

From time to time, Congress has considered legislation that would exclude all aliens or only unauthorized aliens from being included in the census to apportion House seats among the states. Such legislation would have either amended the Census Clause of the Constitution or enacted or amended federal census statutes. In the 111th Congress, legislation has been introduced that uses both approaches. The Fairness in Representation Act would statutorily exclude aliens from the population count for apportionment purposes (H.R. 3797 and S. 1688). Under the above analysis, it would not appear to be constitutionally sufficient for Congress to amend the federal census statutes in such manner. Meanwhile, H.J.Res. 111 would take the other approach and amend the Constitution so that only U.S. citizens would be counted in the apportionment calculation.

Other legislation in the 111th Congress would not raise the same constitutional issues since they would not appear to require the exclusion of any individuals for apportionment purposes. An amendment introduced by Senator Vitter to the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010 (S.Amdt. 2635 to H.R. 2847), would have cut off funding for the census unless the census form included questions regarding citizenship and immigration status. The amendment was subsequently ruled to be non-germane. On the other side of the issue, the Every Person Counts Act (H.R. 3855) would prohibit the Census Bureau from asking about U.S. citizenship or immigration status.

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Introduction

In the 2010 census, as in prior decennial censuses, the total population of the United States will be counted, including U.S. citizens, lawfully present aliens, and unauthorized aliens.¹ Some have asked whether aliens, particularly those in the country unlawfully, should be excluded from the census count.² It appears one concern is that these individuals are included in the data used to apportion House seats among the states and determine voting districts within them, which some perceive as unfair to states or districts with small alien populations.³ One question raised by this idea is whether the exclusion of aliens could be done by amending the federal census statutes (Title 13 of the U.S. Code), or whether such action would require an amendment to the Constitution.

The Constitution requires a decennial census to determine the “actual Enumeration” of the “whole number of persons” in the United States.⁴ The data must be used to apportion the number of House seats among the states.⁵ While not required by the Constitution, the data are used for other purposes as well, including by the states to determine voting districts within a state.

The Constitution expressly vests Congress with the authority to conduct the census “in such Manner as they shall by Law direct.”⁶ Congress has delegated this responsibility to the Secretary of Commerce and, within the Department of Commerce, to the Bureau of the Census.⁷ The Census Bureau counts the total resident population of the states, with each individual counted at his or her “usual residence.”⁸ This includes both citizens and aliens.⁹

There is no legal requirement that the Census Bureau collect information regarding citizenship status. The 2010 census form sent to all households will not include questions regarding citizenship status or place of birth.¹⁰ The Commerce Secretary has used his discretion¹¹ to ask for

¹ The three main components of the unauthorized resident alien population are (1) aliens who overstay their nonimmigrant visas, (2) aliens who enter the country surreptitiously without inspection, and (3) aliens who are admitted on the basis of fraudulent documents.

² See, e.g., John S. Baker and Elliott Stonecipher, *Our Unconstitutional Census*, WALL ST. J., Aug. 9, 2009.

³ See, e.g., *id.*

⁴ U.S. CONST. Art. 1, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct . . .”); Amend. XIV, § 2, cl. 1 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

⁵ The Constitution also requires the census data be used to apportion direct taxes among the states, although the Sixteenth Amendment removes “taxes on income” from the requirement of apportionment. U.S. CONST. Art. 1, § 2, cl. 3; Amend. XVI. While the exact scope of direct taxes is unclear, the federal government does not currently impose any taxes subject to apportionment.

⁶ U.S. CONST. Art. 1, § 2, cl. 3.

⁷ 13 U.S.C. § 141.

⁸ See U.S. Census Bureau, Population Division, *Census 2000: Plans and Rules for Taking the Census*, available at http://www.census.gov/population/www/censusdata/resid_rules.html.

⁹ See *id.*

¹⁰ U.S. Census Bureau, *The Questions on the Form*, <http://2010.census.gov/2010census/how/interactive-form.php>.

¹¹ 13 U.S.C. § 5 (“The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, (continued...)”).

such information on the American Community Survey (ACS), which is sent monthly to a sampling of households.¹² Historically, questions regarding citizenship status have not been consistently included in the census population surveys.¹³ At least two early censuses (1820 and 1830) included a category for foreigners not naturalized,¹⁴ and later censuses asked about place of birth.¹⁵ In modern times, the census questionnaire sent to all households has not included such questions, although the questionnaire sent to a sampling of households (the “long form,” which has been replaced by the ACS) has asked for such information.

Legislation in the 111th Congress

From time to time, Congress has considered legislation that would exclude all aliens or only unauthorized aliens from being included in the census to apportion House seats among the states. A discussion of selected legislation from prior Congresses is included in the **Appendix**. In the 111th Congress, several bills have been introduced that would amend the federal census statutes to explicitly address the treatment of unauthorized aliens. The Fairness in Representation Act (H.R. 3797 and S. 1688) would require the Commerce Secretary to include some means (e.g., a checkbox) for respondents to indicate they are U.S. citizens or lawfully present in the country on the census forms sent to all households. Additionally, the Commerce Secretary would be required to make adjustments to the data to prevent unauthorized aliens from being counted for apportioning House seats among the states.

An amendment introduced by Senator Vitter to the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010 (S.Amdt. 2635 to H.R. 2847) would have cut off funding for the census unless the census form included questions on U.S. citizenship and immigration status.¹⁶ The amendment did not require the information be used for any purpose (i.e., to

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and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.”); 13 U.S.C. § 141(a) (“The Secretary shall ... take a decennial census of population ... in such form and content as he may determine.... In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.”); 13 U.S.C. § 193 (“In advance of, in conjunction with, or after the taking of each census provided for by this chapter, the Secretary may make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof.”).

¹² U.S. Census Bureau, *2009 American Community Survey*, <http://www.census.gov/acs/www/Downloads/SQuest09.pdf>.

¹³ The earliest laws relating to immigration were laws providing for naturalization of foreign-born persons, prohibitions on the entry of certain types of aliens, such as criminals, and restrictions on the entry of foreign workers (specifically, the Chinese). The current framework for immigration was not established until the mid-twentieth century, so there would have been minimal basis for detailed information on immigration status. Currently, certain statistics concerning immigrant status may be collected and maintained by other federal agencies. The Department of Homeland Security maintains statistics regarding visa issuance. Nonimmigrant visa holders are permitted to enter and stay in the United States for limited periods; persons who enter as immigrants or who adjust their nonimmigrant status to lawful permanent resident status are permitted to remain in the United States indefinitely. Both the DHS and Executive Office of Immigration Review in the Department of Justice maintain statistics regarding grants of asylum. (Asylees may apply for lawful permanent resident status.) Statistics regarding unauthorized aliens have been published by various government agencies and non-governmental organizations, but are subject to debate and dispute. For more information, see CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

¹⁴ See Carroll D. Wright, *History and Growth of the U.S. Census, Prepared for the Senate Committee on the Census*, Department of Labor (1900), at 133, 139.

¹⁵ See, e.g., *id.* at 147, 154 (censuses of 1850, 1860, and 1870).

¹⁶ S.Amdt. 2635 (“none of the funds provided in this Act or any other act for any fiscal year may be used for collection (continued...)”).

disregard certain individuals from the apportionment calculation). The amendment was subsequently ruled to be non-germane.

H.J.Res. 111 would amend the Constitution so that only U.S. citizens would be counted in the apportionment calculation. Specifically, it would amend the Constitution to read “Representatives shall be apportioned among the several States according to their respective numbers, which shall be determined by counting the number of persons in each State who are citizens of the United States.”

On the other side of the issue, the Every Person Counts Act (H.R. 3855) would prohibit the Census Bureau from asking about U.S. citizenship or immigration status.

Constitutional Analysis

While the Constitution permits Congress to conduct the census “in such Manner as they shall by Law direct,”¹⁷ the census cannot be done in a way that is constitutionally impermissible. Thus, one question raised by the above legislation is whether they are consistent with the constitutional requirements for the decennial census.

It seems clear that Congress could, under its broad constitutional authority to conduct the census, statutorily require the Commerce Secretary to collect information regarding citizenship status.¹⁸ The constitutionality of the other provisions in the legislation would appear to depend on whether all aliens are required to be included in the census count for any reason. If so, then it would appear that any exclusion would have to be done by constitutional amendment. On the other hand, if the Constitution requires such individuals to be excluded from the census count, then Congress could not prohibit the Commerce Secretary from asking questions about citizenship and immigration status.

As mentioned above, it appears some are concerned that aliens, particularly those individuals in the country unlawfully, are included in the data used to apportion House seats among the states and determine voting districts within the states. The next section analyzes whether Congress could statutorily exclude aliens from the census count for these purposes or whether any such exclusion would have to be done by constitutional amendment.

Data for Apportionment Purposes

Constitutional issues could arise if aliens were excluded by statute from the census count for purposes of apportioning House seats among the states. This is because it appears the term “persons” in the original Apportionment Clause and Fourteenth Amendment was intended to have a broad interpretation that is likely expansive enough to include unauthorized aliens. If true, any

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of census data that does not include questions regarding United States citizenship and immigration status”).

¹⁷ U.S. CONST. Art. 1, § 2, cl. 3.

¹⁸ As mentioned above, the ACS already asks for such information.

proposal to generally exclude unauthorized aliens would have to be in the form of a constitutional amendment.¹⁹

The term “persons/people” appears throughout the Constitution,²⁰ with its meaning evaluated in the context of each provision. On its face, the term’s plain language meaning refers to individuals. However, it has been held to have a less obvious meaning in certain contexts; i.e., to include corporations for the Fourteenth Amendment’s due process and equal protection guarantees.²¹ Here, the question is whether the term refers to only a subset of individuals, U.S. citizens, for purposes of apportioning House seats among the states.

It seems that “persons” is not limited to “citizens” as the Framers would have likely used that term instead had it been their intent. The Constitution uses both the terms “persons/people” and “citizens of the United States,” and the terms do not seem intended to be interpreted identically; rather, “citizens of the United States” appears to be a subset of “persons/people.”²² Courts have generally held that aliens, including unauthorized aliens, are “persons” in the context of other constitutional provisions, including other parts of the Fourteenth Amendment.²³ While it does not appear that any court has decided the meaning of the term “persons” for apportionment purposes,²⁴ a federal district court did state in dicta that the term clearly includes unauthorized aliens.²⁵

It could be argued that certain aliens should not be included in the category of “persons” for purposes of apportionment because of their legal or voting status. On the other hand, historically, those without the right to vote or with inferior legal status, including women, children,²⁶ and

¹⁹ Some commentators have argued there is no constitutional requirement that one class of aliens—illegal aliens—be counted for purposes of apportionment. *See, e.g.*, Charles Wood, *Losing Control of America’s Future: The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465 (1999)(arguing the Constitution permits a stricter test for residence than the Census Bureau’s “usual residence” standard and does not require the counting of illegal aliens because they would not have the requisite stable inhabitanacy in a state); *but see Note: A Territorial Approach to Representation for Illegal Aliens*, 80 MICH. L. REV. 1342 (1981-82)(arguing the Constitution, as evidenced by its language and history, requires illegal aliens be included).

²⁰ *See, e.g.*, U.S. CONST. Amend. I (“Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”); Amend. II (“A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed”); Amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...”).

²¹ *See Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

²² *See, e.g.*, U.S. CONST. Art. I, § 2, cl. 2. (“No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”).

²³ *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”). This does not mean that aliens must be afforded the same benefits as citizens. *See Matthew v. Diaz*, 426 U.S. 67, 78-79 (1976).

²⁴ While several cases have been brought challenging the inclusion of unauthorized aliens, courts have found the plaintiffs lacked standing to bring suit. *See Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Penn. 1989); *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (three-judge panel).

²⁵ *See FAIR*, 486 F. Supp. at 576 (“The language of the Constitution is not ambiguous. It requires the counting of the ‘whole number of persons’ for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly ‘persons.’”).

²⁶ It could be argued that the treatment of women and children should not be compared to that of unauthorized aliens who are violating the laws of the United States. On the other hand, if the purpose of the census is understood to be (continued...)

convicts, have been included. It should also be noted that some states have historically permitted aliens to vote under certain circumstances.²⁷ Furthermore, the fact that slaves were to be partially counted when they enjoyed few rights seems to suggest the Apportionment Clause language was intended to be broadly inclusive.²⁸ Similarly, the fact that the Framers felt compelled to specify the exclusion of “Indians not taxed” may suggest “persons” was understood to otherwise include individuals residing within a state, regardless of legal status.²⁹ Thus, it can be argued that “[b]y making express provisions for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all-inclusive.”³⁰

The debates surrounding the original Apportionment Clause and the Fourteenth Amendment appear to add further support for the conclusion that the term “persons” was intended to be broadly interpreted. The Framers adopted without comment or debate the term “persons” in place of the phrase “free citizens and inhabitants” as the basis for the apportionment of the House,³¹ thus suggesting the term “persons” includes free citizens and any other individuals who would be considered “inhabitants.” According to James Madison, apportionment was to be “founded on the aggregate number of [the states’] inhabitants.”³² During the debate on the Fourteenth Amendment, Congress specifically considered whether the count was to be limited to persons, citizens, or voters.³³ The term “persons” was used instead of “citizens” due, in part, to concern that states with large alien populations would oppose the amendment since it would decrease their representation.³⁴ Another concern with using the term “citizen” was that it “would narrow the basis of taxation and cause considerable inequalities in this respect....”³⁵ Congress may also have been influenced by the fact that aliens could vote in some states.³⁶ Congress has subsequently considered excluding aliens from the apportionment calculation on several occasions,³⁷ and at least some Members have indicated that any such exclusion would have to be done through

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counting all individuals who are actually inhabitants of the United States, then the comparison would be appropriate.

²⁷ Article I, § 2, cl. 1 provides that the voter qualifications in each state for those electing Representatives shall be the qualifications required by state laws for voters electing the most numerous branch of the State legislatures. Historically, some states extended the franchise for electing the most numerous branch of the state legislatures to lawful aliens for all elections. *See The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 108-17 283, fn. 1220 and accompanying text (2002); Jamin B. Raskin, *Legal Aliens, Local Citizens: the Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993). Although today no state extends the franchise to aliens generally, some states do permit lawful permanent residents to vote in certain local elections, such as school board elections. The rationale appears to be that lawful residents have all the obligations of local residents, such as local property tax payments, and may have children attending local schools who are either lawful permanent residents or U.S. citizens themselves; therefore, they should be permitted to vote in certain local elections.

²⁸ *See Note, supra* note 18, at 1354.

²⁹ *See id.* at 1354-55.

³⁰ *See FAIR*, 486 F. Supp. at 576.

³¹ *See M. Farrand, The Records of the Federal Convention of 1787*, vol. 2, at 571, 590-91.

³² *See FAIR*, 486 F. Supp. at 576 (citing *The Federalist*, No. 54, at 369 (J. Cooke ed. 1961)).

³³ *See CONG. GLOBE*, 39th CONG., 1st Sess. 357-59, 2986-87 (1866).

³⁴ *See id.* at 359 (statement by Rep. Conkling); *see also id.* at 2986-87 (statement by Sen. Wilson).

³⁵ *Id.* at 359 (statement by Rep. Conkling).

³⁶ *See Note, supra* note 19, at 1356 (citing to James, *The Framing of the Fourteenth Amendment*, 37 ILL. STUD. SOC. SCI. 3, 195-96 (1956)).

³⁷ *See, e.g.*, H.J. Res. 20, 101, 263, 356, 484, 71st Cong. (1931); S. 2366, 96th Cong. (1980).

constitutional amendment since the Constitution otherwise requires total population as the basis for apportionment.³⁸

Furthermore, while the Constitution expressly grants Congress the authority to grant citizenship,³⁹ it can be argued there is no indication that Congress was given similar power to grant the status of being a “person.”⁴⁰ Thus, under this argument, Congress would not have the authority to statutorily exclude certain groups of individuals from the definition of “persons” and any such change would have to be done by amending the Constitution. On the other hand, it could be argued that Congress’s broad constitutional authority over the census, apportionment, and immigration permits it to exclude certain aliens, particularly undocumented aliens.⁴¹

The argument could be made that counting aliens as “persons” for apportionment purposes dilutes the voting power of citizens in states without significant numbers of aliens and, therefore, is inconsistent with the Supreme Court’s decision in *Wesberry v. Sanders*⁴² that requires congressional districts be drawn equal in population to the extent practicable (i.e., “one person, one vote”).⁴³ However, *Wesberry* and its progeny involve intrastate, as opposed to interstate, disparities,⁴⁴ and the Court has indicated in another line of cases that the *Wesberry* standard does not apply to interstate apportionment.⁴⁵ Because each state must have at least one House district and a fixed number of Representatives must be allocated among all states, votes in states with populations less than the ideal district are “more valuable than the national average” and it is “virtually impossible to have the same size district in any pair of States, let alone in all 50.”⁴⁶ Therefore, while the goal of “complete equality for each voter” under the *Wesberry* standard is “realistic and appropriate for state districting decisions,” the Court has explained that it is “illusory for the Nation as a whole.”⁴⁷ While this second line of cases does not address the specific issue of whether aliens must be counted for apportionment purposes, the cases do seem to undermine the argument that *Wesberry* and its progeny require their exclusion.⁴⁸

Some have pointed to the fact that the census has historically included questions about citizenship, thus perhaps suggesting that a distinction has been made between citizens and aliens for purposes of counting individuals. It is true that at least two early censuses (1820 and 1830)

³⁸ See, e.g., 86 Cong. Rec. 4371-72 (1940)(remarks by Rep. Celler asserting that the term “persons” refers to all individuals, including aliens who are in the country unlawfully); *1980 Census: Counting Illegal Aliens, Hearings on S. 2366 Before the Subcomm. on Governmental Affairs, 96th Cong. 12* (1980) (statement by Sen. Javits asserting that the Constitution requires counting all aliens for apportionment purposes).

³⁹ U.S. CONST. Art I, §8, cl. 4 (“The Congress shall have Power ... To establish a uniform Rule of Naturalization ...”).

⁴⁰ See Note, *supra* note 19, at 1345-48.

⁴¹ See Dennis L. Murphy, Note: *The Exclusion of Illegal Aliens From the Reapportionment Base: A Question of Representation*, 41 Case W. Res. 969, 985-86 (1991).

⁴² *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁴³ See Murphy, *supra* note 41.

⁴⁴ This distinction is important because the Constitution only requires the use of census data for apportionment among the states, not for redistricting and reapportionment within them. Thus, states can determine what data shall be used for redistricting within a state. This issue is discussed further in the next section.

⁴⁵ See *Wisconsin v. City of New York*, 517 U.S. 1, 13-15 (1996); *Dept. of Commerce v. Montana*, 503 U.S. 442, 461-63 (1992); see also *FAIR*, 486 F. Supp. at 577.

⁴⁶ *Dept. of Commerce*, 503 U.S. at 463.

⁴⁷ *Id.*

⁴⁸ See *FAIR*, 486 F. Supp. at 577; see also Note, *supra* note 19, at 1358-63.

included a category for foreigners not naturalized⁴⁹ and later censuses asked about place of birth.⁵⁰ However, such information was not used to exclude any aliens from the census count. Rather, it is clear that such individuals were included in the total count,⁵¹ and it appears the data was collected for informational purposes (similar to how information was collected about age, occupation, etc). It does not appear that aliens have been excluded from any census.

Data Used for Intrastate Redistricting

The U.S. Constitution does not require the use of federal decennial census data for intrastate congressional and state legislative redistricting. It only provides for the use of census data for apportionment among the states, not for redistricting and reapportionment within them. Federal courts have held that states are not required to use federal census data for redistricting, and therefore states can determine what data will be used for redistricting within a state.⁵²

Federal courts have considered cases where state legislatures did not use federal decennial census data or even total population data as the basis for redistricting activities. Depending on the factual circumstances, the courts have upheld or invalidated the use of alternatives to official federal decennial data or total population data. For example, in the 1969 decision *Kirkpatrick v. Preisler*⁵³ involving Missouri's congressional redistricting plan, the Supreme Court, while invalidating the plan, nevertheless indicated that the use of projected population figures was not *per se* unconstitutional and that states may properly consider such statistical data if such data would have a high degree of accuracy (however, the Court also stated that the federal decennial census data were the best data available). In *Kirkpatrick*, the state legislature apparently performed rather haphazard adjustments and projections based on total population and the Court found that the legislature had not justified its methodology. In *Burns v. Richardson*,⁵⁴ the Supreme Court held that, in state legislative redistricting cases, the Constitution "does not require the states to use total population figures derived from the federal census as the standard" of measurement. The Court noted that in earlier cases it was careful to leave open the question of what population basis was appropriate in redistricting activities, even though in several cases total population figures were in fact the basis for comparison when determining whether the Equal Protection Clause of the Constitution had been violated. The Court recognized that, in a particular case, total

⁴⁹ See Carroll D. Wright, *History and Growth of the U.S. Census, Prepared for the Senate Committee on the Census*, Department of Labor (1900), at 133, 139.

⁵⁰ See, e.g., *id.* at 147, 154 (censuses of 1850, 1860, and 1870).

⁵¹ See *id.* at 135, 140-41 (reprinting instructions to the Marshals for the 1820 and 1830 censuses).

⁵² See *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (court indicated in dicta that the use of projected population figures was not *per se* unconstitutional and that states may properly consider such statistical data if such data would have a high degree of accuracy); *Senate of the State of California v. Mosbacher*, 968 F.2d 974 (9th Cir. 1992) (court noted that if a state knows that census data is underrepresentative of the population, it can and should utilize non-census data, in addition to the official count, for redistricting); *Young v. Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981) (in dicta, the court stated that the state legislature is not required by the federal Constitution to use census data supplied by the Census Bureau for congressional redistricting, but could use adjusted population figures when redistricting between decennial censuses, as long as the adjustment is thoroughly documented and applied in a systematic manner); *City of Detroit v. Franklin*, 800 F. Supp. 539, 543 (E.D. Mich. 1992) (court held that an earlier Supreme Court case did not find that states must use census figures in redistricting; rather, the Supreme Court had "merely reiterated a well-established rule of constitutional law: states are required to use the 'best census data available' or 'the best population data available' in their attempts to effect proportionate political representation").

⁵³ 394 U.S. 526 (1969).

⁵⁴ 384 U.S. 73, 91 (1966).

population might not be the appropriate basis for redistricting plans. In the *Burns* case, Hawaii had used the number of registered voters as the basis for redistricting the state senate. The Court found that the redistricting plan “satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.”⁵⁵ Hawaii was found to have a unique situation, wherein the significant number of tourists, military personnel, and other transient population segments distorted the distribution of actual state citizens. The redistricting plan that would have resulted from a total population basis would not have reflected the true state population distribution as accurately as a state citizen population basis. Since a registered voter population basis was the closest approximation of a state citizen population basis, the use of the registered voter population basis was deemed consistent with the Equal Protection Clause. However, the Court was careful to note that the ruling in the *Burns* case did not establish the validity of the unique redistricting population basis for all times or circumstances.⁵⁶ Although the federal decennial census figures need not be used as the basis for state redistricting, any alternate figures used must be shown to be the best data available or to be justified by particular circumstances as resulting in a more accurate redistricting plan than one based on federal decennial census total population figures.

The U.S. Supreme Court has not ruled on the constitutionality or propriety of using total population versus voting population as the basis for intrastate redistricting in a circumstance where the use of total population results in a disparity in voter strength in one district over another, although there is total population equality between the districts. In *Garza v. County of Los Angeles*,⁵⁷ the U.S. Court of Appeals for the Ninth Circuit held that redistricting based on voting populations instead of the total population would have been unconstitutional. Total population had been used as the basis of a court-ordered redistricting plan that was disputed by the County of Los Angeles. Justice Thomas, in his dissent from a denial of a writ of certiorari in *Chen v. City of Houston*,⁵⁸ contrasts the decision of the Ninth Circuit in *Garza* with those in which the U.S. Courts of Appeals for the Fourth and Fifth Circuits have held that the decision about whether to use total population versus voting population as the basis for redistricting within a state is a choice left to the legislative and political process.⁵⁹

Since, under the Federal Constitution, the states arguably can and should use data other than the official apportionment census data in their own redistricting process if they know the other data to be the best available data, one must look at each state’s laws to determine whether the states

⁵⁵ 384 U.S. at 93.

⁵⁶ See also *MacGovern v. Connolly*, 637 F. Supp. 111 (D. Mass. 1986) (court upheld state redistricting scheme which entailed use of data from a decennial state census held every 10 years beginning in 1975 and refused to order a new scheme based on “inapposite” 1980 federal census data); *Klahr v. Williams*, 313 F. Supp. 148 (D. Ariz. 1970) (court held invalid congressional and state legislative redistricting plans based, *inter alia*, on a population estimate formula “converting 1968 voter registration to 1960 census on a proportionate basis” which did not truly represent the population, but ordered the plan used anyway because no better alternative was feasible before the next election).

⁵⁷ 918 F.2d 763, 773-776 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

⁵⁸ 532 U.S. 1046 (2001).

⁵⁹ *Id.* (citing *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (looking to Supreme Court precedent, *Burns v. Richardson*, 384 U.S. 73, 92 (1966), for the proposition that “the choice between measurements ‘involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.’”); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) (finding “[t]here is no reason to believe that voting-age population is significantly better than total population in achieving the goal of one person, one vote” and until the Supreme Court speaks clearly on this issue, any actions by the courts “[should be] tempered by the overriding theme in the Court’s prior apportionment cases weighing against judicial involvement.”)).

themselves require the use of official federal decennial census data in the redistricting processes. Although it appears that generally states prescribe a redistricting procedure by statute for state legislative redistricting, many do not have a statutory procedure for congressional redistricting. The state legislatures in such states conduct the congressional redistricting on an *ad hoc* basis after a federal decennial census. This means that in such states there may be no explicit statutory requirement to use official federal decennial census data for congressional redistricting, although there may be such an explicit requirement for state legislative redistricting. To the extent that a state's own laws do not explicitly require the use of official federal decennial census data for intrastate redistricting, the state is free to use any other data.

It might be suggested that the federal government release two official sets of data, one for apportionment of the House of Representatives among the states and the other for other purposes. In such a situation, it could be unclear what a reference in state law to official federal decennial census data would mean. Arguably, the second data set could still be considered official federal decennial census data, even though not used for apportionment purposes.⁶⁰ However, it should be noted that the Court's holding on standing for the plaintiffs in *Department of Commerce v. U.S. House of Representatives* indicates that a majority of the Court considers the references to official federal decennial census data to be a reference to the apportionment data.⁶¹

At the time of the decision in *Department of Commerce v. U.S. House of Representatives*, there was a flurry of state legislative activity concerning the type of federal decennial census data to be used in intrastate redistricting because of the absence of sufficiently clear and explicit statutory guidelines concerning the appropriate data to be used in intrastate congressional and state legislative redistricting activities.⁶² Although there apparently has been no recent congressional activity concerning state redistricting census data, there is a potential role for Congress in determining what data will likely be used by the states.

Although Congress has not explicitly required states to use federal decennial census data in congressional redistricting, it could arguably do so under the same constitutional powers which give Congress the authority to establish other redistricting guidelines if it chooses, Art. I, § 2, cl. 1, which provides that the Members of the House of Representatives shall be chosen by the People and Art. I, § 4, cl. 1, giving Congress the authority to determine the times, places and manner of holding elections for Members of Congress. Where it is not clear that one data set is more accurate than the other and the constitutional goal of equal representation is not implicated, arguably, Congress could require that a particular type of data, including citizens only or including aliens, must be used in congressional redistricting. However, it could not do so with regard to the redrawing of state legislative or municipal districts, which remain the prerogative of the states as long as no constitutional voting rights are violated.

⁶⁰ The issue of what constitutes official federal decennial census data was considered during the oral arguments in the census sampling cases. Oral Argument Transcript, found at 1998 WL 827383 on Westlaw (oral argument of Michael A. Carvin on behalf of the appellees in No. 98-564) (discussing what data states would use if adjusted and unadjusted data sets were released).

⁶¹ 525 U.S. at 332-4, 119 S. Ct. at 774-5.

⁶² See, e.g., the following legislation enacted in Alaska, Arizona, Colorado, Kansas, and Virginia. In Alaska, S.B. 99, Ch. 18 of the 1999 Acts, was enacted on May 11, 1999. In Arizona, H.B. 2698, Ch. 47 of the 1999 Laws, was enacted on April 22, 1999. In Colorado, S.B. 206, Ch. 170 of the 1999 Laws, was enacted on May 7, 1999. In Kansas, S.B. 351, Ch. 148 of the 1999 Laws, was enacted on May 12, 1999. In Virginia, H.B. 1486, ch. 884 of the 2000 Acts, was enacted on April 9, 2000.

Conclusion

The Constitution requires a decennial census to determine the “actual enumeration” of the “whole number of persons” in the United States. The data must be used to apportion the House seats among the states, although there is no constitutional requirement it be used to determine voting districts within the states. The term “whole number of persons” appears broad enough to include all individuals, regardless of citizenship status, and thus would appear to require the entire population be included in the apportionment calculation. As such, a constitutional amendment, such as that found in H.J.Res. 111, would likely be necessary in order to exclude any individuals from the census count for the purpose of apportioning House seats. Legislation such as the Fairness in Representation Act (H.R. 3797 and S. 1688), which would amend the federal census statutes to exclude aliens from the population count for apportionment purposes, would therefore seem to be constitutionally insufficient.

Appendix. Selected Legislation to Exclude Aliens from the Census

From time to time, Congress has considered legislation that would exclude all aliens or only unauthorized aliens from being included in the census to apportion the House seats among the states. Such legislation would have either amended the Census Clause of the Constitution or enacted or amended federal census statutes.⁶³ Generally, the legislation providing only for statutory exclusions of aliens from the census failed because members recognized the potential unconstitutionality of these statutory restrictions. However, Congress has also consistently not adopted resolutions to amend the Constitution to exclude aliens, with members citing various reasons, including the reversal of constitutional tradition.

Some proponents of excluding aliens from the apportionment census have asserted that the framers of the Constitution did not understand the term “persons” necessarily to include aliens and point to the first census statute in 1790, which refers to “inhabitants,” to support this contention. Since some of the members of the first Congress had been members of the Constitutional Convention a few years earlier, proponents argue that they must have known the intent of the Constitutional Convention in the Census Clause and would not have enacted an unconstitutional census statute. The proponents further argue that the term “inhabitants” in the first census statute was understood to refer to U.S. citizens only and not to foreigners/aliens, citing contemporaneous dictionary definitions. However, there is no direct evidence that this was the intention and, in fact, the early censuses apparently included aliens.

The 1790, 1800, and 1810 censuses included categories for free white males, free white females, other free persons, and slaves.⁶⁴ Free white persons were categorized further by age. The 1820 census was the first to include a subcategory for “foreigners not naturalized.” Instructions to the federal marshals conducting the 1820 census noted that the data for this subcategory was not supposed to be added to the total data for free persons subcategorized by race and age, because they were already included as free persons.⁶⁵ These instructions appear to imply that the earlier censuses included free foreigners as well as free citizens in the data for free persons and that the new subcategory of information was not adding persons who would not have been counted under existing subcategories in earlier censuses.

In 1866, Congress considered constitutional amendments that would have limited the apportionment and census to voters or citizens. Such amendments were considered in the context of the civil rights amendments (ultimately resulting in the Thirteenth, Fourteenth and Fifteenth Amendments) being debated after the Civil War. The Fourteenth Amendment revised the apportionment clause, deleting the phrase counting three-fifths of slaves and instead requiring that the whole number of persons in each state must be counted, excluding Indians not taxed. However, if male inhabitants who were 21 years old and U.S. citizens were disenfranchised by a state for reasons other than participation in the Confederate rebellion or a crime, the population

⁶³ Until 1929, the statutes implementing each decennial census were enacted prior to each census. The Census Act of 1954 superseded the 1929 statute; census legislation since 1954 has generally taken the form of amendments to the 1954 statute.

⁶⁴ Act of March 1, 1790, 1st Cong., Stat. 101. C.D. Wright, *History and Growth of the United States Census* (1900) [hereinafter *History*], pp. 132-133, 925-927.

⁶⁵ Reprinted in C.D. Wright, *History*, *supra* note 64, at 135.

count of that state for purposes of apportionment would be reduced by the ratio of these disenfranchised male citizens to the total number of male citizens in that state. This was intended to discourage former slave states from disenfranchising former slaves and other African-Americans. A similar proposal would have counted the “whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color.”⁶⁶ Some versions of this type of proposal would not have excluded Indians not taxed, while others kept the language excluding Indians not taxed.

During consideration of the civil rights amendments, an alternate type of proposal to amend the constitutional requirements for apportionment and the census would have counted only voters in each state to discourage former slave states from disenfranchising former slaves and other African-Americans.⁶⁷ However, this proposal was deemed flawed because it would also penalize other states by not including aliens/non-citizens in the census count for apportionment, since generally aliens were not permitted to vote in most states. Opponents also noted that this proposal would depart radically from the counting of all persons required by the original census clause. Another criticism was that suffrage would be cheapened because states would reduce or eliminate legitimate conditions for voter eligibility in an attempt to increase the number of voters. Some proposals to count voters or electors would have excluded citizens who had been disenfranchised as former Confederate rebels, while others would have included such citizens. Some voter-based apportionment census proposals were brought up for floor votes and failed.

For proponents, the type of proposals that evolved into the Fourteenth Amendment had the advantage of not penalizing states that were not former slave states, but had high numbers of aliens. Meanwhile, this type of legislation would still effectively discourage former slave states from disenfranchising former slaves, since such disenfranchised persons would not be counted at all, a significant reduction from being counted at a three-fifths ratio.

In the late 1920s and early 1930s, the issue of counting aliens was raised as Congress considered legislation for the 1930 census and related apportionment of the House of Representatives. Apportionment was such a contentious issue following the 1920 census that the requisite decennial apportionment of the House of Representatives was never completed. The apportionment had been directly legislated by Congress until the 1920 census. After the breakdown in the process, Congress legislated a formula for calculating and allocating the Representatives among the states, thus eliminating the partisan negotiations that had hampered earlier apportionments and impeded/prevented apportionment in the 1920s. As Congress considered the appropriate apportionment formula, it debated whether to amend the Constitution to exclude aliens from the census data used for the apportionment. A 1929 Senate Legislative Counsel opinion analyzing such proposals, concluded that “there is no constitutional authority for the enactment of legislation excluding aliens from enumeration for purposes of apportionment of Representatives among the States.”⁶⁸ While acknowledging that no case law had ruled on the issue of the meaning of “persons” in the Census Clause, the opinion found that according to rules of statutory construction, “persons” had at all times been understood to include aliens. Additionally, the reference in the Fourteenth Amendment to excluding Indians not taxed would be unnecessary if “persons” referred only to citizens and the Fourteenth Amendment would not have

⁶⁶ 36, pt. 1, Cong. Globe 351-359 (Jan. 22, 1866).

⁶⁷ 36, pt. 1, Cong. Globe 141-142 (Jan. 8, 1866).

⁶⁸ C.E. Turney, Law Assistant, Senate Legislative Counsel, *Power of Congress to Exclude Aliens from Enumeration for Purposes of Apportionment of Representatives* (April 30, 1929), reprinted at 71 Cong. Rec. 1821 (May 23, 1929).

explicitly referred later in the same clause to the number of male inhabitants who were citizens and 21 years old. With regard to the original apportionment and census language, the opinion contrasted the use of the word “person” with the use of the word “citizen” for particular reasons in other parts of the original Constitution. Proposals to exclude aliens by statute alone failed as unconstitutional. Proposals to amend the constitutional language also failed.⁶⁹

In 1940, when asked by a colleague whether the census for apportionment must count aliens unlawfully present in the United States, Representative Celler asserted that a constitutional amendment would be required to exclude even unlawfully present aliens from the census.⁷⁰ Earlier congressional debates apparently do not discuss unauthorized aliens, but rather consider the constitutionality and/or policy of excluding lawful aliens.

In the late 1970s and the 1980s, Congress considered immigration legislation that became the Immigration Reform and Control Act of 1986, which legalized certain unauthorized aliens and strengthened immigration laws to prevent immigration fraud, provide greater protections for temporary foreign workers and prevent displacement of U.S. workers, etc. In the period before and after the enactment of this legislation, Congress also considered proposals to exclude aliens from the census, including proposals specifically to exclude unauthorized aliens.⁷¹ The latter proposals appear to be related to the proposals to legalize or strengthen enforcement against unauthorized aliens. Some members noted that unauthorized aliens needed to be included in the census in order to assess the potential impact of legalization.

A key legislative proposal in the late 1980s resembled the Vitter amendment in the 111th Congress to prohibit the use of funds to include illegal aliens in the census for apportionment of the House of Representatives. This provision was sponsored by Senator Shelby as amendments to the bill for appropriations to the Departments of Commerce, Justice, and State (CJS appropriations bill)⁷² and the Senate-passed version of the Immigration Act of 1990.⁷³ Although such provisions were passed by the Senate in these bills, they ultimately were not enacted. House proponents of this proposal failed in their attempt to have the House instruct its conferees for the CJS appropriations bill to retain the Senate provision in their negotiations;⁷⁴ there had been no such provision in the House-passed version. The House conferees objected to the provision and it was dropped. However, the House floor debate on instructions to the conferees was echoed by the debates in the 111th Congress.

⁶⁹ *E.g.*, H. J. Res. 356, 71st Cong. (1931), proposing to amend the Constitution of the United States to exclude aliens in counting the whole number of persons in each state for apportionment of Representatives among the several states; reported with amendments in H. Rept. 71-2761 and considered at 74 Cong. Rec. 5454 (Feb. 19, 1931).

⁷⁰ 86 Cong. Rec. 4372 (April 11, 1940).

⁷¹ *E.g.*, H.R. 6769, S. 2366, 96th Cong., and H.J.Res. 199, S. 358, §601, 101st Cong. (1989).

⁷² Senate-passed version of H.R. 2991, 101st Cong. (1989).

⁷³ S. 358, §601, 101st Cong. (1989).

⁷⁴ 135 Cong. Rec. H 6952 (October 11, 1989) (appointment of conferees on H.R. 2991, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990). The House of Representatives voted down similar amendments for H.R. 2991 before going to conference on the bill. The conference version did not include the Senate language; the Senate conferees agreed to deletion of this language. H. Rep't. 101-299 at 87 (1990) (discussing Amdt. No. 188, deletion of Senate language that would have prohibited the counting of illegal aliens in the census for apportionment).

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